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")

BOOK OF AUTHORITIES

(Re Motion Returnable July 30, 2015)

September 1, 2015

GOODMANS LLP
Barristers and Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Jay Carfagnini LSUC#: 22293T
jcarfagnini@goodmans.ca

Alan Mark LSUC#: 21772U
amark@goodmans.ca

Graham Smith LSUC#: 26377D
gsmith@goodmans.ca

Tel: 416-979-2211
Fax: 416-979-1234

Lawyers for the Monitor

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1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.
L. Crozier , for Royal Bank of Canada.
R.C. Heintzman , for Bank of Montreal.
J. Hodgson, Susan Lundy and *James Hilton* , for Canada Trustco Mortgage Corporation.
Jay Schwartz , for Citibank Canada.
Stephen Golick , for Peat Marwick Thorne [*] Inc., proposed monitor.
John Teolis , for Fuji Bank Canada.
Robert Thorton , for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued

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under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

Held:

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

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Associated Investors of Canada Ltd., Re, 67 C.B.R. (N.S.) 237 , Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, (sub nom. *Re First Investors Corp.)* 46 D.L.R. (4th) 669 (Q.B.) , reversed (1988), 71 C.B.R. 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — *referred to*

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Feifer v. Frame Manufacturing Corp., Re, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.) — *referred to*

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Fine's Flowers Ltd. v. Fine's Flowers (Creditors of) (1992), 10 C.B.R. (3d) 87, 4 B.L.R. (2d) 293, 87 D.L.R. (4th) 391, 7 O.R. (3d) 193 (Gen. Div.) — *referred to*

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Reference re Companies' Creditors Arrangement Act (Canada), [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — *referred to*

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Slavik, Re (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — *considered*

Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) — *referred to*

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Ultracare Management Inc. v. Zevenberger (Trustee of) (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon)* 1 O.R. (3d) 321 (Gen. Div.) — *referred to*

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Statutes considered:

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

Judicature Act, The, R.S.O. 1937, c. 100.

Limited Partnerships Act, R.S.O. 1990, c. L.16 —

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Partnership Act, R.S.A. 1980, c.P-2 — Pt. 2

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Rules considered:

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

***Farley J.*:**

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act* , R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act* , R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited

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partnerships registered under Part 2 of the *Partnership Act* , R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.

(b) The restructuring of existing project financing commitments.

(c) New financing, by way of equity or subordinated debt.

(d) Elimination or reduction of certain overhead.

(e) Viability of existing businesses of entities in the Lehndorff Group.

(f) Restructuring of income flows from the limited partnerships.

(g) Disposition of further real property assets aside from those disposed of earlier in the process.

(h) Consolidation of entities in the Group; and

(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) ; *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v.*

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Comiskey) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act* , R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial

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liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.* , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* , supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 320 where Gibbs J.A. for the court stated:

> The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

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> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik* , unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.* , unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act* , R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these* . (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

> **The Power to Stay**
>
> The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:
>
> > 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

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Recently, Mr. Justice O'Connell has observed that this discre tionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

The Power to Stay in the Context of C.C.A.A. Proceedings

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

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15 Montgomery J. in *Canada Systems* , supra, at pp. 65-66 indicated:

> Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, (sub nom. *Lane v. Willis; Lane v. Beach)* [1972] 1 W.L.R. 326 (C.A.) .
>
> . . . . .
>
> In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 , appeal allowed by consent without costs (sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.)* 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.) , Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:
>
>> The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:
>>
>>> (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships* , (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership.

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The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure* , O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership* , 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test* , (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of

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the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

Application allowed.

Footnotes

* As amended by the court.

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2

1999 CarswellOnt 792
Ontario Court of Justice, General Division [Commercial List]

Royal Oak Mines Inc., Re

1999 CarswellOnt 792, [1999] O.J. No. 864, 7 C.B.R. (4th) 293, 86 A.C.W.S. (3d) 1016, 96 O.T.C. 279

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

In the Matter of the Courts of Justice Act, R.S.O. 1990, c. C-43, as amended

In the Matter of a plan of compromise or arrangement of Royal Oak Mines Inc., and the Applicants listed on Schedule "A"

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended and the Business Corporations Act, R.S.O. 1990, c. B.16, as amended

Farley J.

Judgment: March 14, 1999 *
Docket: 99-CL-3278

Counsel: *David E. Baird*, *Patricia D. Jackson* and *Mario J. Forte*, for Royal Oak Mines.
K. McElcheran, for the Monitor.
P. Griffin and *L. Thacker*, for Trilon/Northgate.
M. MacNaughton, for the Unofficial Committee of Senior Secured Subordinated Noteholders.
Sarah E. Pepall, for the Bank of Nova Scotia.
David R. Byers, for Bankers Trust and Macquarrie.
J.H. Grout, for Tercon and Kiewit.
Benjamin Zarnett, for Export Development Corporation.
Stephen I. Graff, for Associates Leasing.
Lyndon Barnes, for Glencorp.
D.V. MacDonald, for Golden Hill.
Michael Weinczok, for Wajax Industries.
C. Hill and *R. Brent*, for Kilborn.
P. Shea, for Regata.

Subject: Corporate and Commercial; Insolvency

Headnote

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

In proceedings under Companies' Creditors Arrangement Act lienholders asserted that there should be no superpriority granted DIP financing as to any of their previously registered liens — Assertion upheld — Court in CCAA proceedings has no jurisdiction in law to grant such superpriority — Even if court had jurisdiction it should not be exercised in this case — As liens were relatively small charge upon property in relation to other security granted, it would be inappropriate to take radical first step which would be tantamount to executing mini-plan of arrangement affecting only liens at this stage — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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Cadillac Fairview Inc., Re (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

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Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — considered

Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd., [1971] 4 W.W.R. 542, 21 D.L.R. (3d) 75 (Man. C.A.) — considered

Mutual Life Assurance Co. of Canada v. Polsky Energy Corp. of Brooklyn Inc. (1998), 167 N.S.R. (2d) 88, 502 A.P.R. 88, 38 C.L.R. (2d) 245, 2 C.B.R. (4th) 213 (N.S. S.C.) — considered

Ontario (Securities Commission) v. Consortium Construction Inc. (1992), 14 C.B.R. (3d) 6, 9 O.R. (3d) 385, 93 D.L.R. (4th) 321, 11 C.P.C. (3d) 352, 57 O.A.C. 241 (Ont. C.A.) — considered

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Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to

Builders Lien Act, R.S.B.C. 1996, c. 41
s. 11 — considered

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

s. 11(4) — referred to

RULING on issue in proceedings under *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

***Farley J.*:**

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1 The CCAA matter was heard on Friday and I was faced with a functional deadline of Monday, March 15, 1999 at 9:30 a.m. in this real time litigation. I am in complete accord with the views of Blair J. as expressed in his expanded reasons released March 10, 1999 [reported at 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List])]. I think it worthwhile to repeat for emphasis paras. 20, 24 and 28.

> 20. CCAA orders will of necessity involve a certain complexity. Nevertheless, at least a nod in the direction of plainer language would be helpful to those having to review the draft on short notice, or to react to the order in quick fashion after it has been made on no notice. It would also be helpful to the Court, which - as I have noted - is not infrequently asked to give its approval and grant the order with very little advance opportunity for review or consideration. The language of orders should be clear and as simple and readily understandable to creditors and others affected by them as possible in the circumstances. They should not read like trust indentures. These comments are relevant to all orders, but to Initial CCAA Orders in particular.
>
> 24. It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with superpriority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, it at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances - as opposed, for instance, to a receivership or bankruptcy - and whether or not, or to what extent, they are prepared to have their positions affected by the DIP or superpriority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach the objective in a judicious and cautious matter.
>
> 28. The comeback provisions are available to sort out issues as they arise during the course of the restructuring. However, they do not provide an answer to overreaching Initial Orders in my view. There is an inherent disadvantage to a person having to rely on those provisions. By the time such a motion is brought the CCAA process has often taken on a momentum of its own, and even if no formal "onus" is placed on the affected person in such a position, there may well be a practical one if the relief sought goes against the established momentum. On major security issues, in particular, which arise at the Initial Order stage, the occasions where a creditor is required to rely upon the comeback should be minimized.

2 I would think it helpful also to have interested parties in a CCAA proceeding to review my observations in *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), *Additional Dimensions To Consider In Reviewing The Barrack Paper* at p.501 (Corporate Restructuring and Insolvencies - Issues and Perspectives, the Queen's Annual Business Law Symposium 1995 (Carswell, Toronto)) and *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div. [Commercial List]), especially at pp 157-9.

3 What have we got in the current situation as we approach (or may be approaching) what in bull fighting is called the moment of truth. Of course it should be remembered that bull fighting is a dangerous activity not only for the bull but also for the bull fighter. Then again the interested spectators all wish to have a seat under protective coverage as opposed to being exposed to the relentless sun. The preferred seating is Sombra - not Sol. However some here submit that they have the preferable seating but that others are trying to force them out into the exposed area.

4 A difficulty mentioned by Blair J. is that CCAA litigation (being real time) is subject to the participants being caught up in the momentum of events. A further difficulty in sorting matters out in real time litigations is when one is faced with dealing with the elements of *stare decisis* while recognizing that there is no functional opportunity to have the higher level of court consider the issue as that would take months (or more) as opposed to days (or immediately). In light of the very general framework of

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the CCAA, judges must rely upon inherent jurisdiction to deal with CCAA proceedings. However, inherent jurisdiction is not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play. I appreciate that there may have been some blurring of distinction among discretion, inherent jurisdiction and general jurisdiction (including the common law facility). This combination is implicitly recognized in *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), 57 D.L.R. (3d) 1 (S.C.C.) in Dickson J.'s analysis of inherent jurisdiction at pp 4-5. See also Galligan J.A. at p. 19 of *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 14 C.B.R. (3d) 6 (Ont. C.A.) It must also be observed that Halsbury's (4th ed, vol. 37, para 14) and Jacob, H. *The Inherent Jurisdiction of the Court*, (1970) 23 Current Legal Problems were dealing with litigation matters generally - and not with the particulars of insolvency and reorganization litigation. However, the reference in Halsbury's at para 14 to:

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

Should be viewed in context. See in particular *Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd.*, [1971] 4 W.W.R. 542 at p. 548, 21 D.L.R. (3d) 75 (Man. C.A.) at p. 81 per Freedman C.J.M. See also in *Curragh Inc.*, supra, my quotations of Macdonald J. in *Re Westar Mining Ltd.*, [1992] 6 W.W.R. 331 (B.C. S.C.) and Tysoe J. in *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.). In *Curragh Inc.* I went on to observe at page 159 in a somewhat analogous situation:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather, the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.
>
> (emphasis added)

5 With that said, I do not wish to be interpreted as being unduly critical of any party in these proceedings but these observations are made with a view toward being helpful and assisting with focus. It must be recognized that these observations are made after the benefit of hindsight and without the benefit of any previous oral submissions before Blair J. The observations and determinations are in no particular order.

1. It is interesting what the interested parties have said; it is perhaps even more interesting what they have not said. No doubt more will be said and more will be revealed as the moment of truth draws closer and to a close.

2. Royal Oak, Trilon and other major participants should likely have a fairly good idea of value at the present time (i.e. value of the assets as well as value of the corporation including tax loss carry forwards, all as affected by environmental concerns) which would be based upon the reasonably foreseeable future. Royal Oak has had the benefit of Nesbitt Burns working with it since last October. Trilon invested $120 million U.S. last July and the Hedge Lenders and Subordinated Notes postponed to the Trilon debt; would all this have been done without the benefit of due diligence (including ranges of values based upon metals markets which were then declining)?

3. It was indicated that the urgency of the application did not make it possible to provide all interested parties with notice of the relief being requested on Monday, February 15, 1999. The application was dated that day; however the essence and significant bulk of the application was a 100 paragraph Witte affidavit with exhibits sworn Friday February 12th with a minor 6 paragraph Witte affidavit sworn Sunday February 14th. See my views about notice of ex-parte permitted CCAA application in *Inducon*, supra. As well since a CCAA application can be made ex-parte, it is quite permissible to notify all interested parties of the application by telephone: *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

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4. CCAA applications should be brought in a timely basis. This timing is a delicate matter since an applicant has to gauge the perceptions and reactions of those with which it is dealing. I appreciate that Royal Oak was said to have been working on prepackaging a proposal. However, given what appears to have been adverse conditions of such long standing, it is unclear what truly precipitated the February 15th application. Applicants should not rely on indulgence being "automatically" given when the applicant has in effect placed a gun to its own head and threatened to pull the trigger.

5. It is puzzling and troublesome why Royal Oak made the three improper payments referred to in paras. 36-39 of the Monitor Third Report (March 10, 1999). At para. 40, the Monitor advised that these payments (including one to Trilon itself for certain machine equipment lease payments) were the basis for Trilon not continuing to fund under the approved limit set by Blair J. In response to any enquiry as to why these payments were in fact made, I was only advised that Royal Oak had made a very serious mistake. I trust Royal Oak will reflect upon that very carefully as this (and anything similar) impacts upon its future as a corporation and could have extremely serious negative consequences, among others, to its employees, their communities, creditors and governments.

6. Notwithstanding the obvious talents of Mr. Dennis Belcher and Prof. Kenneth Klee, it would be inappropriate to admit their affidavits as expert opinion. Prof. Klee is dealing with the U.S. Bankruptcy Code; we are not dealing with U.S. law. It is inappropriate to import concepts and tests from other jurisdictions; Canadian problems are to be resolved by Canadian concepts and tests. At the most one may very carefully examine general analytical approaches while being fully cognizant of the foreign jurisdictions' different problems and different legislative and judicial solutions to those different problems. Mr. Belcher has set forth in essence his view of the CCAA situation; he should be regarded as a powerful advocate for the interests of his employer The Bank of Nova Scotia. See my views as to expert opinion admissibility in general in my endorsement of April 21, 1998 (*Pente Investment Management Ltd. v. Schneider Corp.* (1998), 40 B.L.R. (2d) 244 (Ont. Gen. Div. [Commercial List])) given during the trial of that matter; these views were affirmed by the Court of Appeal in *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 113 O.A.C. 253 (Ont. C.A.) released October 20, 1998.

7. I appreciate that everyone is under immense pressure and have concerns in a CCAA application. However, as much advance notice as possible should be given to all interested parties. It may be helpful to provide the service list with an initial letter or draft notice of motion which would clearly set out the nature of the relief sought and the general grounds (with reasonable elaboration) with the formal material following in due course. At a minimum, absent an emergency, there should be enough time to digest the material, consult with one's client and discuss the matter with those allied in interest and also helpfully with those opposed in interest so as to see if a compromise can be negotiated. Responding material may require further time before the hearing actually takes place. I am not talking of a leisurely process over weeks here; but I am talking of the necessary few days in which the dedicated practitioners in this field have traditionally responded. Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests. This too is a balancing question.

8. It is understood that the Monitor must have increased powers and authority to ensure that Royal Oak does not get off the tracks as it did concerning the three unauthorized payments.

9. The Monitor has not had sufficient time to analyse and comment upon the proposed expenditures over the next month. It proposes to do that by Tuesday, March 16, 1999.

10. It would be inappropriate to authorize DIP financing with or without any superpriority for the next month before having the benefit of the Monitor's review. Such authorizations are based upon the particular fact situations then prevailing. Blair J. gave certain authorizations in his earlier orders in the CCAA application. The question of whether they should have superpriority over the security of others is a live question before me in this hearing.

11. I will deal with future authorizations and superpriorities, if any, for the next month on Thursday, March 18, 1999 and *if necessary* this may go over to Friday March 19th. I note that there are other matters scheduled for those two days which

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I have to deal with along with the Associates Leasing conversion claim in this matter. The stay arrangements and other provisions of Blair J.'s initial order are extended then until Friday March 19, 1999 (subject to possibly a further extension at that time or if I do not give a decision that day).

12. I am given to understand that Trilon and the Export Development Corporation (EDC) have worked out an understanding which in its essence is that Trilon claims no priority over the vehicles which EDC has valid PPSA security pursuant to registrations under the Ontario and British Columbia legislation with the proviso that any accessions financed by Trilon and properly registered as to ensuring valid security would not be affected by the EDC registrations. It was proposed that in the event that the vehicle (with accessions) were sold, then Trilon and the EDC should share the proceeds pro rata according to their respective dollar interests secured. I would expect that this is a more practical solution than to require that the vehicles and the accretions be sold and dealt with separately. It would likely be helpful to have confirmation of that negotiation by the end of this coming week.

13. Trilon is not claiming priority over the lien claimants as to facility 3 (Trilon interest and principal repayment).

14. I would assume that Trilon would consider its position forthwith and, if so advised, proceed immediately to fund Royal Oak up to the limit previously authorized by Blair J. I understand that a half a million dollars more has already been spent than authorized and that there is therefore no unspent cushion.

15. I would remind everyone that timely negotiation of disputes in real time litigation is generally more helpful to the overall insolvency / reorganization regime than proceeding in court. However the court must be available in real, timely and substantive way not only if required ultimately but also to ensure that negotiations can take place on a principled basis.

16. The Monitor is envisaged as having a broader role by everyone - namely that within a maximum of 4 weeks from now, it will report on alternative methods of dealing with the Royal Oak situation (i.e. give various options and comments thereon).

17. Absent (unadvanced) reasons, it would appear that liens which have not been registered before any authorized superpriority DIP financing which has been advanced would be subject to and subsequent in priority to that authorized superpriority DIP financing.

18. Funding of DIP financing necessary for a CCAA applicant to carry on operations should not be restricted to any one source. It may be in certain situations that some or all of the existing creditor body would find it attractive and in their best interest to be a source of such funding - on a pro rata basis or on what one might refer to as a pro rata cash call and fill-up deficit with or without some inducement. For example one inducement may be that for every $10 of new DIP financing, $1 of existing financing would be given the same priority (or at least some enhanced priority).

19. Any one who is dissatisfied with the present CCAA proceedings or their progress (or lack thereof) may, with the approval of the Court, institute a creditor CCAA proposal or take other legal steps. Parties should very carefully consider the situation and the circumstances generally before taking such a step.

20. The Bank of Nova Scotia did not appeal Blair J. granting superpriority to the first $8.4 million of DIP financing to be advanced by Trilon. However, BNS asserted that no further DIP financing should be granted superpriority.

21. BNS is concerned that Royal Oak has not specifically elaborated upon its good faith and due diligence effort as envisaged by s. 11(4) CCAA. While we may read between the lines and also extrapolate in real time litigation, it is better form to cover off the bases specifically.

22. Aside from the question of the lienholders who have registered liens which but for the Initial Order granted by Blair J. (but subject to the comeback clause) would have priority over the DIP financing, I see no reason to interfere with this superpriority granted. It would seem to me that Blair J. engaged properly in a balancing act as to the $8.4 million of superpriority DIP financing as authorized. I am in accord with his views as expressed in *Re Skydome Corporation* released Nov. 27, 1998, where Blair J. stated at p. 7

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> This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors - in the exercise of balancing the prejudices between the parties which is inherent in these situations - have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. 88 (B.C.S.C.) are examples of the flexibility which courts bring to situations such as this. See also *Re Lehndorff Gen Partner* (1992), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Olympia & York Developments Limited v. Royal Trustco* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).

Implicit in his analysis and part of the equation is the reasonably anticipated benefits for all concerned which derive from these sacrifices. It would seem to me that Holden J.A. in his endorsement in *Re Dylex Limited* released January 23, 1995 implicitly engaged in this balancing of prejudices act where he observed:

> I do not believe that the Bank of Montreal will be adversely affected by the making of this order. As a result of the bridge financing, new receivables will be generated which will assist in re-paying or securing the bridge financing.

Better and more timely information will be of assistance in minimizing the momentum effect in the future. My conclusion as to the appropriateness of the superpriority granted the DIP financing is of course limited to the Initial Order $8.4 million amount and is based upon the conditions now determined to be prevailing as of the authorization date. Each subsequent DIP financing authorization and the priority to be attributed to it will have to be determined on the merits and circumstances then existing.

23. The lienholders here assert that there should be no superpriority granted the DIP financing as to any of their previously registered liens. Their claim is based upon two elements: firstly, they state that the CCAA proceedings court has no jurisdiction in law to grant such superpriority and secondly, they state that even if there were jurisdiction, the Court's discretion should not be exercised in the circumstances so as to grant such superpriority.

6 As to the lack of jurisdiction, they point to *Baxter*, supra being binding upon the point. When this Manitoba case went to the Supreme Court of Canada, Dickson, J. for the court determined that the motions court judge had exceeded his jurisdiction when he appointed a receiver of the balance of the proceeds of the CMHC mortgage and purported to grant subsequent CMHC advances as having a priority as to security over and above prior liens registered against the property. He stated at pp 3-4:

> Did the learned Chambers Judge exceed his jurisdiction in making the order? However politic and expedient the appointment of a receiver may have appeared as a means of tapping the only available source of funds and preventing a stalemate, I am of the opinion that the Judge had no proper ground in law for making the appointment. The appointment was wrong in law because provision 2 above quoted runs contrary to s. 11(1) of the *Mechanics' Liens Act* of Manitoba R.S.M. 1970, c. M80, reading:
>
> > 11(1) The lien created by this Act has priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders, recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien to the person making these payments or after registration of the lien as hereinafter provided.
>
> Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner: see *Boake v. Guild*, [1932] 4 D.L.R. 217, [1932] O.R. 617; affirmed [1933] 4 D.L.R. 401, [1934] S.C.R. 10, *sub nom. Carrel v. Hart*; and Rand J., in *Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd. et al.* [1958], 14 D.L.R. (2d) 609 at p. 612, [1958] S.C.R. 361 at p. 364. Section 59(1) [am. 1970, c. 79, s. 1] of the *Queen's Bench Act* R.S.M. 1970, c. C280, it is to be observed, empowers the Court to appoint a receiver "in all cases in which it appears to the Court to be just and convenient so to do" and further provides that "any such order may be made either unconditionally or upon such terms and conditions as the Court thinks fit" [s-s. (2)]; but this cannot afford comfort to the owner because s. 11 of the *Mechanics' Liens Act*, in terms, gives a lien created by the Act priority over all receiving orders made after the lien

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> arises. The question whether the receiving order here in question is a receiving order of the kind contemplated in s. 11(1) need not detain us because even if this question be resolved in favour of the validity of the appointment, the closing words of the subsection, in clearest language, give a mechanics' lien priority over all payments or advances made on account of any mortgage. One may escape the first part of the subsection only to be impaled on the second part of the subsection and Mr. Houston, counsel for the owner, concedes as much.
>
> In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a Judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a Court simply cannot do.

7 This position would appear to be supported by the views of Macdonald J. in *Westar*, supra at pp. 91-2:

> I accept the argument of the provincial crown that property taxes under the *Municipal Act* [R.S.B.C. 1979, c. 290] and the *Taxation* (*Rural Area*) *Act*, [R.S.B.C. 1979, c. 400] have "priority over any claim ... or encumbrances of any person except the Crown," and that it is not open to this court to grant its own charge priority over property taxes, at least in the context of CCAA proceedings.

and by the views of Glube C.J. in *Mutual Life Assurance Co. of Canada v. Polsky Energy Corp. of Brooklyn Inc.* (1998), 2 C.B.R. (4th) 213 (N.S. S.C.) at p. 218.

> It can be argued that although s. 15(1) lists a number of specifics such as judgments, executions and so on, the list does not include every type of order intended to be covered. The *Mechanic' Lien Act* was first passed in 1879; s. 15(1) dates back to 1899 when it was s. 11(1). There have been many social changes since those dates, as well as legislation such as the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which may be included in the listing in s. 15(1) without being actually added to the list.
>
> (emphasis added)

8 However it is unclear whether Macdonald J. was influenced by the question of the Crown not being bound by the CCAA there and whether Glube C.J. felt compelled by the analogy. However, it is fair to say that the SCC in *Baxter*, when faced with the choice between an unpractical but "legal" solution and a practical one, opted for the unpractical one. Thus, one is constrained from distinguishing on the basis of the recognition of the CCAA over the past 15 years having a familial relationship with Necessity. On this - of necessity hurried - analysis, it would appear that s. 11 of the *Builders Lien Act*, R.S.B.C. 1996, c.41, which provides:

> 11. Subject to this Act, a claim of lien that has been filed in the land title office or gold commissioner's office, if applicable,
>
> > (a) takes effect from the date of commencement of the work or when the first materials are furnished or placed for which the lien is claimed, and
> >
> > (b) takes priority over all judgments, executions, attachments and receiving orders recovered, issued or made after the lien takes effect.

would operate in such a way as to eliminate the inherent jurisdiction which could otherwise be used to grant a superpriority of the DIP financing over other security. That does not of course affect the situation where other security does not have the statutory "protection" or "supremacy" of which this type of legislation affords liens. It may be that if this is demonstrated to be a significant problem that a statutory amendment should be considered.

9 However, even if I were to have concluded that the CCAA court did have jurisdiction to grant a superpriority over the subject liens, I would decline to exercise my discretion to do so under the circumstances. This is a fact driven and practicality driven exercise. The following are my reasons. Firstly, the liens are otherwise a relatively small charge in dollar amount upon the Kemess property in relation to other security granted and it seems to me inappropriate to take such a radical first step which is tantamount to executing a mini-plan of arrangement affecting only the liens at this stage. Secondly, the lien claimants are

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parties who (to the extent of their valid lien claims) have not voluntarily offered credit to Royal Oak on any extended time basis as opposed to other secured creditors who may be viewed as having offered credit to Royal Oak on an extended time basis with their security terms being negotiated between the parties. Thirdly, I would specifically note in the case of Tercon that the lien was specifically the subject of an order of Brenner J. of the B.C.S.C. dated Sept. 22, 1998 wherein it was ordered that such $2.9 million lien was:

> a charge, lien or encumbrance in preference and priority to all rights and interests of the Defendant in the Lands, in preference and priority to all charges and encumbrances granted by the Defendant in respect of the Lands after February 26, 1998.

10 Then there is the aspect of why should the lienholders be treated any differently than the EDC which would appear to be in a less statutorily protected position than the lienholders.

11 I would wish to note that any of my observations here are not to be taken as having any bearing upon the question of classification of claims. That is for another day and subject to different considerations. However it may be well for Royal Oak and its supporter Trilon to look a few steps ahead to see what the ramifications could be.

12 Order reflecting above to issue accordingly.

Order accordingly.

Footnotes

* A corrigendum dated April 7, 1999 has been incorporated herein.

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2012 ONSC 2125
Ontario Superior Court of Justice [Commercial List]

Crystallex International Corp., Re

2012 CarswellOnt 4577, 2012 ONSC 2125, 91 C.B.R. (5th) 169

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

And In the Matter of a Plan of Compromise or Arrangement of Crystallex International Corporation

Newbould J.

Heard: April 5, 2012
Judgment: April 16, 2012 *
Docket: CV-11-9532-00CL

Proceedings: affirmed *Crystallex International Corp., Re* (2012), 2012 ONCA 404 (Ont. C.A.)**Proceedings: additional reasons at *Crystallex International Corp., Re* (2012), 2012 ONCA 527 (Ont. C.A.)**

Counsel: Markus Koehnen, Andrew J.F. Kent, Jeffrey Levine for Crystallex International Corporation
Richard B. Swan, S. Richard Orzy, Emrys Davis for Computershare Trust Company of Canada
David R. Byers, Maria Konyukhova for Monitor, Ernst & Young Inc.
Shayne Kukulowicz for Tenor Special Situations Fund LP
John T. Porter for Juan Antonio Reyes
Robert Frank for Forbes & Manhattan Inc., Aberdeen International Inc.

Subject: Insolvency

Headnote

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

C Corp. sought court approval for agreement with T LP providing debtor in possession (DIP) financing — Principal asset of C was US$3.4 billion arbitration claim against Venezuela arising from cancelled mining contract — Agreement with T provided for advances of $36 million and resulting entitlement to 35 per cent of net proceeds of arbitration award — T LP to have right to appoint two directors and right to agree on fifth independent director — Agreement was opposed by C's noteholders who proposed their own DIP financing — Agreement with T LP approved — Agreement was not "plan of arrangement" or "compromise" requiring vote — C had tried to find alternative financing — Return of 10 per cent PIK interest not unreasonable return for DIP lender because of the uncertainty of getting any return — Stay pending appeal by noteholders not appropriate as repayment of bridge financing due.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

C Corp. sought court order extending stay contained in intial order — Stay continued — Motion unopposed and supported by monitor.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors

C Corp. sought court approval for agreement with T LP providing debtor in possession (DIP) financing — Agreement was opposed by C's noteholders who proposed their own DIP financing — Agreement with T LP approved — Agreement was not "plan of arrangement" or "compromise" requiring vote.

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

C Corp. sought court approval for agreement with T LP providing management incentive plan (MIP) — Agreement was opposed by C's noteholders who had own proposed plan — Agreement with T LP approved — Business judgment rule applicable — Provisions of the MIP approved by independent committee of board — Independent board members not participants in MIP — Existing stock options ultimately realized by participants of MIP would be deducted from any bonus awarded under the MIP — Approval of MIP was condition of DIP loan.

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Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — followed

Calpine Canada Energy Ltd., Re (2007), 35 C.B.R. (5th) 27, 410 W.A.C. 25, 417 A.R. 25, 2007 ABCA 266, 2007 CarswellAlta 1097, 80 Alta. L.R. (4th) 60, 33 B.L.R. (4th) 94 (Alta. C.A. [In Chambers]) — referred to

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Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — considered

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — distinguished

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Kerr v. Danier Leather Inc. (2007), 2007 SCC 44, 2007 CarswellOnt 6445, 2007 CarswellOnt 6446, 87 O.R. (3d) 398 (note), 36 B.L.R. (4th) 95, 231 O.A.C. 348, 286 D.L.R. (4th) 601, [2007] 2 S.C.R. 331, 48 C.P.C. (6th) 205, 368 N.R. 204 (S.C.C.) — followed

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — considered

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — considered

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

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 123(4) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(d) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4)(f) [en. 1997, c. 12, s. 124] — considered

s. 11.5(1) [en. 1997, c. 12, s. 124] — considered

Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

Words and phrases considered:

plan of arrangement

A "plan of arrangement"or a "compromise" is not defined in the [Companies' Creditors Arrangement Act]. It is, however, to be an arrangement or compromise between a debtor and its creditors. The [applicant's] DIP facility is not on its face such an arrangement or compromise between [the debtor company] and its creditors. Importantly the rights of the noteholders are not taken away from them by the . . . DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the [Act], they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the . . . DIP

MOTION by corporation for orders approving agreement for debtor in possession financing, management incentive plan, extension of stay, and approval of actions of Monitor.

***Newbould J.*:**

1 Crystallex moves for four orders, the first being an order approving DIP financing pursuant to a credit agreement between Crystallex and Tenor Special Situation I, LLC ("Tenor"), the second being an order extending the stay referred to in paragraph 16 of the Initial Order dated December 23, 2011 until July 16, 2012 or such further date as may be ordered, the third being an order approving a Management Incentive Plan ("MIP") and a Retention Advance Agreement in favour of Robert Fung and the fourth being an order to approve the actions of the Monitor referred to in the second and third reports of the Monitor.

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2 The noteholders of Crystallex [1] oppose the Tenor DIP facility. They propose a DIP loan which they would make for a smaller amount and for a shorter term than the Tenor DIP facility. They also oppose the MIP. In order to preserve any appeal rights they may have and may want to assert, they do not consent to an order approving the actions of the Monitor in the second and third reports, but take no position in opposition to the order sought.

3 A shareholder, Mr. J.A. Reyes appeared on the motion to support the Tenor DIP facility and in principle the MIP, but has some concerns regarding the terms of the MIP.

4 Forbes & Manhattan Inc. and Aberdeen International Inc., creditors owed approximately $2.5 million by Crystallex, oppose the Tenor DIP facility and the MIP.

Background to the Financing

5 The history of the business of Crystallex and its mining project in Venezuela has been the subject of prior decisions in cases brought by the Noteholders. The evidence on the record before me indicates in summary as follows.

6 The principal asset of Crystallex was its right to develop the Las Cristinas gold project in Venezuela. Las Cristinas is one of the largest undeveloped gold deposits in the world containing measured and indicated gold resources of approximately 20.76 million ounces.

7 In September 2002 Crystallex obtained the right to mine the Las Cristinas project through a Mining Operation Contract (the "MOC") with the Corporacion Venezolana de Guayana (the "CVG"), a state-owned Venezuelan corporation. Crystallex complied with all of its obligations under the MOC. Neither the CVG nor the Government of Venezuela raised any material concerns about lack of compliance. The CVG confirmed on several occasions that the MOC was in good standing and that Crystallex was in compliance with it.

8 The Ministry of the Environment advised Crystallex in writing in April 2007 that Crystallex had completed all steps necessary to obtain the required environmental permit. Crystallex was shown a draft of the permit and was told that it would obtain the permit as soon as it had paid certain stamp duties and posted an insurance bond. Crystallex paid the duties, negotiated the bond with the Ministry and posted the bond.

9 On February 3, 2011, despite confirming on several occasions that Crystallex's right to mine the Las Cristinas property continued unchallenged, CVG purported to "unilaterally rescind" the MOC.

10 CVG rationalized its termination of the contract for reasons of "expediency and convenience" and because Crystallex had allegedly "ceased activities for over a year" on the project. Crystallex did not cease activities. It was maintaining the mining site in a shovel-ready state and was awaiting receipt of an environmental permit. Because of Venezuela's refusal to allow Crystallex to exploit Las Cristinas, Crystallex became unable to pay its debts as they became due effective December 23, 2011.

11 Crystallex has a number of liabilities, the most of significant of which is a liability of approximately $100 million in senior unsecured notes that were issued pursuant to a Trust Indenture dated December 23, 2004. The notes were due on December 23, 2011. In addition, Crystallex has other liabilities of approximately CAD$1.2 million and approximately US$8 million.

12 The principal asset of Crystallex is its arbitration claim of US$3.4 billion against Venezuela. In addition, Crystallex has mining equipment with a book value of approximately $10.1 million and cash of approximately $2 million.

13 Crystallex asserts that the insolvency in which it finds itself is not attributable to poor business judgment by Crystallex but to the illegal conduct of the Venezuelan government in refusing to let Crystallex develop Las Cristina, even though Crystallex had the undisputed contractual right to do so.

Arbitration proceedings

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14 On February 16, 2011 Crystallex filed a Request for Arbitration with the International Centre for the Settlement of Investment Disputes ("ICSID") against Venezuela pursuant to a Bilateral Investment Treaty between Canada and Venezuela. ICSID is a mechanism through which private investors can seek legal redress against a foreign government for conduct that might be otherwise immune from suit. In the arbitration, Crystallex seeks compensation of $3.4 billion plus interest as full compensation for the loss of its investment.

15 The Arbitration Tribunal held its first procedural meeting on December 1, 2011 in Washington, DC. At that hearing, the Tribunal established Washington, DC as the seat of the arbitration proceeding, and established a timetable for the arbitration. Pursuant to the timetable, Crystallex delivered its written case on February 10, 2012. Crystallex's written case comprises fourteen volumes of detailed witness statements, expert's reports, exhibits, law and argument. Its memorial summarizing the evidence, law and argument extends to 226 pages. Venezuela is required to respond to Crystallex's case by August 31, 2012. The hearing of the arbitration is scheduled for two weeks beginning on November 11, 2013.

16 The valuation evidence Crystallex submitted with its ICSID case claims damages of $3.4 billion plus interest. While the result of the arbitration is unknown, if it is successful, and the award is collected, there will be far more available than necessary to pay the outstanding debts of Crystallex. It is also clear that any meaningful recovery for the creditors and possibly shareholders will require some success in the arbitration, either by a collectible award or a settlement.

DIP financing selection process

17 In accordance with paragraph 12 of the Initial Order, Crystallex, with the assistance of its counsel and its financial advisor, commenced a process to seek DIP financing of $35 million with a term of December 13, 2014.

18 With the approval of the Monitor, Crystallex hired a financial advisor, Skatoff & Company, LLC based in New York City. Mr. Skatoff is an independent financial advisory firm focused on debt advisory services, financial restructuring advisory services, financing advisory services and M&A services.

19 Crystallex, in consultation with Mr. Skatoff and on its recommendation, prepared a set of bid procedures to govern the solicitation of bids to provide DIP financing to Crystallex. The bid procedures were approved by the Monitor. The bid procedures are referred to in some detail in my endorsement of January 25, 2012. They included a provision whereby the DIP lender could obtain a "back-end entitlement" of up to 49% of the arbitration proceeds.

20 The bid procedures provided that Crystallex would only consider bids from qualified bidders. A qualified bidder was one who, among other things, complied with certain participation requirements including the submission of a participation package.

21 As a result of the DIP financing auction, a small number of qualified bidders ultimately submitted proposals for the DIP financing. Among the bidders were the three hedge funds that hold approximately 77% of Crystallex's senior unsecured notes.

22 Ultimately Mr. Skatoff recommended, and the board of Crystallex agreed, to accept the terms of the Tenor DIP financing now before the court for approval.

Proposed Tenor DIP financing

23 The Tenor DIP facility contains the following material financial terms:

(a) Tenor will advance $36 million to Crystallex due and payable on December 31, 2016. This period for the loan is based on Crystallex's arbitration counsel's assessment of the likely timing of a decision from the arbitral tribunal and collection of the award.

(b) The advances will be in four tranches, being $9 million upon execution of the loan documentation and approval of the facility by court order in Ontario, the second being $12 million upon any appeal of the Ontario court order approving the facility being dismissed and upon a U.S court order approving the facility, the third being $10 million

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when Crystallex has less than $2.5 million in cash and the fourth being $5 million when Crystallex again has less than $2.5 million in cash.

(c) The loans are to be used to (i) repay an interim bridge loan of $3.25 million advanced by Tenor with court approval of January 20, 2012 and payable on April 16, 2012, (ii) fees and expenses in connection with the facility, (iii) general corporate expenses of Crystallex including expenses of the restructuring proceedings and of the arbitration in accordance with cash flow statements and budgets of Crystallex approved by Tenor from time to time.

(d) Crystallex will pay Tenor a $1 million commitment fee.

(e) $35 million of the loan amount will bear PIK interest (payment in kind, meaning it is capitalized and payable only upon maturity of the loan or upon receipt of the proceeds of the arbitration) at the rate of 10% per annum compounded semi-annually.

(f) Tenor will receive additional compensation equal to 35% of the net proceeds of any arbitral award or settlement, conditional upon the second tranche of the loan being advanced. Net proceeds of the award or settlement is defined as the amount remaining after payment of principal and interest on the DIP loan, taxes and proven and allowed unsecured claims against Crystallex, including the noteholders, the latter of which will have a special charge for the unsecured amounts owing. Alternatively, Tenor can convert the right to additional compensation to 35% of the common shares of Crystallex. This conversion right is apparently driven by tax considerations.

24 The Tenor DIP facility also provides for the governance of Crystallex to be changed to give Tenor a substantial say in the governance of Crystallex. More particularly:

(a) Crystallex shall have a reduced five person board of directors, being two current Crystallex directors, two nominees of Tenor and an independent director selected by agreement of Crystallex and Tenor.

(b) The independent director shall be chair of the board of directors and shall not have a second-casting or tie-breaking vote.

(c) The independent director shall be appointed a special managing director and shall have all the powers of the board of directors to (i) the conduct of the reorganization proceedings in Canada and in the U.S. and the efforts of Crystallex to reorganize the pre-filing claims of the unsecured creditors, (ii) any matters relating to the rights of Crystallex and Tenor as against the other under the facility, (iii) the administration of the MIP to the extent not otherwise delegated to the bonus pool committee under the MIP, and (iv) to retain any advisor in respect of these matters. The special manager shall first consult with a non-board advisory panel, consisting of the three Crystallex directors who will step down from the board, and consider in good faith their recommendations.

(d) With respect to matters that may not at law be delegable to the special managing director, he will be required to obtain board approval. If the Tenor nominees use their votes to block that approval, Tenor will forfeit its 35% additional compensation.

25 The Tenor DIP facility contains proscribed rights of Tenor in the event of default. Tenor may seize and sell assets other than the arbitration proceeding (i.e. any cash and unsold mining equipment). It may not sell the arbitration claim. If there is a default before any arbitration award, Tenor would have the right to apply to court to have the Monitor or a Canadian receiver and manager appointed to take control of the arbitration proceedings. If such application were not granted, Tenor would be entitled to exercise the rights and remedies of a secured creditor pursuant to an order, the loan documentation or otherwise at law.

Proposed Noteholders DIP Loan and Plan

26 The noteholders propose a DIP loan of $10 million with a simple interest rate of 1% repayable on October 15, 2012. This was essentially the same as the interim bridge loan of $10 million with simple interest of 1% proposed by the noteholders that would have been repaid on April 16, 2012 that was not accepted by Crystallex. It is quite clear that the interest rate is far below market in the circumstances of Crystallex, and it is referred to in the noteholders factum as "exceptionally favourable".

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27 During the process to find a DIP lender satisfactory to Crystallex and its advisors, the noteholders were asked to increase their proposed loan to $35 million but they refused. However, in his affidavit Mr. Mattoni on behalf of the noteholders stated that the noteholders would in the future be prepared under certain circumstances, if required by the court, to advance a DIP loan on the same terms as the Tenor DIP facility. He stated that the noteholders would do so in the event that prior to October 1, 2012, the court orders that such long-term financing is appropriate and necessary. The noteholders would reserve their ability as creditors to continue to oppose the need for such a loan and any stay extensions or attempts to secure such long-term financing outside of a plan of compromise. The $10 million which they provided in interim financing would be repaid from this financing such that the net effect of the financing would be the same as that of the Tenor DIP facility. During argument on this motion, Mr. Swan said that the noteholders were not prepared to agree to such a $35 million facility at this time but only at some future time as the $10 million facility they now proposed became due.

28 The noteholders have also now proposed a restructuring plan, said to be in response to the Tenor DIP and the MIP. This was first proposed by Mr. Mattoni in his affidavit of March 27, 2012 as a proposal of the noteholders. At that time, he did not have any internal authority from the QVT fund of which he is the investment manager, or from any of the other noteholders, to make such proposal. This was shored up as indicated in his further affidavit of April 4, 2012 served just before the hearing of this motion. The noteholders do not ask for approval of this plan on this motion, but put it forward as indicating a good faith intention to bargain for a plan. The noteholders plan would:

a) provide $10 million at 1% interest in a single-draw to meet Crystallex's funding needs over the next several months while a plan is negotiated;

b) provide $35 million to the Company in a straight exchange for 22.9% of Crystallex's equity;

c) exchange all outstanding debt for equity;

d) secure approximately 14% of the remaining equity for existing shareholders; and

e) provide incentives to management at a lesser level than the MIP. It would be up to the post-emergence board to ensure that management is properly incentivized, which could involve other compensation as well.

Management Incentive Plan

29 In addition to approval of the DIP, Crystallex seeks approval of a Management Incentive Plan ("MIP") for certain of its key employees. The fundamental terms of the MIP are as follows:

(a) An amount equal to up to 10% of the first $700 million in net proceeds of the arbitration award and an amount equal to up to 2% of the net proceeds in excess of $700 million will be reserved as a retention pool for key management employees.

(b) The amount to be retained in this pool is the amount remaining after payment of the outstanding principal and interest on the DIP loan, outstanding operating and professional expenses, the unpaid claims of noteholders and other stayed unsecured creditors, together with post-filing interest and all taxes payable by the company on the award.

(c) The size of the pool shall not exceed 10% of the net proceeds of the arbitral award or one quarter of the amount that is available to shareholders of Crystallex after satisfaction of any additional compensation owing to Tenor under the loan agreement.

(d) A compensation committee consisting of three persons who are currently independent directors of Crystallex and who are expected to retire from the board in accordance with the governance provisions of the Tenor DIP facility, will determine the retention payment paid to each beneficiary of the MIP. The compensation committee will be entitled to distribute as much or as little of the retention pool as they see fit. Amounts remaining unpaid from the retention pool will be returned to Crystallex.

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30 Crystallex also proposes that there be a MIP charge to secure the payments, the charge to be subordinate to the Administration Charge, the DIP Charge, the Directors' Charge and the Pre-filing Unsecured Creditors Charge.

31 Also sought for approval is a retention agreement for Mr. Fung which provides that at the end of each calendar quarter during 2012 and 2013 the board of Crystallex will pay a retention advance of $125,000 per quarter to Mr. Fung. The making of each payment will be at the discretion of the board but only to the extent that he remains properly engaged in the arbitration. Those payments are to be treated as if they were pre-payments of any payments that would otherwise be awarded to Mr. Fung from the retention pool under the MIP and therefore reduce any such amount he may receive from the retention pool.

DIP loan approval analysis

32 Section 11.2 of the CCAA provides that a court may provide security in favour of an interim or DIP lender who agrees to lend to the debtor company having regard to its cash-flow statement. Section 11.2 (4) provides:

> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;
> >
> > (b) how the company's business and financial affairs are to be managed during the proceedings;
> >
> > (c) whether the company's management has the confidence of its major creditors;
> >
> > (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> >
> > (e) the nature and value of the company's property;
> >
> > (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
> >
> > (g) the monitor's report referred to in paragraph 23(1)(*b*), if any.

33 Crystallex relies on the business judgment rule to support the decision of its board of directors to accept the Tenor DIP facility. It is clear that the business judgment rule can apply to a debtor in CCAA proceedings. In *Stelco Inc., Re* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.), Blair J.A. stated in that CCAA proceeding:

> 65. ...It is well-established that judges supervising restructuring proceedings - and courts in general - will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples*, *supra*, at para. 67:
>
> > Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ...

34 The noteholders point to *Kerr v. Danier Leather Inc.*, [2007] 2 S.C.R. 331 (S.C.C.) per Binnie J. at para. 54 in which he stated that the business judgment rule could not be used to qualify or undermine the duty of disclosure required by the *Securities Act* and *Bennett v. Bennett Environmental Inc.*, 2009 ONCA 198 (Ont. C.A.) per Lang. J.A. in which she held that whether a director could be indemnified depended on the application of section 123(4) of the CBCA and not the business judgment rule.

35 I accept that in considering whether security under a DIP loan should be ordered, a court cannot ignore the factors directed to be considered in section 11.2 (4) of the CCAA and could not order such security if a consideration of those factors led to an opposite conclusion. But in my view those factors are not the only factors that can be considered, as section 11.2(4) directs a court to consider the listed factors "among other things". One of the considerations that in my view can be taken into account is the exercise or lack thereof of business judgment by the board of directors of a debtor corporation in considering DIP financing.

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(i) Consideration of the Tenor DIP facility

36 In this case, the Crystallex board took legal advice from its solicitors McMillan LLP and financial advice from Mr. Skatoff. I am satisfied that they carefully considered the relevant matters leading to the decision to accept the terms of the Tenor DIP financing, including giving consideration to the noteholders' proposed DIP financing of $10 million to October, 2012, and that they acted on an informed basis and in good faith with a view to the best interests of Crystallex and its stakeholders. See the affidavits of Mr. Fung at paras. 52 to 67 and the reply affidavit of Mr. van't Hof at paras. 9 to 12. That being said, I must consider the contentions of the parties and the factors as set out in section 11.2 (4).

37 The noteholders have made a number of objections to the Tenor DIP financing.

38 They contend that Crystallex should have sought sufficient financing to pay the noteholders in full, as was attempted prior to the CCAA filing. The evidence indicates, however, that Mr. Skatoff attempted to do so with the market but the message he received back consistently was that the market had no interest in paying out existing noteholders at 100 cents on the dollar in a context where the notes were trading at a significant discount to par. Mr. Mattoni himself said on cross-examination that he did not believe it would be possible to raise sufficient money on the market to pay out the noteholders, as did the noteholder's financial expert witness Mr. Glenn Sauntry.

39 Mr. Mattoni in his affidavit states that the Tenor DIP facility was a pre-ordained coronation rather than the result of a competitive bidding process. There is no evidentiary basis for this suggestion. It is clear from the evidence of Mr. Skatoff, Mr. Fung and Mr. van't Hof and from the Monitor's report that there was a robust competitive bidding process and that full consideration right up to the last minute was given to other bidders. The Monitor stated it its report that from its observation of the process, it saw no evidence that Tenor was afforded preferential treatment over other participants in the process. It is also clear that the noteholders' $10 million bid was considered by the board of Crystallex and, based on advice from its advisors, not accepted. Thus any complaint from the noteholders on this score could only be that the Tenor bid was higher than market pricing for the facility. They had no such evidence and on cross-examination their financial expert Mr. Sauntry acknowledged that he could not say that the Tenor bid was not reflective of market pricing.

40 The noteholders also complain that Mr. Skatoff did not undertake a valuation of Crystallex. The response of Crystallex is that it was not Mr. Skatoff's job to do that. In light of the fact that the main asset of Crystallex is the arbitration claim, Mr. Skatoff in my view would be in a poor position to value Crystallex.

41 Mr. Sauntry in his report attempted to value the arbitration claim in different ways. He is not a lawyer and has no knowledge of the treaties involved or of the merits of the arbitration claim. He made assumptions in his cash flow analysis that, based on the reply expert report of Mr. Dellepiane, which I have no reason to doubt as he was intimately involved in the preparation of the arbitration claim, indicate Mr. Sauntry's lack of knowledge of the basis of the claim. Regarding Mr. Sauntry's analysis in (i) implying a value to the arbitration claim from an analysis of the Tenor DIP proposal and stating that in substance that proposal is a sale of a percentage of Crystallex's assets to Tenor and (ii) using the market value of Crystallex's securities as a proxy for enterprise value, I accept the reply affidavit of Mr. Skatoff, and in particular paragraphs 34 to 41, as reason to doubt Mr. Sauntry's analysis. As well, Mr. Sauntry's evidence on cross-examination, and in particular that referred to in paragraphs 8 to 12 of the Summary of Key Points From Cross-examinations, indicates little reliability should be placed on Mr. Sauntry's evidence.

42 In any event, in light of the lack of evidence from the noteholders that the Tenor bid was not above market, the contention that Mr. Skatoff did not undertake a valuation of Crystallex or of the arbitration claim is of little moment.

43 The noteholders also contend that whereas the bid process spelled out terms that must not be contained in a bid and provided that some terms were to be discouraged, the Tenor bid in the end contained some such terms. In those circumstances, the noteholders contend that Crystallex should have re-canvassed the market. Mr. Skatoff's evidence is that other bidders presented loan terms that would have resulted in similarly extensive changes to the loan document that accompanied the bid packages. The world of restructuring is not a perfect world. A company seeking DIP financing can tell the market what it wants, but

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cannot dictate its terms if the market tells it otherwise. The alternative is to walk away from the market. Regarding the changes sought by the market, the Monitor in its report states:

> 50. During the negotiations, all bidders requested amendments to the template version of the loan agreement posted on the Monitor's website as part of the CCAA Financing Procedures. The Monitor is of the view that such requests are typical in any bidding or investment raising process. The Monitor observed that all parties were provided with the template loan agreement and, as is common in processes such as the CCAA Financing Procedures, the final forms of the selected commitment letter and senior credit agreement deviate from the template agreement.

44 The noteholders take a fundamental objection to the Tenor DIP facility on the basis that it is inconsistent with the purposes of the CCAA and case law dealing with DIP loans. The noteholders say that it is not interim financing but a forced restructuring plan prejudicial to them and that it should not proceed without a vote as required by the CCAA for a plan of arrangement or compromise.

45 *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) is authority for the proposition that a stay under the CCAA should not be continued if the debtor company does not intend to propose a compromise or arrangement to its creditors, and DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. In that case, the debtor wanted to obtain financing to complete the construction of a golf course development without proposing an arrangement or compromise with its creditors.

46 The noteholders seize upon a statement made by Mr. Fung in his affidavit filed on the initial application leading to the Initial Order in which he said:

> Crystallex strongly desires to pursue the arbitration and have stayed all claims against it until the arbitration has been settled or Crystallex has realized on an arbitration award, at which point Crystallex expects that all creditors would be paid in full to the extent of their proven claims.

47 While there is no doubt that Mr. Fung made that statement, I think it needs to be considered in light of the reality agreed by the parties that the only way any of the creditors will receive any substantial cash payment is from the proceeds of the arbitration. This would be the case whether a plan of arrangement could be agreed or not. Also Mr. Mattoni agreed on cross-examination that Crystallex's goal of pursuing the arbitration and using the proceeds to pay creditors in full did not prevent Crystallex from giving creditors some additional benefit in a plan of arrangement.

48 Moreover, often statements are made in CCAA proceedings about the intention of a party that later change. Mr. Koehnen made clear in argument that Crystallex has every intention to attempt to negotiate a plan of arrangement with the noteholders and that this has already been going on now on a without prejudice basis. He said the purpose of the stay to July 16, 2012 is to negotiate a compromise with the noteholders during that time period. I accept that statement. The situation is not the same as in *Cliffs Over Maple Bay*.

49 Is the Tenor DIP facility a plan of arrangement or compromise requiring a vote? In my view it is not.

50 A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

51 I note that in this case the practical exercise of the rights of the noteholders is very problematical because of issues raised in Mr. Fung's confidential affidavit no. 2.

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52 The noteholders contend that giving Tenor 35% of the arbitration proceedings will take away from Crystallex a substantial amount of equity making a compromise more difficult and less available for the unsecured creditors.

53 In *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.), leave to appeal denied (2007), 35 C.B.R. (5th) 27 (Alta. C.A. [In Chambers]), it was contended that a settlement of several claims in a complex cross-border restructuring constituted a plan of arrangement or compromise and thus required a vote under the CCAA by the creditors affected. It was contended that the settlement left less assets available for the Canadian unsecured creditors. In rejecting this contention, Romaine J. stated the following:

> 12. The primary objection is that the GSA [global settlement agreement] amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analyzed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:
>
> > (b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. ... If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.
>
> 19 ... While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights.
>
> 51. The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA.
>
> 55. I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously.

54 In refusing leave to appeal from the decision of Romaine J., O'Brien J.A. stated:

> 34. ... The GSA does not change its status as a creditor of those companies, nor does it bar the applicant from any existing claims against those companies.
>
> 35. ... the fact that the GSA impacts upon the assets of the debtor companies, against which the applicant may ultimately have a claim for any shortfall experienced by it, is a common feature of any settlement agreement and as earlier explained, does not automatically result in a vote by the creditors. The further fact that one of the affected assets of the debtor companies is a cause of action, or perhaps, more correctly, a possible cause of action, does not abrogate the rights of a creditor albeit there may be less monies to be realized at the end of the day.

55 While this case is not binding on me, it is persuasive and makes sense. It is also consistent with authorities in Ontario that a sale of assets or a settlement in a CCAA before a plan of compromise is put forward may be authorized even if there will be insufficient assets to retire the creditor claims in full. See *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]).

56 In this case, it cannot be said that there will be insufficient assets coming from the arbitration to repay all of the outstanding notes in full, which at present is approximately $115 million. Even the valuation of Mr. Sauntry, which I do not accept as

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reliable, indicates far more than that as a possible outcome of the arbitration. While the outcome of the claim cannot be known at this stage, it is a claim for $3.4 billion dollars in circumstances in which Crystallex spent approximately $500 million on the development of the mine.

57 The fundamental purpose of the CCAA is well established, and indicates that flexibility is required in dealing with any particular case. In *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), the following was stated:

> ... the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."
>
> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

58 Since 1934, of course, there has been wide experience in dealing with the CCAA, and it has been an evolving experience. In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, Blair J. (as he then was) approved the sale of the assets of the debtor that would result in the estate having less than sufficient money to pay all of its creditors in full, and before a plan of compromise was put forward. He discussed the flexibility involved in these terms:

> 45. It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. ... The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in *Dylex*, *supra* (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Re Lehndorff General Partner* (1993), 17 C.B.R. (3d) 24, at p. 31, which I adopt:
>
> > The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
> >
> > The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

59 In that case, Blair J. considered the factors in *Soundair* in deciding whether to approve of the sale, being whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; to consider the interests of the parties, to consider the efficacy and integrity of the process by which offers are obtained and to consider whether there has been unfairness in the working out of the process. Those factors are consistent with the factors to be taken into account in considering

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whether security for a DIP loan should be approved, and as the Tenor DIP facility involves a grant of a financial interest in part of the assets of Crystallex, being a percentage of the arbitration award, it seems to me that they can be looked at in this case.

60 It was contended by the noteholders that the size of a loan of $36 million, an amount calculated to complete and collect the arbitration, was not in accordance with the purposes of a DIP loan as it would take Crystallex beyond what is required before any reorganization. However this complaint regarding the size of the loan was not strenuously pursued in argument, no doubt because of the new position of the noteholders that it would fund that amount on the terms of the Tenor DIP loan if later required and because of the provision in the proposed plan of arrangement put forward by the noteholders that it would provide $36 million in funding in return for an equity stake in Crystallex. There seems no doubt that the parties agree that at least $36 million is required to pursue the arbitration.

61 The noteholders also contend that the term of the loan by Tenor is far too long and that it indicates an attempt by Crystallex to do an end run around the need to propose a plan of arrangement as the term would extend beyond the date of an anticipated award. I have already dealt with the issue of Crystallex proposing a plan of arrangement. The noteholders contend that the DIP loan, at least initially, should not extend beyond October, 2012 as by then a plan should have been negotiated. However, both sides agree that the only way that any substantial cash will be available to Crystallex or its creditors will be from the arbitration and that it will be necessary to prosecute the arbitration long after October, 2012. The proposed plan of the noteholders recognizes this as it proposes a $36 million injection for the purposes of prosecuting the arbitration. The $36 million figure is based on a projection of expenditures going far beyond 2012. That is, both sides agree that it will be necessary to have financing for the arbitration that will continue after October, 2012. The term of the Tenor DIP loan as to when the loan becomes due in itself is not an impediment to a restructuring.

62 In my view, the term of the loan is not the substantive issue, so long as Crystallex intends to negotiate if possible an acceptable plan of arrangement or compromise, which it has indicated it intends to do. One of the factors required to be considered under section 11.2(4) is the time during which Crystallex is expected to be subject to the CCAA proceedings. Like many cases, it is not clear when these proceedings may be over. However, as the $36 million financing is going to be required whether Crystallex is out from under the CCAA in a short or longer period, and as the expenditures are to last for a few years, this factor of the time during which Crystallex is expected to be subject to the CCAA proceeding is not a determinative factor.

63 The noteholders also contend that Tenor has been given control over Crystallex and the restructuring process by reason of the changes in the corporate governance required by the Tenor DIP facility. There is no doubt that Tenor has been given substantial governance rights, including the right to name two of the five directors and the right to agree on who the independent director shall be. An issue is whether the governance provisions are too intrusive for a DIP loan, which according to case law relied on by the noteholders should not be excessive or inappropriate. I note that there is no prohibition in the CCAA against the board of directors changing at the hands of the debtor. There is a provision allowing the court to remove directors, which I shall later discuss.

64 Any DIP lender wants to obtain as much control as possible over the affairs of the debtor during the term of the DIP financing, and terms are often imposed to that end. In this case, given the extreme hostility of the noteholders to the board and management of Crystallex over its actions over the few years prior to the arbitration being commenced, it is not surprising that Tenor has demanded what it has. The fact that Tenor at the last minute changed the governance terms that it was prepared to live with, and that the Crystallex board was not happy with the change, does not in itself mean that those terms should not be approved.

65 To put up the financing and have it subject to change by the noteholders or Crystallex would make no economic sense to Tenor or to any other DIP lender in the circumstances of this case. Like the noteholders and shareholders, Tenor will only be able to have its loan repaid from the proceeds of the arbitration, and it has bargained for what it perceives to be necessary protection for that. I agree with the noteholders that the CCAA is not about protecting new DIP lenders. However, the issue is whether the protections negotiated in order to obtain the DIP loan from Tenor are reasonable or excessive.

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66 Even if there were a prospect of money being raised by Crystallex in some fashion to pay out the noteholders prior to an arbitration award or settlement, which on the evidence I have referred to is not the case, including the issues referred to in Mr. Fung's confidential affidavit no. 2, and the opinion of Freshfields, as a practical matter this is not a case in which the noteholders have any realistic steps to try to cash out now before the arbitration claim is dealt with. [2] A restructuring under the CCAA, or any bankruptcy of Crystallex, is not going to change that. The market cap of Crystallex is far too small to repay the noteholders, even if they were given 100% of the equity of Crystallex.

67 The terms of the Tenor Dip facility give Tenor no right to conduct the reorganization proceedings in Canada and in the U.S. or interfere with the efforts of Crystallex to reorganize the pre-filing claims of the unsecured creditors. That will be in the hands of the independent/special managing director who will be required to consult with the non-board advisory panel consisting of the three directors of Crystallex who will step down from the board. With respect to matters that may not at law be delegable to the special managing director, he will be required to obtain board approval and if the Tenor nominees use their votes to block that approval, Tenor will forfeit its 35% additional compensation. Tenor is obviously not going to want to put itself in that position.

68 Tenor recognizes that it cannot conduct the arbitration proceeding. Under the terms of the Tenor DIP facility, if there is a default before any arbitration award, Tenor would have the right to apply to court to have the Monitor or a Canadian receiver and manager appointed to take control of the arbitration proceedings. Whether it would make such an application is a question mark, and likely would depend on whether Crystallex were put into bankruptcy. There would likely be no other reason for wanting someone other than the Crystallex board to have control over the conduct of the arbitration.

69 As a practical matter, the conduct of the arbitration will no doubt be in the hands of Freshfields who have the knowledge and expertise. Mr. Mattoni in his affidavit filed on behalf of the noteholders agreed that the arbitration is really in the hands of litigation counsel. As well, the management personnel of Crystallex that have been involved in the claim in presenting evidence and instructing counsel regarding the evidentiary issues are going to have to continue to be involved in order to prosecute the claim. Their failure to do so would compromise the claim.

70 If any director, whether nominees of Crystallex or of Tenor, is unreasonably impairing the possibility of a viable compromise, the court under s. 11.5(1) of the CCAA has the power to remove such director. That section provides:

> 11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

71 The noteholders point out that section 8.1(t) of the DIP facility makes it an event of default of the DIP loan if a Tenor nominee director is removed from the board without the consent of Tenor except "by reason of misconduct" of the director, and assert that "misconduct" is a considerably different standard from "unreasonably impairing" in section 11.5(1) of the CCAA, thus restricting a court's ability to remove a director for unreasonably impairing a compromise or arrangement. Of course, any application under the section would turn on the particular facts, but it would certainly be arguable that if a director were unreasonably impairing a compromise or arrangement, that could constitute misconduct, particularly as the purpose of a CCAA proceeding is to encourage a consensual compromise or arrangement.

72 One of the factors required to be considered under section 11.2(4) is whether Crystallex's management has the confidence of its major creditors. There is no doubt from the prior litigation that the noteholders expressed extreme displeasure at the steps taken by its board and management to try to come to some accommodation with Venezuela to maintain the rights to the Las Cristinas mine project. The noteholders maintained that Crystallex should stop spending money and commence the arbitration. That of course is now water under the bridge and the only business of Crystallex is the arbitration that has been commenced. The noteholders did not previously take the position that the management should not be involved in the arbitration, nor do they now raise any such objection. The Monitor notes in its report that the noteholders' proposed plan contemplates keeping existing

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management. It is clear that the management who have been involved in the arbitration are going to be needed further, and this is not a situation in which the noteholders could want to insert themselves instead of management in the conduct of the arbitration. As Mr. Mattoni said, that is something in the hands of arbitration counsel.

73 Another factor to be considered under section 11.4(2) is how the company's business and financial affairs are to be managed during the proceedings. In my view, the management of the business and affairs of Crystallex under the provisions discussed, being the conduct of the arbitration and paying for it, are a reasonable compromise between Crystallex and Tenor designed to protect the interests of the stakeholders, including the noteholders. The Monitor, of course, will continue to have an important role to play as well in the oversight of matters. If the noteholders are unhappy with the expenditures for the arbitration claim being incurred in the future, and there is no indication so far that they are, they have the ability in the CCAA process to object to them.

74 The noteholders also contend that because a term of default of the Tenor loan is a refusal of the court to extend the section 11 stay, that term ties the court's hands on any stay extension application, thus creating an incentive for Crystallex not to bargain towards a consensual resolution. I do not accept that the court's hands will be tied in any way. One would expect in any CCAA case that on a refusal to extend the stay, a DIP lender's loan would become payable. This provision in the Tenor loan is not remarkable.

75 The noteholders make the same point about it being a term of default of the Tenor loan if the CCAA case is converted to a receivership, a proposal in bankruptcy or bankruptcy proceeding. Again, one would expect a DIP loan to become payable in these events. This is a normal provision in a DIP loan, as conceded by Mr. Swan in argument. If bankruptcy were appropriate, this provision would not prevent it.

76 The noteholders contend that the right of Tenor to 35% of the proceeds of the arbitration, convertible into equity at Tenor's discretion, should not occur as it will hamper any ability to reach any restructuring resolution. In the bid procedures approved by the Monitor, the market was told that any "back-end entitlement" could not exceed 49% of the equity of Crystallex. 35% is a very large block of the arbitration proceeds and obviously Crystallex would not have been happy to give that up. It eats into any recovery for the shareholders who are entitled to receive any proceeds of the arbitration only after the noteholders have been paid in full. However, 35% on the record does not appear excessive. The process undertaken by Mr. Skatoff indicates that the terms of the Tenor bid were the result of a reasonable market search. Mr. Sauntry, the financial expert for the noteholders, could not say that the Tenor bid did not reflect market pricing. He also said on cross-examination that a return of 10% PIK interest would not be a reasonable return for DIP lender in this case because of the uncertainty of getting anything because of the arbitration risk and risk of collecting on any award, and that a lender would require some additional amount such as the 35% to make it a reasonable deal.

77 The noteholders propose in their proposed plan that they receive 23% of equity for their infusion of the $36 million needed for the arbitration claim. There is no evidence as to how that 23% figure was arrived at. However, the plan also provides for the noteholders to be given approximately 58% of the equity in return for giving up their notes. Together this amounts to 81% of the equity, and it is artificial to say that the 23% for the $36 million infusion reflects a market indication of the value of the infusion. I realize that the plan of the noteholders is only a proposal, but it does reflect a recognition that someone financing the arbitration would require a considerable amount of any arbitration award in order to take the risk of financing it. If the 35% figure in the Tenor DIP facility is used by the noteholders for the $36 million infusion (which the noteholders say they would be prepared to lend for 35% of the equity if later required), the amount of equity to the noteholders in their plan in return for their notes would be 46% rather than 58%, indicating an interest in receiving that amount of equity for their notes. If the Tenor DIP facility is accepted, it would leave 65% of the equity available, less 10% if the MIP is approved, more than the noteholders propose in their plan.

78 The noteholders also rely on a statement in Mr. Sauntry's expert report that the Tenor DIP proposal will prevent any plan of arrangement. He states:

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> The Tenor DIP Proposal will prevent any plan of arrangement. In fact, it is the logical conclusion of a negotiation between the Company, which has stated that it does not want a CCAA plan prior to an Award or settlement arising from the Arbitration Claim, and Tenor, which may benefit from the Company's near-complete lack of flexibility, if future amendments are required.

79 Much of Mr. Sauntry's report is little more than legal argument in the guise of an expert's opinion. I view a good deal of his report in much the same light as Farley J. did of an expert report of Mr. Dennis Belcher in *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]), in which he stated "Mr. Belcher has set forth in essence his view of the CCAA situation; he should be regarded as a powerful advocate..." I see Mr. Sauntry being an advocate for the noteholders.

80 Some things fundamental to Mr. Sauntry's report are wrong. For example, he states that "This is a situation where a material asset could be sold to provide a significant recovery for creditors" and "It is demonstrably possible to sell a significant interest in the Company's business (i.e. the Arbitration Claim) for material proceeds." On cross-examination he acknowledged his understanding that the claim is not assignable. I have earlier referred to problems I have with Mr. Sauntry's attempts to value the arbitration claim.

81 I do not see the Tenor DIP facility preventing a plan of arrangement. The noteholders have no right to keep Crystallex's assets and equity static for the purposes of a plan of arrangement, so long as the DIP loan meets the criteria required for approval. The provisions in the Tenor DIP facility complained of are the result of market forces, and unless there is some other preferable DIP available, which for reasons I will deal with is not the case, the question is whether the Tenor DIP facility should be approved.

82 Reliance is placed by the noteholders on provisions of section 7.19 of the Tenor bid. It provides that Crystallex shall not without the consent of Tenor enter into an agreement with the noteholders that contains certain provisions, including:

> (a) Paying any money to pre-filing creditors before Crystallex pays Tenor. The noteholders contend that this eliminated any realistic possibility of Crystallex being refinanced prior to the collection of an arbitral award or settlement. However, this is a normal provision in any DIP financing. Moreover, there is no realistic possibility of Crystallex being refinanced before an arbitration award or settlement, as previously discussed.
>
> (b) Increasing interest payable to the pre-filing creditors above 15%. The reason for this provision was because under the Tenor bid, any post-filing interest to be paid to creditors is to be paid before the additional compensation of 35% is paid to Tenor, and Tenor negotiated to limit this amount. It perhaps is to be noted that on any bankruptcy of Crystallex, interest to the noteholders would be limited to 5%.
>
> (c) Issuing any equity containing anti-dilution provisions, which the noteholders contend means that any new equity proposed to be issued as a compromise exchange for debt could immediately thereafter be completely devalued at the next moment. I am not clear why this was negotiated by Tenor. In reply Mr. Kent contended that the problem could be taken care of by issuing shares to the noteholders with a coupon or agreement that would lock in their right to a percentage of the arbitration award. As the equity in Crystallex is essentially the same as the proceeds of the arbitration, presumably this is something that could be taken care of in a plan. Whether Crystallex would ever attempt to later issue equity to a third party is of course completely unknown and speculative, but it were to be contemplated during the course of the CCAA proceedings, presumably the Monitor would be aware of it and it would become known to the noteholders who would be able to apply to court for any appropriate relief.

83 I have previously discussed much of what is to be considered under s. 11.4 of the CCAA. Regarding (d), whether the loan would enhance the prospects of a viable compromise or arrangement, in my view it would. Crystallex requires additional financing to pay its expenses and continue the arbitration. A DIP loan allows the company to have the arbitration financed, which if it were not at this stage would impair the arbitration and perhaps the attitude of Venezuela towards the arbitration claim, and as such enhances the viability of a CCAA plan. I have not accepted the argument of the noteholders that the loan would prevent a plan of arrangement.

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84 Regarding (f), whether any creditor would be materially prejudiced by the security, the noteholders are unhappy with the Tenor bid and say they are materially prejudiced, for the reasons that I have discussed and largely rejected. I think their complaints have to be looked at in the context of what the market is demanding for a DIP loan. There was a sufficient arm's length and open effort by Crystallex with the assistance of the Monitor to get the best pricing and terms for the loan and the process was carried out with integrity and fairness. The noteholders were asked during the process to increase their proposal but refused to do so. When at the last moment they indicated they would if later required lend on the same terms as the Tenor DIP facility, they made clear they would not agree to do so at this time. That, of course, is their choice. In all of the circumstances, I would not find that they have been materially prejudiced.

(ii) Consideration of the noteholders' proposed DIP facility

85 The noteholders' proposed DIP loan is for $10 million at 1% interest repayable on October 15, 2012. The term is said to give sufficient time to work out a plan of arrangement or compromise. Mr. Swan said in argument that the noteholders were not being altruistic in this proposal, but merely wanted to maintain the status quo while a plan is being negotiated.

86 The problem that the board of Crystallex had with this proposal was based on the advice of Mr. Skatoff. He advised the board that if Crystallex needed additional financing in October 2012, it would be difficult to return to the market for financing because there was only so much time and energy that bidders were willing to devote to a transaction. Having devoted the time and failed, bidders would be highly reluctant to spend additional time again. In his affidavit, Mr. Skatoff stated that if Crystallex accepted the $10 million DIP financing it would be highly challenged if not entirely impeded in any subsequent exercise to raise additional financing from parties other than the noteholders.

87 The noteholders contend that Mr. Skatoff's views on the difficulty of any future financing if the noteholders' proposed DIP loan is approved is "complete puffery" as he said on cross-examination that the parties with whom he negotiated never told him that they would absolutely not participate in a financing in the fall of 2012 if it were necessary. I think this is oversimplification and I do not accept it. Mr. Skatoff also said on cross-examination —

> I know what the facts are in terms of the financing market and how it views Crystallex. ...I believe that the company, if it were to accept a $10,000,000 financing, would need to go to the market in the very near term to start to address what happens if that $10,000,000 needed to be refinanced when... we reached October of 2012. And I believe in the construct of my experience with this situation over the last three months that if the company were to accept that $10,000,000, we would need to go back out to the market in the very near term to raise capital to possibly refinance that money in the event that $10,000,000 couldn't be extended, that the company would have a very difficult time in convincing potential financing parties to undertake to spend additional time and resources in evaluating potential financing, as we have been able to convince them to do over the last couple months.

88 I accept that evidence as reliable. Common sense would indicate that persons who spent time and energy on pursuing a $36 million facility for a three year term only to see a 6 month facility for $10 million being accepted would be very reluctant to go through the process again in the next few months.

89 This is particularly the case, in my view, when the proposed interest rate by the noteholders is only 1%, clearly below the market rate. [3] The market would see that rate, as would any reasonable observer, as being used for some purpose to further the ends of the noteholders. Hedge funds are not in the business of lending money at less than market rates. The rate no doubt was proposed to assist an argument that the court should accept the noteholders' proposed loan. Why would the noteholders propose that? The answer, I believe, is that it would assist in removing, or seriously eroding, the chance of Crystallex going to the market in time for a new loan by October and thus further make Crystallex beholden to the noteholders in October, as stated by Mr. van't Hof and Mr. Skatoff. I do not view the noteholders proposed loan as being a *bona fide* loan at market rates but rather a loan to gain tactical advantage.

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90 Thus, I do not see the noteholders proposed $10 million 1% six month facility as maintaining the status quo. I accept the evidence of Mr. Skatoff that it would seriously erode the chances of Crystallex obtaining any third party financing in October.

91 Had the noteholders been prepared to lend now on the basis of the terms of the Tenor DIP facility, that would have been a preferable outcome, even if it was not made within the terms of the bid process approved by the Monitor, as it would not have involved the insertion of any third party into the process. Unfortunately, it was made clear during argument that the noteholders were not prepared at this time to do so. The uncertainty of a short six month loan when it is clear that financing for a much longer term is required by Crystallex to prosecute the arbitration is something to be avoided.

(iii) Position of the Monitor

92 I have previously referred to portions of the Monitor's report. The Monitor concludes that on the basis that Crystallex, with assistance of Mr. Skatoff, conducted a canvas of the market and determined that the Tenor Bid was the best available bid generated out of the process to meet its objectives, the Monitor supports approval of the Tenor DIP Loan. This position of the Monitor is subject to this court's determination of the validity of the noteholders' legal arguments, on which the Monitor expresses no view as these are legal issues to be determined by the Court.

93 It is the case, as the Monitor points out, that the introduction of a third party, Tenor, with consent rights to certain actions will add complexity to the negotiation of a CCAA plan. I entirely agree with the Monitor that a mutually acceptable CCAA plan is preferable to continued expensive and protracted legal disputes between the Noteholders and Crystallex. However, in spite of the encouragement of the Monitor and of the court over the last while to see if a settlement could be reached, that has unfortunately not occurred.

(iv) Conclusion on DIP loan

94 Taking into account all of the forgoing, I approve the Tenor DIP facility.

(v) Request for stay

95 The noteholders ask that in the event that the Tenor DIP facility is approved, the order should be stayed pending an appeal to the Court of Appeal. The parties have already had discussion through the Monitor with the Court of Appeal which has agreed as I understand it to move as expeditiously as possible with any appeal from my decision.

96 A judge whose decision is to be appealed can stay the order on such terms as are just. On motions for stays, courts apply the *RJR Macdonald* test and will order stays in restructuring and insolvency proceedings to allow sufficient to for consideration of an appeal.

97 At first blush during the argument, I was inclined to agree with the noteholders that a stay would be appropriate pending an appeal, assuming that it could be dealt with expeditiously. However, argument from Crystallex gave me pause, particularly when the cash flow needs of Crystallex are considered. The cash flow projections as shown in the Monitor's report indicate that as of the end of the week ending April 13, 2012, Crystallex had only $346,000, and that during the following week, it had cash requirements of approximately $6 million, including repayment of the bridge loan due on April 16. Crystallex does not have the luxury of waiting for the conclusion of a successful appeal.

98 The answer of the noteholders to this was that the problem would be solved if the court approved its $10 million DIP proposal rather than the Tenor bid. I understand that the noteholders would be prepared to lend the $10 million if an appeal to the Court of Appeal from an order approving the Tenor DIP facility were successful.

99 Under the Tenor DIP facility, the right of Tenor to the additional compensation of 35% of the proceeds of the arbitration does not arise until the second tranche of the loan of $12 million has been advanced, and this is not due until after any appeal to the Court of Appeal has been completed. As to concerns of the noteholders that Tenor might pre-pay the second tranche in

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order to fix its right to the additional compensation, I was advised during argument that Tenor has undertaken not to do so and Crystallex has undertaken as well not to draw on the second tranche without two weeks' notice to the noteholders.

100 Crystallex, and I assume Tenor as well, has agreed that pending the completion of an appeal to the Court of Appeal, the right of Tenor to convert its rights to 35% of the arbitration proceeds and the governance provisions for Crystallex would also be stayed.

101 In my view, and assuming that the first test of *RJR Macdonald* has been met, there should be no stay of my order approving the Tenor DIP facility, and this can be done in a manner that will protect the interests of the parties on the following basis:

(i) The order approving the Tenor DIP facility shall be subject to the undertakings and agreements of Crystallex and Tenor as referred to.

(ii) The Tenor DIP facility is approved on condition that in the event that the appeal to the Court of Appeal is successful, and the order approving the Tenor DIP facility is set aside in its entirety, the money advanced by Tenor on the first tranche shall be immediately repayable with interest at 1% per annum, in which case the Tenor DIP facility shall be terminated. Tenor shall have no right in that case to any commitment fee which, if already paid, shall be deducted from the repayment of the loan to Tenor.

(iii) The noteholders shall in that event fund the repayment to Tenor by loan to Crystallex with interest at $1% per annum repayable on October 15, 2012 or at some other date as may be agreed or ordered by this court.

Management Incentive Plan (MIP)

102 The terms of the MIP are set out above. In sum, a pool of money, consisting of up to 10% of the net proceeds of the arbitration up to $700 million and 2% of any further net proceeds, after all costs and charges, including the amounts owing to noteholders, is to be set aside and money in this pool may be paid to the beneficiaries of the MIP, depending on the determination of an independent committee. The amounts to be allocated to participants by the compensation committee are discretionary and could be nil. No one will be entitled to any particular amount. Members of the compensation committee will not be eligible for any payments.

103 In exercising its discretion to consider whether and in what amount a payment should be made, the compensation committee will take the following factors into account:

(a) The amount of money recovered by Crystallex in the arbitration.

(b) The risks affecting the size of the retention pool including the quantum of the priority payments and the fact that others have influence on discussions relating to the settlement of the claim

(c) How quickly the funds are recovered.

(d) The impact the premature resignation of the individual from Crystallex would or could have had upon the results of the arbitration.

(e) The amount of time and energy spent by the individual on the arbitration.

(f) [Certain matters confidential to the parties.]

(g) The scale and scope of the balance of the compensation package provided by Crystallex to the individual.

(h) The opportunity cost to the individual in staying with Crystallex in terms of professional experience, money and the development of new opportunities.

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(i) The amount of any severance payments the employee would receive on termination if such termination is reasonably foreseeable and will be accompanied by a severance payment.

(j) The extent to which the arbitration cost more than anticipated to prosecute and the degree to which it may be appropriate to reduce the bonus pool as a result.

(k) Any other relevant matter.

104 The noteholders disagree with Crystallex on the quantum and method for providing an incentive to management. They have also expressed concerns as to the timing of the MIP approval motion and inclusion of some MIP participants in the MIP. Under their proposed plan, management would receive 5% through an equity participation in any after tax award.

105 The Tenor DIP loan is conditional on the approval of a management incentive program acceptable to both Tenor and Crystallex. Tenor has not voiced any objection to the MIP proposal of Crystallex and I take it is in agreement with it. The requirement for a management incentive program acceptable to Tenor is a reflection, obviously, of the need to ensure the participation of the people necessary to pursue the arbitration to a satisfactory conclusion.

106 The reasons for the MIP are set out in the affidavit of Mr. van't Hof. See paras. 4 to 10 and 14 to 23 of his affidavit. In the circumstances of this arbitration, these reasons appear legitimate. They were considered so by the independent directors of Crystallex constituting the compensation committee and by Mr. Jay Swartz of Davies Ward Phillips & Vineberg LLP.

107 Mr. van't Hof states in his affidavit that because in past litigation the noteholders have criticized the independent directors of Crystallex as not being sufficiently independent because of prior business relationships with Robert Fung or companies with which Mr. Fung was associated, Crystallex retained Jay Swartz, a partner of Davies Phillips Vineberg, to determine, from the perspective of an independent director, what an appropriate MIP would be. In coming to that determination, Mr. Swartz was told he could retain such advisors as he saw fit and take such steps as he saw fit. Mr. Swartz' opinion of March 14, 2012 states that he was engaged on June 6, 2011 to negotiate the terms on which directors and members of management will be compensated for their ongoing duties. With the consent of Crystallex, Mr. Swartz retained Hugessen Consulting Inc., an independent national executive compensation consulting firm to provide expert advice with respect to compensation issues and to provide background information regarding compensation standards in circumstances which were analogous to the issues facing Crystallex. Mr. Swartz reviewed extensive documentation and carried out extensive discussions with various persons including the solicitors for Crystallex, counsel for the board and with Freshfields who are arbitration counsel.

108 Mr. Swartz concluded that the overall compensation proposal for the establishment of the bonus pool for the benefit of management of Crystallex was reasonable in the circumstances, for reasons expressed in his opinion. Included in his reasons was the following:

> The current members of the Compensation Committee are granted substantial discretion to allocate, or not allocate, the bonus Pool and can do so in their discretion having regard to what actually occurs over time and the relative and absolute contributions of each party. In doing so, they are subject to fiduciary duties to Crystallex. In this regard, I note that there may be circumstances when the absolute amount of the bonus Pool may be very substantial in light of all of the factors to be considered by the Compensation Committee. In such circumstances, the Compensation Committee may have to carefully consider the absolute amounts to be paid to each member of a Management Group in order to satisfy its fiduciary duties.

109 Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis*, West Law, 2009, it is stated:

> In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations

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of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress.

110 In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis — Butterworths) at p. 231, it is stated:

KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly.

111 In *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]), I accepted these statements as generally being applicable to motions to approve key employee retention plans. See also *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]), *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]), *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) and *Timminco Ltd., Re* (Ont. S.C.J. [Commercial List]).

112 I see no reason why the business judgment rule is not applicable, particularly when the provisions of the MIP have been approved by an independent committee of the board. See my comments in *Grant Forest Products Inc., Re*, in which the payments in question were approved by an independent committee of the board of the debtor, in which I said that the business judgment of the directors should rarely be ignored. See also Morawetz J. in *Timminco Ltd., Re*.

113 In this case, the qualifications of the independent board members, Messrs. Brown, Near and van't Hof, are impressive, and these people are non-conflicted as they will not participate in the MIP. They acted on advice from Mr. Swartz and had market information from Mr. Skatoff as noted in paras. 10 and 33 of Mr. van't Hof's affidavit. Their judgment was informed and I am in no position to say it was unreasonable.

114 There is no question that the judgment of Mr. Swartz is independent and informed, and I would not lightly ignore it without good reason.

115 The noteholders contend that the MIP is something that should await the negotiations of a plan. I can understand the logic of that position, particularly when as here the MIP is to be funded from the proceeds of the arbitration, which is the "asset" that will be the subject of the negotiations of a plan, whether that asset is called the proceeds of the arbitration or equity. However, I am hesitant to have the uncertainty of such a situation hanging over the heads of the people meant to be protected by the MIP. In *Grant Forest Products Inc., Re*, over the objection of a substantial creditor, and in *Canwest Global*, *Canwest Publishing* and *Timminco Ltd., Re*, employee retention plans were approved prior to any plan being negotiated, and it appears to be the practice today that these types of plans are generally approved at the time of the initial orders.

116 The noteholders do not contend that there should not be any MIP. As the Monitor's report notes, under the noteholders' proposed plan, management would receive 5% through an equity participation in any after tax award. While the numbers between the Crystallex MIP (a pool of up to 10% of an award up to $700 million and 2% over that) and the noteholders plan (5%) are different, it is possible that the end result would not be different depending on what the independent compensation committee decided to allocate after the results of the arbitration were known.

117 The noteholders contend that there are participants in the MIP that should not belong. That is a matter of judgment, and the independent committee has exercised its judgment on the matter. The participants were also known to Mr. Swartz who opined as to the reasonableness of the principles of the MIP. Having reviewed the evidence, including the affidavit of Mr. van't Hof and of Ms. Kwinter, I cannot say that any of the persons included in the MIP should not be there.

118 Mr. Tony Reyes is a shareholder of Crystallex. He in principle is supportive of the MIP. He raises two concerns regarding the MIP.

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119 The first is the fact that some of the persons who may benefit already have stock options and it is not clear that the proposed MIP will replace and cancel those options. Thus, these persons could end up with more than the MIP proposes. In response to this, Crystallex advises that it will amend the MIP to provide that the value of any existing stock options ultimately realized by participants of the MIP will be deducted from the amount of any bonus awarded under the MIP on a tax neutral basis.

120 The second relates to the method of calculating the bonus pool. It is described by the Monitor as follows:

> 83. Mr. Reyes also raises a concern that the MIP treats the creation of and payment out of the MIP Pool as a secured debt and not an equity distribution. The MIP Pool is to be protected by a Court-ordered charge and will be created out of the net proceeds of the Arbitration Proceedings but before any payment to shareholders. Value to shareholders is after the repayment of the additional compensation to Tenor and the MIP, while the MIP is calculated based on the gross award before repayment of additional compensation. He notes that the method of calculating the MIP Pool also serves to increase the potential effective "equity participation" of the pool participants well above the rate of 10% relative to the participation rate of existing shareholders, to an effective rate of 18% or more. This is due to the dilutive effect of Tenor's additional compensation on existing shareholders.

121 The first sentence regarding this concern is not correct. The MIP is triggered by a receipt of funds, and the charge over that pool does not give any priority to the participants in the MIP. Regarding the remainder of the concern, it seems to me that this is something that could be taken into account by the compensation committee in determining what, if any, amount should be allocated to any particular person.

122 The Monitor has reviewed the MIP and the noteholders proposal. The Monitor does not expressly state that it supports the MIP as proposed by Crystallex being approved, but clearly does not oppose it. Monitor concludes:

> 130. The MIP is ancillary to the Tenor DIP Loan and approval of a management incentive program is a condition of the Tenors DIP Loan. The Noteholders and Mr. Reyes appear to accept the Company's position that a substantial incentive plan is appropriate in these unique circumstances. Mr Swartz, from the perspective of the independent director with advice from Hugessen Consulting Inc., concludes that the Applicant's proposed MIP is "reasonable in the circumstances". The Noteholders and Mr. Reyes' position, however, is that the terms of any incentive plan should be less favourable to the participants than the MIP proposed by Crystallex.
>
> 131. Although the percentage amounts and debt structure provide the potential for compensation to management that could be substantial, both relative to the recoveries of other stakeholders and in absolute dollar terms, it is subject to the discretion of the independent directors who have fiduciary duties that will provide a measure of balance in the implementation of the MIP.

123 Like the DIP issue, it is unfortunate that Crystallex and the noteholders have not been able to come to some agreement on an MIP. It would have been far more preferable for that to have occurred. However there has been no agreement and it falls for decision by the court.

124 In all of the circumstances, as discussed, I approve the MIP proposed by Crystallex with the changes regarding the stock options agreed to by Crystallex.

Approval of Monitor's reports

125 Approval is sought of the actions of the Monitor as disclosed in its second and third report. I have no hesitation in approving these actions. A Monitor plays a crucial role in any CCAA restructuring, and this is particularly so in this case. The Monitor is to be commended for the way in which it has participated and in its efforts to bring a consensual resolution of matters as they have arisen. This assistance is invaluable. I approve the actions of the Monitor as set out in its second and third report.

Continuation of the stay

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126 Crystallex seeks a continuation of the stay until July 16, 2012 or such further date as may be ordered. No one opposes the stay to that date, and it is supported by the Monitor who recommends the continuation. Due to holiday considerations, I continue the stay to July 30, 2012.

Order accordingly.

Footnotes

* Affirmed at *Crystallex International Corp., Re* (2012), 2012 CarswellOnt 7329, 2012 ONCA 404 (Ont. C.A.).

1 The noteholders in question are hedge funds that represent approximately 77% of the outstanding notes. It is they who have caused Computershare to take action on their behalf in the prior actions against Crystallex and in this CCAA proceeding.

2 The fact that the noteholders have an opinion questioning some of what Freshfields says does not change that.

3 The Monitor calculates the savings in interest over the Tenor loan to October 15, 2012 to be approximately $300,000.

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2012 BCSC 760
British Columbia Supreme Court [In Chambers]

Can-Pacific Farms Inc., Re

2012 CarswellBC 1528, 2012 BCSC 760, [2012] B.C.W.L.D. 5551, 215 A.C.W.S. (3d) 636, 94 C.B.R. (5th) 152

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

In the matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 and the Business Corporation Act, S. B.C. 2002, c. 57

And In the matter of Can-Pacific Farms Inc., Petitioner

Burnyeat J.

Heard: March 29-30, 2012
Oral reasons: March 30, 2012
Docket: Vancouver S121930

Counsel: K.E. Siddall for Petitioner
G. Thompson, M.C. Verbrugge for Canadian Imperial Bank of Commerce

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — General principles

Debtor was farming company that was having financial difficulties — Debtor entered into forbearance agreements with mortgagee to avoid foreclosure — Agreements included covenant not to file for protection under Companies' Creditors Arrangement Act — Debtor allegedly breached forbearance agreements — Debtor failed to pay proceeds of particular crop and sale of equipment to mortgagee — Attempts to sell property had proven unsatisfactory — Debtor brought application for initial order under Act — Application granted in part — Debtor's need to hire numerous part-time workers to harvest current crop was interest that should be protected — Debtor's failure to disclose material facts was not condoned but did not result in denial of relief — Mortgagee's firm reluctance to approve any plan that debtor might offer was not proper basis for denying initial relief — Debtor was not permitted to have $100,000 administrative charge rank ahead of interest of creditors — If debtor's projections were accurate, it would not need administrative charge — Principal of debtor was required to pay amounts expended by mortgagee for security observers — Proposed monitor was approved despite its prior involvement with debtor — Avoiding delay and further costs outweighed monitor's potentially compromised independence.

Table of Authorities

Cases considered by *Burnyeat J.*:

Encore Developments Ltd., Re (2009), 2009 BCSC 13, 2009 CarswellBC 84, 52 C.B.R. (5th) 30 (B.C. S.C.) — considered

Hester Creek Estate Winery Ltd., Re (2004), 2004 BCSC 345, 2004 CarswellBC 542, 50 C.B.R. (4th) 73 (B.C. S.C. [In Chambers]) — considered

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Hickman Equipment (1985) Ltd., Re (2002), 2002 CarswellNfld 154, 34 C.B.R. (4th) 203, 214 Nfld. & P.E.I.R. 126, 642 A.P.R. 126 (Nfld. T.D.) — considered

Laidlaw Inc., Re (2002), 2002 CarswellOnt 790, 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) — considered

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — followed

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 1068, 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]) — considered

Stokes Building Supplies Ltd., Re (1992), 13 C.B.R. (3d) 10, 100 Nfld. & P.E.I.R. 114, 318 A.P.R. 114, 1992 CarswellNfld 20 (Nfld. T.D.) — considered

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — considered

Statutes considered:

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

s. 11.7 [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — considered

s. 23(1) — referred to

Farm Debt Mediation Act, S.C. 1997, c. 21
Generally — referred to

APPLICATION by debtor for initial order under *Companies' Creditors Arrangement Act*.

***Burnyeat J.*:**

1 This application is for an initial order in proceedings brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*Act*"). I am asked to make a declaration that the Petitioner is a corporation to which the *Act* applies. I am satisfied that is the case. The second order requested is that the Petitioner be permitted to file a formal plan with the Court for the approval of its creditors and that I order as a "comeback date" April 30, 2012.

2 The application is opposed by the first mortgagee, Canadian Imperial Bank of Commerce, who, along with the second mortgagee, is owed roughly $8 million. The application is supported by some of the unsecured creditors of the Petitioner and by a lien holder.

3 The opposition on behalf of the Canadian Imperial Bank of Commerce relates in part to the failure of the Petitioner to make disclosure. In particular, the following is not disclosed in the materials:

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(a) The Petitioner, through its principal, Mr. Kooner, has failed to disclose numerous breaches under the various forbearance agreements that were entered into with the Canadian Imperial Bank of Commerce, including a covenant not to file for protection under the *Act* in consideration of the forbearance shown;

(b) The fact that the 2011 berry crop proceeds of between a two and four million dollars which should have been received by the Canadian Imperial Bank of Commerce were used otherwise, including depositing the proceeds with a different financial institution;

(c) The fact that the proceeds from the sale of equipment of the Petitioner have been received but not applied in accordance with the security held by the Canadian Imperial Bank of Commerce and the fact that other equipment of the Petitioner is being advertised for sale;

(d) The fact that there was a recent payment to prior or to subsequent creditors of as much as $250,000; and

(e) The fact that there was a filing by the Petitioner under the *Farm Debt Mediation Act*.

4 It is submitted that the failure to disclose all material facts should lead to a refusal of the Court to make the order that is sought: *Hester Creek Estate Winery Ltd., Re* (2004), 50 C.B.R. (4th) 73 (B.C. S.C. [In Chambers]), and *Encore Developments Ltd., Re* (2009), 52 C.B.R. (5th) 30 (B.C. S.C.).

5 Both of those decisions involved setting aside initial orders that had been obtained on an *ex parte* basis. These decisions are based on the assumption that, when you appear on an *ex parte* basis, it is incumbent upon an applicant to reveal to the Court anything that might have the possibility of influencing the decision that the Court is asked to make and that, if complete material disclosure is not made, the *ex parte* order may be set aside.

6 With the change made to the *Act*, the initial order is not made on an *ex parte* basis. Having said that, it is incumbent upon a petitioning company to present fully the factual basis upon which the relief under the *Act* is sought. The making of any order under the *Act* is discretionary. That discretion should rarely be exercised in favour of an applicant who has not fully disclosed all of the material facts. It is still incumbent upon a petitioning company to bring forward everything that might be material or might affect the decision of the Court. I am satisfied that the Petitioner has not done so here.

7 The Canadian Imperial Bank of Commerce also raises the issue that there is no broad interest to be protected here. At this point in the berry growing season, there are only two full-time employees of the Petitioner so that it is only their ongoing interest which needs to be protected. Having said that, the berry operation is such that hundreds will be called upon this summer on a part-time basis to harvest the crop and make it available for sale. I take into account that this is an interest which should be protected.

8 The Canadian Imperial Bank of Commerce submits that any plan brought forward is doomed to fail as it will oppose any plan. I cannot accede to that argument. I think that argument has been generally discredited by various court decisions. The example I gave is that, if the plan foolishly said, "we will pay to the bank twice as much as it is owed", I am quite confident that even the Bank would vote for such a plan.

9 I agree with the observations in *Pacific Shores Resort & Spa Ltd., Re*, [2011] B.C.J. No. 2482 (B.C. S.C. [In Chambers]). The argument raised is an argument that should meet with no favour before the Court in these circumstances on the first order sought, although it may be given some credence on the comeback order:

> This argument is also part of the "doomed to failure" argument of [the creditor]. I have been referred by [the creditor] to *Hunters Trailer & Marine Ltd. (Re)*, 2000 ABQB 952, as authority for the proposition that unless there is equity in the assets beyond that owed to secured creditors, a *CCAA* order is only appropriate if the secured creditors are supportive of it.
>
> To the contrary, at para. 19 of that case, the Court states quite clearly that a recalcitrant creditor should not necessarily prevent the granting of an order under the *CCAA*. This approach is consistent with the comments of Madam Justice

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Newbury in *Forest & Marine* who stated, in the face of a major secured creditor's insistence that it would vote against any plan:

> [27] I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the Court's exercise of its statutory jurisdiction could be neutralized in this manner.

(at paras. 40-41)

10 I realize that what is being attempted by the Petitioner comes after some 19 months of default under the security of the Canadian Imperial Bank of Commerce. It is an attempt to find financing to pull the whole situation "out of the fire". Since default, there has been an order *nisi* of foreclosure with a redemption period that expired almost a year ago and an order for sale which has produced two offers neither of which would pay the secured creditors in full and neither of which had the subject clauses removed so that they could proceed.

11 The Petitioner submits that it will make major advances between now and when they report back to the Court on April 30, 2012. The Petitioner submits it will have the proceeds of up to $333,000 from the sale of a property, that there will be sales of other assets which may occur, and that Mr. Kooner is committed to putting these funds into the company so that the company has sufficient cash flow to meet the cash flow requirements that are set out in the materials before the Court. Mr. Kooner is also prepared to advance sufficient funds to allow $11,000 a month to be available to the Canadian Imperial Bank of Commerce and $6,000 per month to be available for the second mortgagee.

12 The position of all of the creditors will be enhanced by April 30, 2012 if there can be the investment contemplated. The payments contemplated will maintain the status quo in the interim. In all of the circumstances, I will make the order that is sought. The comeback motion will be heard by me at 9:00 a.m. on April 30, 2012.

13 The Petitioner also seeks an administrative charge in the amount of $100,000 which would rank ahead of the interest of the creditors. In the circumstances, I am satisfied that no administrative charge should be granted at this time. The funds that Mr. Kooner says will be available will allow those costs to be covered. Not granting an administrative charge is one way of assuring that the status quo will be maintained so that, along with the payment of $17,000 per month to the secured creditors, the position of the secured creditors will be no worse than it is presently. The sums of $11,000 and $6,000 will be payable in certified funds payable to each of the two mortgagees no later than close of business on April 2, 2012, and then no later than close of business on April 27, 2012.

14 The stay of proceedings already ordered in the foreclosure proceedings including the application for the appointment of a receiver in those proceedings will be extended to 4:00 p.m. on April 30, 2012. I make no order staying the ability of the Canadian Imperial Bank of Commerce to continue with the order for conduct of sale which was granted by this court some considerable time ago.

15 In addition to the requirement of the payment of $17,000, the costs previously incurred by the Canadian Imperial Bank of Commerce to hire security observers will be borne by Mr. Kooner by the payment of the sum of $36,000 to counsel for the Canadian Imperial Bank of Commerce no later than close of business on April 4, 2012. Further costs of security observers will also be paid by Mr. Kooner.

16 The secured creditors will be at liberty to apply on three days' clear notice if the sums set out above have not been paid in accordance with the order made.

17 The Petitioner makes the further application that Murphy & Associates, Trustee in Bankruptcy, be appointed as Monitor to report to the Court and the creditors of the Petitioner regarding the arrangements that will be made by the Petitioner and the progress in that regard.

18 While I have no doubt about the ability of Murphy & Associates to fulfill the role of being a monitor, I have grave reservations of about whether it is appropriate for Murphy & Associates to be appointed as Monitor. Murphy & Associates has

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been a consultant to the Petitioner. The financial records which are before the Court have been prepared with the assistance of Murphy & Associates. It is also apparent that the Plan which will be forthcoming has been prepared in its initial stages with the assistance of Murphy & Associates.

19 A monitor under proceedings under the *Act* has an obligation to act independently: *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); *Royal Oak Mines Inc., Re* (1999), 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]); *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]). The role of a monitor is also set out by the Learned Author of *Commercial Insolvency in Canada* (Markham, ON: LexisNexis Butterworths, 2005):

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any part in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors. (at p. 236)

20 The Monitor must not only be impartial but also must appear to be impartial so that the confidence of creditors and members of the general public can be assured. Pursuant to s. 23(1) of the *Act*, a monitor must carry out a number of functions in relation to a company as prescribed under the *Act* or as the court may direct.

21 Section 11.7(2) of the *Act* places restrictions on who may serve as a monitor by excluding an auditor, accountant, legal counsel of the debtor if they acted as such within the previous two years. Those excluded from acting as monitors may be appointed "... with the permission of the court and on any conditions that the court may impose ..." (s. 11.7(2) of the *Act*). Murphy & Associates was not the auditor for the Company and, accordingly, does not have the intimate knowledge of the financial affairs of the Company which would be available to an auditor or an accountant for the Company. Decisions reached both prior to and after the enactment of s. 11.7 of the *Act* have come to opposite conclusions as to whether it appropriate for an auditor to be appointed as a monitor. While Murphy & Associates is not the auditor for the company, the decisions do reflect the debate of about whether or not it is appropriate to appoint as a monitor a company or an individual that has had prior dealings with the petitioning company.

22 In *Stokes Building Supplies Ltd., Re* (1992), 13 C.B.R. (3d) 10 (Nfld. T.D.), the Court dismissed the application of a company to appoint its auditor as a monitor because the auditor lacked the requisite degree of "independence" that was necessary and that "... as agent of the Court, is independent of the parties." (at p. 15).

23 In *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.), the Court came to the opposite conclusion about whether an auditor could also be appointed as a monitor:

> Permitting the auditor of a company to act as its monitor under a reorganization plan under the *CCAA* is merely a recognition of the commercial realities at play when a company is forced to seek protection under the *CCAA*. Under the *CCAA*, relief from one's creditors is not automatic. There is no automatic stay of proceedings against the applicant company by creditors merely because it has applied for such relief. The relief must be granted by the order of the Court after the application is filed and after the applicant company has declared and publically filed documents declaring that it is insolvent. Therefore, in order to prepare for a *CCAA* application, the applicant company will usually require the continuing assistance of its own accountants and auditors. These professionals would most likely be the accounting professionals most knowledgeable about the affairs and business of the applicant company and most competent to promptly assembly the requisite information and plans to support the initial application for relief under the *CCAA*. A mandatory requirement that the auditor of an applicant company not be permitted to serve as monitor would, in most cases, result in considerable additional delay because the proposed monitor (not being familiar with the affairs of the company) would need to be brought up to speed. This extra work would obviously result in a duplication of expense for a company which is already cash strapped. Most importantly, it would delay a *CCAA* application being made on a timely basis, resulting in obvious risk of adverse moves being made against the applicant company by its creditors before it can obtain court protection.

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> Cognizant of these commercial realities and the fact that creditors were cancelling dealership agreements and commencing legal action against Hickman, this Court was satisfied to confirm the appointment of Deloitte & Touche Inc. as Monitor.
>
> (at paras. 8-9)

24 It is difficult to come to the conclusion that Murphy & Associates is "independent of the parties" when it has served as the advisor to the Company. While the advice that Murphy & Associates provided to the Company may be viewed by the Company as invaluable, it cannot be said that Murphy & Associates is the most knowledgeable about the affairs and business of the Company. Murphy & Associates has not served as the auditor or the accountant for the Company.

25 However, Murphy & Associates has had the opportunity of reviewing the financial affairs of the Company and has come to a satisfactory arrangement regarding the payment for services rendered to date. Because I am not prepared to order the administrative charge of $100,000 requested, any monitor will have to look to the principals of the Company for a retainer to cover its costs. Accordingly, it is not possible today to both appoint a different monitor and make the initial order sought by the Petitioner. Any different monitor will not have had the opportunity of negotiating an appropriate retainer to cover the cost of the obligations imposed upon the Monitor.

26 In order to avoid a delay and in order to avoid the cost of expenses already incurred which would have to be repeated by a different monitor, the appointment of Murphy & Associates as Monitor is made.

27 Without laying down a general rule that it is inappropriate for a petitioner to seek the appointment as a monitor of a financial adviser that has been working with a petitioner to prepare proceedings under the *Act*, such an appointment should not be made as a general rule.

Application granted in part.

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COMMERCIAL INSOLVENCY IN CANADA

Kevin P. McElcheran, LL.B.
Blake, Cassels & Graydon LLP

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Commercial Insolvency in Canada
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the appeal for other cases, the appeal court also considers the impact of the delay the appeal may cause on the restructuring process as a whole. In the event that leave is granted, appeal courts usually expedite the hearing of appeals of orders made in *CCAA* proceedings so that the issues can be determined within the timetable of the overall restructuring process.

(b) The Monitor

The appointment of a monitor must now be included in every Initial Order commencing proceedings under the *CCAA*.[49] The mandatory appointment of a monitor, the result of the 1997 amendments of the *CCAA*, confirms the practice that had developed through the court's exercise of its discretion under the *CCAA* in making orders staying creditor remedies. The monitor, once appointed, is an officer of the court and exercises the powers that are delegated to it by the court. The minimum powers that are set out in section 11.7 of the *CCAA* are the starting point and monitors are frequently given wide ranging powers to participate actively in the restructuring process.

The minimum powers of the monitor include rights to have access to and to examine the company's property including, among other things, its records to the extent necessary to adequately assess the company's business and financial affairs. The monitor must also file reports with the court as to the state of the company's business and financial affairs in three circumstances (1) forthwith after ascertaining any material adverse change in the debtor company's projected cash flow or financial circumstances (2) at least seven days before any meeting of creditors and (3) at such other times as the court may order.[50]

The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

The monitor is usually associated with an accounting firm. It may be the same firm as the auditor of the debtor company[51] unless otherwise directed by the court. In addition to its reporting obligation, the monitor may "carry out such other functions in relation to the company as the court may direct".[52] The court may expand the powers of the monitor to

49 *Ibid.*, s. 11.7.
50 *Ibid.*, s. 11.7(3)(b).
51 *Ibid.*, s. 11.7(2).
52 *Ibid.*, s. 11.7(3)(d).

6

2004 CarswellOnt 2653
Ontario Court of Appeal

Regal Constellation Hotel Ltd., Re

2004 CarswellOnt 2653, [2004] O.J. No. 2744, 132 A.C.W.S. (3d) 215, 188 O.A.C. 97, 23 R.P.R. (4th) 64, 242 D.L.R. (4th) 689, 35 C.L.R. (3d) 31, 50 C.B.R. (4th) 258, 71 O.R. (3d) 355

In the Matter of the Receivership of Regal Constellation Hotel Limited, of the City of Toronto, in the Province of Ontario

And In the Matter of s. 41 of the Mortgages Act, R.S.O. 1990 c. M.40

HSBC Bank of Canada (Applicant) and Deloitte & Touche Inc. (Receiver / Respondent in Appeal) and Regal Pacific (Holdings) Limited (Respondent / Appellant) and 2031903 Ontario Inc. (Purchaser / Respondent in Appeal) and Aareal Bank A.G. (Intervenor)

Laskin, Feldman, Blair JJ.A.

Heard: May 13, 14, 2004
Judgment: June 28, 2004
Docket: CA C41258, C41257

Proceedings: affirming *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428 (Ont. S.C.J. [Commercial List])

Counsel: J. Brian Casey, John J. Pirie for Deloitte & Touche Inc.
Robert Rueter, A. Chan for Regal Pacific (Holdings) Limited
Tim Gilbert, Sandra Barton for 2031903 Ontario Inc.
James P. Dube for Aareal Bank A.G.

Subject: Contracts; Property; Corporate and Commercial; Insolvency

Headnote

Sale of land --- Judicial sale — Vesting order

Vesting order is court order allowing court to effect change of title directly — Vesting order is also conveyance of title vesting interest in real or personal property in party entitled thereto under order — In its capacity as order, vesting order is in ordinary course subject to appeal — In Ontario, filing of notice of appeal does not automatically stay order and, in absence of stay, it remains effective and may be registered on title under the land titles system — Once vesting order that has not been stayed is registered on title, it is effective as registered instrument and it cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under land titles system.

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Cases considered by *Blair J.A.*:

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R.A. & J. Family Investment Corp. v. Orzech (1999), 121 O.A.C. 312, 1999 CarswellOnt 1829, 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (Ont. C.A.) — referred to

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Royal Trust Corp. of Canada v. Karenmax Investments Inc. (1998), 1998 CarswellAlta 959, 231 A.R. 101, 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]) — referred to

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Statutes considered:

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s. 100 — considered

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s. 191 — referred to

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Pt. X — referred to

s. 25 — referred to

s. 57 — referred to

s. 57(13) — referred to

s. 69 — referred to

s. 69(1) — considered

s. 78 — referred to

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s. 78(4) — considered

ss. 155-157 — referred to

Regulations considered:

Land Titles Act, R.S.O. 1990, c. L.5
General, O. Reg. 26/99

Generally

s. 4

APPEAL by company from judgment reported at *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428, 50 C.B.R. (4th) 253 (Ont. S.C.J. [Commercial List]), approving conduct of receiver.

***Blair J.A.*:**

1 Regal Pacific (Holdings) Limited is the 100% shareholder of Regal Constellation Hotel Limited, the company that operated the Regal Constellation Hotel near Pearson Airport in Toronto. The hotel is bankrupt and in receivership. [1]

2 Deloitte & Touche Inc., the receiver, has agreed to sell the assets of the hotel to 2031903 Ontario Inc. ("203"). The sale was approved, and a vesting order issued, by Sachs J. on December 19, 2003. Following a hearing on January 15, 2004, Farley J. approved the payment of $23,500,000 from the sale proceeds to the hotel's secured creditor, HSBC Bank of Canada ("HSBC"), and as well approved the conduct of the receiver in the receivership and passed its accounts.

3 This appeal involves an attempt by Regal Pacific, in its capacity as shareholder of the bankrupt hotel, to set aside the orders of Sachs J. and Farley J., and thus to set aside the sale transaction between the receiver and 203. It is based upon the argument that the receiver failed to disclose to Regal Pacific and to Sachs J. the name of one of the members of the consortium lying behind the purchaser, 203, and that this failure to disclose tainted the fairness and integrity of the receivership process to such an extent that it must be set aside. Farley J. was made aware of the information. However, his failure to grant an adjournment of the hearing respecting approval of the receiver's conduct in the face of Regal Pacific's fresh discovery of the information, and his conclusion that the information was irrelevant to the receiver's duties with respect to the sale process, are said to constitute reversible error.

4 In a separate motion 203 also seeks to quash the appeal on the ground it is moot.

5 For the reasons that follow, I would quash the appeal from the vesting order and I would otherwise dismiss the appeals.

Facts

6 The hotel has been in financial difficulties for some time. It is old and in need of repair and renovation. Because the premises no longer comply with the requisite fire code regulations, and because liability insurance is difficult to obtain, they have been closed for some time. In addition, the hotel has suffered from the decrease in air passenger traffic following the events of September 11, 2001, and the aftermath of the SARS outbreak in Toronto in early 2003. It is thus an asset of declining value.

7 At the time of the appointment of the receiver, the hotel was in default in its payments to HSBC, which was owed $33,850,000. In fact, HSBC had made demand for repayment in November 2001 and as a result Regal Pacific and the hotel had commenced searching for a purchaser. They retained Colliers International Hotels ("Colliers") to market the hotel.

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8 Several bids were received, and in the fall of 2002 a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group. The purchase price was $45 million and included the purchase of Regal Pacific's shares in the hotel together with other assets. The transaction was not completed, however, and Regal Pacific and the Orenstein Group are presently in litigation as a result. The existence of this litigation is not without significance in these proceedings.

9 When the foregoing transaction failed to close, in June 2003, the bank commenced its application for the appointment of a receiver. On July 4, 2003, Cumming J. granted the receivership order [*Regal Constellation Hotel Ltd., Re* (July 4, 2003), Cumming J. (Ont. S.C.J.)].

10 The receiver and Colliers continued the efforts to market the hotel. The receiver's supplemental report indicates that "an investment profile of the hotel was distributed to more than five hundred potential investors, a Confidential Information Memorandum was distributed to eighty potential purchasers, tours of the Hotel were conducted for twenty-three parties, and a Standard Offer to Purchase Form was provided to 42 purchasers". As of August 28, 2003, the deadline for the submission of binding offers, 13 offers had been received. After reviewing these offers with HSBC, the receiver accepted an offer from 203 to purchase the assets of the hotel for $25 million, subject to court approval (the "First 203 Offer").

11 A summary of the thirteen bids setting out their proposed purchase prices, the deposits made with them, and their conditions, is set out in Appendix 1 of the receiver's supplemental report. Five of the bids were not accompanied by a deposit, as required by the terms of the sale process approved by the court. The receiver went back to each of the bidders who had not provided a deposit and gave them a few more days to submit the deposit. None of them did so.

12 The First 203 Offer was for the fourth highest purchase price. It was accompanied by a $1 million deposit, as required, and it was unconditional. The second and third highest bids were not accompanied by the requisite deposit. The highest bid, by Hospitality Investors Group LLC ("HIG") was for $31 million. While the HIG bid was accompanied by a $1 million non-certified deposit cheque, however, the receiver was advised that the deposit cheque submitted could not be honoured if presented for payment, and the offer was withdrawn by HIG.

13 HIG is a company controlled by the Orenstein Group. The withdrawal of its $31 million offer is the subject of some controversy in the proceedings, and I shall return to that turn of events in a moment.

14 Of the remaining bids, one was rejected as inordinately low. Three of the remaining six were for the same $25 million purchase price as that offered by 203. They were rejected because they were subject to conditions and the First 203 Offer was not. The rest were rejected because their proposed purchase price was lower.

15 On September 9, 2003, Cameron J. approved the sale to 203. At this hearing Regal Pacific expressed a concern that 203 might be connected to the Orenstein Group. Counsel for Regal Pacific states that Cameron J. was advised by counsel for the receiver that there was no such connection. It is not clear on the record whether this statement was accurate in fact, but there is no suggestion that counsel for the receiver was at that time aware of any Orenstein Group connection to 203. Mr. Orenstein's personal involvement did not seem to come until sometime later in October, following the failure of the First 203 Offer to close.

16 At the receiver's request Cameron J. also granted an order sealing the receiver's supplemental report respecting the sale process in order to protect the confidential information regarding the pricing and terms of the other bids outlined above, in case the First 203 Offer did not close and it proved necessary for the receiver to renegotiate with the other offerors. This meant that Regal Pacific was not privy to the information contained in it.

17 The First 203 Offer did not close, as scheduled, on October 10. This led to proceedings by the receiver to terminate the agreement and for the return of the $2 million in deposit funds that had been submitted by 203. These proceedings were settled, with the commercial list assistance of Farley J. But the settled transaction did not close either. As a result of the minutes of settlement, the First 203 Offer was terminated and 203 forfeited a $2.5 million deposit plus $500,000 in carrying costs.

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18 The receiver renewed its efforts to find a purchaser for the hotel. In what was intended to be a second round of bidding, it instructed Colliers to continue its search. Between Colliers and the receiver all thirteen of the original bidders referred to above, including 203, were canvassed again in an effort to generate new offers. Except for a second proposal from 203 ("the Second 203 Offer"), none was forthcoming.

19 The Second 203 Offer was for $24 million. It was again unconditional and this time was buttressed by a $20 million credit facility provided by the intervenor, Aareal Bank A.G. It was also accompanied by a certified and non-refundable deposit cheque for $2 million. The receiver was concerned that the market for the hotel was in a state of steady decline and that the creditors' positions would only worsen if a sale could not be completed expeditiously. With a purchase price of $24 million, HSBC would be suffering a shortfall on its secured debt of approximately $9 million; in addition there are unsecured creditors of the hotel with claims exceeding $2 million. As the receiver had not been able to generate any other new offers at a price comparable to the $24 million, and Colliers had not been able to identify any new purchasers, the receiver accepted the Second 203 Offer and entered into a new agreement with 203 on December 9, 2003, with a projected closing date of January 5, 2004. Given the $3 million in deposits that 203 had previously forfeited, the receiver views the purchase price as being the equivalent of $27 million.

20 On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order pursuant to which title to the hotel would be conveyed to 203 on closing. The transaction closed on January 6, 2004. 203 paid the receiver $24 million and registered the vesting order on title. Aareal Bank's $20 million advance is secured on title based on that vesting order. The hotel's indebtedness to HSBC Bank of Canada has been paid down by $20.5 million from the sale proceeds.

21 A few days later Regal Pacific learned from an article in the Toronto Star newspaper that the hotel had been sold "to the Orenstein Group". A motion was pending before Farley J. on January 15, 2004, for approval of the receiver's conduct and related relief. Regal sought an adjournment of that motion on the basis of the prior non-disclosure of the Orenstein Group's involvement in the 203 offers. When the adjournment request was taken under advisement, Regal Pacific opposed approval of the receiver's conduct on the basis that the failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request, and approved the receiver's conduct and accounts. He concluded that the identity of the principals behind the purchaser was not material. In this regard he said:

> While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.
>
> . . . . .
>
> It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value [as] it could for the hotel after an approved marketing campaign. Vis-à-vis the Receiver and that duty, it does not appear to me that the identity of the principals, but more importantly that there was an overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

Standard of Review

22 The orders appealed from are discretionary in nature. An appeal court will only interfere with such an order where the judge has erred in law, seriously misapprehended the evidence, or exercised his or her discretion based upon irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations.

23 Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances - particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.).

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24 In *Soundair*, at p. 6, Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of the parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working our of the process.

25 In *Soundair* as well, McKinlay J.A. emphasized the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

26 A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), per Austin J.A. at paras. 28 - 31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto Dominion Bank v. Usarco Ltd.*, *supra*, at p. 459.

27 The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

Analysis

The Vesting Order and the Motion to Quash

28 Aareal Bank A.G. and 203 sought to quash the appeal on the basis that it is moot. They argue that once the vesting order granted by Sachs J. was registered on title - no stay having been obtained - its effect was spent, the court's power to set it aside is extinguished, and no appeal can lie from it. Because all the parties were prepared to argue the appeal, we heard the submissions on the motion to quash during the argument of the appeal on the merits.

29 In my opinion the appeal from the vesting order should be quashed because the appeal is moot.

30 Sachs J.'s order of December 19, 2003 granted a vesting order directing the land registrar at Toronto, in the land titles system, to record 203 as the owner of the hotel. The order was subject to two conditions, namely, that 203 pay the purchase price and comply with all of its obligations on closing of the transaction and that the vesting order be delivered to 203. These conditions were complied with on January 6, 2004, and the vesting order was registered on title on that date. Aareal Bank registered its $20 million mortgage against the title to the hotel property following registration of the vesting order.

31 In Ontario, the power to grant a vesting order is conferred by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

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32 The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), at 227, where it was observed that:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made *in personam* orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. *The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly*: see McGhee, *Snell's Equity* 30th ed., (London: Sweet and Maxwell, 2000) at 41-42 [emphasis added].

33 A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

34 I reach this conclusion for the following reasons.

35 In its capacity as an order, a vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order and, in the absence of such a stay, it remains effective and may be registered on title under the land titles system - indeed, the land registrar is required to register it on a proper application to do so: see the *Land Titles Act*, R.S.O. 1990, c. L.5, ss.25 and 69. In this respect, an application for registration based on a judgment or court order need only be supported by an affidavit of a solicitor deposing that the judgment or order is still in full force and effect and has not been stayed; there is no requirement - as there is in some other jurisdictions [2] - to show that no appeal is pending and that all appeal rights have terminated: see *Ontario Land Titles Regulations*, O. Reg 26/99, s. 4.

36 Appeal rights may be protected by obtaining a stay, which precludes registration of the vesting order on title pending the disposition of the appeal. Do those appeal rights remain alive, however, where no stay has been obtained and the order has been registered?

37 In answering that question I start with the provisions of ss. 69 and 78 of the *Land Titles Act*, which deal, respectively, with vesting orders (specifically) and the effect of registration (generally). They state in part, as follows:

> 69(1) Where by order of a court of competent jurisdiction ... registered land or any interest therein is stated by the order ... to vest, be vested or become vested in, or belong to ... any person other than the registered owner of the land, the registered owner shall be deemed for the purposes of this Act to remain the owner thereof,
>
> > (a) until an application to be registered as owner is made by or on behalf of the ... other person in or to whom the land is stated to be vested or to belong; or
> >
> > (b) until the land is transferred to the ... person by the registered owner, as the case may be, in accordance with the order or Act.
>
> 78 (4) *When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register* [italics added].

38 Upon registration, then, a vesting order is deemed "to be embodied in the register and to be effective according to its nature and intent". Here the nature and effect of Sachs J.'s vesting order is to transfer absolute title in the hotel to 203, free and clear of encumbrances. [3] When it is "embodied in the register" it becomes a creature of the land titles system and subject to the dictates of that regime.

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39 Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

40 This interpretation of the effect of registration of a vesting order is consistent with the purpose of the land titles regime and the philosophy lying behind it. It ensures that disputes respecting the registered title are resolved under the rubric of that regime and within the scheme provided by the *Land Titles Act*. This promotes confidence in the system and enhances the certainty required in commercial and real estate transactions that must be able to rely upon the integrity of the register.

41 Donald H.L. Lamont described the purposes of the land titles system very succinctly in his text, *Lamont on Real Estate Conveyancing*, 2nd ed. looseleaf (Toronto: Carswell, 1991) vol. 1 at 1-10, as follows:

> The basis of the system is that the Act authoritatively establishes title by declaring, under a guarantee of indemnity, that a certain parcel of land is vested in a named person, subject to some special circumstances. Early defects are cured when the land is brought under the land titles system, and thenceforth investigation of the prior history of the title is not necessary.
>
> *No transfer is effective until recorded; once recorded, however, the title cannot, apart from fraud, be upset* [italics added].

42 Epstein J. elaborated further on the origins, purpose and philosophy behind the regime in *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (Ont. S.C.J.). At paras. 40 - 42 she observed:

> [40] The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.
>
> [41] The essential purpose of land titles legislation is to provide the public with the security of title and facility of transfer: Di Castri, Registration of Title to Land, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.
>
> [42] The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave,
>
> "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.

43 Certainty of title and the ability of a bona fide purchaser for valuable consideration to rely upon the title as registered, without going behind it to examine the conveyance, are, therefore, the hallmarks of the land titles system. The transmogrification of a vesting order into a conveyance upon registration is consistent with these hallmarks. It does not mean that such an order, once registered on title, is absolutely immune from attack. It simply means that any such attack must be made within the parameters of the *Land Titles Act*.

44 That legislation does present a scheme of remedies in circumstances where there has been a wrongful entry on the registry by reason of fraud or of misdescription or because of other errors of certification of title or entry on the registry. The remedies take the form of damages or compensation from the assurance fund established under the Act or, in some instances, rectification of the register by the Director of Titles and/or the court: see, for example, s. 57 (Claims against the Fund), Part IX (Fraud) and

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Part X (Rectification). In this scheme, good faith purchasers or mortgagees who have taken an interest in the land for valuable consideration and in reliance on the register, are protected, [4] in keeping with the motivating principles underlying the land titles system. It has been held that there is no jurisdiction to rectify the register if to do so would interfere with the registered interest of a *bona fide* purchaser for value in the interest as registered: see *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385 (Ont. C.A.); and *Durrani v. Augier*, *supra*, at paras. 49, 75 and 76.

45 Vesting orders properly registered on title, then - like other conveyances - are not immune from attack. However, any such attack is limited to the remedies provided under the *Land Titles Act* and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order *qua* order has been spent.

46 Johnstone J., of the Alberta Court of Queens Bench, came to a similar conclusion -although not based upon the same reasoning - in *Royal Trust Corp. of Canada v. Karenmax Investments Inc.* (1998), 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]). She refused to interfere with a vesting order granted by the master in the context of a receivership sale, stating (at para. 22, as amended):

> Accordingly, because the Order of Master Funduk has been entered, and no stay of execution was sought nor granted, the Order acts as a transfer of title, which having been registered at the Land Titles Office, extinguishes my ability to set aside the Order, absent any err [*sic*] in fact or law by the learned Master. ....

47 In a brief three-paragraph endorsement this court granted an unopposed motion to quash an appeal from an order approving a sale by a receiver in *National Life Assurance Co. of Canada v. Brucefield Manor Ltd.*, [1999] O.J. No. 1175 (Ont. C.A.). While a vesting order was involved, it does not appear to have been the subject of the appeal. The appeal was quashed. The sale order had been made in May 1996, a motion to stay the order pending appeal had been dismissed in August, and the sale had closed and a vesting order had been granted in November of that year. The proceeds of sale had been distributed. "Against this background", Catzman J.A. noted, "we agree with [the] submission that the order under appeal is spent".

48 This decision was based on the global situation before the court, not on the narrower premise that the vesting order had been registered and the appeal was therefore moot. I am satisfied, based on the foregoing analysis, however, that the narrower premise is sound.

49 I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest". However, there is no automatic stay of such an order in this province, and a losing party might be well advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the *Land Titles Act* (Remedy of person wrongfully deprived of land), or the rules of professional conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration should the occasion arise. It may be that the appropriate authorities should consider whether the Act should be amended to bring its provisions in line with those contained in the Alberta legislation, and referred to in footnote 2 above.

50 The foregoing concerns do not change the legal analysis of the effect of registration of a vesting order outlined above, however, and I conclude that the appeal from the vesting order is moot.

The Appeals on the Merits

51 Even if I am in error respecting the mootness of the appeal from the vesting order, the appeal from it and from the approval orders must be dismissed on their merits. On behalf of Regal Pacific, Mr. Rueter highlights the facts concerning the Orenstein Group's involvement in the failed $45 million share purchase transaction, which was followed by the receivership,

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the sudden withdrawal by HIG (also an Orenstein company) of its $31 million bid on September 2, 2003 - just the day before the First 203 Offer for $25 million was submitted - and the involvement of the Orenstein Group in that First (and subsequent) 203 Offer. He forcefully argues that the Orenstein participation in the 203 Offers should have been disclosed to Regal Pacific and to Sachs J., and submits that had that disclosure been made Sachs J. may have declined to approve the Second 203 Offer. The non-disclosure tainted the receivership sale process to the extent that its fairness and integrity have been jeopardized, he concludes, and accordingly the sale must be set aside.

52 On behalf of the receiver, Mr. Casey acknowledges that the Orenstein involvement was not disclosed, even after the receiver became aware of it (which, he submits, was not until the time of the Second 203 Offer). He concedes that "it would have been nice" if the receiver had disclosed the information, but submits it was under no legal obligation to do so as, in its view, the information was not material to the sale process. The sale process was carried out in good faith in accordance with the duties and obligations of the receiver, and both of the 203 Offers represented the best offers available at the time of their acceptance - and, in the case of the Second 203 Offer, the *only* offer available. The transaction is in the best interests of all concerned, he contends. The orders should not be set aside.

53 203 and the intervenor, Aareal Bank A.G., support the receiver's position. On behalf of 203 Mr. Gilbert argues in addition that 203 is a *bona fide* purchaser of the hotel for value, that it has paid its deposit and purchase price and registered its interest through the vesting order on title, and that $20 million has been advanced by Aareal Bank A.G. on the strength of the registered vesting order. The transaction cannot be overturned because once the vesting order has been registered it is spent and any appeal from the order is therefore moot. Mr. Dube advanced a similar argument on behalf of Aareal Bank A.G.

54 I do not accept the argument advanced by the appellant.

55 In my view, the fact that the Orenstein Group is involved in the 203 bid is not material to the sale process conducted by the receiver. I agree with the conclusions of Farley J., recited above, in that regard.

56 Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the $45 million share purchase transaction, as determined in the pending litigation between them, the facts relating to that transaction are of little more than historical interest in the context of the receivership sale. The hotel was not bankrupt and in receivership, or closed, at that time. For the various reasons outlined earlier, the hotel is an asset progressively declining in value, and it is not surprising that the business may have attracted a higher offer in mid-2002 than it did in mid-2003. Moreover, the $45 million transaction involved the purchase of the shares of Regal Pacific rather than the assets of the hotel and, as well, the acquisition of certain other assets. None of the thirteen bids elicited by the receiver remotely approached a purchase price of $45 million. Apart from its indication that the Orenstein Group has an interest in acquiring the hotel, I do not see the significance of this earlier transaction to the sale process conducted by the receiver.

57 I turn, then, to the $31 million HIG bid. It, too, confirms an interest by the Orenstein Group in the Hotel. Mr. Rueter argues that the withdrawal of that bid the day before the First 203 Offer was presented at the lower $25 million price is suspicious, and that the court should have been apprised of what exchange of information occurred between the receiver, HIG and 203 that resulted in the HIG bid being withdrawn and the lower 203 offer going forward as the offer recommended by the receiver. In my view, however, this argument does not assist Regal Pacific.

58 First, there is not a scintilla of evidence to suggest that the receiver participated in any such discussions. Secondly, when the receiver inquired whether the deposit cheque that had been submitted with the HIG offer - and which had not been certified, as required by the court-approved bidding process - could be cashed, the receiver was told the cheque would not be honoured if presented for payment. The receiver would have been derelict in its duties if it had accepted the HIG bid in those circumstances. Finally, in the absence of some provision in an offer or the terms of the bidding process to the contrary - which was not the case here - a potential purchaser is entitled to withdraw its offer at any time prior to acceptance for any reason, including the belief that the purchaser may be able to obtain the property at a better price by another means. Mr. Rueter conceded that the receiver was not obliged to accept the HIG offer and that he was not asserting a kind of improvident-sale claim for damages based upon the difference in price between the HIG offer and the 203 bid.

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59 The stark reality is that after nearly two years of marketing efforts by Colliers, and latterly by Colliers and the receiver, there were no other offers available to the receiver that were superior to the unconditional $25 million First 203 Offer at the time of its acceptance by the receiver and approval by the court. After the failure of the First 203 Offer to close, and in spite of renewed efforts by both Colliers and the receiver, there were *no other* offers available apart from the $24 million Second 203 Offer, which was accepted by the receiver and approved by Sachs J.

60 A persuasive measure of the realistic nature of the 203 offers is the fact that they are supported by HSBC, which stands to incur a shortfall on its security of $9 million. In addition, there are outstanding unsecured creditors with over $2 million in claims. No one except Regal Pacific has opposed the sale.

61 There is simply nothing on the record to suggest that the hotel assets are likely to fetch a price that will come anywhere close to providing any recovery for Regal Pacific in its capacity as shareholder of the hotel. Regal Pacific, therefore, has little, if anything, to gain from re-opening the sale process. Apart from a liability to make some interest payments as part of an earlier agreement in the proceedings, Regal Pacific is not liable under any guarantees for the indebtedness of the hotel. It therefore has little, if anything to lose from opposing the sale, as well. This lends some credence to the respondents' argument that Regal Pacific's opposition to the sale, and this appeal, are driven by tactical motives extraneous to these proceedings and relating to the separate litigation between it and the Orenstein Group concerning the aborted $45 million share purchase transaction.

62 In the circumstances of this case, then, and given the principles courts must apply when reviewing a sale by a court-appointed receiver, as outlined above, I can find no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

63 I would dismiss the appeals for the foregoing reasons.

Disposition

The Appeals

64 For all of the foregoing reasons, the appeal from the vesting order granted by Sachs J. is quashed, and the appeals from the orders of Sachs J. dated December 19, 2003 approving the sale, and the order of Farley J. dated January 14, 2004, are dismissed.

Costs

65 The respondents and the intervenor are entitled to their costs of the appeal, including the motion to quash, which was included in the argument of the appeal.

66 The receiver and 203 requested that costs be fixed on a substantial indemnity basis - the receiver on the ground that the allegations raised impugned its integrity in the conduct of the receivership, and 203 on the ground that the appeal was futile and brought solely for tactical purposes in an attempt to extract a settlement and at great expense to 203 in terms of uncertainty and carrying costs. I would not accede to these requests. Without in any way questioning the integrity of the receiver in the conduct of the receivership, it seems to me that some of the problems could have been avoided had the receiver revealed the involvement of the Orenstein Group in the 203 transactions when it first learned that was the case. While I understand 203's frustration at the delay in finalizing the results of the transaction, it cannot be said that the appeal was frivolous and there is nothing in the circumstances to justify an award of costs on the higher scale: see *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (Ont. C.A.). I would therefore award costs on a partial indemnity scale.

67 Counsel provided us with bills of costs. Regal Constellation sought $57,123.25 on a partial indemnity basis if successful. The receiver asks for $61,919.00 and Aareal Bank requests $12,224.75. These amounts are inclusive of fees, disbursements and GST and seem somewhat high to me. The draft bill submitted by 203 appears to me to be exceedingly high, given the amounts sought by other parties who carried a similar burden, and notwithstanding the importance of the case for 203. 203 asks us to fix its costs in the amount of $137,444.68. Such an award is not justified and would simply not be fair and reasonable in the

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circumstances, in my view, given the nature and length of the appeal and the issues involved: see *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.).

68 Costs are awarded, on a partial indemnity basis, as follows:

a) To the receiver, in that amount of $40,000;

b) To 203, in the amount of $40,000; and,

c) To Aareal Bank, in the amount of $12,225.

69 These amounts are inclusive of fees, disbursements and GST.

***Laskin J.A.*:**

I agree.

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

I agree.

Appeal dismissed.

Footnotes

1 I shall refer to Regal Constellation Hotel Limited as "the Hotel" throughout these reasons.

2 See, for example, the Alberta *Land Titles Act* R.S.A. 2000, c. L-4, s. 191, which precludes registration of a judgment or order in the absence of consent, an undertaking not to appeal, or proof that all appeal rights have expired.

3 Except certain encumbrances that must remain on title by virtue of the *Land Titles Act*.

4 For instance, where an instrument would have been absolutely void if unregistered and rectification is ordered, a person suffering by the rectification is entitled to compensation as provided: s. 57(13). Persons fraudulently procuring an entry on the registry may be convicted of an offence under the Act, and where an innocent purchaser has acquired a charge or interest in the lands while the wrongful entry was subsisting on the lands the land registrar may revest the lands in the rightful owner but subject to the interests so acquired: ss 155-157.

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2010 ONCA 340
Ontario Court of Appeal

National Trust Co. v. 1117387 Ontario Inc.

2010 CarswellOnt 2869, 2010 ONCA 340, 188 A.C.W.S. (3d)
332, 262 O.A.C. 118, 52 C.E.L.R. (3d) 163, 67 C.B.R. (5th) 204

1117387 Ontario Inc. and Antonios ("Tony") Ishac (Applicants / Appellants / Respondents by way of cross-appeal) and National Trust Company (Respondent / Respondent / Appellant by way of cross-appeal)

National Trust Company (Applicant / Respondent / Appellant by way of cross-appeal) and 1117387 Ontario Inc. and Antonios ("Tony") Ishac (Respondents / Appellants / Respondents by way of cross-appeal)

M.J. Moldaver, Russell Juriansz, Gloria Epstein JJ.A.

Heard: November 30, 2009
Judgment: May 10, 2010 [* **]
Docket: CA C49609, C50315

Proceedings: additional reasons at *National Trust Co. v. 1117387 Ontario Inc.* (2010), 2010 ONCA 492, 2010 CarswellOnt 4839 (Ont. C.A.); reversing in part *National Trust Co. v. 1117387 Ontario Inc.* (2008), 48 C.B.R. (5th) 95, 2008 CarswellOnt 6350 (Ont. S.C.J.)

Counsel: Earl A. Cherniak, Q.C., Brian Radnoff for Appellants, 1117387 Ontario Inc., Antonios Ishac
John P. O'Toole for Respondent, National Trust Company
R. Aaron Rubinoff, Joël M. Dubois for Respondent, Deloitte & Touche Inc.

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

Headnote

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous

Creditor was unable to collect debt secured by mortgage on commercial property — Creditor served notice of intent to enforce security, although parties entered into forbearance agreement — Directing mind of debtor was also director of N Inc., which held second mortgage — Debtor corporation was made subject to receiver as per Bankruptcy and Insolvency Act — Land subject to mortgage was contaminated by actions of vendor — Disagreement regarding remediation of environmental damage was arbitrated, with award being vested in receiver as well as any right of action against vendor — Receiver sought to sell property to creditor — Receiver and mortgagee brought motions for approval of report and for sale of land to creditor, and directing mind of debtor brought motion to allow action against receiver and continue action against vendor of property — Motion of mortgagee and receiver granted, motion of debtor allowed in part — Mortgagor appealed and mortgagee cross-appealed — Appeal dismissed and cross-appeal allowed, setting aside order granting leave to sue receiver — Motion judge's decision to approve sale on basis of receiver's recommendation was unassailable — However, motion judge used wrong test in granting leave to commence action against receiver.

Debtors and creditors --- Receivers — General principles — Miscellaneous principles

Creditor was unable to collect debt secured by mortgage on commercial property — Creditor served notice of intent to enforce security, although parties entered into forbearance agreement — Directing mind of debtor was also director of N Inc., which held second mortgage — Debtor corporation was made subject to receiver as per Bankruptcy and Insolvency Act — Land subject to mortgage was contaminated by actions of vendor — Disagreement regarding remediation of

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environmental damage was arbitrated, with award being vested in receiver as well as any right of action against vendor — Receiver sought to sell property to creditor — Receiver and mortgagee brought motions for approval of report and for sale of land to creditor, and directing mind of debtor brought motion to allow action against receiver and continue action against vendor of property — Motion of mortgagee and receiver granted, motion of debtor allowed in part — Mortgagor appealed and mortgagee cross-appealed — Appeal dismissed and cross-appeal allowed, setting aside order granting leave to sue receiver — Motion judge's decision to approve sale on basis of receiver's recommendation was unassailable — However, motion judge used wrong test in granting leave to commence action against receiver.

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

Creditor was unable to collect debt secured by mortgage on commercial property — Creditor served notice of intent to enforce security, although parties entered into forbearance agreement — Directing mind of debtor was also director of N Inc., which held second mortgage — Debtor corporation was made subject to receiver as per Bankruptcy and Insolvency Act — Land subject to mortgage was contaminated by actions of vendor — Disagreement regarding remediation of environmental damage was arbitrated, with award being vested in receiver as well as any right of action against vendor — Receiver sought to sell property to creditor — Receiver and mortgagee brought motions for approval of report and for sale of land to creditor, and directing mind of debtor brought motion to allow action against receiver and continue action against vendor of property — Motion of mortgagee and receiver granted, motion of debtor allowed in part — Mortgagor appealed and mortgagee cross-appealed — Appeal dismissed and cross-appeal allowed, setting aside order granting leave to sue receiver — Motion judge's decision to approve sale on basis of receiver's recommendation was unassailable — However, motion judge used wrong test in granting leave to commence action against receiver.

Real property --- Mortgages — Sale — Contractual power of sale — Miscellaneous

Creditor was unable to collect debt secured by mortgage on commercial property — Creditor served notice of intent to enforce security, although parties entered into forbearance agreement — Directing mind of debtor was also director of N Inc., which held second mortgage — Debtor corporation was made subject to receiver as per Bankruptcy and Insolvency Act — Land subject to mortgage was contaminated by actions of vendor — Disagreement regarding remediation of environmental damage was arbitrated, with award being vested in receiver as well as any right of action against vendor — Receiver sought to sell property to creditor — Receiver and mortgagee brought motions for approval of report and for sale of land to creditor, and directing mind of debtor brought motion to allow action against receiver and continue action against vendor of property — Motion of mortgagee and receiver granted, motion of debtor allowed in part — Mortgagor appealed and mortgagee cross-appealed — Appeal dismissed and cross-appeal allowed, setting aside order granting leave to sue receiver — Motion judge's decision to approve sale on basis of receiver's recommendation was unassailable — However, motion judge used wrong test in granting leave to commence action against receiver.

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Regal Constellation Hotel Ltd., Re (2004), 23 R.P.R. (4th) 64, 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, (sub nom. *Regal Constellation Hotel Ltd. (Receivership), Re)* 188 O.A.C. 97, 71 O.R. (3d) 355, (sub nom. *HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of))* 242 D.L.R. (4th) 689 (Ont. C.A.) — followed

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APPEAL by mortgagor and CROSS-APPEAL by mortgagee from judgment reported at *National Trust Co. v. 1117387 Ontario Inc.* (2008), 48 C.B.R. (5th) 95, 2008 CarswellOnt 6350 (Ont. S.C.J.).

***Gloria Epstein J.A.*:**

Overview

1 In this action, the mortgagor and guarantor of the mortgage debt challenge the fairness of the conduct of the court-appointed receiver appointed by the mortgagee under the terms of the mortgage in relation to its actions pertaining to the mortgaged property.

2 The appellant, 1117387 Ontario Inc. (the "company"), owns property (the "property") in Bells Corners, Ottawa. The property contains a 12,000 square foot building divided into two restaurant facilities. The appellant, Antonios Ishac, is the chief executive officer of the company. He personally guaranteed a portion of the first mortgage on the property given by the respondent, the National Trust Company.

3 In 2001, contamination was discovered on the property. Petro-Canada, the owner of the adjoining land, admitted responsibility for the contamination. Ultimately the parties entered into an agreement (the "remediation agreement") under which Petro-Canada would pay for the remediation of the property and for other losses the company suffered as a result of the contamination. The remediation did not proceed as planned and the company sued to enforce Petro-Canada's obligations under the remediation agreement and for damages.

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4 By this time, the mortgage had fallen into arrears and National Trust obtained a court order appointing Deloitte & Touche as receiver and manager. Eventually, the receiver was given authority over the claim against Petro-Canada and gave National Trust permission to try to resolve the matter directly with Petro-Canada. In September 2005, these two parties negotiated an agreement (the "settlement agreement") whereby the damage claim would be settled, the property sold to Petro-Canada, and the company's mortgage debt partially recovered and partially forgiven. The receiver issued a report recommending the sale and settlement and moved for court approval.

5 The appellants appeal the motions judge's order of October 10, 2008, in which, among other things, he approved the report and thereby the sale of the property to, and the settlement of the damage claim with, Petro-Canada. The appellants' primary contentions are that the property will be sold for less than the "best price" that could have been obtained, and that the settlement is improvident because it would settle the company's claims for a fraction of its actual entitlement under the remediation agreement. The receiver cross-appeals that part of the order granting the appellants leave to commence an action against the receiver based on its handling of the sale and settlement. National Trust adopts and supports the receiver's position in the appeal from the judicial approval of the sale and settlement.

6 The appellants are clearly unhappy with how matters pertaining to the property have played out. However, the issues raised on appeal involve an analysis of the motions judge's findings of fact applied to well-established legal principles applicable to the exercise of his discretion. In my view, this analysis discloses no reviewable error on the part of the motions judge. Accordingly, I would dismiss the appeal. For the reasons set out in paras. 93 and 94, I would allow the cross-appeal.

7 The appellants also move to introduce fresh evidence concerning events that took place during the period that the decision was under reserve by the motions judge. While, in the particular circumstances of this case, I would admit the fresh evidence, in my view, it does not assist the appellants.

Facts

8 The company purchased the property in 1995, in part with money borrowed from National Trust. The loan was secured by a first mortgage in the amount of $650,000, registered against the property. In 1997, additional funds were advanced for renovations and the mortgage was increased to $905,000. This work was necessary as deficiencies in the building and equipment were interfering with the company's ability to attract sufficient rental income to keep the mortgage in good standing.

9 The mortgage fell into arrears in 1999 after the renovations were completed. As a result of these difficulties, National Trust exercised rights under the mortgage that allowed it to appoint an agent to collect and remit rents. At that time, the approximate principal balance of the mortgage was $884,000.

10 In February 2001, National Trust served a notice of intention to enforce security. On October 30, 2001, the parties entered into a six-month forbearance agreement, crystallizing the obligations of the mortgagor and mortgagee as of that date. By agreement, for the purposes of the forbearance agreement, the debt was fixed at $1,095,909.89, with the mortgage maturing on April 30, 2002.

11 The property had not been properly maintained and the company was having difficulty attracting sufficient rent to meet expenses. As a result, the company decided to sell the property. The company received a conditional offer of $1,450,000 with a closing date of February 1, 2002. The offer was conditional, in part, on a satisfactory environmental assessment. This assessment, completed in December 2001, demonstrated that the property was contaminated by petroleum hydrocarbons that had escaped from a neighbouring property owned by Petro-Canada. When the purchaser learned of the contamination, the sale was lost.

12 For some time after the contamination was found, commercial tenants continued to lease the property. Under the terms of the forbearance agreement the company agreed to lease the property to Vox Lounge. In March 2002, Vox renewed its lease for five years but only for part of the premises. In April 2002, the remainder of the building was leased to Dianne Dang, carrying on business as Buffet Place. Vox vacated in October 2003 and Ms. Dang, despite having been granted several reductions in rent, left in March 2004. Since then, the building has been empty and has fallen into disrepair.

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13 The parties agreed to arbitrate the company's claims arising from Petro-Canada's acceptance of responsibility for the contamination. On February 3, 2003, just prior to the arbitration, the parties entered into the remediation agreement, the terms of which are as follows:

> 1. [Petro-Canada] will proceed with the remediation action plan set out in its report at a time convenient to both [the company] and [Petro-Canada's] consultants, but in any event not later than June, 2003, for the commencement of such work;
>
> 2. All work and investigations will be carried out in a manner so as to minimize to the greatest extent possible any interference with [the company's] lands and the ongoing operations by its tenants thereon;
>
> 3. The remediation of [the company's] lands is to be at no cost whatsoever to [the company] and all reasonable costs incurred by [the company] in the context of, or as a result of, the clean-up will be paid by [Petro-Canada];
>
> 4. Where the remediation interferes with the ongoing tenant businesses such that the tenant is required to either vacate the premises or is justified in not paying full rental during such remediation operations, then [Petro-Canada] will reimburse [the company] for any reasonable loss of tenant revenue including all costs incurred in obtaining alternative tenants, if a tenant is lost as a result of ongoing remediation operations;
>
> 5. [Petro-Canada] will pay [the company's] reasonable consultant costs incurred by its consultants in supervising the remediation and testing to determine that appropriate remediation levels have been reached;
>
> 6. All work forces and equipment will be employed in such a manner and in such a way as to minimize the visual impact of the ongoing clean-up operation to the greatest extent possible.

14 For the purposes of the arbitration, the parties agreed that the fair value of the property was $1,735,000 based on a compromise between appraisals prepared by the appellants' valuator, Ron Juteau, and the receiver's valuator, David Atlin.

15 The arbitration continued on issues unresolved in the remediation agreement. On March 10, 2003, the arbitrator, the Honourable Mr. Rosenberg, awarded the company $208,200 to compensate for potential devaluation of the property due to stigma and $100,000 for future development costs. Petro-Canada paid the total award of $308,200 to the company.

16 On June 19, 2003, Mackinnon J., on consent of all parties, appointed Deloitte & Touche as the receiver over all matters relating to the property except for Petro-Canada's remediation obligations. These were left to the company.

17 In August 2003, because Petro-Canada had not started remediation in accordance with the agreed-upon schedule, the company sued Petro-Canada for breach of the remediation agreement. This claim was dismissed for want of prosecution and subsequently reinstated at the request of the appellants.

18 Various disputes arose between the parties over the remediation and related issues. As a result, by order dated October 9, 2003, Morin J. [*National Trust Co. v. 1117387 Ontario Inc.*, 2003 CarswellOnt 3881 (Ont. S.C.J.)] transferred the claim against Petro-Canada to the receiver and ordered the company to pay the $308,200 it received from Petro-Canada to the receiver on the basis that this money formed part of National Trust's security. The company has not complied with that order.

19 On November 6, 2003, the receiver listed the property for sale at a price of $1,380,000.

20 The remediation finally started in December 2003. It was anticipated that the process would take approximately three months. Exterior remediation was completed in March 2004. However, contamination was discovered under the building, necessitating excavation through the floor of the building and underpinning of the structure. This interior excavation started in August 2004 but was delayed later in the month as a result of the Ministry of Labour's concern about work-safety conditions. Excavation resumed on September 20 but was again suspended a month later over a dispute about which Ministry of Environment guidelines applied.

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21 The clean-up came to a complete halt in December 2004. The principal dispute at that time involved whether the building had to be demolished to facilitate remediation or whether the structure could remain in place while remediation - more costly remediation -could be carried out.

22 On December 8, 2004, the receiver wrote to Petro-Canada demanding that it complete the remediation work and pay the damages owed under the remediation agreement. The receiver sought payment of $488,000 in compensation for lost revenues, property taxes and insurance incurred as a result of the remediation delay. The receiver also took the position that damages for ongoing delay were accruing at $35,000 per month. Petro-Canada took the position that these claims were "completely unrealistic".

23 On February 10, 2005, a meeting was held at Mr. Ishac's request. Representatives of National Trust and the receiver concluded that their differences with Mr. Ishac were too great to continue attempting to find a resolution acceptable to all parties. Beginning in February 2005, with the concurrence of the receiver, direct settlement discussions began between National Trust and Petro-Canada.

24 By August 31, 2005, the outstanding amount owed under the mortgage was just over $2,000,000. In September 2005, the settlement agreement was reached between National Trust and Petro-Canada.

25 The receiver provided three reports to the court; two within the first six months of the receivership. The third was provided on November 29, 2005. It was in this report that the receiver recommended the approval of the settlement agreement that contained the following terms:

1) Petro-Canada would purchase the property from National Trust for $1,187,500.

2) Petro-Canada would demolish the building and complete the remediation of the property in accordance with current Ministry of the Environment standards.

3) Petro-Canada would pay the receiver an additional $200,000 in full satisfaction of its claims for lost rent and delay costs in the remediation.

4) The remaining mortgage debt owed by the company and Mr. Ishac to National Trust, approximately $600,000, would be forgiven.

5) Petro-Canada would offer the property to the company or its nominee at fair market value once the remediation has been completed. [1]

26 The report also states that the receiver will not seek to recover the $308,200 that Morin J. ordered the company to pay to the receiver.

27 With the exception of the appellants, all parties supported the proposed settlement agreement. This state of affairs generated three motions before the motions judge. The appellants sought orders prohibiting the sale of the property, permitting the appellants to prosecute the action against Petro-Canada and for leave to commence an action against the receiver arising out of the administration of the receivership. As an alternative, the appellants sought an order replacing the receiver and instructing the new receiver to prosecute all claims of the appellants "with dispatch". National Trust brought a cross-motion to approve the settlement agreement. The receiver brought a cross-motion for the same relief and for approval of its third report.

The Reasons of the Motions Judge

28 The motions judge approved the settlement agreement on the basis that the materials provided were sufficient to determine that the settlement was reasonable. He did not find it necessary to address the appellants' alternative request to replace the receiver.

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29 Specifically, the motions judge found that the value proposed by the respondents for Petro-Canada's purchase of the land was reasonable. There was substantial evidence before the court, expert and otherwise, concerning the value of the property at the relevant times. The motions judge expressed specific concerns about the evidence upon which the appellants relied. He ultimately concluded that he preferred the receiver's evidence that the property, *in a completely remediated state*, was properly valued between $600,000 and $1,200,000. Based on that finding, the motions judge held that the price Petro-Canada agreed to pay for the property actually exceeded its value.

30 In terms of the other major contentious area, the claim against Petro-Canada for damages resulting from the contamination, there were two issues. First, the parties were divided over who should bear the responsibility for the loss of revenue and additional costs associated with the delay in the remediation work. Second, the appellants argued before the motions judge, as they did before this court, that the remediation agreement required Petro-Canada to remediate the property despite the difficulties arising from excavating beneath the floor of the building.

31 With respect to delay, the motions judge noted that Petro-Canada, citing difficulties in obtaining access to the property and in obtaining permission to remove soil through the building floor, blamed the company and the receiver for the delays. The receiver blamed the company for interfering with both the commencement and the scope of the remediation work. The appellants blamed the receiver for generally failing to take all proper steps to protect their rights under the remediation agreement. The motions judge did not make a direct finding with regard to the ultimate cause of the delay.

32 In terms of complexity of the remediation work, the discovery of contamination under the building gave rise to a dispute over how to deal with it. After reviewing the evidence and arguments on that issue, the motions judge concluded that the building was beyond financially reasonable repair and had to be demolished to effect remediation of the contamination that had migrated through much of the property.

33 Against the background of the recommendations of the receiver in its third report, the parties' submissions, his findings, and the applicable law, the motions judge concluded that the process followed by the receiver in the complicated circumstances leading up to the request for approval of the sale and settlement was prudent and that the terms of sale and settlement recommended by the receiver were reasonable.

34 Having approved the settlement agreement, the motions judge dismissed the appellants' motion for an order returning the claim against Petro-Canada to their control, and declared the claims to be extinguished by the settlement agreement.

35 However, the motions judge did, somewhat curiously, grant the appellants leave to commence or continue proceedings against the receiver for "negligence or a failure to act with a fiduciary's due regard to the interests of a debtor" on the basis that if the allegations contained in Mr. Ishac's affidavits were proven, it would not be "perfectly clear that there was no foundation for the claim or the action is frivolous and vexatious". He made clear that he was "not deciding the merits of the owner's claims that the receiver failed to win all of the benefits the owner believes he could have won from Petro-Canada", despite his explicit finding that the "settlement is reasonable."

The Application to Introduce Fresh Evidence

36 The proposed fresh evidence discloses the following.

37 The motions were argued over a period of four days between November 21, 2006 and April 5, 2007, at which point, the motions judge took the matter under reserve. He released his decision on October 10, 2008.

38 On May 28, 2008, counsel for the receiver unilaterally contacted the motions judge requesting that he expedite the release of his decision. On July 15, 2008, a meeting among counsel and the motions judge took place in the motions judge's chambers. Several months later, counsel for the receiver, again unilaterally, contacted the motions judge and the Regional Senior Justice in another attempt to expedite the release of the decision. Shortly thereafter, the reasons were released.

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39 At the meeting in his chambers, the motions judge indicated that he was not prepared to approve the settlement. Then, eighteen months following argument and three months following the chambers meeting, the motions judge released his decision in which he approved the recommended settlement and, at the same time, gave leave to the appellants to commence an action against the receiver.

40 Counsel for the appellants submits that the proposed fresh evidence will demonstrate that the receiver brought pressure to bear upon the motions judge to release his decision. Relying on this court's decisions in *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323 (Ont. C.A.), at 325, and in *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Ltd. Partnership* (2008), 90 O.R. (3d) 561 (Ont. C.A.), at 571, counsel for the appellants argues that this evidence should be admitted as it demonstrates that the judicial process was fundamentally unfair and brings the administration of justice into disrepute.

41 I agree with the appellants that in these circumstances the fresh evidence ought to be admitted. The authorities the appellants cite make it clear that where the proposed fresh evidence raises issues of the validity of the process of the hearing, the interests of justice require its admission. In such cases, the traditional criteria for the admission of fresh evidence, found in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), do not apply. Here, the issues raised in the proposed fresh evidence implicate the integrity of the administration of justice.

Issues

42 The issues raised in the appeal and cross-appeal can be grouped into the following two main categories:

1. Whether the motions judge erred in approving the sale of the property to Petro-Canada and the settlement of the company's claim for breach of the remediation agreement.

2. Whether, in the light of what is contained in the fresh evidence, the process involving the motions judge's decision was compromised.

Standard of Appellate Review of Orders Approving Receivers' Reports

43 The principles to be applied in reviewing a sale or proposed sale by a court-appointed receiver are set out in this Court's decision in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.) [hereinafter HSBC]. A court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all who have an interest in the debtor's property. The receiver, as an officer of the court, is obliged to make full and fair disclosure to the court in all of its applications: *HSBC* at para. 26. The court should rely on the receiver's expertise in arriving at its recommendations and is entitled to assume that the receiver is acting properly unless the contrary is clearly shown.

44 Particularly where, as in this case, the receiver is dealing with an "unusual or difficult asset", the court will only interfere in special circumstances: ***HSBC*** at para. 23. While the court must carefully scrutinize the procedure the receiver followed, it must be remembered that the receiver must act "with meticulous correctness, but not to a standard of perfection": ***HSBC*** at para. 26.

45 Finally, I note that the orders appealed from are discretionary in nature. As in the case of all discretionary decisions, this court will only interfere where the judge has erred in law, seriously misapprehended the evidence, or exercised discretion based on irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations: ***HSBC*** at para. 22.

46 In *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), at p. 6, four factors are identified as considerations for the court in considering "whether a receiver who has sold a property acted properly". In my view, with appropriate modifications, the same factors can be applied in considering the providence of this settlement, where the values of both a property and a claim for damages are in issue:

(a) Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) The interests of all parties;

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(c) The efficacy and integrity of the process by which offers are obtained; and

(d) Whether there has been unfairness in the sale process.

47 Finally, at p. 7., *Soundair Corp.* affirmed the principle first stated in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.), that a court "ought not sit as on appeal from the decision of the receiver, reviewing in minute detail every element of the process by which the decision is reached."

Analysis

1. Whether the motion judge erred in approving the sale of the property to Petro-Canada and the settlement of the company's claim for breach of the remediation agreement.

A. The Receiver's Efforts to Obtain a Good Price

48 I turn to the first *Soundair* factor, whether the receiver has made sufficient efforts to obtain the best price, both for the property and the claim against Petro-Canada. Counsel for the appellants submits that the settlement agreement substantially undervalues not only the property but also the company's claim arising out of Petro-Canada's breach of the remediation agreement. What the receiver should have done, say the appellants, is force Petro-Canada to honour its obligations under the remediation agreement, both in terms of the remediation itself and the compensation that it agreed to pay as a result of the contamination, and then sell the remediated property at fair market value. This course of action, according to the appellants, would have resulted in National Trust's recovering its mortgage debt, with leftover equity value for the appellants. The motions judge's approval of the settlement agreement as reasonable, according to the appellants, is unsupportable. Rather, they argue, the settlement agreement is improvident.

49 I disagree. In my view, the motions judge's conclusion that the receiver met its obligations, both in terms of the value of both components of the proposed settlement and in terms of the process by which it was arrived at, is amply supported by the application of the relevant legal principles to the motions judge's findings of fact.

50 The law requires the receiver to pursue the debtor's rights. It is up to the receiver to carefully consider the available information and use its expertise to determine how to maximize the value of those rights. In relation to a cause of action, this responsibility can be met by settling the matter as long as the proposed compromise is commercially reasonable.

i. The sale of the property

51 In terms of the proposed sale of the property, the appellants take issue with the fact that the motions judge approved the receiver's recommendation of a sale at a price, which assumed the land was remediated, but was determined when the property was in an unremediated state. They contend that the receiver should have sought specific performance of Petro-Canada's obligations to remediate the property, or damages in the alternative, and then sold the property for fair market value in a remediated state.

52 I do not accept that argument.

53 First, it is highly unlikely that the receiver would have been successful in obtaining an order against Petro-Canada for specific performance of its remediation obligations. As the considerations set out in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.) at para. 14, demonstrate, the principles of specific performance are mainly related to the transfer of property (either personal or real) and even then only when the property is unique in some way. As Estey J. wrote in *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.), at p. 668, "[b]efore a plaintiff can rely on a claim to specific performance...some fair, real and substantial justification for his claim to performance must be found." There was nothing unique about this property. Indeed, the only reason the company wanted it remediated was for the purpose of immediately selling it. There is no justification for forcing Petro-Canada to go to the expense of remediating the land, when the appellants' only interest is in the value of the land rather than the land itself.

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54 The alternative remedy for breach of contract is damages such that the affected party is put in a position as though the contract had been fulfilled. To establish these so-called "expectation damages", the appellants relied on an affidavit of Philip Augustine, an experienced civil litigator.

55 Counsel for the appellants argues that the damage claim, (putting aside for the moment the claim for loss of rental income) is either $1,735,000, using the "reduction in value" method, or $3,980,468, using the "cost of performance" method. The "cost of performance" method of valuing damages from breach of contract, which Augustine takes to include the cost of destroying the building, remediating the property, and reconstructing the building, raises substantially the same issues as specific performance. I have already explained why this basis for damages is unavailable to the appellants. Since the purpose of damages is to recover value that the appellants would have obtained under the contract, and since it is known that they intended to sell the property in order to pay their mortgage debt, the proper valuation method of damages is the "reduction in value" method. See Swan, A., *Canadian Contract Law*, 2nd ed., (Markham: LexisNexis Canada, 2009), at pp. 370 - 379.

56 The question of the value of the land in a pristine state is critical for measuring the reduction in value of the property caused by the contamination. The appellants are wrong, however, to argue that the only way to determine this value is to remediate the land and try to sell it on the open market. The receiver utilized a commercially reasonable alternative method; it requested and received appraisals from several appraisers for the property, appraisals that assumed the property to be in an uncontaminated state. The motions judge approved this method as legitimate and I agree.

57 So much for the method of determining value. As for the value itself, based on his preference of the receiver's evidence concerning the value of the property over that of the appellants, the motions judge found that the proposed sale price of $1,187,000 represented a fair value for the property. This finding is sound.

58 The motions judge rejected the property value the appellants advanced through the Augustine affidavit - and properly so. The Augustine analysis in support of a "reduction in value" of $1,735,000 was deficient. Augustine accepted the 2003 Juteau valuation of the property notwithstanding its obvious flaws. The motions judge noted that Mr. Juteau acknowledged on cross-examination that he was "unaware of serious deficiencies in the premises and substantial rent reductions (and vacancies) resulting from them." The valuation was therefore based on a capitalization of rental income that did not take into account existing rental arrears or the high turnover in tenants.

59 I note that Mr. Augustine made no attempt to reconcile or otherwise address the receiver's expert and market evidence that supported the receiver's position that the property in a remediated state, at the time it recommended the comprehensive settlement, had a value of between $900,000 and $1,050,000. I refer to the receiver's four comprehensive market value appraisals, the listing price recommended by real estate agents and the results of the listing agent's attempts to sell the property.

60 The appellants also argued that, by reason of its mismanagement, the receiver was responsible for the property's low value. This is not supported by the evidence. The evidence before the motions judge, including the appraisal reports, demonstrated that when the receiver was appointed in June 2003, it inherited a rundown property struggling to attract and maintain tenants willing to pay rent sufficient to cover operating costs.

61 The appellants' position is not assisted by the tender of an offer to purchase the property for $1,320,000 that the company received in January 2006, after the receiver sought approval of the proposed sale and settlement. The offer, never delivered to the receiver, was unsigned and contained conditions unfavourable to the vendor concerning remediation and the nature of the tenants. As well, the receiver had no obligation to consider this offer, given its timing. Moreover, the offer does not show that the price the receiver was recommending was so unreasonably low as to demonstrate that the receiver was acting improvidently in recommending it: see *Soundair*, at p. 9.

62 I conclude that the motions judge's decision to approve the sale to Petro-Canada for $1,187,500, on the basis of the receiver's recommendation is unassailable. The receiver made appropriate efforts to obtain reliable information as to the value of the property. It secured an agreement with Petro-Canada based on this value that was provident and in fact advantageous to the creditors and the appellants. The fact that this agreement is with the polluter of the property, is, in my view, of no relevance.

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ii. The acceptance of $200,000 in damages

63 I will now turn to the settlement of the loss of rental income claim for $200,000.

64 Counsel for the appellants forcefully argues that the $200,000 does not come close to adequate compensation for the loss of rent, asserted to be $838,000, based on $488,000 [2] to December 2004, plus $35,000 per month after that to the date of Petro-Canada's acceptance of the offer.

65 Once again, I would not agree with this argument. It completely ignores the weaknesses of the claim, and the risks and costs associated with pursuing it.

66 The appellants approach the claim from the perspective that the receiver will be successful in demonstrating that the contamination was the sole cause of the loss of rental income. As previously indicated, the record demonstrates quite clearly that this is not the case. Before the further contamination was discovered in the spring of 2004, Vox Lounge had abandoned the property and was in arrears of rent in the amount of $70,000, and the Buffet Palace's rent arrears, part of which Mr. Ishac had forgiven due to its complaints about the state of the building, had reached $140,000.

67 Further, the delay in the commencement of the remediation and the conflict over the reasons for that delay, added to the uncertainty over the amount that might be awarded against Petro-Canada. The receiver claimed loss of rent from October 2003 to December 2004 in the amount of $214,262 and carrying costs including property management fees, property taxes, property insurance, legal fees and the receiver's fees and utilities. However, Petro-Canada denied many of these claims on the basis that the appellants bore responsibility for some, if not all, of the delay in the commencement of the remediation work from May until November 2003.

68 Then, there was further delay resulting from the dispute over how to remediate the soil under the building. The remediation agreement did not address who would be required to bear the burden of the loss of rental income caused by that delay.

69 Finally, Petro-Canada not only resisted the claim for loss of rental income, but also indicated it was going to launch a counter-claim for the costs caused by the appellants' delay.

70 The evidence available to the receiver about the claim for loss of rental income demonstrated that the amount of Petro-Canada's ultimate liability for damages was far from certain. Furthermore, the receiver was well aware of the other costs associated with litigation of this complexity such as ongoing carrying costs and unrecoverable legal costs. The receiver did not know, therefore, the exact value of this claim. What it did know was that Petro-Canada and National Trust supported a comprehensive resolution of the mortgage debt, in addition to the $200,000 Petro-Canada agreed to pay. Petro-Canada had already paid $318,000 to the company for damages arising from the contamination of the property pursuant to the arbitration award, and the receiver agreed to leave that amount with the company. [3] National Trust had also agreed to forgive the remaining mortgage debt of $600,000 owed by the appellants to National Trust.

71 Against this background the receiver made a realistic appraisal of value of the company's ancillary claims against Petro-Canada. It had to evaluate the risks and costs associated with litigation. This court must defer to the assessment and judgment of its independent receiver and to the exercise of discretion of the motions judge. In my view, the receiver's appraisal and the motions judge's review of the receiver's recommendations based on that appraisal are, in all of the circumstances, perfectly sound.

B. The Interests of All the Parties

72 The next part of the *Soundair* test requires that the judge conduct an examination of the interests of all the parties.

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73 The secured creditor, National Trust, supports the settlement. It does so with the knowledge that it will realize a significant shortfall. Petro-Canada also supports the settlement, and the interests of a party that has negotiated a settlement with a court-appointed receiver are very important: see *Soundair* at p. 12.

74 It is only the appellants, the debtors, who opposed the proposal. They argue that the receiver's dereliction of duty has deprived them of equity they had in the property at the time of the receivership. They will recover nothing from this settlement.

75 The appellants contend that the acceptance of the receiver's recommendations results in a loss to the company of approximately $400,000 in equity. They base their argument on an alleged offer to purchase the property for $1,500,000 submitted before the contamination was discovered.

76 However, the offer is not in evidence and the respondent argues that it was far from certain. The reliable evidence that is in the record places the value of the property in an uncontaminated state between $900,000 and $1,200,000, roughly the amount of the mortgage debt at that time. In my view, the record does not support the appellants' position that the company had equity in the property at the time the contamination was discovered.

77 Clearly, the receiver owes a duty to the appellants to treat them fairly. However, its primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors: *Soundair* at p. 12. The duty of fairness also requires that it maximize the return to the debtors, but such a return is not always commercially feasible. As Farley J. recognized in *Royal Bank v. Rose Park Wellesley Investments Ltd.*, [1995] O.J. No. 147 (Ont. Gen. Div. [Commercial List]), at para. 9, there will frequently be a point below which certain interested parties will be adversely affected by the receiver's decision. If the receiver's decision is otherwise reasonable, it is entitled to determine, in the words of Farley J. "where the cusp will lie".

78 Here, the cusp lies at a place that is to no party's clear advantage; the amount satisfies neither the appellants nor National Trust. I further note that given that $2,016,466 was owing under the mortgage at the time the settlement was reached, the appellants would only stand to benefit if a purchaser could be found that was willing to pay almost twice the value of the property, or if Petro-Canada consented to pay out several times the amount it has indicated a willingness to pay in response to the damage claim for loss of rental income.

79 The losses these parties will suffer are unfortunate but are the reality of the circumstances that plagued this property with these issues in this market. Also, it is important to bear in mind that no payments had been made under the mortgage since 2001. As time goes by, the receiver's costs constitute a priority charge on the property and therefore continue to reduce the amount available to pay National Trust and ultimately the appellants.[4] In this case, Petro-Canada was the only purchaser that would be reasonably expected to purchase the property in its current state as though it were pristine. Without the sale, it would have been impossible for National Trust otherwise to recover any significant portion of the debt. The value of the claims against Petro-Canada was, as I have explained, uncertain, and the receiver could not have relied solely upon them in the discharge of its duties. In considering the interests of those involved, and especially the receiver's primary duty to recover the mortgage debt from the appellants, the balance is clearly in favour of endorsing the settlement, and the motions judge considered these factors in making his ruling.

C. The Process Through Which the Sale and Settlement were Obtained

80 I now turn to *Soundair* factors (c) and (d) - the efficacy and integrity of the process and the fairness in the implementation of the process. The motions judge was required to consider the integrity of the process by which the receiver determined the fair value of the sale and the settlement and the fairness in the working out of that process.

81 The process under which the sale agreement is arrived at should be consistent with commercial efficiency and integrity. See *Selkirk, Re* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.), at p. 286.

82 The appellants' complaint about the process appears to be that National Trust and Petro-Canada negotiated the price between them, essentially behind closed doors. However, the receiver gave National Trust and Petro-Canada permission to

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negotiate a sale, if one could be reached, only after it proved impossible to continue with the appellants' involvement. The receiver's conduct until this point was open and transparent. It obtained various professional opinions as to the market value of the property independent of the contamination. These values were tested through the results of the listing and marketing initiatives. The appellants sought and obtained a meeting for the purposes of negotiating a settlement. They participated in that process until their demands threatened to interfere with any possibility that the negotiations would be successful. The receiver was entitled to make the determination that, as the motions judge put it, "[the respondents'] differences with Mr. Ishac were too great to continue attempting to find a resolution acceptable to all parties."

83 The motions judge clearly put his mind to the difficulty the receiver faced in valuing the property including the costs of remediation to current standards and the law suit with all of its costs and risks. In the light of the evidence before him and due consideration to the uncertainties, the motions judge quite properly held that "the process [of arriving at the settlement] was reasonable and prudent".

2. Whether, in the light of what is contained in the fresh evidence, the process involving the motions judge's decision was compromised.

84 Counsel for the appellants argues that the fresh evidence of events that took place while the matter was under reserve, together with the decision itself, give his clients a legitimate reason to doubt that they have been fairly treated within the context of the judicial process. The submission is based on the letters the receiver wrote to the motions judge asking about the status of the release of his reasons and on the decision itself in relation to comments the motions judge is alleged to have made in the course of the in-chambers meeting. On the basis of the pressure brought to bear on the motions judge by the receiver and the contradictions in the motions judge's thinking between the meeting and the decision and within the decision itself, there is good reason to be concerned that the process was not fair.

85 I disagree with this submission.

86 Concerning the letters, I agree that it may have been preferable for the receiver to have consulted with counsel for the appellants before writing the two letters inquiring about the status of the release of the decision. However, I am not persuaded that these letters, which were purely of an administrative nature, are any cause for concern about the integrity of the judicial process. I also note that the appellants' stated concern about those letters in the context of this appeal was not brought to the attention of the motions judge.

87 This takes me to the appellants' other argument that the fresh evidence demonstrates uncertainty in the motions judge's mind about whether to approve the receiver's recommendations. This uncertainty is demonstrated, they say, by the length of time the matter was under reserve, the comments the motions judge made during the in-chambers meeting and the contradiction in the decision itself of approving the receiver's recommendations and granting the appellants leave to commence an action against the receiver for breach of duty relating to its recommendations.

88 First, as this court has said in *Dusk v. Malone* (2003), 167 O.A.C. 333 (Ont. C.A.), at para. 3, "a lengthy delay in...releasing reasons, without more, will not automatically amount to a denial of a fair trial. The fairness of a trial must be determined by the particular circumstances of each case so that generally some evidence of active prejudice must be shown."

89 Second, the evidence of what was said at the meeting, namely the notes produced by lawyers who attended the meeting, is inconclusive in terms of what the motions judge said or was thinking. He may have indicated some ambivalence about his view of the case at the time. Regardless, he was entitled to go off and wrestle further with the decision. He was entitled to make up his mind after that meeting and prepare reasons that support his decision to approve the settlement.

90 Despite approving the receiver's third report, the motions judge granted leave to the appellants to commence an action against the receiver on the basis that the receiver failed to perform its obligations in relation to the property, including recommending the sale and settlement. The appellants submit that granting leave to bring such an action cannot be reconciled with approving the receiver's third report. It therefore shows the motions judge's doubts about whether the receiver had acted properly in relation to the sale.

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91 The motions judge was very clear in his reasons that he did not think the receiver had acted improperly. He granted leave because "[h]owever difficult, [the appellants] might succeed in demonstrating negligence..." He later reiterated that he was granting leave because it was not "perfectly clear that that there is no foundation for the claim or that the action is frivolous or vexatious." It would appear that this concern motivated the motions judge to grant leave to the appellants to take proceedings against the receiver, in the light of the possibility that the receiver may not have acted "with a fiduciary's due regard to the interests of the debtor". However, he obviously thought this was a long shot.

92 In my view, the motions judge, in granting leave, applied the wrong test. Rather than applying the low threshold he did, he should have been satisfied that the appellants had established a strong *prima facie* case, before granting leave. The conduct that the appellants wish to impugn is exactly the same conduct approved by the motions judge: see *Bank of America Canada v. Willann Investments Ltd.* (1993), 23 C.B.R. (3d) 98 (Ont. Gen. Div.). As Blair J. put it at paras. 9 - 10:

> In my opinion the "normal" test referred to above sets a threshold which is too low in cases where the activities of the Receiver, including the conduct sought to be impugned by the creditor seeking leave to proceed, have already been approved by the Court...Were it otherwise there would be little point in a receiver or receiver/manager seeking an Order approving its conduct and activities in the exercise of its duties as an officer of the Court. The very purpose of the granting of such an Order is to afford the receiver some measure of judicial protection. To say that that shield may be readily pierced unless the receiver can show that "it is perfectly clear" there is no foundation to the proposed claim, or that it is frivolous or vexatious, is to render such protection virtually meaningless in situations where the approved conduct and the conduct subject to the proposed attack are in substance the same.

93 The motions judge thought that this case did not apply because the receiver's actions had not been the subject of previous court approval. He did not consider that he had just approved the receiver's actions in this very instance, and that the *Bank of America* rationale applies here as well. It is contradictory and provides meaningless protection to a receiver, to grant an order approving its recommendations and simultaneously granting leave to bring an action for negligence or breach of fiduciary duty in arriving at these recommendations.

94 No matter which test the motions judge used, granting leave in these circumstances does not necessarily reflect an uncertainty in his mind regarding the receiver's recommendation of the overall appropriateness of the comprehensive settlement.

95 Based on this analysis, there is nothing in the evidence that supports the conclusion that there was any unfairness in the judicial process.

Conclusion Regarding the Appeal

96 In the circumstances of this case and given the principles courts must apply when reviewing the receiver's recommendations, I can find no error on the part of the motions judge in the exercise of his discretion when granting the orders under appeal.

The Cross-Appeal

97 As discussed above, the motions judge used the wrong test in granting leave to commence an action against the receiver. For the reasons given there, I would allow the cross-appeal.

Disposition

98 For the foregoing reasons, I would dismiss the appeal from the order approving the receiver's third report approving the sale of the property and the settlement. I would allow the cross-appeal and set aside the order granting leave to sue the receiver.

99 At the conclusion of the hearing, it was agreed that the parties would make submissions as to costs following the release of this decision. Failing agreement as to costs both of the appeal and the cross-appeal, submissions are to be made according to the following timetable. The receiver and National Trust may make written submissions, no longer than three pages, to be

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received by the senior legal officer, no later than May 17. The appellants will make their submissions, again, no longer than three pages, to be received no later than May 25. The receiver and National Trust may deliver a brief reply, no longer than two pages, to be received no later than May 28.

***M.J. Moldaver J.A.*:**

I agree.

***Russell Juriansz J.A.*:**

I agree.

Appeal dismissed; cross-appeal allowed.

Footnotes

* A corrigendum issued by the court on May 14, 2010 has been incorporated herein.

** Additional reasons at *National Trust Co. v. 1117387 Ontario Inc.* (2010), 2010 ONCA 492, 2010 CarswellOnt 4839 (Ont. C.A.).

1 The forgiveness of the mortgage and the offer of the property to the company post-remediation (items 4. and 5.) were offered in exchange for the company's support of the settlement agreement upon presentation to court for approval.

2 Adjusted for a mathematical error made by the appellants.

3 Given that the property would ultimately be sold to Petro-Canada on a pristine basis, the damages paid to the company for stigma and loss of future development costs were no longer warranted and could properly be considered additional consideration.

4 This court was informed, though it was not in evidence, that as of July 2009, the amount owing under the mortgage exceeded $3.1 million, including principal, interest, property taxes and other receivership expenses.

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2003 CarswellOnt 4537
Ont. S.C.J. [Commercial List]

Bell Canada International Inc., Re

2003 CarswellOnt 4537, [2003] O.J. No. 4738, 126 A.C.W.S. (3d) 790

IN THE MATTER OF BELL CANADA INTERNATIONAL INC.

AND IN THE MATTER OF AN APPLICATION BY BELL CANADA INTERNATIONAL INC. UNDER SECTION 192 OF THECANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, as amended (the "CBCA")

Farley J.

Heard: October 29, 2003
Judgment: October 30, 2003
Docket: 02-CL-4553

Counsel: John T. Porter, Derrick C. Tay, Alan B. Merskey for BCI
Christine Snow for Directors of BCI
James H. Grout for Monitor
W. Grant Worden for BCE
J.L. McDougall, Q.C., Michael D. Schafler for Peter Legault
Frederick L. Myers for Horizon
Robert Staley for Hicks, Muse, Tate & Furst Inc., Davivo International Ltd.

Subject: Corporate and Commercial; Insolvency

Headnote

Business associations --- Changes to corporate status — Amalgamations and takeovers — Takeovers — Miscellaneous issues

C Ltd. considered two bids for its shares — C Ltd. elected to accept bid by corporation H — Monitor scrutinizing bid process wrote report stating sale process conducted fairly and openly — Minority shareholder told monitor he had party interested in submitted higher bid, but no offer was received — BCI Inc. brought motion for order authorizing BCI Inc. to enter into voting agreement with H to vote its 75.6 per cent interest in common shares of C Ltd. in favour of sale agreement between C Ltd. and H — Order issued that BCI Inc., if authorized by its board, could enter into voting agreement with H, which obligated it to vote in favour of sale agreement — Report of monitor in proceedings of this nature is evidence — Monitor, as officer of court, not necessarily barred from being cross-examined — Court officers may be examined or cross-examined in unusual circumstances — Motion would have been better supported by affidavit, but given limited nature of relief sought, it was not fatal that only monitor's report provided — Motion granted subject to determination by board and management of whether it was in best interests of BCI Inc. to vote in favour of sale agreement.

Table of Authorities

Cases considered by *Farley J.*:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 908, 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) — considered

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Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — considered

Confederation Treasury Services Ltd., Re (1995), 37 C.B.R. (3d) 237, 1995 CarswellOnt 1169 (Ont. Bktcy.) — referred to

Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp. (1995), 30 C.B.R. (3d) 100, 3 O.T.C. 23, 1995 CarswellOnt 43 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — considered

s. 189 — referred to

s. 189(3) — referred to

s. 190 — referred to

s. 192(1) "arrangement" — referred to

s. 192(3) — referred to

MOTION by corporation for order authorizing it to enter into voting agreement with another corporation to vote its interest in common shares in third corporation in favour of sale agreement.

***Farley J.*:**

1 [1] This was a motion by Bell Canada International Inc. ("BCI") for an order:

(b) authorizing and approving the entry of BCI into a voting agreement (the "Voting Agreement") with Horizon, Cablevision do Brazil, SA ("Horizon") to vote its 75.6 percent interest in the common shares of Canbras Communications Ltd. ("Canbras") in favour of a sale agreement between Canbras and Horizon (the "Sale Agreement") pursuant to which Horizon proposes to acquire substantially all of Canbras' assets (the "Canbras Sale Transaction").

2 [2] It appears to me that all interested persons have been duly served, including Peter Legault ("L"), a minority shareholder of Canbras. L had originally been favourably disposed towards a bid by Elicio which was to acquire only BCI's shares in Canbras as this would allow him to continue as a shareholder of Canbras, a CBCA public corporation. It appears that the two bidders who were selected for further negotiations (Horizon and Hicks) were advised in early June 2003 by Canbras that the Board of Canbras would meet on June 23, 2003 to make a final decision on which of the two bids to pursue, and wanted both Horizon and Hicks to submit final bids. Horizon's final bid was for the CPAR shares (the holding company subsidiary of Canbras) while Hicks bid for all the shares of Canbras. Apparently, the two bids were compared after adjustment on an apples for apples, oranges for oranges basis, and the Horizon bid was determined to be substantially higher than the Hicks bid (which was determined to be subject to significant closing conditions that had a high risk of not being met).

3 [3] No one has submitted any further bid or proposal of any nature or sort. However, L contacted the BCI Monitor on October 14, 2003, indicating that he had a party that was interested in submitting a bid at a price higher than the proposed Horizon transaction (the salient terms of which, including price, had been publicly disclosed on October 8, 2003). L advised the interested party was a combination of Hicks and Elicio who would make a joint offer for all the shares of Canbras. (There appears to be some possible discrepancy here as a bid for all shares of Canbras would in fact negate L's desire to remain a

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shareholder of Canbras). On October 20, 2003, L contacted the Monitor and advised that the Monitor would likely receive a letter with details of the offer by October 24, 2003. No such offer has yet been received.

4 [4] According to L, Hicks advised with respect to a continuation of bidding in the spring of 2003 that Hicks would not unilaterally increase its bid, but would be prepared to top another bid (which assumes that this was part of the process - which it appears it was not - and that Hicks would be advised of the price and other terms of the other bid; this presumes that the other bidder would be similarly advised of Hick's bid, but this type of process is certainly belied by the very significant bid jump by Horizon).

5 [5] At paragraph 28 of its report, the Monitor stated:

> 28. Based on its procedures as outlined above, the Monitor is satisfied that the Canbras sale process was conducted fairly and openly, that all interested parties were given a commercially reasonable opportunity to submit offers to Canbras and that a "level playing field" was maintained at all times.

6 [6] L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown & Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of reports being received as admissible evidence, stating at p. 791:

> A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement - "inquisition" or "inquest" - suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.
>
> Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra).

7 [7] Sir Gavin Lightman and Gabriel Moss, *The Law of Receivers and Administrators of Companies* (3rd ed., 2000; Sweet & Maxwell, London) at p. 115 distinguishes between the capacity and quality of "officer-holder" and "officer of the court."

> Officers of the court [such as court appointed receivers) (Chap. 22), administrator (Chap. 23), provisional liquidators and liquidators in a compulsory liquidation (Chap. 2)] are appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex p. James [(1874) 9 Ch. App. 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably.

8 [8] L submitted that the Monitor, as an officer of the court, cannot be cross examined (citing *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (Ont. C.A.) at paras. 31-32; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) at para. 5; *Anvil Range Mining Corp., Re*, [2001] O.J. No. 1125 (Ont. S.C.J. [Commercial List]) at paras. 3-4). With respect, that is an oversimplification or an overstatement as is clearly seen by my observations at paras. 3-4 of *Anvil Range Mining Corp.* including the cite from *Innisfil*:

> (3) The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.
>
> (4) See *Mortgage Insurance Co. v. Innisfil Landfill Corp.* (1995) 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 101-2 where I stated:

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> As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs
>
> of the Commercial List - cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is truly needed.

The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.) and *Avery v. Avery*, [1954] O.J. No. 67, (H.C.J.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. QB) at p. 30. See also paper *"Canadian Airlines - The Last Tango in Calgary"*by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

9 As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

10 [9] L raised a concern about this motion by BCI not being supported by anything other than the Monitor's report. This concern has been raised as a general problem quite recently. I have indicated within the past month that, in my view, it is desirable to have an affidavit from someone in the moving party's camp if the matter is reasonably expected to be contentious. If a matter turns contentious, it may be necessary to provide such an affidavit before the hearing with sufficient time to cross examine on it if necessary or to adjourn the hearing to allow for same (the exigencies of the situation may require otherwise if there is urgency). The provision of an affidavit is not of course a mandatory invitation to cross examine in the sense of delaying what must be accomplished on a timely basis, if it is to be accomplished at all (in other words, inappropriate delay should not be allowed to kill an otherwise meritorious motion). The Commercial List is well populated by counsel who have warmly embraced the 3Cs of communication, cooperation (at least in procedural matters) and common sense; I know there will be no problem with this question of unwarranted delay if the 3Cs continue to be observed.

11 [10] Here there was only the Monitor's report; in my view it would have been preferable to have had an affidavit (possibly, for instance, from Mr. Hendricks or from a representative of Credit Swiss First Boston, advisor to Canbras). However, given the limited nature of the relief requested by this motion - and the limited nature of the order which in fact can be granted, I do not see that the failure to provide such an affidavit is fatal.

12 [11] At para. 30 of its report, the Monitor has advised the Court and the parties:

> 30. Based on the above procedures, the Monitor is satisfied that the proceeds to be realized from the Canbras Sale Transaction maximize amounts available for distribution to the BCI Stakeholders. (emphasis added)

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13 As a side note, I would observe that the Monitor here correctly proceeded by providing a "main" report which was circulated with enough time to allow reflection and a "follow up" report to advise as to any intervening matters on an up to date basis.

14 [12] There has been no prior request to this Court to deal with anything at the Canbras (or lower) level and certainly nothing with respect to the marketing process. The Canbras transaction is proceeding as an "ordinary" sale transaction as governed by s. 189(3) specifically of the CBCA and s. 189 generally. This will involve a right to dissent under s. 190. One may observe that consideration will also have to be given to s. 192(1) and (3). I also stressed that aside from the other concerns in this paragraph, nothing that this Court does in respect of this motion should be taken as authorizing, approving, sanctioning or otherwise dealing with the activities of the board and management of BCI, Canbras or any other lower tier subsidiary; in other words, any order I may grant in respect of this motion will not, nor is it intended, to create either a shield or a sword with respect to any oppression or other claim.

15 [13] I observed that the voting agreement which was handed up was ambiguous as to the quality of the court approval sought and that it needed to be revised. The Court does not have a copy of the Sale Agreement; it was withheld from the parties as being confidential and sensitive. The Court in no way is to be taken as approving the terms of the Sale Agreement. It is up to the board and the management to determine if it is in the best interests of BCI to vote in favour (I assume they have made that decision). Given the Monitor's conclusion in para. 30 of its report, I see no reason to prevent that vote from taking place.

16 [14] In conclusion, the Court orders that BCI (if authorized by its Board) may enter into a voting agreement with Horizon which obligates it to vote in favour of the Sale Agreement in respect of a vote pursuant to s. 189(3) of the CBCA (including any terms which are reasonably ancillary to that).

Order accordingly.

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2008 BCSC 356
British Columbia Supreme Court

Pine Valley Mining Corp., Re

2008 CarswellBC 579, 2008 BCSC 356, [2008] B.C.W.L.D. 2893, 165 A.C.W.S. (3d) 842, 41 C.B.R. (5th) 43

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

And In the Matter of the Business Corporations Act,—R.S.B.C. 2002, c. 57, as amended

In the Matter of Pine Valley Mining Corporation, Falls Mountain Coal Inc., Pine Valley Coal Inc., and Globaltex Gold Mining Corporation (Petitioners)

N. Garson J.

Heard: March 14, 2008
Oral reasons: March 14, 2008 *
Docket: Vancouver S066791

Proceedings: additional reasons at *Pine Valley Mining Corp., Re* (2008), 2008 BCSC 446, 2008 CarswellBC 712 (B.C. S.C.)

Counsel: J.R. Sandrelli, O. Jones for Pine Valley Mining Corporation
B.G. McLean, C. Armstrong for Tercon Mining PV Ltd.
W. Kaplan, Q.C. for Monitor
D.A. Garner for Petro-Canada
R.D. Watson for CN Rail

Subject: Insolvency

Headnote

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

F Inc. was wholly-owned subsidiary of P Corp. — P Corp. and F Inc. successfully petitioned for general stay of proceedings under Companies' Creditors Arrangement Act ("CCAA") — Petition did not disclose inter-company debt as between petitioners — Inter-company debt was revealed when Monitor appointed by Court in CCAA proceeding requested unconsolidated financial statements for each of petitioners — P Corp. filed claim with Monitor stating that F Inc. was indebted to P Corp. in amount of $41,658,441 — Fourth report issued by Monitor to Court contained detailed view of transactions underlying P Corp. claim — Monitor proposed to allow revised claim against F Inc. in amount of $27,070,166 — Some creditors objected to claim — Application was brought for directions respecting process for determination of amount of P Corp.'s claim against F Inc. within proceeding under CCAA — Function of Monitor was to determine validity and amount of claim on basis of evidence submitted — Monitor's process in doing so was in no way akin to adversarial process — Monitor was not entitled to deference in sense that would alter burden of proof ordinarily imposed on claimant — P Corp. had burden of proving its claim — Either party was at liberty to use Monitor's report or part of report at trial of matter as expert report provided necessary notice was given to other — Section 12 of CCAA requires summary trial — Section 12 of CCAA informed any decision court must make as to format of trial and that trial must be as section dictated unless to do otherwise would be unjust, or there was some other compelling reason against summary trial — Claim could be tried summarily on reserved date.

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Cases considered by *N. Garson J.*:

Air Canada, Re (2004), 2 C.B.R. (5th) 23, 2004 CarswellOnt 3320 (Ont. S.C.J. [Commercial List]) — distinguished

Algoma Steel Corp. v. Royal Bank (1992), 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 11 C.B.R. (3d) 11, 1992 CarswellOnt 163 (Ont. C.A.) — referred to

Canadian Airlines Corp., Re (2001), [2001] 7 W.W.R. 383, 14 B.L.R. (3d) 258, 92 Alta. L.R. (3d) 140, 2001 ABQB 146, 2001 CarswellAlta 240, 294 A.R. 253 (Alta. Q.B.) — distinguished

Matte v. Roux (2007), 2007 CarswellBC 1433, 2007 BCSC 902 (B.C. S.C.) — distinguished

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 231, 2006 CarswellOnt 6230 (Ont. S.C.J.) — distinguished

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — distinguished

Triton Tubular Components Corp., Re (2005), 2005 CarswellOnt 4439, 14 C.B.R. (5th) 264 (Ont. S.C.J.) — distinguished

Statutes considered:

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

Generally — referred to

s. 12 — referred to

s. 12(2)(a)(iii) — considered

APPLICATION for directions respecting process for determination of amount of P Corp.'s claim against F Inc. within proceeding under *Companies' Creditors Arrangement Act*.

***N. Garson J.*:**

1 This is an application for directions respecting the process for the determination of the amount of Pine Valley Mining Corporation's ("PVM") claim against Falls Mountain Coal Inc. ("FMC") within a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended, (the "CCAA Proceeding"), in which both PVM and FMC are related parties and petitioners.

2 FMC is a wholly-owned subsidiary of PVM. PVM claims that FMC owes PVM $37,692,218. The other major creditors of FMC dispute that amount largely on the basis that the advances made to FMC are properly characterized as capital investment in FMC, not debt, and therefore PVM should rank behind the other unsecured creditors in the distribution of FMC assets. The Monitor appointed by this Court in the CCAA Proceeding has reviewed the accounts of PVM and FMC and determined that $27,070,166 is properly owed to PVM by FMC as debt.

3 On this application the Court is asked to determine two issues:

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1. Who bears the onus of proof of the amount and character of PVM's claim?

2. Should the trial be a summary trial or a conventional trial with *viva voce* witnesses, or some combination of those two procedures?

4 The relevant factual background to the matter may be stated as follows:

• FMC is the wholly-owned subsidiary of PVM.

• FMC operated the Willow Creek Coal Mine.

• On October 20, 2006, PVM and FMC petitioned this Court for a general stay of proceedings under the *CCAA*. The order they sought was granted, and extended from time to time since the initial order.

• The Petition did not disclose an inter-company debt as between the two petitioners. All financial reporting was done on a consolidated basis. When the Monitor requested unconsolidated financial statements for each of the petitioners the inter-company debt was revealed. In recounting this history I make no adverse finding of fact on this point. That is a matter for the trial judge.

• On January 19, 2007, PVM filed a claim with the Monitor stating that FMC was indebted to PVM in the amount of $41,658,441.

• On March 16, 2007, the Monitor issued its Fourth Report to the Court. That report contained a detailed review of the transactions underlying the PVM claim. As already noted, as a result of his investigations the Monitor "[proposed] to allow a revised PVM Claim against FMC in the amount of $27,070,166".

• Some of the creditors objected to the claim, including the revised claim, and agreed that the counsel for the largest creditor, Tercon, would have standing to defend the PVM claim and to raise all defences available to FMC and to creditors of FMC. The other main creditors have maintained — if I may describe it thus — an active watching brief.

5 A ten-day trial has been reserved for May of this year. The parties have reached an impasse on the two issues mentioned above. Mr. Sandrelli, counsel for PVM, says that "deference is owed to the Monitor's ... conclusions ... in [his] Fourth Report, such that the onus to challenge the Monitor's findings lies on the party appealing the Monitor's findings; and if deference is owed to the Monitor's findings, what standard of review applies to those findings".

6 I understood Mr. Sandrelli to use the term "appeal" in a loose sense. He acknowledged that this is not an appeal because Tercon did not participate in the original decision making process of the Monitor. He said in submissions that the process is more akin to a review on a correctness standard of review. He concluded his submissions by contending that Tercon should bear the onus of displacing the finding of the Monitor that PVM is owed $27 Million by FMC, and that PVM bears the onus of displacing the Monitor's finding that PVM is not entitled to the additional approximate $11 million it claims.

7 Mr. McLean, counsel for Tercon, contends that "the burden of proof lies upon the party who substantially asserts the affirmative of the issue": *Phipson on Evidence*,14th ed. He says that PVM seeks to prove that it is a creditor of FMC and it must carry the burden of proof of that whole claim.

8 Mr. Sandrelli argues that in the special context of a *CCAA* proceeding the Monitor, who is appointed by the court, should be accorded deference and that the review of his decision is akin to a review of a *CCAA* claims officer's decision in a *CCAA* proceeding. He relies for this proposition on dicta in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Air Canada, Re* (2004), 2 C.B.R. (5th) 23 (Ont. S.C.J. [Commercial List]); *Canadian Airlines Corp., Re*, 2001 ABQB 146 (Alta. Q.B.); *Matte v. Roux*, 2007 BCSC 902 (B.C. S.C.) ; *Triton Tubular Components Corp., Re*, [2005] O.J. No. 3926 (Ont. S.C.J.); and *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.).

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9 In *Olympia & York*, the decision under review was that made by a claims officer. The claims officer is akin to a judicial officer. The proceeding before him is an adversarial one and naturally he should be granted some deference. That decision is distinguishable on the grounds that the court appointed Monitor in this proceeding, while undoubtedly an impartial agent of the court, reviews the claim but is in no way engaged to conduct a hearing or any type of adversarial or quasi-judicial type proceeding. Similarly, *Air Canada* involved an appeal from a decision of a claims officer appointed in the *CCAA* proceeding in which the claims officer had dismissed a contingent claim. The appeal was dismissed. The *Air Canada* case is distinguishable for the same reasons as the *Olympia & York* case. In *Canadian Airlines*, the decision under review was also that of a claims officer appointed to determine disputed claims within a *CCAA* proceeding. Paperny J., as she then was, held that the review was a trial *de novo*, but that was because the law in Alberta differed from Ontario. The *Matte* case involved the standard of review of a master's decision and for the same reasons, I find it unhelpful and distinguishable. *Triton* also involved the review of a claims officer's decision. The court determined that the standard of review was correctness but, for the same reasons as above, the case is distinguishable. The *Muscletech* case is similarly distinguishable.

10 In none of the cases cited above was the decision under review one of a monitor, not engaged in an adversarial process.

11 Paragraph 17 of the Claims Procedure Order pronounced December 8, 2006, provides:

> Where a Creditor delivers a Dispute Notice in accordance with the terms of this Order, such dispute shall be resolved as directed by this Court or as the Creditor in question, the Petitioners and Monitor may agree.

12 Section 12(2) of the *CCAA* provides in part as follows:

> For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of the unsecured claim shall be the amount
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor;

13 I conclude from the *CCAA* and the Claims Procedure Order that the function of the Monitor, that is relevant to this application, is to determine the validity and amount of a claim on the basis of the evidence submitted. The Monitor's process in doing so is in no way akin to an adversarial process. Although his findings and opinion should be respectfully considered, he is not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant. Counsel have not called my attention to any authority for either of the following propositions, either that the CCAA claim process alters substantive law that would otherwise apply to the determination of such a claim, or that a monitor appointed on the terms here is entitled to the deference accorded a quasi-judicial officer like a court appointed claims officer. It follows that PVM has the burden of proving its claim. PVM shall file a statement of claim. Tercon, with standing to defend on behalf of FMC, shall file a statement of defence.

14 I turn next to the procedural questions.

15 The Monitor has spent a good deal of time investigating the PVM claim. His report documents the numerous transactions that are at issue, and provides a very useful framework for the court. There is much in the report that may be of use to the parties at the hearing of this matter. In exercising my jurisdiction to give directions for a summary determination of this matter I order that either party is at liberty to use the Monitor's report or part of the report at the trial of this matter, as an expert report, provided the necessary notice is given to the other. The Monitor may be required to be cross-examined on the report.

16 The second issue I have been asked to determine is the question of the format of this trial. Section 12 of the *CCAA* requires a summary trial. I recognize that in some cases, courts have held that that does not preclude a conventional trial. (See *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449 (Ont. C.A.). I do not understand Mr. McLean to object in principle to an

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order that this matter be determined in a summary way but, rather, I think he reserves his right to object to the suitability of such a procedure depending on how the evidence unfolds. It is my view that s.12 of the *CCAA* informs any decision the court must make as to the format of a trial and that trial must surely be as the section dictates, a summary trial, unless to do otherwise would be unjust, or there is some other compelling reason against a summary trial. I am not persuaded that this claim cannot be tried summarily on the date reserved in May of this year. The parties have one week to work out an agreement as to a time line for the necessary steps to prepare for that trial, including the exchange of pleadings, disclosure of documents as requested by Tercon, agreed facts, delivery of affidavits, expert reports (including notice of reliance on all or part of the Monitor's reports), delivery and responses to notices to admit, examination for discovery if consented to, and delivery of written arguments. I acknowledge that many of these steps are underway.

17 Mr. Sandrelli says he will now have to marshall all the evidence to prove his claim from ground zero as opposed to simply relying in the first instance on the Monitor's report. As I have said, he may rely on all or part of the Monitor's report. I am not persuaded yet that he cannot marshall his evidence in the time remaining before the May trial date. I will hear submissions on the trial schedule if, by March 21, 2008, the parties have been unable to reach agreement on it. The parties may contact the registry to arrange such a hearing prior to ordinary court hours. Either party has leave to apply to cross-examine the deponent of an affidavit out of court or in court. Either party has leave to apply to convert this summary trial to a conventional trial but I expect the parties to make their best efforts to manage this generally as a summary trial.

18 The parties have each proposed somewhat differing forms of order, concerning various procedural matters relevant to the conduct and hearing of the inter-company claim. Also Mr. Watson, for CN, objects to the following clause proposed by PVC:

> No other creditor, claimant or counsel therefore shall be entitled to participate by having representation in the proceedings concerning the determination of the Issues and in relation to the claim of PVM against FMC without leave of the Court, which application for leave,if any, shall be made on 4 days' notice to PVM and Tercon by no later than March 31, 2008.

19 Mr. Watson, counsel for CN, one of the creditors, contends that his client should be exempted from the limitation imposed on all other creditors contemplated by this last mentioned clause in the draft order. I agree with Mr. Sandrelli that it is necessary for the orderly conduct of the resolution of the claim that PVM and Tercon have some certainty as to what counsel are involved. On the other hand, CN and Petro-Canada have maintained what I earlier described as an active watching brief on the progress of the inter-company claim resolution. They should have the ability to continue to do so. Their submissions have generally been helpful and consequently I see no prejudice in permitting them to continue in that role, at least until shortly before the hearing. I will leave it to counsel to work out a date by which those two creditors will be barred from seeking leave to participate. I have in mind something like two weeks before the hearing but if counsel cannot agree they may make further submissions on this point.

20 I will leave it to the parties to work out the balance of the terms of the order. They have leave to speak to the matter if those terms cannot be agreed upon.

Order accordingly.

Footnotes

* Additional reasons reported at *Pine Valley Mining Corp., Re* (2008), 2008 BCSC 446, 2008 CarswellBC 712, 41 C.B.R. (5th) 49 (B.C. S.C.)

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2002 CarswellOnt 3002
Ontario Court of Appeal

Confectionately Yours Inc., Re

2002 CarswellOnt 3002, [2002] O.J. No. 3569, 116 A.C.W.S. (3d) 871, 164 O.A.C. 84, 219 D.L.R. (4th) 72, 25 C.P.C. (5th) 207, 36 C.B.R. (4th) 200

IN THE MATTER OF THE PROPOSALS OFCONFECTIONATELY YOURS, INC., BAKEMATES INTERNATIONAL INC., MARMAC HOLDINGS INC., CONFECTIONATELY YOURS BAKERIES INC., and SWEET-EASE INC.

Catzman, Doherty, Borins JJ.A.

Heard: April 8, 2002
Judgment: September 19, 2002
Docket: CA C36486

Proceedings: reversing in part (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List])

Counsel: *Martin Teplitsky*, for Appellants, Barbara Parravano, Mario Parravano
Benjamin Zarnett, *David Lederman*, for Respondent, KPMG Inc.
Katherine McEachern, for Respondent, Laurentian Bank of Canada

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Remuneration of receiver — Accounts

Court-appointed receiver operated business of debtor companies pending going concern asset sale — Receiver presented report to court for approval — Report recommended that court approve receiver's fees and disbursements as well as fees and disbursements of receiver's solicitors — Shareholders of debtor companies objected to amount of fees and disbursements of receiver and solicitors — Motion judge refused to permit counsel for shareholders to cross-examine representative of receiver on report — Motion judge permitted counsel for shareholders as judge's "proxy" to ask questions of receiver's representative who was not sworn — Motion judge approved fees and disbursements of receiver and solicitors in amount submitted in report without any reduction — Shareholders appealed — Appeal allowed in part — Portion of order of motion judge approving accounts of receiver's solicitors set aside — Motion judge erred in failing to give accounts of receiver's solicitors separate consideration — Accounts of receiver's solicitors were ordered to be resubmitted, verified by affidavit and assessed by different judge — Shareholders had fair opportunity to challenge remuneration of receiver and questioning of receiver's representative was adequate substitute for cross-examining him, however receiver's representative could not speak to accuracy or reasonableness of solicitors' accounts — No representative of receiver's solicitors was available to question or cross-examine — Motion judge erred in equating procedure to be followed for approving receiver's conduct of receivership with procedure to be followed in assessing receiver's remuneration — Better practice is for receiver and its solicitors to each support claim for remuneration by way of affidavit.

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Avery v. Avery, [1954] O.W.N. 364, 1954 CarswellOnt 200 (Ont. H.C.) — referred to

Bank of Montreal v. Nican Trading Co., 43 B.C.L.R. (2d) 315, 78 C.B.R. (N.S.) 85, 1990 CarswellBC 397 (B.C. C.A.) — referred to

Belyea v. Federal Business Development Bank, 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed

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Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc., 20 B.C.L.R. (3d) 70, [1996] 7 W.W.R. 296, 50 C.P.C. (3d) 29, 41 C.B.R. (3d) 251, 76 B.C.A.C. 190, 125 W.A.C. 190, 1996 CarswellBC 1083 (B.C. C.A.) — referred to

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Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc., 40 C.P.C. (2d) 280, 1989 CarswellOnt 464 (Ont. H.C.) — referred to

Prairie Palace Motel Ltd. v. Carlson, 35 C.B.R. (N.S.) 312, 1980 CarswellSask 25 (Sask. Q.B.) — considered

R. v. S. (R.D.), 1997 CarswellNS 301, 1997 CarswellNS 302, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.) — followed

Silver v. Kalen, 52 C.B.R. (N.S.) 320, 1984 CarswellOnt 165 (Ont. H.C.) — referred to

Toronto Dominion Bank v. Park Foods Ltd., 13 C.P.C. (2d) 302, 62 C.B.R. (N.S.) 68, 77 N.S.R. (2d) 202, 191 A.P.R. 202, 1986 CarswellNS 49 (N.S. T.D.) — referred to

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s. 61(3) — referred to

Rules considered:

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R. 57.01(3) — referred to

R. 74.17(1)(i) [en. O. Reg. 484/94] — considered

R. 74.18(1)(a) [en. O. Reg. 484/94] — considered

R. 74.18(9) [en. O. Reg. 484/94] — considered

APPEAL by shareholders of debtor companies from judgment reported at 2001 CarswellOnt 1784, 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]), assessing fees and disbursements of court-appointed receiver and its solicitors.

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***Borins J.A.*:**

1 This is an appeal by Mario Parravano and Barbara Parravano from the assessment of a court-appointed receiver's fees and disbursements, including the fees of its solicitors, Goodmans, Goodman and Carr and Kavinoky and Cook, consequent to the receiver's motion to pass its accounts. The motion judge assessed the fees and disbursements in the amounts presented by the receiver. The appellants ask that the order of the motion judge be set aside and that the receiver's motion to pass its accounts be heard by a different judge of the Commercial List, or that the accounts be referred for assessment, with the direction that the appellants be permitted to cross-examine both a representative of the receiver and of the solicitors in respect to their fees and disbursements.

Introduction

2 On October 3, 2000, on the application of the Laurentian Bank of Canada (the "bank"), Spence J. appointed KPMG Inc. ("KPMG") as the receiver and manager of all present and future assets of five companies ("the companies"). Collectively, the companies carried on a large bakery, cereal bar and muffin business that employed 158 people and generated annual sales of approximately $24 million. The companies were owned by Mario and Barbara Parravano (the "Parravanos") who had guaranteed part of the companies' debts to the bank. Upon its appointment, KPMG continued to operate the business of the companies pending analysis as to the best course of action. As a result of its analysis, KPMG decided to continue the companies' operations and pursue "a going concern" asset sale.

3 Paragraph 22 of the order of Spence J. reads as follows:

> **THIS COURT ORDERS** that, prior to the passing of accounts, the Receiver shall be at liberty from time to time to apply a reasonable amount of the monies in its hands against its fees and disbursements, including reasonable legal fees and disbursements, incurred at the standard rates and charges for such services rendered either monthly or at such longer or shorter intervals as the Receiver deems appropriate, and such amounts shall constitute advances against its remuneration when fixed from time to time.

4 The receiver was successful in attracting a purchaser and received the approval of Farley J. on December 21, 2000, to complete the sale of substantially all of the assets of the companies for approximately $6,500,000. The transaction closed on December 28, 2000.

5 The receiver presented two reports to the court for its approval. In the first report, presented on December 15, 2000, KPMG outlined its activities from the date of its appointment and requested approval of the sale of the companies' assets. The second report, which is the subject of this appeal, was presented on February 2, 2001. The second report contained the following information:

- an outline of KPMG's activities subsequent to the sale of the companies' assets;
- a statement of KPMG's receipts and disbursements on behalf of the companies;
- KPMG's proposed distribution of the net receipts;
- a summary of KPMG's fees and disbursements supported by detailed descriptions of the activities of its personnel by person and by day;
- a list of legal fees and disbursements of its solicitors supported by detailed billings.

In its second report, KPMG recommended that the court, *inter alia*, approve its fees and disbursements, as well as the fees and disbursements of Goodmans, calculated on the basis of hours multiplied the hourly rates of the personnel. The total time billed by KPMG was 3,215 hours from October 3, 2000 to December 31, 2000 at hourly rates that ranged from $175 to $550. Its

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disbursements included the fees and disbursements of its solicitors. Each report was signed on behalf of KPMG by its Senior Vice-President, Richard A. Morawetz.

6 In summary, KPMG sought approval of the following:

• receiver's fees and disbursements of $1,080,874.93, inclusive of GST.

• legal fees of Goodmans of $209,803.46, inclusive of GST.

• legal fees of Goodman and Carr of $92,292.32, inclusive of GST.

• legal fees of Kavinoky & Cook of $2,583.23.

7 The Parravanos objected to the amount of the fees and disbursements of KPMG and Goodmans. Their grounds of objection were that the time spent and the hourly rates charged by the receiver and Goodmans were excessive. They submitted that the fees of KPMG and Goodmans were not fair and reasonable. They also sought to cross-examine Mr. Morawetz with respect to their grounds of objection. The motion judge refused to permit Mr. Pape, counsel for the Parravanos, to cross-examine Mr. Morawetz on the ground that a receiver, being an officer of the court, is not subject to cross-examination on its report. However, the motion judge permitted Mr. Pape as the judge's "proxy" to ask questions of Mr. Morawetz, who was not sworn. The motion judge then approved the fees and disbursements of the receiver and Goodmans in the amounts as submitted in the receiver's report without any reduction.

8 The appellants appeal on the following grounds:

(1) The motion judge exhibited a demonstrable bias against the appellants and their counsel as a result of which the appellants were denied a fair hearing;

(2) The motion judge erred in holding that on the passing of its accounts a court-appointed receiver cannot be cross-examined on the amount of the fees and disbursements in respect to which it seeks the approval of the court; and

(3) The motion judge erred in finding that the receiver's fees and disbursements, and those of its solicitors, Goodmans, were fair and reasonable.

9 For the reasons that follow, the appellants have failed to establish that they were denied a fair hearing on the grounds that the motion judge was biased against them and their counsel and that they were not permitted to cross-examine the receiver's representative, Mr. Morawetz, on the receiver's accounts. As I will explain, the examination of Mr. Morawetz that was permitted by the motion judge afforded the appellants' counsel a fair opportunity to challenge the remuneration claimed. As well, the appellants have provided no grounds on which the court can interfere with the motion judge's finding that the receiver's accounts were fair and reasonable. However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. The motion judge failed to give these accounts separate consideration. I would, therefore, allow the appeal to that extent and order that there be a new assessment of Goodmans' accounts.

Reasons of the motion judge

10 The reasons of the motion judge are reported as *Bakemates International Inc. Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]).

11 In the first part of his reasons, the motion judge provided his decision on the request of the appellants' counsel to cross-examine Mr. Morawetz with respect to the receiver's accounts. He began his consideration of this issue at p. 25:

> Perhaps it is the height — or depth — of audacity for counsel for the Parravanos to come into court expecting that he will be permitted (in fact using the word "entitled") to cross-examine the Receiver's representative (Mr. Richard Morawetz) in this court appointed receivership concerning the Receiver's fees and disbursements (including legal fees).

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After reviewing two of his own decisions — *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) and *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) — the motion judge concluded that because a receiver is an officer of the court who is required to report to the court in respect to the conduct of the receivership, a receiver cannot be cross-examined on its report.

12 In support of this conclusion, the motion judge relied on the following passage from his reasons for judgment in *Mortgage Insurance* at pp. 101-102:

> As to the question of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is *truly* needed [emphasis added].

13 As authority for the proposition that a receiver, as an officer of the court, is not subject to cross-examination on his or its report, the motion judge relied on *Avery v. Avery*, [1954] O.W.N. 364 (Ont. H.C.) and *Silver v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.). He went on to say at p. 26 that when there are questions about a receiver's compensation, "[t]he more appropriate course of action" is for the disputing party "to interview the court officer [the receiver] . . . so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions".

14 The motion judge noted on p. 26 that the appellants' counsel had "not provided any factual evidence/background to substantiate that there were unusual circumstances" in respect to the rates charged and the time spent by the receiver. Consequently, he concluded that it was not an appropriate case to exercise what he perceived to be his discretion to allow the Parravanos' counsel to cross-examine Mr. Morawetz on the passing of the receiver's accounts. At p. 27, he stated: "Mr. Pape has not established any grounds for doing that."

15 Nevertheless, the motion judge did permit Mr. Pape to question Mr. Morawetz. His explanation for why he did so, the conditions that he imposed on Mr. Pape's examination, and his comments on Mr. Pape's "interview" of Mr. Morawetz, are found at p. 27:

> Mr. Pape has observed that Mr. Morawetz is here to answer any questions that I may have as to the fees and disbursements. While Mr. Pape has no right or entitlement to cross-examine Mr. Morawetz with respect to the fees and disbursements — and he ought to have availed himself of any last minute follow-up interview/questions last week if he thought that necessary, I see no reason why Mr. Pape may not be permitted to ask appropriate questions to Mr. Morawetz covering these matters — in essence as my proxy. However, Mr. Pape will have to conduct himself appropriately (as I am certain that he will — and I trust that I will not be disappointed), otherwise the questioning will be stopped as I would stop myself if I questioned inappropriately. Mr. Morawetz is under an obligation already as a court appointed officer to tell the truth; it will not be necessary for him to swear another/affirm [sic] — he may merely acknowledge his obligation to tell the truth. It is redundant but I think necessary to point out that this is not the preferred route nor should it be regarded as a precedent.
>
> [There then followed the interview of Mr. Morawetz by Mr. Pape and submissions. I cautioned Mr. Pape a number of times during the interview that he was going beyond what was reasonable in the circumstances and that Mr. Morawetz was entitled to give a full elaboration and explanation.]

16 In the second part of his reasons, the motion judge considered the amount of the compensation claimed by the receiver and its solicitors, Goodmans. He began at p. 27 by criticizing Mr. Pape "for attempting to show that Mr. Morawetz was not

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truthful or was misleading" in the absence of any expert evidence from the appellants in respect to the time spent and the hourly rates charged by the receiver in the course of carrying out its duties.

17 In assessing the receiver's accounts, the motion judge made the following findings:

(1) This was an operating receivership in which the receiver operated the companies for three months so that the companies' assets could be sold as a going concern.

(2) Usually, an operating receivership will require a more intensive and extensive use of a receiver's personnel than a liquidation receivership.

(3) The receivership was difficult and "rather unique".

(4) Mr. Morawetz scrutinized the bills before they were finalized "so that inappropriate charges were not included".

(5) It was not "surprising" that the receiver was required to use many members of its staff to operate the companies' businesses given what he perceived to be problems created by the Parravanos.

(6) It was necessary to use the receiver's personnel to conduct an inventory count in a timely and accurate way for the closing of the sale of the companies' assets.

(7) Mr. Morawetz "had a very good handle on the work and the worth of the legal work".

18 The motion judge assessed, or passed, the receiver's accounts, including those of its solicitors, Goodmans, in the amounts requested by the receiver in its report. He gave no effect to the objections raised by the appellants. On a number of occasions, he empahsized that there was no contrary evidence from the appellants that, presumably, might have caused him to reduce the fees claimed by the receiver or its solicitors.

19 He referred to Spence J.'s order appointing KPMG as the receiver, in particular para. 22 of the order as quoted above, and observed at p. 30:

> While certainly not determinative of the issue, that order does contemplate in paragraph 22 a charging system based on standard rates (i.e. docketed hours × hourly rate multiplicand). That would of course be subject to scrutiny — and adjustment as necessary.

20 He also noted that the appellants had relied on his own decision in *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]) in which he had said:

> [An indemnity agreement] is not a licence to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the court house to the Royal York Hotel via Oakville.

As to the application of this observation to the circumstances of this case, the motion judge said at pp. 31-32:

> I am of the view that subject to the checks and balances of *Chartrand v. De la Ronde* (1999), 9 C.B.R. (4th) 20 (Man. Q.B.) a fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent. Further I am of the view that the market is the best test of the reasonableness of the hourly rates for both receivers and their counsel. There is no reason for a firm to be compensated at less than their normal rates (provided that there is a fair and adequate competition in the marketplace). See *Chartrand*; also *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.). No evidence was led of lack of competition (although I note that Mr. Pape asserts that legal firms and accounting firms had a symbiotic relationship in which neither would complain of the bill of the other). What would be of interest here is whether the rates presented are in fact sustainable. In other words are these firms able to collect 100 cents on the dollar of their "rack rate" or are there write-offs incurred related to the collection process?

Issues and Analysis

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21 In my view, there are three issues to be considered. The first issue is the alleged bias of the motion judge against the appellants and their counsel. The second issue is the proper procedure to be followed by a court-appointed receiver on seeking court approval of its remuneration and that of its solicitor. This procedural issue arises from the second ground of appeal in which the appellants assert that the motion judge erred in precluding their lawyer from cross-examining the receiver in respect to the remuneration that it requested. The third issue is whether the motion judge erred in finding that the remuneration requested by the receiver for itself and its solicitor was fair and reasonable.

(1) Bias

22 I turn now to the first issue. If I am satisfied that the appellants were denied a fair hearing because the motion judge exhibited a demonstrable bias against the appellants and their counsel, it will be unnecessary to consider the other grounds of appeal since the appellants would be entitled to a new hearing before a different judge. As I will explain, I see no merit in this ground of appeal.

23 The appellants submit that the motion judge acted with bias against their counsel, Mr. Pape. They rely on the following circumstances as demonstrating the motion judge's bias:

• the motion judge took offence to Mr. Pape having arranged for a court reporter to be present at the hearing.

• the motion judge was affronted by Mr. Pape's request to cross-examine Mr. Morawetz on the receiver's accounts.

• the first paragraph of the motion judge's ruling with respect to Mr. Pape's request to cross-examine Mr. Morawetz (which is quoted in para. 11) demonstrates that the motion judge was not maintaining his impartiality.

• in his ruling the motion judge curtailed the scope of the questions Mr. Pape was permitted to ask Mr. Morawetz and admonished Mr. Pape that he would "have to conduct himself properly".

• Mr. Pape's examination of Mr. Morawetz was curtailed by multiple interjections by the motion judge favouring the receiver.

• the motion judge's ruling on the passing of the receiver's accounts disparaged the appellants and Mr. Pape, in particular, by commenting with sarcasm and derision on Mr. Pape's lawyering.

24 Public confidence in the administration of justice requires the court to intervene where necessary to protect a litigant's right to a fair hearing. Any allegation that a fair hearing was denied as a result of the bias of the presiding judge is a serious matter. It is particularly serious when made against a sitting judge by a senior and respected member of the bar.

25 The test for reasonable apprehension of bias on the part of a presiding judge has been stated by the Supreme Court of Canada in a number of cases. In dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 (S.C.C.), at 735, which concerned the alleged bias of the chairman of the National Energy Board, Mr. Crowe, de Grandpré J. stated:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal [at p. 667], that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?"

26 This test was adopted by a majority of the Supreme Court of Canada in *R. v. S. (R.D.)* (1997), 151 D.L.R. (4th) 193 (S.C.C.). Speaking for the majority, Cory J. expanded upon the test at pp. 229-230:

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> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . . . Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"[emphasis in original].

27 Cory J. concluded at pp. 230-31:

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. . . . Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

28 My review of the transcript of the proceedings and the reasons of the motion judge leads me to conclude that the appellants have failed to satisfy the test. The most that can be said about the motion judge's reaction to the presence of a court reporter, his interjections during the cross-examination of Mr. Morawetz and his reference to Mr. Pape's lawyering in his reasons for judgment, is that he evinced an impatience or annoyance with Mr. Pape. In the circumstances of this case, the motion judge's impatience or annoyance with Mr. Pape does not equate with judicial support for either Mr. Morawetz or the receiver. To the extent that the motion judge's interjections during the examination of Mr. Morawetz reveal his state of mind, they suggest only some impatience with Mr. Pape and a desire to keep the examination moving forward. They did not prevent counsel from conducting a full examination of Mr. Morawetz.

29 Considered in the context of the entire hearing, the circumstances relied on by the appellants do not come close to the type of judicial conduct that would result in an unfair hearing. I would not, therefore, give effect to this ground of appeal.

(2) The procedure to be followed on the passing of the accounts of a court-appointed receiver

30 In my view, the motion judge erred in equating the procedure to be followed for approving the receiver's conduct of the receivership with the procedure to be followed in assessing the receiver's remuneration. The receiver's report to the court contained information on its conduct of the receivership as well as details of items such as the fees the receiver paid to its solicitors during the receivership. Such details also relate to or support the receiver's passing of its accounts. However, it is one thing for the court to approve the manner in which a receiver administered the assets it was appointed by the court to manage, but it is a different exercise for the court to assess whether the remuneration the receiver seeks is fair and reasonable (applying the generally accepted standard of review).

31 Moreover, the rule that precludes cross-examination of a receiver was made in the context of a receiver seeking approval of its report, not in the context of the passing of its accounts. When a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.

32 As I will explain, the problem in this case was that the receiver's accounts were not verified by an affidavit. They were contained in the receiver's report. As a matter of form, I see nothing wrong with a receiver including its claim for compensation in its final report, as the receiver has done in this case. However, as I will discuss, the receiver's accounts and those of its solicitors should be verified by affidavit. Had KPMG verified its claim for compensation by affidavit, and had its solicitors done so, the issue that arose in this case would have been avoided.

33 The inclusion of the receiver's accounts, including those of its solicitors, in the report had the effect of insulating them from the far-ranging scrutiny of a properly conducted cross-examination when the motion judge ruled that the receiver, as an officer of the court, was not subject to cross-examination on the contents of its report. Assuming, without deciding, that the ruling was correct, its result was to preclude the appellants, and any other interested person or entity, that had a concern about

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the amount of the remuneration requested by the receiver, from putting the receiver to the proof that the remuneration, in the context of the duties it carried out, was fair and reasonable. When I discuss the third issue, I will indicate how the court is to determine whether a receiver's account is fair and reasonable.

34 A thorough discussion of the duty of a court-appointed receiver to report to the court and to pass its accounts is contained in F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 443 *et seq.* As Bennett points out at pp. 445-446:

> . . . the court-appointed receiver is neither an agent of the security holder nor of the debtor; the receiver acts on its own behalf and reports to the court. The receiver is an officer of the court whose duties are set out by the appointing order. . . . Essentially, the receiver's duty is to report to the court as to what the receiver has done with the assets from the time of the appointment to the time of discharge.

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

35 The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

36 I accept as correct Bennett's discussion of the purpose of the passing of a receiver's accounts at pp. 459-60:

> One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties, and to satisfy the court that the fees and disbursements were fair and reasonable. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities. However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the calculations in the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may, in addition, consider complaints concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. *The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions* [footnotes omitted] [emphasis added].

37 As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, *e.g.*, *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Assess. O.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (N.S. T.D.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

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38 Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63).[1] I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd.* (1983), 46 C.B.R. (N.S.) 117 (N.S. T.D.), adopted the following statement from *Kerr on Receivers*, 15th ed. (London: Sweet & Maxwell, 1978) at 246: "It is the receiver's duty to make out his account and to verify it by affidavit."[2] In *Holmested and Gale on the Judicature Act of Ontario and rules of practice*, vol. 3, looseleaf ed. (Toronto: Carswell 1983) at 2093, the authors state: "[t]he accounts of a receiver and of a liquidator are to be verified by affidavit." In *In-Med Laboratories Ltd. v. Ontario (Director, Laboratory Services Branch)*, [1991] O.J. No. 210 (Ont. Div. Ct.). Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit . . . substantiating the hours spent and the disbursements". This court approved that practice in *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (Ont. C.A.), at 52-53, in discussing the fixing of costs by a trial judge under rule 57.01(3) of the *Rules of Civil Procedure* (as it read at that time). In addition, I note that on the passing of an estate trustee's accounts, rule 74.18(1)(a) requires the estate trustee to verify by affidavit the estate accounts which, by rule 74.17(1)(i), must include a statement of the compensation claimed by the estate trustee. However, if there are no objections to the accounts, under rule 74.18(9) the court may grant a judgment passing the accounts without a hearing. Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

39 The requirement that a receiver verify by affidavit the remuneration which it claims fulfils two purposes. First, it ensures the veracity of the time spent by the receiver in carrying out its duties, as provided by the receivership order, as well as the disbursements incurred by the receiver. Second, it provides an opportunity to cross-examine the affiant if the debtor or any other interested party objects to the amount claimed by the receiver for fees and disbursements, as provided by rule 39.02(1). In the appropriate case, an objecting party may wish to provide affidavit evidence contesting the remuneration claimed by the receiver, in which case, as rule 39.02(1) provides, the affidavit evidence must be served before the party may cross-examine the receiver.

40 Where the receiver's disbursements include the fees that it paid its solicitors, similar considerations apply. The solicitors must verify their fees and disbursements by affidavit.

41 In many cases, no objections will be raised to the amount of the remuneration claimed by a receiver. In some cases, however, there will be objections. Objecting parties may choose to support their position by tendering affidavit evidence. In some instances, it may be necessary for the court before whom the receiver's accounts are to be passed to conduct an evidentiary hearing, or direct the hearing of an issue before another judge, the master or another judicial officer. This situation would usually arise where there is a conflict in the affidavit evidence in respect to a material issue. The case law on the passing of accounts referred to by the parties indicates that evidentiary hearings are quite common. See, *e.g.*, *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251 (B.C. C.A.); *Hermanns v. Ingle*, *supra*; *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.); *Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C.); *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 (Ont. H.C.); *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.) These and other cases also illustrate that courts employ careful scrutiny in determining whether the remuneration requested by a receiver is fair and reasonable in the context of the duties which the court has ordered the receiver to perform. I will now turn to a discussion of what is "fair and reasonable".

(3) Fair and reasonable remuneration

42 As I stated earlier, the general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable. This standard of review had its origin in the judgment of this court in *Atkinson Estate, Re* (1951), [1952] O.R. 685 (Ont. C.A.); aff'd [1953] 2 S.C.R. 41 (S.C.C.), in which it was held that the executor of an estate is entitled to a fair fee on the basis of *quantum meruit* according to the time, trouble and degree of responsibility involved. The court, however, did not rule out compensation on a percentage basis as a fair method of estimating compensation in appropriate cases. The standard of review approved in *Atkinson, Re* is now contained in s. 61(1) and (3) of the *Trustee Act*, R.S.O. 1990, c. T.23. Although *Atkinson Estate, Re* was concerned

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with an executor's compensation, its principles are regularly applied in assessing a receiver's compensation. See, *e.g.*, *Ibar Developments Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. H.C.). I would note that there is no guideline controlling the quantum of fees as there is in respect to a trustee's fees as provided by s. 39(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

43 Bennett notes at p. 471 that in assessing the reasonableness of a receiver's compensation the two techniques discussed in *Atkinson Estate, Re* are used. The first technique is that the quantum of remuneration is fixed as a percentage of the proceeds of the realization, while the second is the assessment of the remuneration claimed on a *quantum meruit* basis according to the time, trouble and degree of responsibility involved in the receivership. He suggests that often both techniques are employed to arrive at a fair compensation.

44 The leading case in the area of receiver's compensation is *Belyea*. At p. 246 Stratton J.A. stated:

> There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

45 In considering the factors to be applied when the court uses a *quantum meruit* basis, Stratton J.A. stated at p. 247:

> The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

46 In an earlier case, similar factors were employed by Houlden J. in *West Toronto Stereo Center Limited, Re* (1975), 19 C.B.R. (N.S.) 306 (Ont. Bktcy.) in fixing the remuneration of a trustee in bankruptcy under s. 21(2) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. At p. 308 he stated:

> In fixing the trustee's remuneration, the Court should have regard to such matters as the work done by the trustee; the responsibility imposed on the trustee; the time spent in doing the work; the reasonableness of the time expended; the necessity of doing the work, and the results obtained. I do not intend that the list which I have given should be exhaustive of the matters to be considered, but in my judgment they are the more important items to be taken into account.

These factors were applied by Henry J. in *Hoskinson, Re* (1976), 22 C.B.R. (N.S.) 127 (Ont. S.C.).

47 The factors to be considered in assessing a receiver's remuneration on a *quantum meruit* basis stated in *Belyea* were approved and applied by the British Columbia Court of Appeal in *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.). They have also been applied at the trial level in this province. See, *e.g.*, *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. Gen. Div.)

48 The *Belyea* factors were also applied by Farley J. (the motion judge in this case) in *BT-PR Realty Holdings, supra*, which was an application for the reduction of the fees and charges of a receiver. In that case the debtor had entered into the following indemnity agreement with the receiver:

> Guarantee payment of Coopers & Lybrand Limited's professional fees and disbursements for services provided by Coopers & Lybrand Limited with respect to the appointment as Receiver of each of the Companies. It is understood that Coopers & Lybrand Limited's professional fees will be determined on the basis of hours worked multiplied by normal hourly rates for engagements of this type.

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In reference to the indemnity agreement, Farley J. made the comment referred to above that "[t]his is not a license to let the taxi meter run without check."

49 He went on to add at paras. 23 and 24:

> While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible: see *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B.C.A.). Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

50 Farley J. applied the list of factors set out in *Belyea* and *Nican Trading* and added "other material considerations" pertinent to assessing the accounts before him. He concluded at para. 24:

> In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

51 I am satisfied that in assessing the compensation of a receiver on a *quantum meruit* basis the factors suggested by Stratton J.A. in *Belyea* are a useful guideline. However, they should not be considered as exhaustive of the factors to be taken into account as other factors may be material depending on the circumstances of the receivership.

52 An issue that has arisen in this appeal has been the subject of consideration by the courts. It is whether a receiver may charge remuneration based on the usual hourly rates of its employees. The appellants take the position that the receiver's compensation based on the hourly rates of its employees has resulted in excessive compensation in relation to the amount realized by the receivership. The appellants point out that the compensation requested is approximately 20% of the amount realized. As I noted in paragraph 20, the motion judge held that "subject to checks and balances" of *Chartrand v. De la Ronde* and *Prairie Palace Motel Ltd. v. Carlson*, a "fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent". It is helpful to consider these cases.

53 In *Chartrand* the issue was whether a master had erred in principle in reducing a receiver's accounts, calculated on the basis of its usual hourly rates, on the ground that the entity in receivership was a non-profit federation. Although Hamilton J. was satisfied that the master had appropriately applied the factors recommended in *Belyea*, she concluded that the master had erred in reducing the receiver's compensation because the federation was a non-profit organization. She was otherwise in agreement with the master's application of the *Belyea* criteria to the circumstances of the receivership. However, she added at p. 32:

> Having said that, I do not interpret the *Belyea* factors to mean that fair and reasonable compensation cannot equate to remuneration based on hourly rates and time spent.

By this comment I take Hamilton J. to mean that there may be cases in which the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors requires the court to do so to constitute fair and reasonable remuneration. I presume that this is what the motion judge had in mind when referring to "the checks and balances" of *Chartrand*.

54 In *Prairie Palace Motel* the court rejected a submission that a receiver's fees should be restricted to 5% of the assets realized and stated at pp. 313-14:

> In any event, the parties to this matter are all aware that the receiver and manager is a firm of chartered accountants of high reputation. In this day and age, if chartered accountants are going to do the work of receiver-managers, in order to facilitate the ability of the disputing parties to carry on and preserve the assets of a business, there is no reason why they should not get paid at the going rate they charge all of their clients for the services they render. I reviewed the receiver-

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manager's account in this matter and the basis upon which it is charged, and I have absolutely no grounds for concluding that it is in any way based on client fees which are not usual for a firm such as Touche Ross Ltd.

Conclusion

(1) Bias

55 As I concluded earlier, the motion judge did not exhibit bias against the appellants or their counsel rendering the hearing unfair.

(2) Cross-examination of the receiver

56 The appellants did not have an opportunity to cross-examine Mr. Morawetz or another representative of the receiver in respect to its remuneration. Nor did they have an opportunity to cross-examine a representative of the receiver's solicitors, Goodmans, in respect to their fees and disbursements. This was as a result of the process sanctioned by the motion judge on the passing of the receiver's accounts in implicitly not requiring that the receiver's and the solicitors' accounts be verified by affidavit. Whether the appellants' lack of an opportunity to cross-examine the appropriate person in respect to these accounts should result in a new assessment being ordered, or whether this should be considered as a harmless error, requires further examination of the process followed by the motion judge in the context of the procedural history of the receiver's passing of its accounts.

57 Mr. Pape was not the appellants' original solicitor. The appellants were represented by another lawyer on February 9, 2001 when the receiver moved for approval of its accounts. The bank, which was directly affected by the receiver's charges, supported the fees and disbursements claimed by the receiver. Another creditor expressed concern that the receiver's fees were extremely high, but did not oppose their approval. Only the appellants opposed their approval. On February 16, 2001, which was the first return of the motion, the motion judge granted the appellants' request for an adjournment to February 26, 2001 to provide them a reasonable opportunity to review the receiver's accounts.

58 On February 26, 2001, the appellants requested a further adjournment to enable them to obtain an expert's opinion commenting on the fees of the receiver and its solicitors. The motion judge granted an adjournment to April 17, 2001 on certain terms, including the requirement that the receiver provide the appellants with curricula vitae and professional designations of its personnel, which the receiver did about two weeks later. The appellants' counsel informed the motion judge that he intended to examine "one or two people" from the receiver about its fees, whether or not they filed an affidavit. It appears that this was satisfactory to the motion judge who wrote in his endorsement: "A reporter should be ordered; counsel are to mutually let the court office know as to what time and extent of time a reporter will be required."

59 On March 13, 2001, the receiver wrote to the appellants to advise them of its position that any cross-examination in respect of the receiver's report to the court was not permitted in law. However, the receiver said that it would accept and respond to written questions about its fees and disbursements. On April 4, 2001, the appellants gave the receiver twenty-nine written questions. The receiver answered the questions on April 10, 2001, and invited the appellants, if necessary, to request further information. The receiver offered to make its personnel available to meet with the appellants and their counsel to answer any further questions about its fees. By this time, Mr. Pape had been retained by the appellants. He did not respond to the meeting proposed by the receiver, but, rather, wrote to the receiver on April 12, 2001 stating that arrangements had been made for a court reporter to be present to take the evidence of the receiver at the hearing of the motion on April 17, 2001.

60 This set the stage for the motion of April 17, 2001 at which, as I have explained, the motion judge ruled that the appellants were precluded from cross-examining the receiver's representative, Mr. Morawetz, on the receiver's accounts, but nevertheless permitted Mr. Pape, as his "proxy", to question Mr. Morawetz, as an unsworn witnesses, about the accounts. In the discussion between the motion judge and counsel for all the parties concerning the propriety of Mr. Pape having made arrangements for the presence of a court reporter, it appears that every one had overlooked the motion judge's earlier endorsement that a reporter should be ordered for the passing of the accounts.

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61 Although the appellants had obtained an adjournment to obtain expert reports about the receiver's fees, no report was ever provided by the appellants. They did file an affidavit of Mrs. Parravano, but did not rely on it at the hearing of the motion.

62 It appears from the motion judge's reasons for judgment and what the court was told by counsel that the practice followed in the Commercial List permits a receiver to include its request for the approval of its fees and disbursements in its report, with the result that any party opposing the amounts claimed is not able to cross-examine the receiver, or its representative, about the receiver's fees. In denying the appellants' counsel the opportunity to cross-examine Mr. Morawetz under oath, at p. 26 of his reasons, the motion judge referred to the practice that is followed in the Commercial List: "The more appropriate course of action is to proceed to interview the court officer [the receiver] with respect to the report so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions. That course of action was pointed out to the Parravanos and their previous counsel . . . "

63 Mr. Pape, before the motion judge, and Mr. Teplitsky, in this court, submitted that neither the practice of interviewing the receiver, nor the opportunity given to Mr. Pape to question Mr. Morawetz as the motion judge's proxy, is an adequate and effective substitute for the cross-examination of the receiver under oath. I agree. However, as I will explain, I am satisfied that in the circumstances of this case Mr. Pape's questioning of Mr. Morawetz was an adequate substitute for cross-examining him. It is well-established, as a matter of fundamental fairness, that parties adverse in interest should have the opportunity to cross-examine witnesses whose evidence is presented to the court, and upon which the court is asked to rely in coming to its decision. Generally speaking, in conducting a cross-examination counsel are given wide latitude and few restrictions are placed upon the questions that may be asked, or the manner in which they are asked. See J. Sopinka, S. N. Lederman, A. W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at paras. 16.6 and 16.99. As I observed earlier, in the cases in which the quantum of a receiver's fees has been assessed, cross-examination of the receiver and evidentiary hearings appear to be the norm, rather than the exception.

64 In my view, the motion judge was wrong in equating the receiver's report with respect to its conduct of the receivership with its report as it related to its claim for remuneration. As the authorities indicate, the better practice is for the receiver and its solicitors to each support its claim for remuneration by way of an affidavit. However, the presence or absence of an affidavit should not be the crucial issue when it comes to challenging the remuneration claimed. Whether or not there is an affidavit, the interested party must have a fair opportunity to challenge the remuneration at the hearing held for that purpose. I do not think that an interested party should have to show "special" or "unusual" circumstances in order to cross-examine a receiver or its representative, on its remuneration.

65 Where the accounts have been verified by affidavit, rule 39.02(1) provides that the affiant may be cross-examined by any party of the proceedings. Although there is a *prima facie* right to cross-examine upon an affidavit, the court has discretion to control its own process by preventing cross-examination or limiting it, where it is in the interests of justice to do so. See, *e.g.*, *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.). It would, in my view, be rare to preclude cross-examination where the accounts have been challenged. Similarly, where the accounts have not been verified by affidavit, the motion judge has discretion to permit an opposing party to cross-examine the receiver, or its representative. In my view, the threshold for permitting questioning should be quite low. If the judge is satisfied that the questioning may assist in determining whether the remuneration is fair and reasonable, cross-examination should be permitted. In this case, I am satisfied that the submissions made by Mr. Pape at the outset of the proceedings were sufficient to cross that threshold.

66 Thus, whether or not there is an affidavit, the opposing party must have a fair opportunity to challenge the remuneration claimed. That fair opportunity requires that the party have access to the relevant documentation, access to and the co-operation of the receiver in the review of that material prior to the passing of the accounts, an opportunity to present any evidence relevant to the appropriateness of the accounts and, where appropriate, the opportunity to cross-examine the receiver before the motion judge, or on the trial of an issue or an assessment, should either be directed by the motion judge.

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67 In this case, I am satisfied that the appellants had a fair opportunity to challenge the remuneration of the receiver and that the questioning of Mr. Morawetz was an adequate substitute for cross-examining him. I base my conclusion on the following factors:

• The appellants had the report for over two months.

• The appellants had access to the backup documents for over two months.

• The appellant had been given two adjournments to procure evidence.

• The appellants had the opportunity to meet with the receiver and in fact did meet with the receiver.

• The appellants submitted a detailed list of questions and received detailed answers. Mr. Pape expressly disavowed any suggestion that those answers were unsatisfactory or inadequate.

• The motion judge allowed Mr. Pape to question the receiver for some 75 pages. That questioning was in the nature of a cross-examination. I can find nothing in the transcript to suggest that Mr. Pape was precluded form any line of inquiry that he wanted to follow. Certainly, he did not suggest any such curtailment.

• Mr. Pape was given a full opportunity to make submissions.

(3) The remuneration claimed by the receiver and its solicitor

68 Having found no reason to label the proceedings as unfair in any way as they concern the receiver's remuneration, I shall now consider, on a correctness standard if there is any reason to interfere with the motion judge's decision on the receiver's remuneration.

69 In my view, the motion judge was aware of the relevant principles that apply to the assessment of a receiver's remuneration as discussed in *Belyea* and the other cases that I have reviewed. He considered the specific arguments made by Mr. Pape. He had the receiver's reports, the backup documents, the opinion of Mr. Morawetz, all of which were relied on, properly in my view, to support the accounts submitted by the receiver. Against that, the motion judge had Mr. Pape's submissions based on his personal view of what he called "human nature" that he argued should result in an automatic ten percent deduction from the times docketed by the receiver's personnel. In my view, the receiver's accounts as they related to its work were basically unchallenged in the material filed on the motion. I do not think that the motion judge can be criticized for preferring that material over Mr. Pape's personal opinions.

70 In addition, the position of the secured creditors is relevant to the correctness of the motion judge's decision. The two creditors who stood to lose the most by the passing of the accounts accepted those accounts.

71 The terms of the receiving order of Spence J. are also relevant, although not determinative. Those terms provided for the receiver's payment "at the standard rates and charges for such services rendered". Mr. Morawetz's evidence was that these were normal competitive rates. There was no evidence to the contrary, except Mr. Pape's personal opinions. It is telling that despite the two month adjournment and repeated promises of expert evidence from the appellants, they did not produce any expert to challenge those rates.

72 However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. Mr. Morawetz really could not speak to the accuracy or, except in a limited way, to the reasonableness of those accounts. There was no representative of Goodmans for the appellants to question or cross-examine. The motion judge did not give these accounts separate consideration. In my view, he erred in failing to do so. Consequently, I would allow the appeal to that extent.

Result

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73 For the foregoing reasons, I would allow the appeal to the extent of setting aside the order of the motion judge approving the accounts of the receiver's solicitors, Goodmans, and order that the accounts be resubmitted, verified by affidavit, and that they be assessed by a different judge who may, in his or her discretion, direct the trial of an issue or refer the accounts for assessment by the assessment officer. In all other respects, the appeal is dismissed. As success is divided, there will be no costs.

***Catzman J.A.*:**

I agree.

***Doherty J.A.*:**

I agree.

Appeal allowed in part.

Footnotes

1 Among suggested precedents prepared for use in Ontario, at pp. 755-56, Bennett includes a precedent for a Receiver's Report on passing its accounts. The report is in the form of an affidavit in which the receiver, *inter alia*, includes a statement verifying its requested remuneration and expenses.

2 Although the practice in England formerly required that a receiver's accounts be verified by affidavit, the present practice is different. Now the court becomes involved in the scrutiny of a receiver's accounts, requiring their proof by the receiver, only if there are objections to the account. See R. Walton & M. Hunter, *Kerr on Receivers & Administrators*, 17th ed. (London: Sweet & Maxwell, 1989) at 239.

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11

1923 CarswellOnt 12
Ontario Supreme Court, In Bankruptcy

Tlustie, Re

1923 CarswellOnt 12, 23 O.W.N. 622, 3 C.B.R. 654

In re Tlustie

Holmested, K.C., Registrar

Judgment: February 5, 1923

Counsel: *J. J. Glass*, for the trustee.
J. N. Bullen, for the inspectors.

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

Headnote

Bankruptcy --- Powers of Bankruptcy Court — General

Bankruptcy --- Practice and procedure in courts — Costs — Of trustee's lawyer

I. Bankruptcy — Jurisdiction of Court — Matters Not Expressly Provided for in Bankruptcy Act — Authorization to Trustee — Bankruptcy Act, Sec. 20, 1 C.B.R. 28, 568 — Act, Sec. 63, 1 C.B.R. 70, 579, 2 C.B.R. 615.

For the purpose of carrying out *The Bankruptcy Act* the Court exercising bankruptcy jurisdiction has the necessary power and jurisdiction to authorize and sanction acts necessary to be done by the trustee for the due administration and protection of the estate even though there be no specific provisions in the Act expressly conferring such power and jurisdiction.

II. Costs — Trustee's Solicitor — Authorization of Employment — Disallowance to Trustee of Costs Incurred Without Authorization of Inspectors or of the Court — Bankruptcy Act, Sec. 20(1 d), 1 C.B.R. 29 — Act, Sec. 20(2), 1 C.B.R. 568.

Where the bankruptcy trustee has employed a solicitor without the authority either of the inspectors or of the Court, he will be disallowed the solicitor's costs in passing his accounts.

Application to the registrar to pass the trustee's accounts after refusal by the inspector to pass same.

***Holmested, K.C.* (Registrar):**

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1 The inspectors in this case having refused to pass the trustee's accounts, an application has been made to me to pass them.

2 The total amount realized is $829 and in the trustee's accounts an item is claimed of $120 for costs paid to the trustee's solicitor. Counsel for the inspectors objects to the allowance of this item, on the ground that the trustee was never authorized to employ a solicitor.

3 The only clause relating to the appointment of a solicitor is sec. 20(1 *d*), which authorizes an appointment of a solicitor to be made by the trustee with the permission in writing of the inspectors [1 C.B.R. 29] and by subsec. 2, as amended by 1921, ch. 17, sec. 20, it is declared that the permission shall not be a general permission, "but shall only be a permission to do the particular thing or things, or class of things which the written permission specifies." [1 C.B.R. 568.]

4 The provisions in the English Act are similar; but in that Act there are also to be found provisions enabling the Board of Trade to authorize the trustee to appoint a solicitor where there are no inspectors; Imp. Stat., 4 & 5 Geo. V., ch. 59, sec. 18(10). Here there is no such provision, and it is possible that in Canada the Court must discharge the function which in England is cast on the Board of Trade, otherwise trustees would be in the predicament of requiring to obtain legal assistance for the protection of an estate in their hands, and be unable to obtain any authority to employ a solicitor.

5 I am of the opinion that for the purpose of carrying out the Act there must be deemed to be vested in the Court the necessary power and jurisdiction to authorize and sanction acts necessary to be done by the trustee for the due administration and protection of the estate even though there be no specific provisions in the Act expressly conferring such power and jurisdiction.

6 At all events, I have been so construing the Act in some cases recently before me and on the assumption that the Court has that power I have approved of sales to inspectors, where under sec. 20 such sales could not be approved in the manner the Act contemplates because of the proposed purchaser being himself one of the inspectors; and I may say this very application is based on the same principle.

7 It is obvious that cases may arise where the appointment of a solicitor could not be authorized in the manner sec. 20 contemplates, by reason of there being no inspectors, when it is clearly necessary for the due protection of an estate that the trustee should have power to employ a solicitor without running the risk of involving himself in personal liability for costs without any right of indemnity out of the estate. In such cases it seems to me he must come to the Court and get the required authority; but, having regard to the provisions of sec. 20(2) as amended, I think that neither the permission of the inspectors, nor of the Court, ought to be given in general terms but should specify with reasonable certainty the particular business for which the employment is authorized. See *In re Yeatman*, [1916] 1 K.B. 461 and 780, 85 L.J.K.B. 789.

8 In the present case the trustee has obtained no authority to employ a solicitor, either from the inspectors, or the Court, and on the authority of *In re Geiger*, [1915] 1 K.B. 439, 84 L.J.K.B. 589[1] I have no alternative but to disallow this item.

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9 The provisions of sec. 20 seem to me to indicate that a trustee cannot of his own mere notion burden an estate with costs, and that wherever such an expense is thought necessary to be incurred by him, he must first obtain authority, and if he chooses to act without authority he takes the risk of having no recourse to the estate for costs so incurred.

10 The Act gives trustees considerable authority to take proceedings in Court in person, as I have already held, and if instead of availing themselves of that power they choose to delegate their duty unnecessarily to solicitors without the proper authority, they may find that they will themselves be personally liable for costs without any right to indemnification out of the estate therefor.

Costs disallowed.

Footnotes

[1] AUTHORITY TO TRUSTEE TO EMPLOY SOLICITOR — In *In re Geiger*, [1915] 1 K.B. 439, 84 L.J.K.B. 89, the debtor was adjudicated bankrupt on the petition of his sole creditor. Shortly thereafter he became entitled to property more than sufficient to enable him to pay the petitioning creditor's debt and all costs. The bankruptcy was then annulled. In the meantime the sole creditor had appointed himself to be the committee of inspection, and as such committee had purported to fix the remuneration of the trustee and to sanction the employment by him of solicitors. After the annulment the debtor inquired of the trustee's solicitors when their costs were to be taxed and the trustee's remuneration fixed, and stated that he required to be present on the application. He was then informed that the costs had already been taxed and the trustee's remuneration fixed.

It was held that a sole creditor could not appoint himself to be the committee of inspection; there was, therefore, no committee of inspection, no sanction of the employment of solicitors, and no retainer. The payment of the costs out of the estate was disallowed to the trustee and the allocatur for costs rescinded. *In re Geiger, supra*.

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2003 CarswellOnt 3514
Ontario Superior Court of Justice

Wiggins, Re

2003 CarswellOnt 3514, [2003] O.J. No. 3685, [2003] O.T.C. 837, 125 A.C.W.S. (3d) 563, 50 C.B.R. (4th) 306, 67 O.R. (3d) 133

IN THE MATTER OF the Consumer Proposal of Sally Teresa Wiggins

Swinton J.

Heard: September 16, 2003
Judgment: September 18, 2003
Docket: 31-388321

Counsel: Sanjeev P.R. Mitra for Administrator
Valerie Anderson for Superintendent of Bankruptcy

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Consumer proposals

Debtor failed to make payments under consumer proposal for three months and then resumed payments and made up arrears — Pursuant to s. 66.31(1) of Bankruptcy and Insolvency Act debtor's consumer proposal was deemed annulled — Administrator of consumer proposal nevertheless allowed debtor to pay arrears and continued to make distributions to creditors as if consumer proposal remained in effect — Administrator brought application for declaration that court had inherent jurisdiction to waive default in consumer proposal more than three months following default — Application dismissed — Inherent jurisdiction cannot be exercised if exercise conflicts with provisions of Act — Section 66.31 deals specifically with what follows if consumer debtor is in default in payments for three months and makes it clear that consumer proposal is deemed annulled unless court has ordered otherwise or unless amendment to proposal has been filed before three-month period expires — Court did not have inherent jurisdiction to waive debtor's default and to set aside deemed annulment of her consumer proposal in view of express terms of Act.

Table of Authorities

Cases considered by *Swinton J.*:

Dziewiacien, Re (2002), 2002 CarswellOnt 3599, 37 C.B.R. (4th) 250 (Ont. S.C.J.) — considered

Schrader, Re (1999), 13 C.B.R. (4th) 256, 1999 CarswellNS 330 (N.S. S.C.) — considered

Tlustie, Re (1923), 3 C.B.R. 654, 23 O.W.N. 622, 1923 CarswellOnt 12 (Ont. S.C.) — considered

Wasserman, Arsenault Ltd. v. Sone (2000), 2000 CarswellOnt 4934, 22 C.B.R. (4th) 153 (Ont. S.C.J. [Commercial List]) — considered

Wasserman, Arsenault Ltd. v. Sone (2002), 2002 CarswellOnt 989, 157 O.A.C. 183, 33 C.B.R. (4th) 145 (Ont. C.A.) — considered

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White, Re (2001), 2001 CarswellNS 489, 31 C.B.R. (4th) 128 (N.S. S.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 66.3(1) [en. 1992, c. 27, s. 32(1)] — referred to

s. 66.31 [en. 1992, c. 27, s. 32(1)] — considered

s. 66.31(1) [en. 1992, c. 27, s. 32(1)] — considered

ss. 69-69.2 — referred to

s. 183(1) — considered

s. 187(11) — referred to

APPLICATION by administrator of consumer proposal for declaration that court had inherent jurisdiction to waive default in consumer proposal more than three months following default.

***Swinton J.*:**

1 The Administrator of the Consumer Proposal of Sally Teresa Wiggins and other individuals listed in Schedules A, B and C of the Motion Record sought a declaration that this Court has the inherent jurisdiction to waive default in a consumer proposal more than three months following the default and for other relief.

2 Section 66.31(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, provides:

> Independently of section 66.3,
>
> (a) where payments under a consumer proposal are to be made monthly or more frequently and the consumer debtor is in default to the extent of three months payments, or
>
> (b) where payments under a consumer proposal are to be made less frequently than monthly and the consumer debtor is in default for more than three months on any payment,
>
> the consumer proposal shall thereupon be deemed to be annulled unless the court has previously ordered otherwise or unless an amendment to the consumer proposal has previously been filed, and the administrator shall forthwith so inform the creditors and file a report thereof in the prescribed form with the official receiver.

3 In this case, Ms. Wiggins failed to make payments for three months. She then resumed payments and made up the arrears. However, pursuant to s. 66.3(1), her consumer proposal was deemed annulled. Nevertheless, the Administrator allowed her to pay the arrears and has continued to make distributions to creditors as if the consumer proposal remained in effect.

4 Mr. Justice Ground approved the omnibus procedure for this motion, which groups individuals like Ms. Wiggins in Schedule A and seeks an order waiving the default and setting aside the deemed annulment. Schedule B includes individuals who were in arrears over three months and who are making progress to make up the arrears. The Administrator seeks an order of waiver of the default, the setting aside of the deemed annulment and filing of an amended proposal, or the granting of leave to file a second consumer proposal. Finally, Schedule C consists of individuals who were in arrears over three months and who

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made unsuccessful attempts to catch up. An order is sought with respect to the distribution of funds held by the Administrator which were received after the deemed annulment.

5 Decisions of the Registrar in both Nova Scotia and Ontario have held that there is no specific authority under the *BIA* to allow a court to waive the default by the debtor following the deemed annulment of a consumer proposal (*Schrader, Re* (1999), 13 C.B.R. (4th) 256 (N.S. S.C.); *Dziewiacien, Re* (2002), 37 C.B.R. (4th) 250 (Ont. S.C.J.)). Deputy Registrar Nettie in *Dziewiacien, Re* held that s. 187(11) of the Act does not permit the court to extend a time period in the Act where there has been an intervening statutory event consequent upon default. That decision was not appealed.

6 Section 183(1) of the Act vests the Superior Court of Justice in Ontario and the named courts in other jurisdictions with "such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy". The Administrator argued that this section confers inherent jurisdiction on this Court, which should be exercised in this case to waive the default and set aside the deemed annulment under the Act for debtors in Schedule A and B. Counsel for the Superintendent agreed with this position, based on the facts before me in this motion.

7 The Bankruptcy Court may authorize and sanction acts required to be done by a trustee for the due administration and protection of the bankrupt estate, even though there is no specific provision in the Act (*Tlustie, Re* (1923), 3 C.B.R. 654 (Ont. S.C.)). However, inherent jurisdiction can not be exercised if the exercise conflicts with the provisions of the Act (*Wasserman, Arsenault Ltd. v. Sone* (2000), 22 C.B.R. (4th) 153 (Ont. S.C.J. [Commercial List]), aff'd (2000), 33 C.B.R. (4th) 145 (Ont. C.A.)). Here, s. 66.31 deals specifically with what follows if the consumer debtor is in default in payments for three months: the consumer proposal is deemed annulled unless the court has ordered otherwise or unless an amendment to the proposal has been filed *before* the three month period expires.

8 In my view, there is no inherent jurisdiction to waive a default like that of Ms. Wiggins and to set aside the deemed annulment of her consumer proposal, given the express terms of the Act. While Ontario courts may have granted the relief sought in this motion prior to the decision in *Dziewiacien, Re*, in my view, they had no inherent jurisdiction to do so.

9 Given that individuals like Ms. Wiggins and those in Schedule A have continued to make payments as if the consumer proposal were still in effect, and the Administrator has continued to make distributions, leave is given to this group to file a second consumer proposal, and I order that they are entitled to the relief in ss. 69-69.2. Given the payment history since the default, it appears that there is a reasonable prospect of the new proposal being accepted by the creditors.

10 Given the history of the Schedule B debtors, I also grant leave to this group to file a second consumer proposal, and I order that they are entitled to the relief in ss. 69-69.2 for the same reason.

11 With respect to Schedule C, the Administrator has asked for directions with respect to the distribution of funds which it received after the deemed annulment. According to *White, Re* (2001), 31 C.B.R. (4th) 128 (N.S. S.C.), those funds should be distributed to the creditors.

Application dismissed.

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2006 CarswellOnt 2835
Ontario Superior Court of Justice [Commercial List]

Toronto Dominion Bank v. Preston Springs Gardens Inc.

2006 CarswellOnt 2835, [2006] O.J. No. 1834, 19 C.B.R. (5th) 165

The Toronto Dominion Bank (Plaintiff) and Preston Springs Gardens Inc., Benchmark Equity Corporation, Peter B. Moffat, Melvyn A. Dancy and Dondeb Inc. (Defendants)

Morawetz J.

Heard: January 12, 2006
Judgment: March 17, 2006
Docket: 04-CL-5579

Counsel: Thomas J. Corbett for Moving Parties, Benchmark Equity Corporation, Peter B. Moffat
Evert Van Woundenberg, James Cook for Responding Party, BDO Dunwoody Limited

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

Headnote

Debtors and creditors --- Receivers — Discharge of receiver — Practice and procedure

Defendant company was shareholder of bankrupt corporation — Plaintiff bank held first mortgage from bankrupt — Defendant was one guarantor of indebtedness of bankrupt to plaintiff — Bankrupt made filing and receiver was appointed — Receiver was granted approval to market and sell property of bankrupt — Receiver reached agreement to sell property to third party and was granted approval to proceed against objections of defendant — Receiver's motion for discharge and approval of actions and final accounts was granted — Order specifically stated that defendant was not limited by principles of res judicata or estoppel in any future motion seeking leave to sue receiver — Defendant brought motion for leave to bring counterclaim against receiver for damages for negligence or breach of fiduciary duty related to sale of property — Motion dismissed — Defendant's claims were frivolous and vexatious and had no valid foundation — Defendant's allegations of gross negligence and breach of fiduciary duty had already been considered and rejected at various court hearings in proceeding — Court had already decided receiver discharged responsibilities in proper manner and acted in good faith, and dealt with property of bankrupt in commercially reasonable manner — Previous order's statement merely granted defendant right to bring motion, not to re-argue stale issues — Motion was properly dismissed on account of res judicata or issue estoppel.

Table of Authorities

Cases considered by *Morawetz J.*:

Bank of America Canada v. Willann Investments Ltd. (1993), 23 C.B.R. (3d) 98, 1993 CarswellOnt 249 (Ont. Gen. Div.) — followed

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2001), 2001 CarswellOnt 3773 (Ont. Div. Ct.) — referred to

MOTION by defendants for leave to bring counterclaim against receiver.

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***Morawetz J.*:**

1 This is a motion by the defendants, Benchmark Equity Corporation ("Benchmark") and Peter B. Moffat ("Moffat"), for leave to sue BDO Dunwoody Limited ("BDO"), as Receiver, by way of counterclaim in this proceeding. Leave is necessary because paragraph 12 of the Order dated April 20, 2001, appointing BDO as Receiver and Manager of the assets, property and undertaking of the defendant Preston Springs Gardens Inc. ("PSGI") provides that no person may institute any action against the Receiver without first obtaining leave of this Court.

2 Benchmark is one of the shareholders of PSGI, and Moffat is the president of Benchmark.

3 The shareholders of PSGI also hold a third mortgage from PSGI. In addition, Moffat is one of the guarantors of the indebtedness of PSGI to the first mortgagee, The Toronto Dominion Bank ("TD Bank").

4 BDO filed its First Report in support of the motion to seek the court's approval of its actions to date as well as an order approving its decision to market and sell the property of PSGI on an "as is" basis. The motion was originally returnable on June 20, 2001. However, it did not proceed as scheduled. Moffat filed an affidavit sworn June 19, 2001, in response to the motion. The Receiver then submitted the Second Report, sworn July 4, 2001, which responded to some of the issues raised in the affidavit of Moffat. The motion was heard by Pepall J. on July 6, 2001. The resulting Court Order granted the relief requested by the Receiver.

5 Benchmark and Moffat sought leave to appeal the decision of Pepall J. before the Divisional Court. Leave was denied by Then J. in an endorsement dated October 30, 2001.

6 BDO subsequently brought a motion to seek approval of the court of the Receiver's actions to date and the accounts of the Receiver to November 15, 2001, and an order approving an Agreement of Purchase and Sale between the Receiver, as vendor, and Guelph Financial Corporation ("GFC"), as purchaser, and authorizing the Receiver to complete the transaction. The motion also sought a vesting order and other related relief.

7 BDO filed its Third Report in support of this motion and Benchmark and Moffat responded by filing a factum.

8 C. Campbell J. made an Order on December 10, 2001 which granted the relief requested by the Receiver.

9 BDO brought a further motion to seek the court's approval of its actions to date and its final accounts, as well as an order discharging BDO as Receiver.

10 On May 7, 2002, Spence J. made an Order, which granted the relief requested by the Receiver. The final paragraph of the Discharge Order reads as follows:

> **THIS COURT ORDERS** that the correctness of the decision of Pepall J. of July 6, 2001 was not considered at this hearing for discharge and Benchmark Equity Corporation and Peter B. Moffat are not limited by the making of this Order through the principles of *res judicata* or *estoppel* in any future motion seeking leave to sue the Receiver.

11 Leave is now sought to sue the Receiver for damages for negligence or breach of duty or damages in equity for breach of fiduciary duty in the amount of $8 million. The particulars of the allegations sought to be made are set out in the draft Amended Amended Statement of Claim, Counterclaim and Cross-Claim, and repeated in the affidavit of Moffat, sworn in support of this motion.

12 The granting of leave is opposed by BDO on the basis that the issues have already been determined by the Court in these proceedings, in both the approval of the Receiver's decision to market and sell the property, as well as authorizing the Receiver to enter into the Agreement of Purchase and Sale with GFC. There are also three Court Orders approving the activities of the Receiver. It is the position of BDO that the proposed action against BDO is without foundation, is frivolous and vexatious, and is barred by the doctrine of *res judicata*.

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13 In his affidavit sworn July 4, 2001, Moffat raised the issue as to whether the Receiver should sell the property or, alternatively, whether the Receiver should borrow monies and complete the construction of the project. Moffat took the position that the completion of the construction of the project would be the most financially advantageous approach. Moffat challenged the analysis of the Receiver as contained in the First Report. Suffice to say, the affidavit was extremely critical of the Receiver's First Report. As a result, the Receiver filed the Second Report, in which it addressed the issues raised by Moffat in his affidavit and provided the Court with the results of a more detailed analysis of the financial projections surrounding the disposition alternatives for the assets of PSGI.

14 The endorsement of Pepall J. reflects that the opposition of Moffat against the sale of the property was considered by the Court.

15 At page 3 of her endorsement, Pepall J. stated:

> Benchmark and Mr. Moffat argue that the basis for the Receiver's recommendation is flawed and that the Receiver should take an additional period of time — 6 weeks was the suggestion — to analyze the situation. They did not seek an adjournment of the motion before me. They resist the "as is" alternative and submit that if the Receiver wishes to proceed on this basis he should do so by private appointment and be discharged as a court appointed receiver. There was no motion brought requesting such relief.
>
> While it is true that there were some errors in the 1st Receiver's report filed, these have now been addressed. The facts strongly support the Receiver's recommendation and decision. All other parties with any interest including the first and second mortgagees have either consented or are unopposed to the proposed course of action. The Receiver has concluded that the risks and variables associated with completing construction of the subject property result in an "as is" sale being the preferred course of action. I agree with this assessment.

16 Benchmark and Moffat sought leave to appeal the decision of Pepall J. A twenty-page factum was filed in support of the motion before the Divisional Court. The factum covered in detail issues that had been raised before Pepall J. concerning the recommendation of the Receiver to proceed with the sale of the property as opposed to completing the construction of the project.

17 In his endorsement dated October 30, 2001, Then J. dismissed the motion for leave [*Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2001 CarswellOnt 3773 (Ont. Div. Ct.)].

18 The points raised by Benchmark and Moffat were addressed by Then J. in his endorsement.

19 In its motion to approve the sale of the property to GFC, BDO filed the Third Report which provided the Court with a summary of the Receiver's marketing efforts in connection with the sale of the property, and a summary of the tender process.

20 Benchmark and Moffat opposed the motion and filed a factum in response, which incorporated the factum that was used at the hearing before the Divisional Court.

21 The responding factum on the sale approval motion took issue with the sales process. It complained that two of the three offers received were "low ball" offers, and the offer for which approval is sought is in some way associated with Mr. Melvyn Dancy, part owner of PSGI and the protagonist, as described in the factum of Moffat.

22 The factum provides a summary of the history of the exposure of the property to the market by the Receiver and concludes that the sale should not be approved on two grounds, firstly, that the timing of the marketing process and lack of any reasonable "third party" offers indicated that the property had not been sufficiently marketed, and secondly, that the marketing results of the property "as is" should have caused the Receiver to reconsider its decision regarding completion of construction of the project.

23 The factum also indicated that counsel for Moffat and Benchmark would not be appearing on the return of the motion.

24 The Order, as requested by BDO, was made by C. Campbell J. and no appeal was taken from this hearing.

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25 The Receiver then proceeded to close the sale transaction and subsequently made a motion to the court to seek approval of final accounts and to seek its discharge. The Receiver filed the Fourth Report in support of this motion. Spence J. made the Order which has been described above, after hearing submissions of counsel for the Receiver, Benchmark and Moffat.

26 At all times it should be noted that the first mortgagee, TD Bank, and the second mortgagee, Cosbild Investment Corporation, did not oppose the relief being brought by the Receiver.

27 The endorsements of Pepall J. and Then J. indicate that the submissions of Benchmark and Moffat were fully considered. Pepall J. decided, on the evidence before her, notwithstanding some errors in the Receiver's First Report, that those matters had been addressed and that the facts strongly supported the Receiver's recommendation and decision. Then J. also had the benefit of a very detailed factum from Benchmark and Moffat when he dismissed the application for leave. C. Campbell J. had the benefit not only of the factum that was submitted to the Divisional Court, but also the factum in response to the Receiver's application for approval of the Agreement of Purchase and Sale with GFC.

28 I now consider the affidavit of Moffat filed in support of this motion. The first twenty paragraphs deal with the period prior to the receivership application. Paragraphs 21 to 36 deal with proceedings during the receivership and a summary of the orders, motions and endorsements made in the proceedings. Commencing at paragraph 37 is a section entitled, "The Motions Associated with the Sale of the Property", which continues up to paragraph 50. It then concludes with a section which addresses procedural matters surrounding a discharge application.

29 The draft counterclaim attached to the Notice of Motion details the allegations of negligence and breach of fiduciary duty.

30 Paragraph 68 of the draft pleading deserves specific mention. Benchmark and Moffat acknowledge that the actions of the Receiver they complain of have been the subject of a previous hearing. Paragraph 68 reads as follows:

> The Receiver in pursuing its decision to sell the lands 'as is' failed to meet the standard of care required of it in order to meet its duty of care to Benchmark Equity Corporation and Peter B. Moffat. ***Particulars of the breaches of the standard of care have previously been provided to the Receiver and are detailed in the factum provided by Benchmark Equity Corporation and Peter B. Moffat to the Receiver for the purposes of the motion seeking leave to appeal*** [emphasis added].

31 The pleading goes on to allege that as a result of the Receiver's conduct in the sale process, the Agreement of Purchase and Sale was completed with GFC, which is related to the defendants to the cross-claim, in particular Melvyn A. Dancy, and that the involvement of Mr. Dancy was known to the Receiver.

32 The complaints recited in the draft pleading have already been the subject of Court Orders made by Pepall J., Then J. and C. Campbell J. These Orders approve the activities of the Receiver. In my view the record clearly indicates that the activities of the Receiver were detailed in the reports filed by the Receiver, and complaints about the activities of the Receiver were detailed in two affidavits and two facta submitted by Benchmark and Moffat. The activities of the Receiver could scarcely have been approved if the courts hearing these previous motions had been of the view that there was substance in the complaints raised by either Benchmark or Moffat in the evidence and on the arguments submitted by them.

33 The approach of Benchmark and Moffat is very similar to the approach that was taken by the objecting parties in *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ont. Gen. Div.). The words of Blair J. (as he then was) in disposing of the matter are equally applicable to this case. In paragraph 18 he said the following:

> In short, the disposition of these questions was "fundamental to the decision arrived at" by Farley J. because the Receiver's activities could scarcely have been approved if he had been of the view that there was substance in the complaints raised by the Crown in the evidence and on the argument before him. The very same issues regarding which the Crown now seeks leave to pursue the Receiver were raised in the proceedings before Mr. Justice Farley, and Mr. Justice Montgomery, or could have been raised, through reasonable diligence. They were decided. The decisions are final and binding, subject to the results of the appeals. The parties are the same. The doctrines of *res judicata* or of issue *estoppel* apply. See: *Angle*

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> *v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.), particularly per Laskin J. at p. 551, and per Dickson J. at pp.555-556; *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536 H.L., per Lord Guest at pp.564-565.

34 The situation in the case at bar is even more clear than that in *Bank of America Canada*, due to the fact that there are no outstanding appeals. The previous Court Orders in these proceedings are final and binding.

35 The language in paragraph 3 of the Order of Spence J. does not operate so as to permit the moving parties to re-argue these issues. Rather, that paragraph merely provides that the defendants are free to bring this motion. Having done so, the motion, in my view, is properly dismissed on account of *res judicata* or issue *estoppel*.

36 Furthermore, in the event that the matter had not been disposed of in this manner and it was necessary to consider whether leave should be granted, I am in agreement with the reasoning of Blair J. in *Bank of America Canada* in circumstances such as this, where there have been a number of orders approving the conduct and activities of the Receiver, the more stringent "strong *prima facie* case" test would have to be met by any party seeking leave to sue the Receiver.

37 The allegations of gross negligence and breach of fiduciary duty have been considered and rejected at various court hearings in this proceeding. In so doing, this Court has already decided that the Receiver discharged its responsibilities in a proper manner and acted honestly and in good faith, and dealt with the property of PSGI in a commercially reasonable manner. Having reviewed the record and heard the submissions of the parties, I see no reason to question any of the decisions previously made in this matter. Consequently, I am of the view that the moving party has not demonstrated that it has a strong *prima facie* case against BDO on the matters at issue. The proceeding is, in my view, nothing more than an attempt by Moffat and Benchmark to re-litigate past issues by involving a court-appointed Receiver whose conduct was both authorized and approved by previous Court Orders.

38 I have also considered the issues that Moffat raised in his affidavit sworn April 20, 2005, which alleged a conflict of interest on the part of BDO insofar as BDO was the auditor of a corporation, Vital Retirement Living Inc., which was controlled by Mr. Dancy. I have also considered the response of Mr. Clarkson in his affidavit sworn July 12, 2005. I am satisfied that the parties involved at BDO in its capacity as Receiver of PSGI had no knowledge of the audit engagement that BDO's Calgary office had with Vital Retirement Living Inc. In my view BDO's activities were not in any way affected by the engagement of BDO as auditor of Vital Retirement Living Inc.

Disposition

39 It follows that to grant leave to Benchmark or Moffat to proceed would be to allow them to pursue a claim that no longer has any foundation, is frivolous and vexatious. An order will go dismissing the motion of Benchmark and Moffat.

40 If the parties are unable to agree on costs within 15 days of the date of release of this endorsement, I invite them to make written submissions (maximum three pages each) within a further period of 15 days.

Motion dismissed.

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2007 ONCA 145
Ontario Court of Appeal

Toronto Dominion Bank v. Preston Springs Gardens Inc.

2007 CarswellOnt 1182, 2007 ONCA 145, [2007] O.J. No. 801, 155 A.C.W.S. (3d) 840, 31 C.B.R. (5th) 167

The Toronto Dominion Bank (Plaintiff) and Preston Springs Gardens Inc., Benchmark Equity Corporation, Peter B. Moffat, Melvyn A. Dancy and Dondeb Inc. (Defendants / Appellants) and BDO Dunwoody Limited (Proposed Defendant to the Counterclaim / Respondent)

S.T. Goudge, E.E. Gillese, S.E. Lang JJ.A.

Heard: February 26, 2007
Judgment: February 26, 2007
Docket: CA C45181

Proceedings: affirming *Toronto Dominion Bank v. Preston Springs Gardens Inc.* (2006), 19 C.B.R. (5th) 165, 2006 CarswellOnt 2835 (Ont. S.C.J. [Commercial List])

Counsel: Thomas J. Corbett for Appellants
Evert Van Woudenberg, James R.G. Cook for Responding Party, BDO Dunwoody Limited

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

Headnote

Debtors and creditors --- Receivers — Discharge of receiver — Practice and procedure

Plaintiff bank held first mortgage from bankrupt — Defendant company was one guarantor of indebtedness of bankrupt to plaintiff — Bankrupt made filing and receiver was appointed — Receiver was granted approval to market and sell property of bankrupt — Receiver reached agreement to sell property to third party and was granted approval to proceed against objections of defendant — Receiver's motion for discharge and approval of actions and final accounts was granted — Order specifically stated that defendant was not limited by principles of res judicata or estoppel in any future motion seeking leave to sue receiver — Defendant brought motion for leave to bring counterclaim against receiver for damages for negligence or breach of fiduciary duty related to sale of property, and motion was dismissed — Motions judge held that defendant's claims were frivolous and vexatious and had no valid foundation — Motions judge held that defendant's allegations of gross negligence and breach of fiduciary duty had already been considered and rejected at various court hearings in proceeding — Motions judge held that previous order merely granted defendant right to bring motion, not to re-argue stale issues — Defendant appealed — Appeal dismissed — Issue estoppel dictated that defendant could not try issues for fourth time, and it would be abuse of process to allow it to do so — Allegations of negligence and breach of fiduciary duty in appeal at bar were made in previous proceedings — Defendant had litigated same facts and arguments to final disposition three times — Essentially all facts concerning receiver's conduct were known throughout.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

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Allegations of breach of fiduciary against receiver — Plaintiff bank held first mortgage from bankrupt — Defendant company was one guarantor of indebtedness of bankrupt to plaintiff — Bankrupt made filing and receiver was appointed — Receiver was granted approval to market and sell property of bankrupt — Receiver reached agreement to sell property to third party and was granted approval to proceed against objections of defendant — Receiver's motion for discharge and approval of actions and final accounts was granted — Order specifically stated that defendant was not limited by principles of res judicata or estoppel in any future motion seeking leave to sue receiver — Defendant brought motion for leave to bring counterclaim against receiver for damages for negligence or breach of fiduciary duty related to sale of property, and motion was dismissed — Motions judge held that defendant's claims were frivolous and vexatious and had no valid foundation — Motions judge held that defendant's allegations of gross negligence and breach of fiduciary duty had already been considered and rejected at various court hearings in proceeding — Motions judge held that previous order merely granted defendant right to bring motion, not to re-argue stale issues — Defendant appealed — Appeal dismissed — Issue estoppel dictated that defendant could not try issues for fourth time, and it would be abuse of process to allow it to do so — Allegations of negligence and breach of fiduciary duty in appeal at bar were made in previous proceedings — Defendant had litigated same facts and arguments to final disposition three times — Essentially all facts concerning receiver's conduct were known throughout.

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

Alleged dereliction of duty by receiver.

APPEAL by guarantor from judgment reported at *Toronto Dominion Bank v. Preston Springs Gardens Inc.* (2006), 19 C.B.R. (5th) 165, 2006 CarswellOnt 2835 (Ont. S.C.J. [Commercial List]) dismissing guarantor's motion for leave to bring claim against receiver in relation to sale of debtor's property.

***Per curiam*:**

Endorsement

1 The appellants raise two arguments in their main appeal.

2 First, they argue that neither all the facts nor the legal characterization that they seek to put on them in their proposed action have been litigated before, and that the motion judge erred in finding otherwise.

3 We disagree. The appellants acknowledge that essentially all the facts concerning the Receiver's conduct have been known throughout, with the exception of the details that now may be available from the Receiver's notes of a meeting on May 7, and a possible further cross-examination on those notes. However from the beginning, the Receiver disclosed the meeting and who was present. It would have been possible to obtain the notes through cross-examination in the prior proceedings but the appellants chose not to do so. Moreover, it is hard to see what value would be added to the appellant's proposed allegations by those notes. Thus, with this minor exception all the facts have been previously scrutinized by the court and the Receiver's conduct has been found entirely proper.

4 As to the proposed legal characterization of those facts, counsel told us that the allegations of negligence and breach of

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fiduciary duty have not been made in previous proceedings. A perusal of the facta filed by counsel in those proceedings makes it obvious that that representation is not so. The very allegations were indeed made in those terms, and, like the facts, have been scrutinized in previous proceedings.

5 Two judges have expressly found that, given the facts and in spite of the arguments of the Receiver's negligence and breach of fiduciary duty, the Receiver was throughout seeking to deal with the property prudently and fairly, and in a commercially reasonable manner. The appellants' arguments were obviously rejected. The same facts and arguments were put before a third judge in opposing the order approving the sale, and while he gave no reasons, that judge also clearly rejected them because he granted the order.

6 The appellants have therefore litigated the same facts and arguments to final disposition against the Receiver not once but three times. We agree with the motion judge that since the appellants, having previously chosen to put in issue before three courts the facts, and the arguments that the Receiver breached its duty of care and its fiduciary obligation, and having had those issues determined against them to the point of finality, issue estoppel dictates that they not be permitted to try a fourth time. At the very least it would be an abuse of process to permit them to do so.

7 In light of this conclusion, we need not deal with the appellants' second argument, namely that if issue estoppel does not apply, the motion judge erred in the test he applied to determine whether leave to commence the proposed action should be granted.

8 Finally, the appellants also seek leave to appeal the costs order below. We see no reason to interfere with the discretion of the motion judge to award costs on a substantial indemnity scale. While the allegations made against the Receiver do not extend to fraud, they are allegations of a serious dereliction of duty by the Receiver. Particularly in light of the fact that the appellants have sought unsuccessfully to raise these allegations again, and again, we see no error in the scale ordered.

9 The appeal must be therefore dismissed.

10 The appeal is dismissed with costs in the amount of $15,000.00 inclusive of disbursements and G.S.T.

Appeal dismissed.

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14

1993 CarswellOnt 249
Ontario Court of Justice (General Division)

Bank of America Canada v. Willann Investments Ltd.

1993 CarswellOnt 249, [1993] O.J. No. 3039, 23 C.B.R. (3d) 98, 44 A.C.W.S. (3d) 437, 5 W.D.C.P. (2d) 26

BANK OF AMERICA CANADA v. WILLANN INVESTMENTS LIMITED and CRANBERRY VILLAGE, COLLINGWOOD INC.

R.A. Blair J.

Judgment: December 14, 1993
Docket: Docs. 76984/91Q, Commercial List B22/91

Counsel: *Frank Bennett* and *E.O. Peterson*, for Attorney General of Canada.
William E. Pepall and *Angus McKinnon*, for Coopers & Lybrand Limited, receiver and manager.
Stephen Schwartz, for Prenor Trust Company of Canada.
E.J.C. Newbould, Q.C., for Bank of America Canada.

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

Headnote

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

Receivers --- Actions by and against — Practice and procedure — General

Receivers — Actions — Against court-appointed receiver — Threshold test for leave to commence proceedings against receiver being “strong prima facie case” — No reason existing for receiver to seek court approval of its activities if less stringent test for leave used.

The Crown, in its provincial and federal capacities, was a secured creditor of the debtor company. It was second in priority behind the bank, whose rights had been assigned to the trust company, and ahead of the trust company in its own right. The bank and the trust company held security over all of the debtor’s assets; the Crown did not. The court appointed a receiver of the debtor.

In preparing to sell the assets of the debtor, the receiver divided the assets into “core assets” and “non-core assets”. The Crown did not have security over the non-core assets. The sale was approved by court order, over the adamant objections of the Crown. An appeal from that order was unsuccessful, and an appeal from that decision was dismissed. The activities of the receiver were approved by the court.

The Crown sought leave to sue the receiver for negligence and breach of fiduciary duty in its realization of the debtor’s assets. The receiver opposed the granting of leave, arguing that as the issues had already been determined against the Crown in the proceedings with respect to the approval of the sale and the passing of the receiver’s accounts, the Crown was estopped from asserting them again.

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Held:

The motion was dismissed.

Leave to commence proceedings against a court-appointed receiver will normally be granted, unless there is no foundation for the claim or it is frivolous or vexatious. That usual test set a threshold that was too low for cases in which the activities of the receiver, including the conduct sought to be impugned by the creditor seeking leave, have already been approved by the court. Circumstances such as those in this case demanded the more stringent "strong prima facie case" test. If that more stringent test is not used, there would be no reason for the receiver to seek court approval of its activities.

The same issues that led the Crown to bring the present motion had been raised and dealt with, or could have been raised through reasonable diligence, in the prior proceedings. The issues were decided, and the decisions were final. The parties were the same as those in the prior proceedings. The doctrines of res judicata and issue estoppel applied.

Table of Authorities

Cases considered:

Angle v. Minister of National Revenue (1974), 47 D.L.R. (3d) 544, 74 D.T.C. 6278, 2 N.R. 397 (S.C.C.) — *referred to*

Bayhold Financial Corp. v. Clarkson Co. (1985), 70 N.S.R. (2d) 70, 166 A.P.R. 70 (C.A.) — *referred to*

Canada Deposit Insurance Corp. v. Greymac Mortgage Corp. (1991), 2 O.R. (3d) 446 (Gen. Div.), affirmed (1991), 4 O.R. (3d) 608 (C.A.) — *applied*

Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2) (1966), [1967] 1 A.C. 853, [1967] R.P.C. 497, [1966] 2 All E.R. 536 (H.L.) — *referred to*

Diehl v. Carritt (1907), 15 O.L.R. 202 (K.B.) — *referred to*

RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of), (sub nom. *Roynat Inc. v. Allan)* 69 C.B.R. (N.S.) 245, 61 Alta. L.R. (2d) 165, [1988] 6 W.W.R. 156, (sub nom. *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receivership))* 90 A.R. 173 (Q.B.) — *referred to*

Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1992), 9 C.P.C. (3d) 387 (Ont. Gen. Div.) — *referred to*

Motion by Attorney General of Canada for leave to bring proceedings on behalf of federal and provincial Crown against receiver/manager.

***R.A. Blair J.*:**

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Background

1 This is a motion by the Attorney General of Canada, on behalf of both the federal and provincial Crown, for leave to commence an action against Coopers & Lybrand Limited ("Coopers") in its professional capacity as receiver and manager of Willann Investments Limited and Cranberry Village, Collingwood Inc. Leave is necessary because paragraph 8 of the original Court Order of July 11, 1991, appointing Coopers as receiver and manager so stipulates.

2 The Crown, in its federal and provincial capacities, is a secured creditor of the Defendants in an amount of approximately $3 million. It stands in second position, behind the Plaintiff (whose rights have been assigned to Prenor Trust) and ahead of Prenor Trust in Prenor's own right. The Crown, however, does not have security over all of the defendants' assets, whereas Bank of America Canada and Prenor Trust do; and therein lies the rub.

3 For the purposes of sale by Coopers (whom I shall sometimes refer to as "the Receiver") the assets of the defendants were divided into "core assets" and "non-core assets". The Crown does not have security over the latter. In the sale of Cranberry Village by the Receiver, which took place earlier this year, the purchase price was allocated in a fashion that split the values of the assets and attributed them to non-core assets in a way which benefited the Plaintiff and Prenor Trust, but which left the Crown empty handed. One can readily understand why the Crown is out of sorts over this development. However, the sale was approved by Farley J. on December 23, 1992, after a hotly contested hearing in which the Crown vigorously objected to the sale. Moreover, the Order of Farley J. was approved by the Court of Appeal, and the appeal therefrom dismissed, on April 23rd of this year.

4 Shortly thereafter, on April 30, and again on June 28, 1993, Mr. Justice Farley was called upon to deal with matters pertaining to this troubled receivership anew. On April 30th he was asked to approve the activities of the Receiver, as set out in its Second, Third and Fourth Reports (dealing with the period September 1991 to September 1992), and to pass the Receiver's accounts. On June 28th, he was asked to approve the Receiver's activities as set out in its Sixth and Seventh Reports. Farley J. approved the Receiver's activities as requested in both instances, and approved the passing of accounts [reported at 20 C.B.R. (3d) 223 (Ont. Gen. Div.)]. The Receiver's activities for the earliest period of the receivership, that prior to September 27, 1991, were approved by Order of Montgomery J. dated November 21, 1991.

5 Leave is sought, as Mr. Bennett put it on behalf of the Crown, to sue the Receiver for negligence and breach of fiduciary duty "in the method and manner of realization" of the defendants' assets. The particulars of the allegations sought to be made are set out in the draft statement of claim and repeated in the affidavit of Christine Zuk, sworn in support of this motion. The granting of leave is opposed by the Respondents on the basis, essentially, that the issues have already been determined against the Crown in the proceedings respecting the approval of the sale and the approval of the Receiver's activities, and, accordingly, that the Crown is estopped from asserting them again, with the result that no action can lie. The Respondents also argue that the Crown has failed to put forward any evidence to support its position.

Law and Analysis

The Test

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6 I do not find it necessary to deal with the law or the facts in these Reasons at great length, although I have given very careful consideration to both, and to the careful and able arguments presented by counsel. In my view this is not a proper case for the granting of leave to proceed.

7 A number of authorities stand for the proposition that leave to commence proceedings against a court-appointed receiver will normally be granted, unless it is perfectly clear that there is no foundation for the claim or the action is frivolous or vexatious: see, *Diehl v. Carritt* (1907), 15 O.L.R. 202 (K.B.); *Roynat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of)* (1988), 69 C.B.R. (N.S.) 245 (Alta. Q.B.); *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1992), 9 C.P.C. (3d) 387 (Ont. Gen. Div.). In the latter case, however, Mr. Justice Farley pointed out that the application for leave should not be dealt with on a perfunctory basis, but that there should be a very careful examination of both the factual and legal issues, and that leave should not be given in a blanket or carte blanche manner (see p. 391).

8 In none of the cases which were referred to me could it be said — as I am satisfied it can be said here — that the very complaints with respect to which it is sought to obtain leave to sue the receiver were, in substance, dealt with and determined as part of vigorously opposed proceedings, involving the same parties, leading to Court approval of that very conduct. I shall return to a more detailed examination of those circumstances later in these Reasons.

9 In my opinion the "normal" test referred to above sets a threshold which is too low in cases where the activities of the Receiver, including the conduct sought to be impugned by the creditor seeking leave to proceed, have already been approved by the Court. In such circumstances, I prefer the analogy to the test for the granting of an interlocutory injunction adopted by Mr. Justice Chadwick in *Canada Deposit Insurance Corp. v. Greymac Mortgage Corp.* (1991), 2 O.R. (3d) 446 (Gen. Div.), at pp. 455-456, appeal dismissed (1991), 4 O.R. (3d) 608 (C.A.). Whether that test is described as that of establishing "a reasonable cause of action", as Chadwick J. described it, or in the more traditional terms of "a strong *prima facie* case" or the lesser "sufficient case to be tried", I am satisfied on the materials before me that the Crown has not met the test in this case. In circumstances such as these, I would endorse the more stringent "strong *prima facie* case" test.

10 Were it otherwise there would be little point in a receiver or receiver/manager seeking an Order approving its conduct and activities in the exercise of its duties as an officer of the Court. The very purpose of the granting of such an Order is to afford the receiver some measure of judicial protection. To say that that shield may be readily pierced unless the receiver can show that "it is perfectly clear" there is no foundation to the proposed claim, or that it is frivolous or vexatious, is to render such protection virtually meaningless in situations where the approved conduct and the conduct subject to the proposed attack are in substance the same.

Res Judicata or Issue Estoppel

11 In the proceedings respecting the approval of the sale of the assets by the Receiver, the allocation of amounts to the non-core lands in a fashion which, as Farley J. noted, would mean "the Crown would go begging", was very much an issue. Mr. Justice Farley carefully examined the justification put forward by the Receiver and Prenor Trust for "this seeming hocus-pocus" and concluded, after doing so, that the combination of various factors "washed away" the hocus pocus. He found that the Receiver "had made a sufficient effort to get the best price and it [had] not acted improvidently." His Order "authorized, empowered *and directed*" the Receiver "to perform its obligations under the Purchase Agreement".

12 The grounds of appeal from this decision included an attack on the allocation of the purchase price, as outlined above,

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and the assertion that Farley J. had erred "in finding that all avenues for marketing the Purchased Assets were exhausted by the Receiver and that the Receiver had made a sufficient effort to get the best price *and had not acted improvidently*". In its factum on the appeal, the Crown submitted that the learned Motions Court Judge had erred "in not scrutinizing with greater care the procedure followed by the Receiver" and that he "should have examined the Receiver's conduct in light of the information if [sic] had when it agreed to accept the Offer". As already noted, the Court of Appeal dismissed the appeal. It found the submissions of the Crown to be "without merit".

13 In the later Hearings, *which related specifically to the approval of the Receiver's activities*, as well as to the passing of the Receiver's accounts, the conduct of the Receiver was placed even more directly in issue by the Crown. See the affidavit of Christine Zuk, sworn April 23, 1993, "in support of the Crown's *objection to the approval of the Receiver's activities*" (Receiver's Compendium, Tab 14). Indeed, the Crown was candid on the April 30 Hearing in asserting that it was not interested in the passing of accounts, "but only wished to participate ... for the purpose of protecting its interests vis-à-vis a lawsuit it was threatening against the Receiver" (Reasons of Farley J., Compendium p. 119). The Crown also indicated "that its concerns lay not with the Receiver's 'managerial' functions *but with its 'realization' duties*" (p. 119, emphasis added). Farley J. then went on to outline three specific areas in which the Crown faulted the Receiver, namely,

(i) its failure to obtain an appropriate and an independent appraisal in time for the October 15, 1991 tender (it is the gravamen of the Crown's case that the Receiver should not have rejected a $20 million tender by Prenor Trust (which amount would have yielded a return for the Crown) and later sold the assets for $17 million (which did not));

(ii) its provision of a copy of a second appraisal report to Prenor Trust, while not providing the Crown with a copy of the report until sometime later; and,

(iii) its delay and mishandling of the listing arrangements once the tender process had failed to generate a buyer for the project.

14 Farley J. dealt with each of the Crown's submission carefully and fully. He decided, on all of the evidence before him, that, while there may have been "various slips and embarrassments" by the Receiver, the Receiver had satisfied the test of showing that it had acted as a prudent business person would have acted, and that no harm had been occasioned to the Crown by its conduct. Farley J. also had the benefit of *viva voce* evidence from the president of Prenor Trust with regard to the $20 million Prenor bid, which the Crown asserts the Receiver should have taken. He accepted the Prenor Trust evidence on this point, and concluded that the first mortgagee did not find the terms of the Prenor Trust bid acceptable "with the result that any negotiation on terms with it were preempted" (Reasons, Compendium, p. 126). In other words, there was no reasonable likelihood that the Prenor deal would have been completed.

15 The Orders of Mr. Justice Farley approving the activities of the Receiver are presently under appeal. The appeals, I am advised, have not yet been perfected.

16 An examination of the grounds of appeal, in conjunction with the allegations raised in the proposed statement of claim, as set out in the Christine Zuk affidavit of September 14, 1993, is instructive. I will refer only to the grounds of appeal from the Order of Farley J. dated May 2, 1993 (respecting the April 30 Hearing), rather than what is set out in both sources. The grounds of appeal assert that Farley J. erred in reviewing the Receiver's conduct and activities at all, "to the detriment of the Crown's position", and further, that he erred in failing to conclude that the Receiver owed a fiduciary duty and breached that duty "amongst other areas" in,

a) failing to consult the secured creditors *on the method and manner of realization* with respect to the first tender

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offering (i.e., the October 1991 tenders);

b) failing to consult the secured creditors on rejecting the tenders that had been submitted;

c)failing to apply to the Court, pursuant to the July 11, 1991 Order, for directions with respect the sale or rejection of tenders; and,

d)failing to request new tenders or re-negotiate existing tenders when if found out that it had rejected the tenders on an inadequate appraisal.

17 These grounds recite complaints which are identical to those set out in subparagraphs 5(a), (d), (e) and (f) of Ms. Zuk's affidavit as allegations of negligence and breach of fiduciary duty. A review of the materials and evidence before Mr. Justice Farley on the Hearings, and of his Reasons, indicates that the "other areas" referred to above undoubtedly include most, if not all, of the other particulars of negligence listed in Ms. Zuk's affidavit and the proposed statement of claim. They all reveal that the Crown's complaints about the appraisal process and the general marketing and realization strategies of the Receiver were front and centre in the proceedings and in their disposition.

18 In short, the disposition of these questions was "fundamental to the decision arrived at" by Farley J. because the Receiver's activities could scarcely have been approved if he had been of the view that there was substance in the complaints raised by the Crown in the evidence and on the argument before him. The very same issues regarding which the Crown now seeks leave to pursue the Receiver were raised in the proceedings before Mr. Justice Farley, and Mr. Justice Montgomery, or could have been raised, through reasonable diligence. They were decided. The decisions are final and binding, subject to the results of the appeals. The parties are the same. The doctrines of *res judicata* or of issue estoppel apply. See: *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.), particularly per Laskin J. at p. 551 and per Dickson J. at pp. 555-556; *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536 (H.L.), per Lord Guest at pp. 564-565.

19 It may be that a Court should be cautious about giving effect to an argument of *res judicata* on a motion of this sort on the premise that such an allegation "can only be properly canvassed after evidence has been taken": see, *Bayhold Financial Corp. v. Clarkson Co.* (1985), 70 N.S.R. (2d) 70, 166 A.P.R. 70 (C.A.). However, there is no particular magic in, or need for, *viva voce* evidence at a trial if the evidence before the Court is adequate to enable the Court to determine whether the tests for the application of *res judicata* have been met. That is the case, in my view, here.

20 It follows that to grant leave to the Crown to proceed would be to allow it to pursue a claim that no longer has any foundation or is frivolous or vexatious — at least, pending the determination of the outstanding appeals.

Conclusion

21 Accordingly, an Order will go dismissing the Crown's motion for leave to commence an action against Coopers & Lybrand Limited in its professional capacity as receiver and manager of the Defendants, subject to the caveat that the Crown may renew its Motion in this respect in the event that it is successful on its appeals from the Orders of Farley J. dated May 2 and June 28, 1993.

22 I may be spoken to with respect to the issue of costs, if counsel so desire.

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Motion dismissed.

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2008 CarswellOnt 330
Ontario Superior Court of Justice

80 Aberdeen Street Ltd. v. Surgeson Carson Associates Inc.

2008 CarswellOnt 330, 163 A.C.W.S. (3d) 751, 40 C.B.R. (5th) 109

80 ABERDEEN STREET LTD. (Plaintiff) and SURGESON CARSON ASSOCIATES INC. and MICHAEL K. CARSON (Defendants)

R. Smith J.

Heard: November 27, 2007
Judgment: January 28, 2008 *
Docket: 06-CV-35454

Counsel: Fred E. Seller for Plaintiff / Moving Party / Respondent to Cross-Motion
Alan L.W. D'Silva, Katherine J. Menear for Defendants / Respondent on the Motion / Moving Party on Cross-Motion to Strike the Statement of Claim

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

Headnote

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

Receiver/manager was appointed by court to manage affairs of mortgagor after it defaulted on mortgage and failed to pay contractors — Two of receiver/manager's interim reports were approved by court — Conditional discharge of receiver/manager was arranged to allow mortgagor to refinance property — Receiver/manager filed final report but discharge was subject to any claims mortgagor might bring against receiver/manager — Mortgagor brought action against receiver/manager for damages for gross negligence and breach of fiduciary duties — Mortgagor brought motion for declaration that leave of court was not required to commence action, for retroactive leave if necessary, and for order consolidating action with receiver/manager's passing of accounts — Receiver/manager brought cross-motion for order striking out statement of claim as disclosing no reasonable cause of action — Motion granted; cross-motion dismissed — Leave of court was required but was granted on retroactive basis and action was to be consolidated with passing of accounts — Requirement of leave was term of receiver/manager's initial appointment — Discharge order did not specifically grant leave — Receivership was never completed since discharge was conditional and receiver/manager's accounts had not been passed — Mortgagor was not required to demonstrate strong prima facie case in order to obtain leave since conduct complained of had not already been approved by court — Mortgagor's action was not frivolous, vexatious, or clearly without merit — Doctrines of res judicata, issue estoppel, and abuse of process did not apply since issues had not been litigated previously — It was not plain and obvious that action could not succeed — Consolidation was appropriate as amount of receiver/manager's fees was yet to be determined and claims in action arose from same series of transactions.

Table of Authorities

Cases considered by *R. Smith J.*:

Bank of America Canada v. Willann Investments Ltd. (1993), 23 C.B.R. (3d) 98, 1993 CarswellOnt 249 (Ont. Gen. Div.) — considered

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Falloncrest Financial Corp. v. Ontario (1995), (sub nom. *Nash v. Ontario*) 27 O.R. (3d) 1, 1995 CarswellOnt 910 (Ont. C.A.) — referred to

Gallo v. Beber (1998), 1998 CarswellOnt 4981, 116 O.A.C. 340, 7 C.B.R. (4th) 170, 31 C.P.C. (4th) 60 (Ont. C.A.) — considered

Hunt v. T & N plc (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — referred to

RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of) (1988), (sub nom. *Roynat Inc. v. Allan*) 61 Alta. L.R. (2d) 165, (sub nom. *Roynat Inc. v. Allan*) [1988] 6 W.W.R. 156, (sub nom. *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receivership)*) 90 A.R. 173, 1988 CarswellAlta 299, (sub nom. *Roynat Inc. v. Allan*) 69 C.B.R. (N.S.) 245 (Alta. Q.B.) — considered

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2006), 19 C.B.R. (5th) 165, 2006 CarswellOnt 2835 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 215 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 1.04 — referred to

R. 6.01 — referred to

R. 21.01(1)(b) — considered

R. 41 — considered

MOTION by mortgagor for declaration that leave of court was not required to commence action, for retroactive leave if necessary, and for order consolidating action with receiver/manager's passing of accounts; CROSS-MOTION by receiver/manager for order striking out statement of claim as disclosing no reasonable cause of action.

***R. Smith J.*:**

Overview

1 The defendant, Surgeson Carson Associates Inc. (the "Receiver"), was appointed as the court appointed receiver and manager of the commercial building and property owned by the plaintiff, 80 Aberdeen Street Ltd ("Aberdeen"). The application to appoint a receiver was made by the first mortgage as a result of a default under the mortgage and of numerous construction

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liens being filed against the property. The defendant, Michael K. Carson ("Carson"), was the individual who had primary responsibility for the Aberdeen Receivership.

2 The Receiver was discharged by orders dated May 1, 2006 and May 26, 2006 in order to allow the owner to reacquire the title and the right to manage the property to allow it to obtain a new first mortgage and to pay off the existing mortgage. The property value rose sufficiently during the receivership to allow the plaintiff to refinance the mortgage and pay off all the creditors.

3 The May 1, 2006 order discharged the Receiver however the discharge was "subject to and without prejudice to any claims which (Aberdeen) may bring against the Receiver (the "Claims") which shall include but are not limited to claims with respect to the fees and disbursements of the Receiver ...". Paragraph 11 of the discharge order also granted Aberdeen the right to commence any claims against the Receiver provided certain conditions were met.

4 Aberdeen has commenced an action against the Receiver and Carson alleging gross negligence and breach of fiduciary duty and claiming damages in the approximate amount of 2 million dollars, without obtaining leave of the Court. In addition, Aberdeen is contesting the fees of $1,471,519.00 charged by the Receiver during the period of the receivership.

5 Aberdeen has brought a motion seeking:

i) a declaration that leave of the court is not required to commence the Action against the Receiver;

ii) leave to commence the Action *nunc pro tunc*, if leave is required; and

iii) an order consolidating Aberdeen's opposition to the passing of the Receiver's accounts in Court File No. 02-CV-19963 (the "Receivership Action") with file number 06-CV-35454 (the "Action") due to the involvement of similar facts, parties and legal issues.

6 The Receiver and Carson have brought a cross-motion to strike the plaintiff's statement of claim on the grounds that the actions of the Receiver were ratified by numerous court orders made on notice to all stakeholders, and the pleading discloses no reasonable cause of action against the Receiver or Carson, as a result of the doctrines of *res judicata* or abuse of process.

7 The court must decide the following issues:

1. Is leave of the Court required in order for Aberdeen to commence this Action against the Court appointed Receiver?

2. If leave is required, should Aberdeen be granted leave to commence the Action against the Receiver and against Carson personally *nunc pro tunc*?

3. Is Aberdeen *estopped* from commencing the Action on the basis of issue *estoppel* or abuse of process?

4. Should the Action, alleging that the Receiver was grossly negligent and breached his fiduciary duty, be consolidated with the Receivership Action contesting the amount of the Receiver's fees incurred during the receivership? and

5. Should Aberdeen's statement of claim be struck as disclosing no reasonable cause of action against either the Receiver or Carson on the basis of *res judicata* or abuse of process?

Background Facts

8 Aberdeen is a company duly incorporated pursuant to the laws of the Province of Ontario. Aberdeen is the owner of the property municipally known as 80 Aberdeen Street, Ottawa, Ontario (the "Property") and the commercial office building located thereon (the "Building").

9 The "Receiver" is a company incorporated pursuant to the laws of the Province of Ontario and carries on business in the City of Ottawa as trustees in bankruptcy and credit counsellors.

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10 Michael K. Carson, is a principal, director, officer and employee of Surgeson Carson Associates Inc., and is both a Chartered Accountant and a Chartered Insolvency and Restructuring Professional who had primary responsibility for the receivership.

11 After purchasing the Property in January 2000, Aberdeen undertook significant renovation efforts. These efforts required Aberdeen to seek and obtain financing via a first mortgage from The Civil Service Co-Operative Credit Society, Limited, now known and hereinafter referred to as CS Alterna Bank ("Alterna").

12 In 2001, the Property was rented to three tenants: Hummingbird Ltd. ("Hummingbird"); Precarn Inc. ("Precarn"); and Canpatent Administrative Services ("Canpatent").

13 Aberdeen owned and continues to own, as a result of the actions of the Receiver during the Receivership, the Building and Property located at municipal address 80 Aberdeen Street, Ottawa, Ontario.

14 At the time of the initial application, Aberdeen was at risk of losing the Building and the Property. Aberdeen was in default on its mortgage made with CS Co-op (Alterna); Aberdeen had made written admissions that it did not have sufficient funds to deal with outstanding work and Building Project issues and had instructed CS Co-op to take whatever action it deemed appropriate; Aberdeen was not paying its creditors according to contract terms; several construction liens had been registered against the Property; collection of rents from the Tenants was becoming difficult; the Tenants were faced with serious fit-up deficiencies and base Building deficiencies that were impacting Aberdeen's ability to collect rent; the integrity of the tenancies was being threatened by the financial problems of Aberdeen thereby putting the entire Project and creditor and shareholder groups at risk; and the directors/officers/shareholders of Aberdeen were potentially exposed to lien trust issues/guarantees.

Surgeson Appointed Receiver

15 On March 5, 2002, Surgeson was appointed by order of the Court as receiver and manager without security of all property and assets and undertakings of Aberdeen. Aberdeen and Callan-Jones consented to the Appointing Order.

16 The Appointing Order granted the Receiver broad discretion and authority to carry out its duties as Receiver. The Receiver was given the authority and power to immediately take possession and control of the Assets, and to conduct, manage, administer, operate and sell the Assets, until further order of the Court, including the Property. The Receiver was empowered to perform or do any or all acts and things that in its opinion were necessary or desirable for the purposes of receiving, managing, operating, preserving, protecting and realizing the Assets or any part thereof, including taking such steps to complete the construction of the Building on the Property, settling or compromising any indebtedness by or to Aberdeen and taking any steps it may deem necessary or desirable.

Orders made throughout the Receivership

17 From March 5, 2002 through to its discharge on May 26, 2006, the Receiver reported to the Court and attended before the court on a number of motions. Throughout the Receivership, the Receiver was in constant communication with the Tenants, Service List and Stakeholders including Aberdeen and Callan-Jones, as indicated in Exhibit 8 to the Third Report.

18 All of the Receiver's reports and notices were served on the Service List, which was comprised of a number of Stakeholders — Doucet McBride and Piazza Brooks Siddons on behalf of all Construction Lien and Trust Claimants; Callan-Jones and John Nelligan on behalf of Aberdeen and all Guarantors; and CS Co-op.

19 The Receiver's Preliminary Report set out the conservatory and protective measures that the Receiver had taken immediately after the Appointing Order and its recommendations with respect to remediating the Hummingbird tenant fit up deficiencies and Base Building deficiencies. The Receiver had met with Callan-Jones, Aberdeen, Mask, the Lien Committee and the Tenants on an individual basis to discuss Construction Project deficiencies, the costs of remedying deficiencies and each Stakeholder's role and responsibilities in addressing and properly completing the outstanding deficiencies.

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20 The Receiver made a Motion to the Court on April 5, 2002 to seek the approval of its recommendations in the Preliminary Report. The Motion was made with notice to all stakeholders including Aberdeen and Callan-Jones. Prior to the attendance, Aberdeen and Callan-Jones, consented to the April 5, 2002 Order made by the Court, which ordered that the Receiver remediate the lands and Building at the Property and set out the scope and terms of the Project.

21 The Receiver provided the First Report dated April 26, 2002 and the Supplemental First Report dated May 10, 2002 to all parties on the Service List, including Aberdeen and Callan-Jones, which updated the stakeholders and the Court on the Receiver's activities to that date.

22 The Receiver sought an order approving the First Report and Supplemental First Report Order on May 15, 2002. The Motion was made on notice to the Lien Committee, Tenants and Service List, including Aberdeen and Callan-Jones.

23 Aberdeen and Callan-Jones, consented to the May 15, 2002 Order made by the Court which, among other things, approved the First Report and the First Supplemental Report, ordered the Receiver to proceed with its plan for Tenant fit up deficiencies, approved the Receiver's plan with respect to the Base Building deficiencies as well as other remediation plans, and approved the procedure to be followed with respect to the 4th Floor Tenants' desire for a rent adjustment. With respect to the 4th Floor Tenant's desire for a rent adjustment, the matter was to return on a motion before Justice Chadwick on July 2, 2002, later adjourned on consent of all parties and was ultimately heard on February 17, 2003.

24 While the May 15, 2002 Order was the first order addressing the rent adjustment, a number of subsequent orders of the Court also addressed the resolution of the rent issues with the 4th Floor Tenants. The rent issues stemmed from the 4th Floor Tenants' dissatisfaction with the Base Building and Tenant fit-up construction and the deficiencies associated therewith. In this respect, an Interim Settlement was achieved and the June 6, 2002 Order was made on consent, which provided among other things, that the 4th Floor Tenants would pay a reduced rent for a four month period until the deficiencies were remedied and a resolution could be agreed upon. The June 6th Order was extended, on consent, by way of the October 3, 2002 Order and again by the February 17, 2003 Order.

25 The Receiver provided the Receiver's Second Report dated December 3, 2002 and Second Supplemental Report dated February 7, 2003, to all parties on the Service List, including Aberdeen and Callan-Jones, which provided an update regarding the issues being faced by the Receiver and the Receiver's activities to that date.

26 A motion was originally scheduled for December 9, 2002, to approve the Second Report. On consent of all parties, the motion was adjourned in order that more remedial work would be accomplished.

27 A Plan of Debt Compromise dated July 2, 2003 was unanimously accepted and approved by Aberdeen's creditors on July 18, 2003. The Plan of Debt Compromise, among other things, settled all claims against Aberdeen save and except for Alterna and D&A MacLeod Company Ltd. ("D&A MacLeod") and made funds available to the following Creditor Classes: Class 1 Lien Holders with Holdback Deficiency; Class II Lien Claimants with Lien Balances; Class III Potential Trust Claimants; and Class IV Potential Unsecured Creditors.

28 The Plan of Debt Compromise was approved by the Court on July 31, 2003. The July 31, 2003 Order was made with notice to the parties on the Service List including Aberdeen and Callan-Jones, and following submissions from counsel for the Receiver, the Lien committee, Callan-Jones (Aberdeen), and D&A MacLeod in its capacity as Trustee of 95 Beech Street Limited.

29 The Receiver provided the Third Report dated April 12, 2006 to Aberdeen and Callan-Jones. The purpose of the Third Report, was to update stakeholders and the Court regarding the steps taken by the Receiver throughout the Receivership and to obtain Court approval for the remaining steps to be taken by the Receiver.

30 The Receiver made a motion to the Court returnable May 1, 2006 for an order approving the Receiver's Third Report, passing the Receiver's accounts, and seeking other authorizations. Aberdeen and Callan-Jones received a copy of the motion

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record but did not file any materials on the motion, nor did they make any submissions at the hearing of the motion. The Receiver and Aberdeen consented to the May 1, 2006 Order.

31 The Receiver's Third Report was approved subject to and without prejudice to Aberdeen's right to make claims against the Receiver, which shall include but not be limited to claims with respect to fees and disbursements of the Receiver.

32 As a follow-up up to the May 1, 2006 Order, the Receiver made a motion to the Court on May 26, 2006 on consent of Aberdeen and the Receiver to discharge the Receiver. The Receiver was discharged as of May 26, 2006.

33 On July 28, 2006, after the Receiver had been discharged, Aberdeen commenced the Action against Surgeson and Carson claiming 2 million dollars in damages alleging gross negligence and breach of fiduciary duties, without obtaining prior leave of the Court.

Analysis

Issue #1 Is Leave of the Court Required for Aberdeen to Commence This Action Against the Court Appointed Receiver?

34 Aberdeen submits that leave of the Court is not required to commence the Action against a Court appointed Receiver because the Receiver has been discharged and the initial terms of appointment order no longer apply. The Receiver was appointed pursuant to Section 101 of the *Courts of Justice Act* and Rule 41 of the *Rules of Civil Procedure* and neither Section 101 or Rule 41 or any other statute requires a party to obtain leave of the Court before commencing an action against a court appointed Receiver.

35 Aberdeen further submits that since the Receiver has been discharged, the appointment order of Justice Chadwick dated March 5, 2002, which required leave of the Court before commencing any action against the Receiver, ceased to have any effect after the discharge of the Receiver on May 26, 2006.

36 Aberdeen further submits that the terms of paragraphs 1 and 11 of the discharge order dated May 1, 2006 serve to grant leave to commence the Action in any event.

37 The Receiver submits that the Court should look to the terms of the appointing order to determine if leave is required to commence an action against the Receiver, after it has been discharged. The Discharge Orders are silent regarding the requirement to obtain leave to commence an action against the Receiver, other than paragraphs 1, 4 and 11 which clearly contemplate the possibility of future actions being brought against the Receiver, provided certain conditions were met.

38 The Receiver argues that I should read in a requirement for leave to commence an Action against a discharged Receiver, where the discharge order is silent; because such protection is afforded to a receiver appointed under Section 215 of the *Bankruptcy and Insolvency Act* and because such protection ought to be afforded to a receiver appointed pursuant to s. 101 of the C.J.A., in the context where leave was required under the original appointing order.

Appointing Order

39 In paragraph 8 of Justice Chadwick's appointment order dated March 5, 2002, he orders that "no legal actions, applications, administrative proceedings, ... shall be asserted against the Receiver ... without the written consent of the Receiver or leave of the Court first being obtained ..." Aberdeen argues that the appointment order ceased to have any effect after the discharge of the Receiver and therefore leave is not required.

Discharge Orders

40 The Discharge Orders (May 1, 2006 and May 26, 2006), which were made on consent of all parties, are silent on the issue of whether leave of the court is required prior to commencing any future actions against the Receiver. However, in paragraph 1 of the May 1, 2006 order, the Receiver's Third Report was "... approved, subject to and without prejudice to any claims which

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the Defendant ("Aberdeen") may bring against the Receiver (the "Claims"), which shall include but not be limited to claims with respect to the fees and disbursements of the Receiver, ... with respect to the period from April 1, 2002 to the date of discharge ..."

41 The Receiver's Third Report described its actions to date and the Receiver remained subject to any claims that Aberdeen might decide to assert after it had reviewed documentation in the Receiver's possession that was to be provided to Aberdeen as set out in paragraphs 2 and 5 of the May 1 st Discharge Order. I find that the terms of the May 1 st Discharge Order make it clear that the Receiver's Third Report had not been finally adjudicated upon us between the Receiver and Aberdeen and Aberdeen specifically reserved its right to make any future claim against the Receiver that it may wish to advance.

42 In paragraph 9 of the May 1 st Discharge Order, the claims for relief quested by the Receiver in paragraphs 2, 3 and 4 of the motion were adjourned *sine die*. The relief sought in paragraphs 2, 3 and 4 included a request to approve the Receiver's statement of Receipts and Disbursements, assessing the fees of the Receiver and professionals engaged by it as set forth in the Final Report, and payment fees up to date. As a result, the Receiver's motion was not completely and fully adjudicated upon. Paragraph 10 of the Order required the Receiver to deliver an *affidavit* in support of its claim for fees before May 31, 2006 and Paragraph 11 of the Order stated that, within 60 days of receipt of the Receiver's *affidavit*, the Defendant *shall* commence the Claims and deliver a responding *affidavit* with respect to the fees, failing which Aberdeen was to be *estopped* from bringing any claims.

43 In essence, I find that what happened by way of the May 1 st Discharge Order was the following:

a) The Receiver's Third Report was approved subject to Aberdeen's right to make any claims it wished to assert against the Receiver including its right to contest the amount of the Receiver's fees, provided certain steps were taken by both parties within the time periods set out in the Order

b) The Receiver was aware that the amount of its fees was being contested by Aberdeen and I infer the Receiver must have been aware of the possibility of additional claims by Aberdeen after disclosure had been made, however no details of any claim were specified at the time of this discharge order.

c) The Court did not grant leave to commence any claim against the Receiver in the discharge order as no details of any claim were provided, other than disputing the Receiver's fees, but it was clear that a possible claim of some sort was contemplated by Aberdeen.

d) The sum of $50,000 was retained in trust by the Receiver as security for costs with respect to the possibility of future "claims" to be made by Aberdeen.

44 The Receiver submits that I should read in a requirement that leave of the Court should be required before a party can commence an action against a discharged Receiver, who was appointed by the Court, similar to the protection afforded to an official receiver, interim receiver and a trustee under s. 215 of the *Bankruptcy and Insolvency Act*. I agree with the Receiver's position that leave of the Court is required in the circumstances of this case for the following reasons:

a) Notwithstanding that the possibility of a future claim or claims and against the Receiver was contemplated under the terms of the Discharge Order, no specific leave was sought by Aberdeen to commence the present Action against the Receiver and no such order was granted, as the nature and factual basis of the potential claim was unknown;

b) The initial appointment order required leave of the Court before commencing an action against the Receiver and this was part of the conditions under which the Receiver accepted the appointed. I find that it is fair and reasonable to accord this protection to a court appointed Receiver as it was part of the terms agreed to on the Receiver's appointment;

c) Even though the Receiver was discharged, the Receivership had not been completed, as would normally be the case when the Receiver is discharged, because:

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i) the Receiver's Third Report had not been finally approved and was subject to possible claims by Aberdeen; and

ii) the Receiver had not yet passed its accounts to obtain Court approval for its fees and the claims for relief in paragraphs 2, 3 and 4 of the Receiver's motion were adjourned *sine die*.

d) The Receiver cooperated with Aberdeen and agreed to be discharged on the terms set out in the Order to allow Aberdeen to refinance the property, as it was necessary for Aberdeen to retake full legal control and management authority of the Property in order to obtain the mortgage.

e) If the urgency of refinancing the Property had not arisen, then in the normal course the issue of whether the Receiver's actions as described in the Third Report should be approved, would have been decided by the Court at a hearing held before the Receiver was finally discharged. I find in the circumstances it would be unfair to the Receiver and consistent with the original intention of the parties, as expressed in the appointment order, that the Receiver, who had not yet obtained approval of its final report by the Court to accord the Receiver the protection provided in the initial appointment order, requiring prior leave of the Court before any party could commence an action against the Receiver, until the Receivership was completed.

Issue #2 Should Aberdeen be granted leave to commence the Action Against the Receiver and Against Carson Personally nunc pro tunc?

45 Aberdeen submits that leave of the Court should be granted to allow it to assert its claim against the Receiver unless there is no foundation for the claims or the claim is frivolous and vexatious.

46 The Receiver submits that Aberdeen must meet the "strong *prima facie* case" test in order to obtain leave to sue a Court appointed receiver who has sought and obtained court approval of its actions during the Receivership.

47 The Receiver relies on the cases of *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]) at paragraph 36; which agrees with the reasoning of Blair J. in *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ont. Gen. Div.), and where G.B. Morawetz J. states as follows:

> ... in circumstances such as this, where there have been numerous orders approving the conduct and activities of the Receiver, the more stringent "strong *prima facie* case" test would have to be met by any party seeking leave to sue the Receiver.

48 In the case before me, Court approval of the Receiver's conduct, which would normally have occurred by obtaining Court approval of the Receiver's reports, was never obtained, except for the approval of the Receiver's first report and Supplemental First Report, which were approved by the Court on May 15, 2002. The claim that has been made against the Receiver in the Action relates to the Receiver's actions or failure to act, during the period subsequent to May 15, 2002.

49 I find that the more stringent test of requiring Aberdeen to demonstrate a strong *prima facie* case would only apply in situations where the allegations raised in the Action could have been raised in earlier proceedings or where the conduct subject to the proposed attack is in substance the same as conduct approved earlier by the Court, as was the case in the *Toronto Dominion Bank v. Preston Springs Gardens Inc.* case *supra*.

50 In *Gallo v. Beber*, [1998] O.J. No. 5357 (Ont. C.A.), Feldman J.A. set out the test to be applied when seeking leave to commence the action against a Receiver *nunc pro tunc*. She quoted with approval the quote from *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of)* (1988), 69 C.B.R. (N.S.) 245 (Alta. Q.B.) as follows:

> An application for leave to commence an action *nunc pro tunc* should be granted if to do so does not cause prejudice or any substantial injustice and if leave would have been granted if it had been sought at the appropriate time. In the absence

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of prejudice, leave will generally be granted unless it is clear that there is no foundation for the claim or whether the action is frivolous or vexatious.

51 Justice Feldman went on to state that a stricter test for leave may be appropriate "where the same issues raised in the action had been raised or could have been raised in the discharge proceeding." In that case the Court held that the applicant must show a strong *prima facie* case in order to meet the test for leave. I have found that the stricter test does not apply as the issues raised in the Action were not raised in the discharge proceeding and in fact, the right to assert the claims made in the Action were specifically reserved by Aberdeen in the Discharge Order.

52 Having reviewed all of the Orders made during the Receivership, I find that the only Order approving the Receiver's conduct was the Order date May 15, 2002 which approved the Receiver's First Report and Supplementary Report to that date. The approval of the Receiver's Third and final Report in the Discharge Order of May 1, 2006 was subject to Aberdeen's right to make future claims against the Receiver. As a result, I find that the issues raised in the Action which are allegations that the Receiver breached his fiduciary duties and was grossly negligent in the manner in which it carried out several aspects of the Receiver's responsibilities as set out in the Statement of Claim, were never ruled on by the Court in the Receivership proceeding.

53 As the Receiver never obtained Court approval for its conduct and actions as set out in Third Report, the issues raised in the Action have not been decided in the Receivership and could not have been raised as the Receiver never obtained final approval of its Third Report. Therefore I find that the more stringent test of demonstrating a strong *prima facie* case does not apply and the plaintiff must only demonstrate that there is some foundation for its case and that the Action is not frivolous and vexatious. As a result it is not necessary to decide if Aberdeen has demonstrated a "strong *prima facie* case" as this test does not apply in the circumstances of this case.

54 I find that Aberdeen's Action is not frivolous and vexatious and is not without any possible foundation since the Receiver's conduct has not been previously approved by the Court and the allegations cannot be found to be clearly without merit based on the evidence before me.

55 The claim against Michael K. Carson personally, is based on the fact that he was the individual who had carriage of the Receivership. The plaintiff in its statement of claim makes allegations of gross negligence and breach of fiduciary duty against both the Receiver and against Carson personally. I am unable to conclude on the limited evidence before me that the action against Carson personally is frivolous and vexatious or that it is "plain and obvious" that the action cannot succeed against Carson at this stage of the proceeding and based on the allegations made in the statement of claim.

56 As a result, leave to commence the Action against the Receiver and Carson is granted *nunc pro tunc* for the reasons set out above.

Issue #3 Is Aberdeen Estopped from Commencing the Action on the Basis of Issue Estoppel or Abuse of Process?

57 I have previously found that the questions and issues raised in the Action were not decided by a Court at any time in the Receivership proceeding because the Receiver never obtained court approval of its reports other than on May 15, 2002 and secondly, Aberdeen specifically reserved its right to advance claims against the Receiver after its discharge and the Receiver consented to the order. As a result, since there was never any adjudication by the Court on disputed questions set out in the Action the doctrines of *res judicata*, issue *estoppel*, or abuse of process do not apply on the facts before me, other than to any allegations concerning conduct of the Receiver approved by the order of Justice Chadwick on May 15, 2002.

58 I agree with the submissions of the Receiver that the doctrine of abuse of process has been applied to prevent re-litigation in circumstances where the strict requirements of issue *estopped* have not been met, but I find the doctrine of abuse of process does not apply because a) the Receiver consented to the Discharge Order, which specifically reserved Aberdeen's right to advance future claims set out in the Action against the Receiver, and b) the unknown and unspecified claims were never litigated and decided upon by a Court in the Receivership proceeding.

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59 If the Receiver had "bared its breast" in its reports to the Court, and if the reports had been finally approved by the Court, without specifically allowing a party to subsequently advance claims, then the situation would be different as was the situation in the case of *Bank of America Canada*, *supra.*

60 As a result, I find that Aberdeen is not *estopped* from commencing the Action on the basis of Issue *Estoppel* or Abuse of Process.

Issue #4 Should the Action, Alleging Gross Negligence and Breach of Fiduciary Duty, be Consolidated with the Receivership Action, Contesting the Amount of the Receiver's Fees?

61 Rule 6.01 of the *Rules of Civil Procedure* allows the Court to order that two or more proceedings pending before the Court, be consolidated where they have a question of fact or law in common, the relief claimed in them arises from the same series of transactions or occurrences, or for any other reason such an order ought to be made.

62 Rule 1.04 of the *Rules of Civil Procedure* requires the Court to construe the rules liberally to secure the just, most expeditious and least expensive determination of civil proceedings.

63 The Receiver argues that, since it was discharged, the ongoing proceeding to contest the Receiver's fees is not a pending proceeding as it argues that the Receivership Proceedings are ended. I disagree.

64 Under the terms of the Discharge Order, Aberdeen specifically reserved its right to contest the amount of the Receiver's fees and some limited procedural guidance was provided to attempt to identify the issues in dispute. I find that there is an ongoing proceeding pending in the Receivership Action, namely determining if the amount of the Receiver's fees is fair and reasonable in the circumstances of this Receivership, considering all of the steps taken by the Receiver.

65 This dispute has not yet been resolved, and, as a result there is a pending proceeding regarding the amount of the Receiver's fees. Since the Receiver has been paid in full during the period of the Receivership, it is in essence a claim by Aberdeen against the Receiver to return some of the fees which it has invoiced and been paid. The proceeding by Aberdeen against the Receiver to return some of the fees charged in the Receivership is not at a very advanced stage, and is certainly not ended.

66 I find that the least expensive and most expeditious manner of deciding the claim against the Receiver for the return of some of its fees is to have this claim heard at the same time as the other claims against the Receiver are advanced. The claims related to the Receiver's fees also arise out of the same series of transactions, namely the Receiver's actions throughout the period of the Receivership.

67 The issue of the appropriate amount of the Receiver's fees and the steps taken by the Receiver, as set out in its Final Report, would in the ordinary course have been dealt with before the Receiver was discharged without the necessity and cost of a full legal proceeding. Therefore, the parties may seek further directions from me with regard to time limits, in the consolidated proceeding, and steps to be taken in order to manage this consolidated action efficiently.

68 I therefore order that the Action 06-CV-35454 shall be consolidated with the Receivership Action 02-CV-19963.

Issue #5 Should Aberdeen's Statement of Claim be Struck Out?

69 The Receiver moves to strike Aberdeen's Action and Statement of Claim under Rule 21.01(b) of the *Rules of Civil Procedure* on the grounds that Aberdeen's Statement of Claim discloses no reasonable cause of action.

> The test to be applied in a motion to strike under Rule 21.01(a)(b) requires the Court to find that it is "plain and obvious" that the action cannot succeed.

Hunt v. T & N plc, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (S.C.C.) at para. 31.

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70 No evidence is admissible on motion under Rule 21.01(b), and the Court must accept the facts alleged in the Statement of Claim as proven unless they are patently ridiculous or incapable of proof.

Falloncrest Financial Corp. v. Ontario (1995), 27 O.R. (3d) 1 (Ont. C.A.)

71 In view of my finding that the issues raised in the Action have not been adjudicated upon or approved by the Court in the Receivership proceeding, I find that it is not plain and obvious that Aberdeen's Action cannot succeed and it is not plain and obvious that the doctrines of abuse of process or *res judicata* apply. The Receiver's cross-motion to strike Aberdeen's Action is therefore dismissed.

Costs

72 Aberdeen shall have 15 days to make submissions on costs, the Receiver shall have 15 days to respond and Aberdeen shall have 10 days to reply.

Motion granted; cross-motion dismissed.

Footnotes

* Additional reasons at *80 Aberdeen Street Ltd. v. Surgeson Carson Associates Inc.* (2008), 2008 CarswellOnt 1813 (Ont. S.C.J.).

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16

2010 QCCS 2643
Cour supérieure du Québec

Chantiers Davie inc., Re

2010 CarswellQue 6188, 2010 QCCS 2643, 191 A.C.W.S. (3d) 713, EYB 2010-175668

Dans l'affaire du plan d'arrangement de: Chantiers Davie inc., Débitrice, c. Samson Bélair/Deloitte & Touche inc., Contrôleur

Parent J.C.S.

Audience: 21 mai 2010
Jugement: 25 mai 2010
Dossier: C.S. Qué. Québec 200-11-019127-102

Avocat: *Me Martin Desrosiers, Me Sandra Abitan*, pour la débitrice
Me Sandra Abitan, pour le contrôleur
Me Marie-Paule Gagnon, pour Investissement Québec
Me Frédéric Desgagnés, pour Ocean Hotels PLC
Me Guy De Blois, pour Exportation et développement Canada
Me Alain Riendeau, pour Cecon ASA et de Upper Lakes Group inc.

Sujet: Insolvency

***Parent J.C.S.*:**

1 La Débitrice Chantiers Davie Inc. présente une *Requête en prorogation de délai* (la « *Requête* ») en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* [1] (LACC).

2 Il s'agit de la deuxième demande en prorogation de l'Ordonnance initiale, la première période de prorogation de 60 jours se terminant le 25 mai 2010.

3 La Débitrice demande une prorogation jusqu'au 15 septembre 2010. Elle allègue que ce délai est nécessaire afin de lui permettre, avec l'aide de ses conseillers, de compléter les démarches devant mener à la présentation d'un plan d'arrangement aux créanciers.

4 Les créanciers et les autres parties intéressées ayant comparu consentent à la demande de prorogation. Toutefois, Cecon ASA (Cecon), l'un des deux clients de la Débitrice, s'oppose au délai requis. Cecon estime que la période de prorogation ne devrait pas excéder cinq semaines, afin de permettre au Tribunal d'exercer les responsabilités que lui impose la LACC.

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5 Investissement Québec s'oppose à une conclusion accessoire de la requête, laquelle demande l'approbation par le Tribunal des activités du Contrôleur énoncées à son quatrième rapport [2] .

5 *Analyse*

6 Contrairement à l'Ordonnance initiale qui ne peut excéder trente jours [3] , la LACC ne prévoit pas de délai pour les prorogations de cette dernière. L'article 11.02(2) LACC indique simplement que le Tribunal ordonne la prorogation « aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire ». Tout est question de circonstances.

7 L'article 11.02(3) LACC précise les conditions imposées pour l'émission d'une ordonnance initiale ou en prorogation :

> (3) Le tribunal ne rend l'ordonnance que si :
>
> > a) le demandeur le convainc que la mesure est opportune;
> >
> > b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

8 Le fardeau de preuve incombe au demandeur à chacune des étapes.

Délai de prorogation

9 Comme déjà mentionné, les parties ayant comparu ne mettent pas en doute la bonne foi ni la diligence de la Débitrice. Elles estiment également que la demande de prorogation pourrait favoriser la présentation d'un plan arrangement à l'avantage des créanciers ainsi que des autres parties intéressées.

10 Le témoignage du Contrôleur confirme que la Débitrice, malgré sa situation difficile, déploie tous les efforts possibles pour tenter de présenter un plan d'arrangement satisfaisant pour toutes les parties intéressées.

11 Le 12 mai 2010, le Tribunal approuvait le contrat d'embauche du conseiller financier Rostchild. L'intervention de cette firme a pour but de permettre à la Débitrice d'identifier et d'intéresser d'éventuels investisseurs. Cette démarche de la Débitrice a reçu l'aval des principaux créanciers et des deux clients de la Débitrice, Cecon et Ocean Hotels.

12 Dans ce contexte, le Contrôleur estime irréaliste de croire qu'un délai de cinq semaines permettra à la Débitrice d'effectuer ces démarches, la période estivale étant à nos portes.

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13 Le Contrôleur fait aussi valoir que les éventuels investisseurs pourraient hésiter à donner suite à des sollicitations, dans un climat d'incertitude causé par l'approche imminente d'une nouvelle demande en prorogation. Dans ces conditions, des tiers pourraient refuser de s'engager dans des démarches coûteuses et possiblement inutiles.

14 Reconnaissant l'importance de garder des communications fluides avec les créanciers et les autres parties intéressées, le Contrôleur propose la production de rapports d'étape tous les trente jours pendant la période de prorogation.

15 De son côté, Cecon plaide que la période de 3 1/2 mois demandée est inappropriée et excessive. Plusieurs événements pourraient survenir pendant cette longue période sans que le Tribunal ni les parties en soient informés.

16 Cecon en veut pour preuve la décision de la Débitrice, à la fin d'avril 2010, de cesser les opérations de construction du navire # 717, entraînant la mise à pied d'une centaine d'employés. Cette décision n'a pas été préalablement soumise au Tribunal ni à Cecon. Cette dernière est directement affectée par cette décision, la Débitrice devant construire trois navires pour Cecon, l'unité # 717 étant celle dont les travaux sont les plus avancés.

17 Cecon rappelle qu'au moment de la demande de prorogation présentée en mars 2010, il n'était nullement question de la cessation des opérations sur le chantier naval pour les travaux touchant l'unité # 717.

18 Le Contrôleur reconnaît que cela n'était pas envisagé à ce moment. Il explique l'évolution de la situation. À la suite de l'ordonnance de prorogation du 26 mars 2010, il est apparu qu'aucun des créanciers ou des parties intéressées n'entendait réinvestir dans les affaires de la Débitrice à moins de l'intervention de nouveaux investisseurs.

19 Or, le Contrôleur ajoute qu'il s'agit d'une démarche de longue haleine, qui nécessite non seulement plusieurs mois d'efforts, mais également l'intervention de professionnels en démarchage.

20 Confrontée à cette réalité, et en tenant compte de ses liquidités, la Débitrice a conclu, de concert avec le Contrôleur, que la seule façon de franchir ces étapes, avec les coûts qui s'y rattachent, nécessitait la suspension de toutes les opérations de construction du navire # 717.

21 Le Contrôleur souligne que cette hypothèse fut discutée avec les créanciers et les parties intéressées, dont Cecon. Il admet que la décision fut prise par le conseil d'administration de la Débitrice sans qu'en soit préalablement avisée Cecon.

22 Le Contrôleur fait valoir que cette décision était la seule possible dans les circonstances.

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23 Les procureurs de la Débitrice et du Contrôleur plaident que ce type de décision ne nécessitait pas l'autorisation préalable du Tribunal, ni celle de Cecon. Ils s'appuient sur la conclusion suivante de l'Ordonnance initiale :

> 24. **DECLARES** that, to facilitate the orderly restructuring of its business and financial affairs (the « Restructuring ») but subject to such requirements as are imposed by the CCAA, the Petitioner shall have the right, subject to approval of the Monitor or further order of the Court, to:
>
> (a) permanently or temporarily cease, downsize or shut down any of its operations or locations as it deems appropriate and make provision for the consequences thereof in the Plan;
>
> (Soulignement du Tribunal)

24 Dans les circonstances particulières de la présente affaire, la Débitrice pouvait agir comme elle l'a fait, sans autorisation préalable. Cecon, comme toute autre partie intéressée, aurait pu saisir le Tribunal de la situation si elle l'avait jugé nécessaire, tant en vertu de l'article 11 LACC que de la clause de retour prévue à l'Ordonnance initiale :

> 51 **DECLARES** that any interested Person may apply to this Court to vary or rescind the Order or seek other relief upon seven days notice to the Petitioner, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order: [. . .]

25 Cecon a choisi de ne pas présenter de demande, ne contestant pas davantage la récente requête en approbation du contrat d'embauche de Rothschild.

26 Le Tribunal conclut que ce motif ne justifie pas la suggestion de Cecon de limiter à cinq semaines la période de prorogation.

27 Cecon plaide qu'elle n'a pas encore reçu le rapport d'enquête concernant les transactions effectuées par la Débitrice entre le 1er janvier 2007 et le 28 février 2010, date de l'Ordonnance initiale[4]. Il s'agit selon Cecon d'un motif supplémentaire pour prévoir une courte période de prorogation, l'analyse du rapport pouvant éventuellement remettre en cause la bonne foi de la Débitrice.

28 Le Contrôleur explique la tâche colossale abattue pour la production du rapport d'enquête, la version préliminaire ayant été signée deux jours avant l'audition, soit le mercredi 19 mai 2010.

29 Plus de 17 000 transactions bancaires représentant des encaissements d'environ 619 000 000 $ et des déboursés d'environ 592 000 000 $ ont été examinées.

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30 De ce lot, le Contrôleur précise qu'environ 43 000 000 $ de déboursés doivent encore être identifiés, étant composés de transactions inférieures à 100 000 $ chacune.

31 Le Contrôleur n'a constaté aucun paiement douteux à ce jour, reconnaissant cependant qu'environ 11 000 000 $ ont été versés à des personnes liées, éteignant les dettes de la Débitrice envers elles. Le Contrôleur n'a pas encore analysé les circonstances de ces paiements.

32 Le Contrôleur est disposé à transmettre aux parties intéressées le rapport d'enquête. Il s'engage à tenir les parties informées des résultats des analyses à venir. À la demande de Ocean Hotels, le Tribunal prendra acte de cet engagement aux conclusions du présent jugement.

33 Malgré cela, Cecon insiste sur le fait qu'elle n'a pas encore pris connaissance du rapport. Son analyse pourrait conduire à modifier sa position sur la bonne foi de la Débitrice. Elle croit donc qu'il s'agit d'un motif qui milite en faveur de la période de prorogation qu'elle propose.

34 La Débitrice rétorque que la bonne foi visée à l'article 11.02(3) LACC ne s'analyse qu'à partir de la date de l'Ordonnance initiale. Or, le rapport d'enquête vise les transactions antérieures à cette date. L'argument de Cecon serait donc sans pertinence. La Débitrice ajoute qu'un plan d'arrangement pourrait prévoir la révision des transactions irrégulières, si cela s'avérait nécessaire.

35 Avec égards, le Tribunal ne croit pas que l'analyse de la bonne foi d'un débiteur doive se limiter à la période postérieure à l'Ordonnance initiale. Il est vrai que l'article 11.02(3)b) LACC fait référence à ce critère lors de la demande de prorogation. Cependant, le demandeur doit démontrer « qu'il a agi et continue d'agir de bonne foi ».

36 Cette formulation n'impose aucune restriction dans l'analyse de la bonne foi. Cela respecte l'esprit de la LACC. Les privilèges conférés à un débiteur en vertu de la LACC exigent sa bonne foi.

37 Cela étant, Cecon, au même titre que toute autre partie intéressée, pourra s'adresser au Tribunal à la suite de l'analyse du rapport d'enquête du Contrôleur si elle estime qu'il comporte des éléments importants remettant en cause la bonne foi de la Débitrice. Il n'est pas nécessaire de limiter la période de prorogation demandée pour ce motif.

Transmission d'informations

38 Comme le Tribunal l'a mentionné à l'audience, il apparaît important de prévoir formellement une procédure de transmission d'informations pendant la période de prorogation. La mise en place de ces modalités s'inscrit dans l'exercice des pouvoirs du Tribunal au moment de la prorogation du délai.

39 Le Contrôleur a déjà pris l'engagement de produire des rapports à des intervalles de trente jours suivant le présent jugement.

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40 Chaque rapport devra être transmis au Tribunal ainsi qu'aux parties ayant comparu, en plus d'être rendu disponible sur le site *web* du Contrôleur.

41 Toute partie intéressée pourra formuler par écrit au Contrôleur des demandes de précisions et de transmission de documents en regard du rapport. Le Contrôleur devra répondre aux demandes dans les meilleurs délais, et au plus tard dix jours après réception de celles-ci. Toutes difficultés découlant de ces demandes pourront être soumises au Tribunal suivant un préavis de sept jours donné aux parties ayant comparu.

42 De plus, toute partie intéressée pourra formuler une demande selon les modalités prévues au paragraphe 51 de l'Ordonnance initiale à la suite du dépôt par le Contrôleur d'un rapport.

43 Finalement, s'il survenait un changement défavorable important dans la situation de la Débitrice, le Contrôleur devrait en aviser sans délai le Tribunal. Comme l'article 23(1)d)(i) LACC impose déjà cette obligation au Contrôleur, il est inutile de la répéter aux conclusions du présent jugement.

Approbation des activités du Contrôleur

44 La Débitrice demande au Tribunal d'approuver les activités du Contrôleur décrites à son quatrième rapport.

45 Investissement Québec souligne que ce type de conclusion n'a pas sa raison d'être dans le cadre de la demande en prorogation de l'Ordonnance initiale.

46 Appelés à préciser l'objet de cette conclusion, les procureurs de la Débitrice et du Contrôleur indiquent que cette approbation n'a pas pour objet de libérer le Contrôleur de toute responsabilité pouvant découler de l'exécution de ses fonctions. Il s'agirait davantage d'une pratique courante par laquelle le Tribunal prendrait acte de la conformité des activités du Contrôleur en regard de son mandat.

47 Avec égards, le Tribunal estime que cette conclusion est inutile et, à la rigueur, peut devenir source de confusion concernant sa portée. Le législateur a déjà prévu, notamment aux article 23(2) et 25 LACC, les conditions de non-responsabilité du Contrôleur.

48 Bien qu'aucune des parties ne l'ait soulevé à l'audience, le Tribunal rappelle qu'une conclusion semblable était formulée concernant le deuxième rapport du Contrôleur, lors de la première demande de prorogation de délai. Or, malgré l'absence d'opposition à cette occasion, le Tribunal n'a pas donné suite à cette demande, prenant plutôt acte de ces activités. L'utilité de cette formulation peut être discutable, mais elle évite l'ambiguïté de l'approbation des activités du Contrôleur.

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POUR CES MOTIFS, LE TRIBUNAL:

49 *ACCUEILLE* la deuxième Requête en prorogation de l'Ordonnance initiale.

50 *DÉCLARE* que la Requête a été dûment signifiée, que les avis de présentation de la Requête sont suffisants et *DISPENSE* la Débitrice de tout avis supplémentaire.

51 *PROROGE* la date de suspension des procédures (telle que définie dans l'Ordonnance Initiale) jusqu'au 15 septembre 2010, le tout sujet aux termes de l'Ordonnance Initiale, sauf pour ce qui suit.

52 *ORDONNE* au Contrôleur de déposer auprès du Tribunal un rapport portant sur l'état des affaires financières et autres de la Débitrice conformément au sous alinéa 23(1)(d)(iii) de la *Loi sur les arrangements avec les créanciers des compagnies* à des intervalles de trente (30) jours suivant le présent jugement, soit les 25 juin 2010, 25 juillet 2010, 24 août 2010 et un dernier rapport le 15 septembre 2010, ces rapports devant être transmis aux parties ayant comparu et rendu disponibles sur le site *web* du Contrôleur.

53 *PERMET* à toute partie intéressée de demander par écrit au Contrôleur des précisions et des documents en regard de tels rapports, le Contrôleur devant répondre par écrit aux demandes dans les meilleurs délais, et au plus tard dix jours après réception de celles-ci.

54 *DÉCLARE* que toutes difficultés découlant de ces demandes pourront être soumises au Tribunal suivant un préavis de sept jours donné aux parties ayant comparu.

55 *DÉCLARE* que toute partie intéressée peut formuler une demande selon les modalités prévues au paragraphe 51 de l'Ordonnance initiale à la suite du dépôt par le Contrôleur d'un rapport visé au paragraphe 52 du présent jugement.

56 *PREND ACTE* des activités du Contrôleur décrites dans son 4ième rapport, pièce R-1.

57 *PREND ACTE* de l'engagement du Contrôleur de transmettre aux parties intéressées qui en font la demande le rapport d'enquête (*Forensic Review*) auquel fait référence son 4ième rapport.

58 *ORDONNE* l'exécution provisoire de cette ordonnance malgré appel et sans caution.

59 *LE TOUT* sans frais.

Notes de bas de page

1 L.R.C., chap. C-36.

2 Pièce R-1.

3 Article 11.02(1) LACC.

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4 Ce rapport est décrit comme le *Forensic review* au rapport du Contrôleur, pièce R-1.

Fin du document

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2012 NBQB 355
New Brunswick Court of Queen's Bench

Landdrill International Inc., Re

2012 CarswellNB 686, 2012 NBQB 355, 1024 A.P.R. 197, 224 A.C.W.S. (3d) 23, 396 N.B.R. (2d) 197, 99 C.B.R. (5th) 211

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 Landdrill International Inc. (a British Columbia Corporation), Landdrill International Ltd. (a New Brunswick Corporation), Landdrill Atlantic Ltd. (a New Brunswick Corporation), Landdrill Contract Mining Ltd. (a New Brunswick Corporation), Landdrill International Mexico S.A. de C.V. (a Mexican Corporation), Landdrill International LLC (a Mongolian Corporation) and Landdrill International Inc. (a Barbados Corporation)

David Smith C.J.Q.B.

Heard: November 2, 2012
Judgment: November 5, 2012
Docket: M/M/114/12

Counsel: Stephen Hutchinson for Applicants, Landdrill International Inc. et al
Jeff M. Lee, R. Gary Faloon, Q.C. for Crown Capital Partners Inc., Norrep Credit Opportunities Fund, LP
Ashley John Taylor for Ernst & Young Inc.
Mary Buttery for Sprott Resource Lending Partnership
Alissa K. Mitchell for GE Canada Equipment Financing G.P.
Kelly Van Buskirk for Roger Rogers and Michael Tripp
G. Robert Basque, Q.C. for Ronald J. Goguen

Subject: Insolvency

Headnote

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

Varying initial order to increase monitor's authority — Debtor group of companies operated international drilling business — Debtor entered into protection under Companies Creditors' Arrangement Act and monitor was appointed — Creditors maintained that manager of debtor was attempting to hamper sale of assets — Secured creditor brought motion to vary initial order and increase authority of monitor — Motion dismissed — Court did not have legislative power or inherent jurisdiction to replace manager with monitor.

Table of Authorities

Cases considered by *David Smith C.J.Q.B.*:

Jameson House Properties Ltd., Re (2009), 2009 CarswellBC 1864, 2009 BCSC 844, 57 C.B.R. (5th) 1 (B.C. S.C. [In Chambers]) — followed

Jameson House Properties Ltd., Re (2009), 2009 BCCA 339, 2009 CarswellBC 1904, 96 B.C.L.R. (4th) 208, [2009] 11 W.W.R. 425, 461 W.A.C. 285, 273 B.C.A.C. 285, 57 C.B.R. (5th) 21 (B.C. C.A.) — referred to

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

843504 Alberta Ltd., Re (2003), 30 Alta. L.R. (4th) 91, 4 C.B.R. (5th) 306, 351 A.R. 222, 2003 CarswellAlta 1786, 2003 ABQB 1015 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

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

Generally — referred to

MOTION by creditor to increase powers of monitor in hearings pursuant to *Bankruptcy and Insolvency Act*.

***David Smith C.J.Q.B.*:**

1 Norrep Credit Opportunities Fund LP, a principal secured creditor, moves to vary the Court's initial order dated August 31st, 2012, as amended on September 17th, 2012 and September 27th, 2012, under the *Creditors Arrangement Act* R.S.C. 1985, C-36:

2. [...]

(a) to enhance the powers of the Monitor to make and implement decisions related to the continued employment, dismissal, termination, lay-off and/or rationalization of personnel employed by the Applicants (including all executive and senior management personnel employed by the Applicants);

(b) to authorize and direct the Monitor to have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants, but in consultation with the Senior Lenders) to make and implement decisions related to rationalizing and reducing operating costs of the Applicants, including (without limitation) decisions to wind up, discontinue, reduce, cease and downsize the business operations of the Applicants (in whole or in part);

The alleged grounds for the variations are:

1. Contrary to and in breach of paragraphs 27 and 28 of the Initial Order, the Applicants have failed or refused to co-operate fully with the Monitor and have failed or refused to provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions, particulars of which failures or refusals are as follows:

(a) The Monitor has conducted the Sale Process in accordance with the Initial Order and has identified a potential purchaser of the assets of the Applicants, which purchaser, in the opinion of the Monitor, has submitted the optimal bid (the 'Proposed Purchaser');

(b) Ronald J. Goguen, Chief Executive Officer of Landdrill International Inc., has informed the Monitor that he objects to the Monitor concluding a transaction with the Proposed Purchaser;

(c) Mr. Goguen has informed the Monitor that he intends to cause the Applicants to contest and oppose the decision by the Monitor to conclude a transaction with the Proposed Purchaser;

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(d) Mr. Goguen has instructed counsel for the Applicants to deny, limit or restrict access by the Monitor to communications with Mexican counsel for the Applicants, thereby actively impairing, disrupting or interfering with the ability of the Monitor to exercise its power under paragraph 28(g) of the Initial Order to have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to negotiate with the Potential Purchaser to conclude a transaction for the sale of the Mexican assets of the Applicants.

2. Contrary to and in breach of paragraph 35 of the Initial Order, Mr. Goguen is causing the Applicants to withhold, delay and disrupt payment of the professional fees of the Monitor and its legal counsel on a weekly basis as authorized and directed by the Court in the Initial Order.

3. The acts and omissions of Mr. Goguen more particularly described above have caused or contributed to the present situation in which the Applicants:

(a) have failed to meet the Sale Process timelines set out in Schedule "B" to the Initial Order and have thereby breached the August 31, 2012 DIP Term Sheet;

(b) are operating without access to operating credit and/or debtor-in-possession financing; and

(c) are very quickly reaching the point where they will have run out of cash entirely and will be unable to fund continued business operations.

Facts

2 The Landdrill group (Applicants) of companies operates an International Industrial drilling business (with operations in Canada, Mexico, Mongolia, Russia and Nicaragua) providing drilling services to mineral exploration companies worldwide.

The Landdrill Group has credit facilities with three principal service creditors, namely:

1) Norrep Credit Opportunities Fund LLP

2) Sprott Resource Lending Partnership

3) GE Canada Equipment Financing G.P.

3 On August 31, 2012, the Applicants sought and were granted CCAA protection. D.I.P. financing was in place but some conditions were not met. The Monitor advises that Landdrill probably has enough cash flow to continue to operate until the asset purchase approval hearing on November 13th, 2012.

4 The Initial Order of August 31st, 2012, states under paragraph 28 (e) through (i):

"These *sui generis* provisions included paragraphs 28(e), 28(f), 28(g), 28(h) and 28(i) of the Initial Order, which paragraphs read as follows:

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

. . .

e) (after having discussed such matters with the Applicants, where circumstances permit it to do so), have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to instruct Clarus Securities Inc. with respect to the development and implementation of an orderly process for the sale of the Business and/or the Property to be completed within 90 days (the "Sale Process") in accordance with the timelines set out in Schedule "B" hereto,

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and to take such steps and execute such documentation in the name of and on behalf of the Applicants as may be necessary or incidental to the Sale Process;

f) have and exercise the authority (in the name of and on behalf of the Applicants), with the consent of the Senior Lenders, to replace Clarus Securities Inc. and disclaim the engagement letter with Clarus Securities Inc.;

g) have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to negotiate with potential purchasers of the Business and/or the Property pursuant to the Sale Process;

h) have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants), with the consent of the Senior Lenders, to dispose of redundant or non-material assets not exceeding $100,000.00 in any one transaction or $1,000,000 in the aggregate;

i) have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to accept one or more offers to purchase the Business and/or the Property pursuant to the Sale Process (subject to approval of the Court);

5 Norrep (Crown) supported by the other principal secured lenders alleges that Mr. Ronald Goguen Sr., the CEO of the Landdrill Companies is interfering with the sales process of the assets. Norrep (Crown) offers three specific examples of Mr. Goguen's interference:

27. More particularly, Mr. Goguen has informed the Monitor that he intends to cause the Applicants to contest and oppose the decision by the Monitor to conclude a transaction with the proposed purchaser.

28. Further, Mr. Goguen has instructed counsel for the Applicants to deny, limit or restrict access by the Monitor to communications with Mexican counsel for the Applicants by discontinuing an extant practice where counsel to the Monitor had been copied on all correspondence between the Applicants and Mexican counsel. When this extant practice was abruptly stopped by counsel for the Applicants, Monitor's counsel requested of counsel for the Applicants that this practice be reinstated and that he be copied with correspondence between the Applicants and Mexican counsel. Counsel for the Applicants refused, stating that: "given the situation that has unfolded as between the Monitor and the Companies, I am not in a position to do that" 15.

29. An additional act or omission of Mr. Goguen relied upon by Crown in the Amended Notice of Motion was that, contrary to and in breach of paragraph 35 of the Initial Order, Mr. Goguen caused the Applicants to withhold, delay and disrupt payment of the professional fees of the Monitor and its legal counsel on a weekly basis as authorized and directed by the Court in the Initial Order. Since this ground for the Crown Application was first brought forward by Crown in its Amended Notice of Motion, Mr. Goguen appears to have "seen the error of his ways". Payments of professional fees required to put the Applicants back in compliance with paragraph 35 of the Initial Order appear now to have been made.

Issues

6 Does the Court have authority to confer powers on the Monitor to remove Mr. Goguen from management and assume management of Landdrill.

7 If the answer is "yes" to the first question, then should Mr. Goguen be removed from the management of Landdrill for his actions in regard to the sales process.

8 There is no authority found in the CCAA which allows the Court to remove or replace management with the Monitor.

9 Counsel for Norrep cites 843504 Alberta Ltd;

2003 CarswellAlta 1786, 2003 ABQB 1015, 30 Alta. L.R. (4th) 91, 351 A.R. 222, 4 C.B.R. (5th) 306 (Alta. Q.B.) *843504 Alberta Ltd., Re*

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> In the Matter of the Bankruptcy and Insolvency Act R.S.C. 1985, C.B-3, As Amended and 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 843504 Alberta Ltd. (formerly known as Skyreach Equipment Ltd.)

An Alberta Court of Queen's Bench case in support of its motion. In 843504 Alberta Ltd. the company made arrangements with its creditors to seek protection under the CCAA, but days later changed its position and filed a Notice of Intention to make a proposal to its creditors under the *Bankruptcy and Insolvency Act*. The creditor applied for a CCAA stay of proceedings with the creditor being successful with a 30 day stay and an accounting firm appointed Monitor with power to operate the business. The creditor and the Monitor applied to have the stay extended at the end of the 30 day period. At the extension hearing, the creditor and Monitor relied on the Monitor's third report with an affidavit from the creditor stating that the Monitor was acting diligently, in good faith and that circumstances exist to warrant an extension. At the extension hearing, the company took no position.

10 The company in the Alberta case acquiesced to the Monitor to manage its affairs during the CCAA proceedings.

11 The facts before the Court are that the Landdrill Group is clearly not acquiescing to the present motion to have the Monitor manage its affairs and, in fact, vigorously oppose it. The decision in the Alberta case is irrelevant to the matter before the Court.

12 There is no statutory authority for the Court to authorize the Monitor to make managerial decisions for a debtor company, that is, to replace management.

13 The Court must now examine if it has the inherent jurisdiction to dismiss management. Justice Robert Blair of the Ontario Court of Appeal in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171 (Ont. C.A.), holds that a Court cannot authorize a Monitor to remove management of a debtor company under a CCAA arrangement. He gives his reasons throughout the decision, but one in particular is worth noting at paragraph 51:

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

14 Counsel for the Applicants also cites *Jameson House Properties Ltd., Re*, 2009 BCSC 844 (B.C. S.C. [In Chambers]) aff'd, 2009 BCCA 339, 96 B.C.L.R. (4th) 208 (B.C. C.A.) and in conclusion, I adopt the reasoning of Chief Justice Donald Brenner wherein he states at paragraph 25:

> No receiver, liquidator or trustee in bankruptcy has been appointed. The court-appointed monitor in this case is in a materially different position from those parties. Unlike a receiver, liquidator or trustee, the monitor has no control over the management of the business. That remains in the hands of the petitioners.

15 Having decided that the Court has no authority to confer powers on the Monitor to remove Mr. Goguen, there is no need to examine Mr. Goguen's actions in relation to the sales process.

The second report of the Monitor is hereby approved.

The request to enhance the powers of the Monitor to manage the company is denied for the reasons above.

A hearing on costs will be scheduled on request of counsel.

Motion dismissed.

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2012 CarswellMan 833
Manitoba Court of Queen's Bench

Arctic Glacier Income Fund, Re

2012 CarswellMan 833

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

In the Matter of a Proposed Plan of Compromise or Arrangement With Respect to Arctic Glacier Income Fund, Arctic Glacier Inc., Arctic Glacier International Inc. and the Additional Applicants Listed on Schedule "A" Hereto, (collectively, the "Applicants")

Spivak J.

Judgment: September 5, 2012
Docket: Winnipeg Centre CI 12-01-76323

Counsel: Counsel — not provided

Subject: Insolvency

Headnote

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

Applicants sought protection of Companies' Creditors Arrangements Act — Initial order was issued — Monitor brought motion for extension of stay in initial order; release and discharge of certain charges set out in initial order; approval of monitor's sixth report; and other relief — Motion granted — Stay extended — Financial advisor charge, DIP lenders' charge, and KERP charge were released and discharged — Payment by monitor for management incentive plan was approved — Authorization granted to execute documents required to change names of corporate applicants — Monitor's sixth report was approved.

Table of Authorities

Cases considered by *Spivak J.*:

Arctic Glacier Income Fund, Re (2012), 2012 CarswellMan 827 (Man. Q.B.) — referred to

MOTION by monitor for extension of stay in initial order; release and discharge of certain charges set out in initial order; approval of monitor's sixth report; and other relief.

***Spivak J.*:**

1 THIS MOTION, made by Alvarez & Marsal Canada Inc., in its capacity as monitor of the Applicants (the *"Monitor"*), for an order (i) extending the Stay Period (*"Stay Period"*) defined in paragraph 30 of the Order of the Honourable Madam Justice Spivak made February 22, 2012 [2012 CarswellMan 827 (Man. Q.B.)] (the *"Initial Order"*) until November 30, 2012; (ii) releasing and discharging the Financial Advisor Charge, the DIP Lenders' Charge and the KERP Charge set out in the Initial Order; (iii) approving the Applicants making certain payments in respect of the Management Incentive Plan; (iv) authorizing the CPS (as defined in the Initial Order) to execute such documents as are required to change the names of the Applicants and changing the title of proceedings; and (v) approving the Sixth Report of the Monitor (the *"Sixth Report"*) and the activities

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described therein; was heard this day at the Law Courts Building at 408 York Avenue, in The City of Winnipeg, in the Province of Manitoba.

2 ON READING the Notice of Motion and the Sixth Report, and on hearing the submissions of counsel for the Monitor, counsel for the Applicants and Glacier Valley Ice Company, L.P. (California) (together, *"Arctic Glacier"* or the *"Arctic Glacier Parties"*), counsel for the Trustees of the Applicant Arctic Glacier Income Fund, counsel for the Direct Purchaser Claimants, counsel for Plaintiffs in the Indirect Purchasers Litigation, counsel for Desert Mountain Ice LLC, counsel for the Executive Vice-President of Operations for Arctic Glacier, the Chief Process Supervisor and representatives of Talamod Fund LP and Coliseum Capital Partners LP, also present in person or by telephone, no one appearing for any other party although duly served as appears from the affidavit of service, filed:

SERVICE

1. THIS COURT ORDERS that the time for service of this Motion and the Sixth Report is hereby abridged and validated such that this Motion is properly returnable today and hereby dispenses with further service thereof.

STAY EXTENSION

2. THIS COURT ORDERS that the Stay Period is hereby extended until November 30, 2012.

RELEASE OF CERTAIN CHARGES CREATED IN THE INITIAL ORDER

3. THIS COURT ORDERS that the Financial Advisor Charge, the DIP Lenders' Charge and the KERP Charge (as such terms are defined in the Initial Order) be and are hereby released and discharged and are of no further force and effect.

PAYMENT PURSUANT TO MANAGEMENT INCENTIVE PLAN

4. THIS COURT ORDERS that the payment by the Monitor on behalf of the Applicants of the amounts in respect of the Management Incentive Plan described in paragraphs 6.11 to 6.15 of the Sixth Report is hereby approved.

CHANGE OF CORPORATION NAMES AND TITLE OF PROCEEDINGS

5. THIS COURT ORDERS that the CPS (as defined in the Initial Order) is hereby authorized to execute such documents as are required to change the names of the Applicants that are corporations.

6. THIS COURT ORDERS that if and when the name of any of the corporations in the title of proceedings are changed, then the title of proceedings shall be modified to incorporate the new name of the corporation followed by the phrase "formerly known as" and the corporation's original name.

MONITOR'S ACTIVITIES AND REPORT

7. THIS COURT ORDERS that the Sixth Report of the Monitor and the activities described therein are hereby approved.

GENERAL PROVISIONS

8. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, including the United States Bankruptcy Court for the District of Delaware, or in any other foreign jurisdiction, to give effect to this Order and to assist the Arctic Glacier Parties, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Arctic Glacier Parties and to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Arctic Glacier Parties and the Monitor and their respective agents in carrying out the terms of this Order.

Motion granted.

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2015 CarswellMan 274
Manitoba Court of Queen's Bench

Arctic Glacier Income Fund, Re

2015 CarswellMan 274, 254 A.C.W.S. (3d) 769

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Arctic Glacier Income Fund, Arctic Glacier Inc., Arctic Glacier International Inc. and the Additional Applicants Listed in Schedule "A" Hereto, (collectively, the "Applicants") Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c C-36, as Amended

Spivak J.

Judgment: June 2, 2015
Docket: Winnipeg Centre CI 12-01-76323

Counsel: Counsel — not provided

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Miscellaneous

Monitor brought motion for order extending stay period and approving monitor's twenty-first and twenty-second reports — Motion granted — Stay period was extended — Reports were approved.

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

Monitor brought motion for order extending stay period and approving monitor's twenty-first and twenty-second reports — Motion granted — Stay period was extended — Reports were approved.

MOTION by monitor for order extending stay period and approving two of monitor's reports.

***Spivak J.*:**

1 *THIS MOTION* made by Alvarez & Marsal Canada Inc. in its capacity as Court-appointed Monitor of the Applicants (the "*Monitor*") for an Order (i) extending the Stay Period as defined in paragraph 30 of the Order of the Honourable Madam Justice Spivak made February 22, 2012 (the "*Initial Order*") until November 16, 2015; (ii) approving the Twenty-First Report of the Monitor dated April 27, 2015 (the "*Twenty-First Report*"); and (iii) the Twenty-Second Report of the Monitor dated May 27, 2015 (the "*Twenty-Second Report*") and the Monitor's activities as described therein; was heard this day at the Law Courts Building at 408 York Avenue, in the City of Winnipeg, in the Province of Manitoba.

2 *ON READING* the Notice of Motion, the Twenty-First Report and the Twenty-Second Report, and on hearing the submissions of counsel for the Monitor, counsel for the Applicants and Glacier Valley Ice Company, L.P. (together, the "*Arctic Glacier Parties*"), counsel for the Trustees of Arctic Glacier Income Fund and a representative of Ross Smith Asset Management Inc., no one appearing for any other party although duly served as appears from the Affidavit of Service, filed:

SERVICE

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1. **THIS COURT ORDERS** that the time for service of this Motion, the Twenty-First Report and the Twenty-Second Report is hereby abridged and validated such that this Motion is properly returnable today and hereby dispenses with further service thereof.

STAY EXTENSION

2. **THIS COURT ORDERS** that the Stay Period is hereby extended until December 18, 2015.

MONITOR'S ACTIVITIES AND REPORTS

3. **THIS COURT ORDERS** that the Twenty-First Report and the Twenty-Second Report and the activities described therein are hereby approved.

GENERAL PROVISIONS

4. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, including the United States Bankruptcy Court for the district of Delaware, or in any other foreign jurisdiction, to give effect to this Order and to assist the Arctic Glacier Parties, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Arctic Glacier Parties and to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Arctic Glacier Parties and the Monitor and their respective agents in carrying out the terms of this Order.

Schedule "A" — Additional Applicants

Arctic Glacier California Inc.

Arctic Glacier Grayling Inc.

Arctic Glacier Lansing Inc.

Arctic Glacier Michigan Inc.

Arctic Glacier Minnesota Inc.

Arctic Glacier Nebraska Inc.

Arctic Glacier Newburgh Inc.

Arctic Glacier New York Inc.

Arctic Glacier Oregon Inc.

Arctic Glacier Party Time Inc.

Arctic Glacier Pennsylvania Inc.

Arctic Glacier Rochester Inc.

Arctic Glacier Services Inc.

Arctic Glacier Texas Inc.

Arctic Glacier Vernon Inc.

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Arctic Glacier Wisconsin Inc.

Diamond Ice Cube Company Inc.

Diamond Newport Corporation

Glacier Ice Company, Inc.

Ice Perfection Systems Inc.

ICEsurance Inc.

Jack Frost Ice Service, Inc.

Knowlton Enterprises, Inc.

Mountain Water Ice Company

R&K Trucking, Inc.

Winkler Lucas Ice and Fuel Company

Wonderland Ice, Inc.

Motion granted.

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2011 QCCS 5223
Cour supérieure du Québec

White Birch Paper Holding Co., Re

2011 CarswellQue 10850, 2011 QCCS 5223, 209 A.C.W.S. (3d) 26, EYB 2011-196701

White Birch Paper Holding Company, White Birch Paper Company, Stadacona General Partner Inc., Black Spruce Paper Inc., F.F. Soucy General Paratner Inc., 3120772 Nova Scoti Compapny, Arrimage de gros Cacouna inc. and Papier Masson ltée, Debtors, v. Ernst & Young Inc., Monitor, and Stadacona Limited Partnership, F.F. Soucy Limited Partnership and F.F. Soucy Inc. & Partners, Limited Partnership, Mises en cause

Mongeon J.C.S.

Heard: 5 october 2011
Judgment: 7 october 2011
Docket: C.S. Qué. Montréal 500-11-038474-108

Subject: Insolvency

Subject:

***Robert Mongeon, J.S.C.*:**

The context

1 The Monitor comes before me with a Motion for Directions in the following context.

2 The Debtors (collectively WB Canada) are under the protection of the CCAA. The Initial Order extending this protection has been in force since February 24, 2010 and will remain in force at least until November 18, 2011, whereupon it shall most likely be extended further.

3 The Debtors also conduct business in the United States of America through a subsidiary of White Birch Paper Holding Company known as Bear Island Paper Company LLC (« Bear Island ») presently under the protection of Chapter 11 of the United States Bankruptcy Code (WB Canada and Bear Island are hereinafter referred to as the « WB Group »). Both the Canadian proceedings and the U.S. proceedings are being conducted simultaneously and appropriate Cross-Border Insolvency Protocols have been put in place in the early stages of this restructuration. It is to be noted, however, that Bear Island is not a « Debtor » under the current CCAA proceedings.

4 It is also to be noted that the United States Bankruptcy Court for the Southern District of Virginia (the USBC) has recognized the Canadian Proceedings under the CCAA as « foreign main proceedings » and has recognized White Birch Paper Holding Company as « foreign representative ».

5 In the course of both the U.S. and the Canadian restructuring process, the usual DIP financing was put in place guaranteed by appropriate super-priority charges upon all Canadian and U.S. assets of the WB Group.

6 Furthermore, it has been previously decided and approved by both jurisdictions that the greater majority (if not the totality of the assets) of the WB Group would be sold through a « Stalking Horse » bidding process. The auction has taken place but the sale has not yet closed. The purchaser is an entity known as BD White Birch Investments Inc. and certain of its subsidiaries (BDWBI).

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7 As indicated above, Bear Island has commenced proceedings in the U.S. under Chapter 11 of the U.S. Bankruptcy Code pursuant to which it must file its Plan of Arrangement as well as a « Disclosure Statement' of all circumstances surrounding the submission and administration of the proposed Plan, including which assets may be used by Bear Island for a proposal to its creditors.

8 In its Report dated September 27, 2011, the Monitor specifically represents that:

. . .

15. The plan filed by Bear Island is essentially a liquidation plan that is conditional upon the occurrence of a closing of a transaction with BDWBI. The plan and draft disclosure statement contemplate essentially a pro rata distribution amongst creditors of a fund (« Fund ») comprised of the proceeds of the sale to BDWBI that are allocated to Bear Island; proceeds of the settlement or prosecution of causes of action for fraudulent preferences, void or voidable transactions; and proceeds from the disposition of any remaining asset during the wind down of the activities of Bear Island.

It should be noted that the plan contemplates that WB Canada will share in the distribution of the proceeds of the Fund, based on an admitted intercompany claim of approximately US$136M, representing 17.6% of the scheduled claims.

16. While the plan and the draft disclosure statement provide for a distribution from the Fund, the plan and the draft disclosure statement as filed do not indicate what would be the allocation of the proceeds of the sale to BDWBI, as between Bear Island and WB Canada.

. . .

(emphasis added)

9 This allocation of proceeds is crucial to WB Canada, inasmuch as its share of the sale proceeds will form the basis of its own. Plan of Restructuration to be approved by all appropriate Canadian stakeholders.

10 The Monitor further represents that:

. . .

18. **In the course of the discussions with the Monitor, several different models of allocation have been explored, which yield a wide range of different results. Depending upon the formula used to allocate assets and the principles adopted to allocate the responsibility for the repayment of the Interim Financing facility, the results of the allocation models yielded a greater allocation to Bear Island in some cases, and a greater allocation to WB Canada in other cases, by a wide margin. The main factors influencing the allocation are summarized below:**

18.1 **Whether the allocation for the assets sold is based on a standard formula derived from the historical breakdown in working capital (current assets minus assumed current liabilities) as between Bear Island and WB Canada, or on the actual breakdown in working capital on a set date. In the past, the breakdown in working capital has been approximately 20% for Bear Island and 80% for WB Canada, although more recently the breakdown has been in the range of 10% to 15% for Bear Island and 85% to 90% for WB Canada.**

18.2 **The manner in which the responsibility for the repayment of the Interim Financing facility is allocated between the co-borrowers, namely Bear Island and certain entities comprising WB Canada. At the time the Interim Financing facility was negotiated, the Companies' cash flow forecasts suggested that a portion of the borrowings would be necessary for Bear Island and a portion for WB Canada, and the aggregate**

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requirements were built into the interim Financing Credit Facility. In fact, the drawings under the Interim Financing facility were all made by WB Canada, although the Interim Financing facility was necessary for all entities within WB Group in order to provide the required degree of confidence to the trade suppliers that the Companies had the necessary resources to pay for the merchandise supplied and services rendered after the commencement of the restructuring proceedings.

Depending on the perspective, an argument can be made that the responsibility for the repayment of the Interim Financing facility lies with the entities that made the draws under the credit facility. Another argument can be made that the responsibility for the repayment should be shared amongst all of the entities that benefited from the availability of funds, since the DIP was negotiated for the benefit of both WB Canada and Bear Island equally, and was necessary to satisfy the creditors of both WB Canada and Bear Island that the Companies had the resources to carry on business.

The difference in approach leads to widely different results.

19. **The problem of determining which specific formula to use to allocate the working capital is compounded by the fact that the amount that needs to be allocated is not known with certainty. The amount that will ultimately be available for distribution to the creditors depends upon the timing of the closing of the transaction with BDWBI, which has not yet been established, and the amount to be distributed will be left over, if any, after repayment of the Interim Financing facility. At this juncture, the models of allocation prepared by the Companies for the purpose of completing the disclosure statement and the plan are based on cash flow projections and historical results, and the actual amounts may be different when the residual amounts are calculated at the time of the closing.**

20. **As mentioned earlier, the basis of allocation had not yet been disclosed, as of the date of drafting of this report, notwithstanding the fact that the hearing on the adequacy of the disclosure statement is scheduled for October 5, 2011. The Monitor has been informed that the disclosure statement will be amended to reflect a range of values based on various allocation alternatives, and that Bear Island will not seek an approval by the US Court of any definitive allocation but rather will suggest that the Companies and the creditors continue to seek a consensual allocation, with such an allocation being subject to the approval of the US Court at the latest at the hearing to confirm a plan.**

Based on the most recent information made available to the Monitor, which is still subject to adjustment, the range in values could provide an allocation of net proceeds to WB Canada that varies between US$23.4 million and US$0.5 million, or an allocation of between 88.5% and 1.8% of the funds estimated to be available for distribution to the unsecured creditors.

21. **The Monitor is concerned that the First Term Loan lenders and the UCC may favour an allocation methodology that results in an allocation that favours the estate of Bear Island, and thus prejudices the rights or creditors with claims against WB Canada.**

The Monitor understands that the First Term Loan lenders consist in large part of the purchaser for the assets of the Companies or companies or entities related to the purchaser, and that an allocation that favours Bear Island as compared with WB Canada would benefit primarily the First Term Loan lenders, at the expense of the other creditors that have filed claims in the proceedings in Canada.

22. **The Monitor considers it would be necessary to ensure that stakeholders in Canada are given an opportunity to express their views on the proposed allocation if a consensual formula is to be devised, and that the allocation of proceeds to each respective estate is made after a joint hearing in which the views of the interested stakeholders from Canada and the U.S. can be expressed, if a consensual allocation cannot be reached.**

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(emphasis added)

11 This *was* the situation at the time of filing of the Monitor's Motion and Report.

12 However, at the hearing of the present Motion, an extract of Bear Island's Disclosure Statement was submitted to this Court. The said extract deals with current problems surrounding the finalization of an « Estate Allocation » between WB Canada and Bear Island. [1]

13 This document states:

The Estate Allocation

The Estate Allocation provides the manner by which the Debtor and the Canadian Sellers, and their respective estates, shall allocate proceeds from the Sale and satisfy certain obligations that remain as of the Sale Closing, including obligations under the DIP Credit Facility. As discussed in more detail below, the outcome of, among other things, the Estate Allocation, will determine monies available for distribution to creditors of both the Debtor's Estate and the Canadian Sellers' estates. The determination of the proper Estate Allocation has required, and will continue to require, significant and extensive negotiations and compromise between various parties in interest.

(emphasis added)

14 The document further describes the way the cash funds held by Bear Island and WB Canada will firstly be used and allocated towards the DIP reimbursement of the loan and, thereafter, how the cash component of the sale proceeds (US$ 90 000 000,00) will be used. Bear Island represents that:

Once the First DIP Repayment is consummated, at which point the Debtor's Estate and Canadian Sellers' estates shall be depleted of all cash, the Debtor and Canadian Sellers shall allocate the $90,000,000 cash component (after accounting for earnings on escrowed amounts and periodic taxes, the « Cash Component ») of the Purchase Price. The ASA does not prescribe the manner in which the Cash Component shall be allocated between the Debtor's Estate and the Canadian Sellers' estates, and parties in interest have yet to agree regarding this allocation. One outstanding issue is whether to allocate the Cash Component according to the relative proportions of each estate's gross current assets or net current assets. On this point, both the Sale Order and the ASA support an allocation based on gross current assets. In particular, the Sale Order entered by he Bankruptcy Court provides that the Cash Component is to be allocated to « Current Assets[,] » which are defined as the collateral under the Revolving ABL Agreement, including, « among other things, Bear

Island's inventory, accounts receivable and cash[.] » Likewise, the Asset Allocation Schedule, attached to and as defined in the ASA, provides that « the Cash Component shall be allocated exclusively to the current assets of the Sellers. » Neither document nor any other document identified by any party makes mention of subtracting accounts payable or accrued liabilities assumed by the Purchaser, as would be required under a net current assets analysis. An additional issue is whether to include the respective estates' cash positions in such current asset amounts.

Upon allocation of the Cash Component, the Debtor and Canadian Sellers must then pay the remaining balance under the DIP Credit Facility (the « Final DIP Repayment »). Similar to the allocation of the Cash Component, the ASA does not prescribe the Debtor and Canadian Sellers' respective obligations to satisfy the Final DIP Repayment. Accordingly, the Debtor, Creditors' Committee, the majority lenders under the First Lien Credit Facility (the « Majority First Lien Lenders »), Canadian Sellers and Monitor in the CCAA Cases engaged in extensive good-faith discussions with respect to potential methodologies by which to allocate obligations on account of the Final DIP Repayment. The parties, however, maintain divergent views of the Debtor's obligations on the one hand, and the Canadian Sellers' obligations on the other hand, to repay amounts due under the DIP Credit Facility.

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(emphasis added)

15 As can be seen from the foregoing, the issues are serious, the parties are engaged in serious negotiations and a consensus has not yet been reached.

16 There is more: Bear Island further contends that one of the difficulties which may be encountered has to do with Bear Island's obligation to assume liability for part of the repayment of the DIP loan although it never benefited from the DIP funds. Bear Island expresses the problem as follows:

> **One issue raised for consideration is that, upon the Debtor's repayment of the $2.5 million in DIP Credit Facility funds that were used to satisfy the Debtor's obligation under the Revolving ABL Agreement, the Debtor had, and currently has, no borrowings under the DIP Credit Facility. Additionally, the Debtor does not anticipate borrowing any funds from the DIP Credit Facility. Yet, under the terms of the ASA, the Debtor and Canadian Sellers are both required to apply their remaining cash on hand to repay a portion of the DIP Credit Facility as described above in connection with the First DIP Repayment. Arguably, any such payment made by the Debtor constitutes a payment by the Debtor under the DIP Credit Facility Guarantee of the obligations of the Canadian Sellers, which entitles the Debtor, by right of subrogation, to seek repayment from the Canadian Sellers' estate of the amount the Debtor paid under the First DIP Repayment. Specifically, the DIP Credit Facility Guarantee provides that, if a guarantor thereunder (a « Guarantor ») makes payment under the DIP Credit Facility Guarantee, and if the obligations under the DIP Credit Facility are paid in full, the DIP Lenders will, at such Guarantor's request, transfer by subrogation their interest in the DIP Credit Facility obligations and any security held therefore to the Guarantor without recourse and without representation and warranty. The Plan provides for such transfer upon repayment of the DIP Credit Facility. Accordingly, the Debtor, as Guarantor, would succeed to the rights of the DIP Lenders and maintain a postpetition Subrogation Claim in the CCAA Cases in an amount equal the Debtor's portion of the First DIP Repayment, which, based on the Debtor's 13-week cash flow forecast dated as of September 22, 2011, would equal approximately $16.1 million.**
>
> **An additional issue raised for consideration is that because the Debtor will have no borrowings under the DIP Credit Facility as of the Sale Closing, the Debtor should not be obligated to pay any amounts owed by the Canadian Sellers on account of the Final DIP Repayment when (a) Final DIP Repayment should be based on direct borrowings of the respective estates and (b) the Canadian Sellers have sufficient financial wherewithal to meet their obligations under the DIP Credit Facility. The Debtor would be entitled to assert a Subrogation Claim against the Canadian Sellers in the event that it pays any amounts under the Final DIP Repayment. If the Canadian Sellers' allocated portion of the Cash Component is not sufficient to satisfy the Final DIP Repayment, the Debtor would pay the balance and such amounts would also become part of the Debtor's Subrogation Claim. An Estate Allocation that adopts these arguments would, based on the Debtors' and Canadian Sellers' 13-week cash flow forecast dated as of September 22, 2011, provide the Debtor's Estate with approximately $26.5 million (less the costs of administration and Wind Down of the Debtor's Estate) and the Canadian Sellers' estates with approximately $400,000 (in addition to any recovery on account of the Intercompany Claims, which, if allowed in their asserted amount, would equal approximately $5.4 million).**
>
> **A final issue for consideration is that, similar to the allocation of the Cash Component, the Final DIP Repayment should be allocated based on the relative proportions of the Debtor's and the Canadian Sellers' net or gross current assets. Consideration has also been given to the notion that the Debtor benefited from the DIP Credit Facility, and as such, cannot seek to recover the amount paid under the First DIP Repayment from the Canadian Debtors' and Canadian Sellers' 13-week cash flow forecast dated as of September 22, 2011, provide the Debtor's Estate with approximately $3.1 million (less the costs of administration and Wind Down of the Debtor's Estate) and the Canadian Sellers' estates with approximately $23.8 million.**

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> **In light of the foregoing and assuming that the currently estimated ratio of current assets and the total amount of cash available following repayment of the DIP Credit Facility do not change materially, as of the Sale Closing, the Debtor's Estate will receive a recovery ranging from approximately $3.1 million to approximately $26.9 million. The components of the Estate Allocation and the ranges of recovery based on the various positions discussed above are set forth in Exhibit B to this Disclosure Statement.**
>
> **Further, it is important to note that, as of the date hereof, a significant number of creditors of the debtors in the CCAA Cases have not been informed of, or consulted with, regarding the Estate Allocation. Once informed of the issues identified herein, such creditors may seek to investigate (a) the basis for payment of outstanding obligations under the DIP Credit Facility and (b) thee right, if any, of the debtors in the CCAA Cases to (i) offset the Intercompany Claims against any Subrogation Claims and (ii) assert an Administrative Claim or right of setoff against the Debtor, or require transfer of funds prior to the Sale Closing, on account of fees, expenses and repayments potentially due from the Debtor to the debtors in the CCAA Cases under the DIP Credit Facility, the Revolving ABL Agreement or certain intercompany transfers. The assertion and outcome of any of the foregoing may impact the monies available for distribution to the Debtor's creditors.**
>
> **In sum, given the various issues concerning repayment of the DIP Credit Facility, the parties have been unable to reach final agreement on the proper Estate Allocation. Nevertheless, to enable the Debtor to proceed with solicitation and Confirmation, the Debtor, Creditors' Committee and Majority First Lien Lenders have agreed that all parties shall reserve their rights with respect to the Estate Allocation. The Debtor, Creditors' Committee and Majority First Lien lenders believe that this approach is fair and reasonable, and allows the parties to continue to negotiate a consensual resolution to the Estate Allocation or, to the extent necessary, conduct cross-border litigation to resolve these issues at or prior to Confirmation.**
>
> **(emphasis added)**

17 Based upon the foregoing, the Monitor is very seriously concerned with the risk of an Estate Allocation being decided in the United States without taking into consideration all of the effects of such a decision upon the Canadian proceedings. In light of such a possibility, the Monitor seeks the following conclusions:

> [1] **GRANT the present Motion for Directions;**
>
> [2] **DIRECT the monitor as to the information that should be given to the creditors with claims against the Debtors with respect to the specific issue of Estate Allocation;**
>
> [3] **DECLARE that any definitive Estate Allocation shall be approved by this Court;**
>
> [4] **ORDER the Debtors, should the parties with an interest fail to reach a consensual Estate Allocation or an Estate Allocation which the Monitor can support and recommend for acceptance by this Court, to request a joint hearing between the United States Bankruptcy Court for the Eastern District of Virginia and this Court to deal with the specific issue of Estate Allocation;**
>
> [5] **APPROVE the Monitor's activities, as described in the monitor's Report dated September 27, 2011;**

18 But for the wording of conclusion no. [3] above, the stakeholders present at the hearing do not oppose the Monitor's Motion. Several stakeholders, however, believe that this conclusion is premature and that the parties should continue their negotiations in order to arrive at a consensual Estate Allocation. They do not wish to see an Order from this Court which could be interpreted as subordinating the validity of Estate Allocation to a unilateral judgment of this Court.

Analysis

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19 The Court's intervention in CCAA proceedings must always be framed within the powers given to it by the legislation. As Deschamps J. stated in Re: Century Services [2], those powers are broad, because of the broad language used by the statute. More particularly, she writes:

> **[77] The CCAA creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization which is fair to all.**

20 Fairness to all, here, goes through negotiation in good faith of all disputes with the least possible intervention of supervising Courts.

21 Primarily, the function of the Court in CCAA proceedings is to facilitate an orderly restructuration process and to promote a negotiated settlement of any disputes which may arise. The Court should not be asked to intervene to promote the point of view of one particular stakeholder or group of stakeholders. Furthermore, the Court's duty in cross-border proceedings is to protect the jurisdiction of all tribunals involved in an international restructuration.

22 At this point in time, the parties, on both sides of the border, are engaged in negotiations. Furthermore, there is no indication that these negotiations will not come to fruition. Accordingly, the Court should abstain to intervene.

23 It is quite obvious that this Court may have some implication in the use and/or allocation of the proceeds resulting from the sale of the WB Group's assets. It should not be forgotten that the sale process and draft Asset Purchase Agreement had been previously agreed to and authorized by this Court. Furthermore, the bidding process including the use of credit bidding was not only authorized and sanctioned by the undersigned, but also the validity of the auction procedure held in New-York was the subject matter of a vivid contestation which resulted in a judgment ratifying the entire process (see 2010 QCCS 4915; Motion for Leave to Appeal denied per Dalphond JCA, 2010, QCCA 1950).

24 Nevertheless, the Monitor suggests at paragraphs 16 of its Motion:

> **16. Although Bear Island has yet to file its definitive proposed Estate Allocation, which shall be part of Bear Island Plan, the Monitor is concerned that Bear Island may well adopt an allocation methodology that favours the U.S. estate to the detriment of the Canadian estate;**

25 Given the position taken by Bear Island in its above-noted comments on the issue of Estate Allocation, it is expected that, in the absence of a consensus, very important issues may have to be debated and decided either before this Court, the United-States Bankruptcy Court or perhaps even in a Joint Hearing before both jurisdictions.

26 Furthermore, in order to arrive at a consensus, all stakeholders on both sides of the border should be kept informed of their respective positions. The Monitor point is well taken when he suggests that:

> > 29. **The Monitor considers it would be appropriate to ensure that the proposed allocation is discussed in a context where the views of Canadian stakeholders can be expressed in order to arrive at a consensual allocation formula;**
> >
> > 30. **In the event a consensual allocation formula cannot be developed, the Monitor considers it would be preferable to debate the allocation in a context of a joint hearing in order to avoid, if possible, incompatible outcomes between the decisions of the US Bankruptcy Court and decisions that this honourable Court may render in the future with respect to the proper manner in which the proceeds from the sale transaction with BDWBI are distributed amongst WB Canada and Bear Island and the repayment of the Interim Financing facility is assumed by WB Canada and Bear Island;**

27 This is an interesting suggestion. A joint hearing may prove to be a good way to dispose of some of the disputes but may not be the best vehicle to dispose of complex matters where legal principles may differ depending upon which legal regime is applicable to the dispute and which Court has jurisdiction to decide upon same.

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28 The undersigned is aware of the importance of protecting and asserting this Court's jurisdiction in CCAA matters and, when such matters involve Cross-Border issues, it is equally important to protect, and not to interfere with, the jurisdiction of the United States Bankruptcy Court.

29 It seems that the question of Estate Allocation is an essential element of the Disclosure Statement, which is a necessary requirement of U.S. procedure in Chapter 11 proceedings. In this context, the U.S. Court may have to approve the allocation. It also must be emphasized that the Canadian Court has no direct jurisdiction over Bear Island which has never filed for protection under the CCAA and, conversely, the U.S. Court has no direct jurisdiction over the Canadian Debtors.

30 On the other hand, any allocation of the sale price of the WB Group's assets between WB Canada on the one part, and Bear Island on the other part, should not be the result of any Canadian or U.S. unilateral decision. Although the Estate Allocation of proceeds may have to be ratified and/or approved by both Courts, such a step may only come after a negotiated settlement, or after all disputes blocking a negotiated settlement will have been decided.

31 The end result of this allocation is equally important in Canada: WB Canada expects to obtain sufficient funds from the allocation of proceeds of the sale in order to implement its Plan of restructuration.

32 Accordingly, both Courts will most probably have to intervene upon the issue of final Estate Allocation and approve or ratify same, both within the scope of their respective jurisdictions.

33 Consequently, any unresolved dispute over any issue involving the allocation of the proceeds of sale of the assets of the WB Group shall firstly be submitted to either this Court or the U.S. Bankruptcy Court depending upon which Court has jurisdiction. Upon resolution of these disputes, both Courts, either jointly or separately, may approve the final allocation in accordance with their respective rules of procedure.

34 Inasmuch as this Motion is brought by the Monitor in its capacity as Officer of the Court, there shall be no adjudication as to costs.

35 As indicated above, the other conclusions sought by the Monitor, they cause no specific difficulties and they will be granted as sought.

35 *FOR THESE REASONS*, the Court

36 *GRANTS* the Monitor's Motion for Directions;

37 *DIRECTS* the Monitor to inform the creditors with claims against the Debtors with respect to the specific issue of Estate Allocation, by way of a general mailing containing a copy of this Order together with a copy of the Monitor's Report dated September 27, 2011;

38 *APPROVES* the Monitor's activities as described in its Report of September 27, 2011;

39 *DIRECTS* the parties having an interest in the Estate Allocation to continue their negotiations towards a final and global settlement of the Estate Allocation.

40 *DIRECTS* that any consensual definitive Estate Allocation of the proceeds of the sale of the assets of the WB Group, establishing the proper manner in which the proceeds from the sale transaction with BD White Birch Investments Inc. are to be distributed amongst WB Canada on the one part and Bear Island on the other part, including the repayment of the Interim financing Facility to be assumed by WB Canada and Bear Island, may be approved by both the Superior Court of Quebec and by the United States Bankruptcy Court for the Southern District of Virginia within the scope of their respective jurisdictions and *DIRECTS FURTHER* that should the parties fail to reach a consensual allocation (or an allocation which the Monitor can support and recommend for acceptance by this Court), *AUTHORIZES* any interested party to seek the adjudication of any dispute before the Court having jurisdiction upon same.

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41 *THE WHOLE WITHOUT COSTS.*

Footnotes

1 Pages 15 to 17 of Bear Island's Disclosure Statement.

2 [2010] 3, SCR 379; [2010] SCC 60

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21

2010 QCCS 4382
Cour supérieure du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 9720, 2010 QCCS 4382, EYB 2010-179464

Dans l'affaire du plan d'arrangement relatif à: White Birch Paper Holding Company, White Birch Paper Company, Stadacona General Partner Inc., Black Spruce Paper Inc., F.F. Soucy General Partner Inc., 3120772 Nova Scotia Company, Arrimage de gros Cacouna inc. et Papier Masson ltée, Débitrices, c. Ernst & Young inc., Contrôleur, et Stadacona Limited Partnership, F.F. Soucy Limited Partnership et F.F. Soucy, inc. & Partners, Limited Partnership, Mis en cause, et Service d'impartition industriel inc et KSH Solutions inc., Opposantes

Mongeon J.C.S.

Audience: 7 septembre 2010
Jugement: 10 septembre 2010
Dossier: C.S. Qué. Montréal 500-11-038474-108

Avocat: *Me Jean Fontaine*, pour les débitrices
Me Jean-Éric Guindon, pour l'Opposante Service d'Impartition Industriel Inc.
Me Pierre-Stéphane Poitras et Me Julie Lavertu, pour l'Opposante KSH Solutions Inc.
Me Louis Gouin, pour le Contrôleur

Sujet: Insolvency

***Mongeon J.C.S.*:**

1 Le Tribunal a entendu en date du 7 septembre 2010 une série de requêtes de la part de divers intervenants dans le contexte d'une demande des débitrices visant l'approbation d'un processus de vente de type « Stalking Horse » de tous les actifs du Groupe.

2 Vu l'urgence de statuer sur ce processus, le Tribunal est d'avis que la requête des Débitrices doit être accueillie, motifs à suivre, avec certaines modifications quant aux conclusions recherchées et que les diverses requêtes des opposantes à ce processus doivent être rejetées, aussi avec motifs à être déposés ultérieurement.

3 En conséquence, le Tribunal rend l'ordonnance suivante:

The **Motion to approve a Stalking Horse Bidder to approve an Asset Sale Agreement, to approve bidding procedures for the sale of substantially all the WB Group's assets and to schedule an auction and sale hearing** (no. 55) is granted**,** with reasons to follow, with the following modifications:

a) The dates and delays suggested in the conclusions of the Motion shall be extended to take into account the date of the present Order;

b) There shall be no Break-Up Fee of US $2,000,000.00 payable to the Stalking Horse Bidder or Purchaser (as defined in the ASA). The Stalking Horse Bidder shall, instead, be entitled to the reimbursement of its expenses up to an amount of US $3 million.

The Break-up fee and Expense Reimbursement proposed by the Stalking Horse Bidder in paragraphs 9.2 and 9.3 of the ASA shall be limited to an Expense Reimbursement not to exceed the sum of US $3 million;

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c) The obligation of the Debtors and Mis-en-cause to pay the Expense Reimbursement to the Staling Horse Bidder shall be guaranteed by a « CCAA Charge » as provided for in the definition of « Expense Reimbursement » in section 1.1 of the ASA, the whole not to exceed the sum of US $3 million and shall be payable to the Purchaser in accordance with section 9.3 of the ASA.

Accordingly, the Order pursuant to said Motion shall read as follows:

CONSIDERING the Debtors' "Motion to Approve a Stalking Horse Bidder, to Approve an Asset Sale Agreement, to Approve Bidding Procedures for the Sale of Substantially All the WB Group's Assets and to Schedule an Auction and Sale Hearing" (the **"Motion"**); and its supporting exhibits;

CONSIDERING the submissions of counsel;

GIVEN the provisions of the Initial Order granted by this Court in this matter on February 24th, 2010 (the **"Initial Order"**);

GIVEN the provisions of the order of this Court approving the Sales and Investor Solicitation Process; and

GIVEN the provisions of the *Companies' Creditors Arrangement Act*, (R.S.C., 1985, c. C-36) as amended (the **"CCAA"**);

THE COURT:

GRANTS the present Motion;

DECLARES sufficient the service and notice of the present Motion;

APPROVES the Monitor's Report, Exhibit SM-1 and the addendum thereto, Exhibit SM-1A;

APPROVES as the Stalking Horse Agreement, the Asset Sale Agreement dated August 10th, 2010, as amended on August 23rd and August 31st, 2010, Exhibit SM-2, by and between White Birch Paper Company (together with certain subsidiaries) and BD - White Birch Investment LLC (the "**Sale Agreement**"), as these documents are modified by the present Order including, without limitation, the obligations of the Sellers to pay the Expense Reimbursement not to exceed the aggregate sum of US $3 million (as such expression is defined in the Sale Agreement) to the Purchaser on the terms and conditions set forth in the Sale Agreement;

APPROVES the bidding procedures, as set out at Exhibit SM-3 (the "Bidding Procedures"), including, without limitation, the section entitled « *Expense Reimbursement"*;

ORDERS that the capitalized terms used herein but not defined shall have the meanings ascribed to them in the Bidding Procedures or, if not defined therein, in the Initial Order;

DECLARES that BD White Birch Investment LLC ("BD") shall be the stalking horse bidder for the purposes of the competitive bidding process set out in the Bidding Procedures, Exhibit SM-3;

AUTHORIZES AND ORDERS the WB Group, its advisors and the Monitor to conduct the competitive bidding process set out in the Bidding Procedures, Exhibit SM-3, in accordance with the Bidding Procedures;

ORDERS that, to the extent a Qualified Bid, as defined in the Bidding Procedures, Exhibit SM-3, other than the bid received from BD White Birch Investment LLC, is received by no later than 5:00 pm (Eastern time) on September 17, 2010, an auction for the Assets of the WB Group shall be held at the offices of Kirkland & Ellis, 601 Lexington Avenue, New York, New York, United States of America, 10022, beginning at 10:00 am (Eastern time) on September

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21, 2010; or at such later time or other place as the WB Group shall notify all Qualified Bidders in accordance with the terms of the Bidding Procedures;

AUTHORIZES AND ORDERS the WB Group and its advisors to carry out any such Auction in accordance with the Bidding Procedures;

DECLARES that a hearing shall take place before the Superior Court of Quebec, Commercial Division, on or prior to September 24, 2010 in order to authorize and approve the sale of the WB Group's Assets, pursuant to the terms set out in the Asset Purchase Agreement, Exhibit SM-2, or pursuant to the terms of an alternative transaction with the winning bidder at the auction, as the case may be (the "Sale Hearing");

ORDERS that, in the event that no Qualified Bids other than the Qualified Bid submitted by BD are received pursuant to the terms of the Bidding Procedures, that the WB Group is authorized and ordered to (i) cancel the Auction and (ii) seek entry of the Canadian Sale Order (as defined in the Sale Agreement) in accordance with the Bidding Procedures;

DECLARES that, pursuant to the terms of the Sale Agreement and as security for the Debtors' and the Mises en Cause's obligation to pay the Expense Reimbursement to the Purchaser, as hereby approved under the terms and conditions set forth in the Sale Agreement and the Bidding Procedures, the Purchasers are hereby granted a hypothec on, mortgage of, lien on and security interest in the Property to the extent of the aggregate amount of the Expense Reimbursement (being an amount not to exceed three million United States dollars (US $3,000,000.00)), which charge shall be subordinate to the Administration Charge, the D&O Charge and the Interim Financing Charge, but shall otherwise be, and be deemed to be, an additional "CCAA Charge" under, and for the purposes of, the provisions of the Initial Order concerning the CCAA Charges;

DECLARES that, in the event that BD submits the Winning Bid (as defined in the Bidding Procedures), the provisions of the ASA that contemplate that at Closing the $10 million D&O Charge (as defined in the Initial Order) and the $3 million Administrative Charge (as defined in the Initial Order) will be discharged and expunged and replaced, in effect, with the $10 million letter of credit and the $3 million Wind-Down Amount, pursuant to the Canadian Sale Order (as defined in the ASA) and as provided for under Sections 5.2(g) and 5.18 of the ASA, respectively, are hereby approved;

ORDERS that, in connection with the Bidding Procedures and pursuant to clause 7(3)(c) of the Personal Information Protection and Electronic Documents Act (Canada), the Debtors and the Mises en Cause are authorized and permitted to disclose personal information of identifiable individuals to Qualified Bidders and their advisors, but only to the extent required in connection with the terms of the Bidding Procedures and the bidding and sale process to be conducted thereunder. Each such Qualified Bidder shall maintain and protect the privacy of such information and limit the use of such information to its participation in the Sale and, if it does not complete the Sale, shall return all such information to the Debtors and the Mises en Cause, or in the alternative**,** destroy all such information;

REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or elsewhere, including the United States Bankruptcy Court for the Eastern District of Virginia, to give effect to this Order and to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors, the Mises en Cause and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order;

THE WHOLE WITHOUT COSTS.

4 La *Requête en rétractation de jugements* (no. 58) de l'opposante Service d'Impartition Industriel Inc. est *rejetée avec dépens*, motifs à suivre;

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5 La *Requête en rejet d'une demande visant à approuver une vente et pour ordonner la fin de la protection de la LACC par ordonnance* (no. 60) de l'opposante Service d'Impartition Industriel Inc. est *rejetée, sans frais*, motifs à suivre;

6 La *Contestation et Requête pour faire déclarer abusive la requête en rétractation de jugements de Service d'Impartition Industriel Inc*. (no. 62) des Débitrices est *rejetée, avec dépens*, motifs à suivre;

7 La *Réplique et contestation du contrôleur à la « Requête en rejet d'une demande visant à approuver une vente et pour ordonner la fin de la protection de la LACC par ordonnance » et à la « Requête en rétractation de jugements » de la requérante* (no. 64) est *rejetée, sans frais*, motifs à suivre;

8 La *Requête pour modification et révision de l'ordonnance initiale du 24 février 2010* (no. 71) de l'opposante KSH Solutions Inc. est *rejetée, sans frais*, motifs à suivre.

9 La *Contestation de la créancière KSH Solutions Inc. à la « Motion to approve a Stalking Horse Bidder, to approve an asset sale agreement, to approve the bidding procedures for the sale of substantiallly all the WB Group assets and to schedule an auction and sale hearing » et Requête pour ordonner la fin de la protection de la LACC* (no. 72) est *rejetée, sans frais*, motifs à suivre.

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22

2008 CarswellQue 15021
Quebec Superior Court

Maax Corp., Re

2008 CarswellQue 15021, EYB 2008-181925

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

MAAX Corporation, Maax Canada Inc., Maax Spas (Ontario Inc.), 4200217 Canada Inc. Maax Cabinets Inc., Initial Petitioners and Maax Ksd LLC, Aker Plastics Company Inc., Maax Spas (Arizona), Inc. Maax-Hydro Swirl Manufacturing Corp. Maax Midwest, Inc. Pearl Baths LLC, Additional Petitioners and Alvarez & Marsal Canada ULC, Monitor

Buffoni J.C.S.

Judgment: July 10, 2008
Docket: C.S. Qué. Montréal 500-11-033561-081

Counsel: None given

Subject: Insolvency; Corporate and Commercial

***Buffoni J.C.S.*:**

Order (Extending CCAA protection to Additional Petitioners)

1 *SEEING* the Initial Petitioners and Additional Petitioners' *Motion for an order extending CCAA protection to Additional Petitioners* (the "*Motion*"), reading the affidavit of Paul Golden sworn July 8, 2008 and the Alvarez & Marsal Canada ULC (the "*Monitor*") Second Report dated July 9, 2008, and hearing the submissions of counsel for the Initial Petitioners and Additional Petitioners and for the Monitor; and

2 *GIVEN* the provisions of the CCAA;

3 *WHEREFORE THE COURT:*

A. *GRANTS* the present Motion.

B. *EXEMPTS* the Initial Petitioners and the Additional Petitioners from having to serve the Motion and from any notice of presentation.

C. *ORDERS* that the Second Report of the Monitor be and is hereby accepted and approved and the actions and activities of the Monitor described therein be and are hereby approved;

D. *ORDERS* that the Additional Petitioners are companies to which the CCAA applies; and

E. *ORDERS* that, from the date hereof, all provisions of the Initial CCAA Order rendered by this Honourable Court on June 12, 2008, as may be amended or extended from time to time including by the Order of this Honourable Court dated June 26, 2008, shall apply to the Additional Petitioners, *mutatis mutandi*.

F. *ORDERS* the provisional execution of the Order notwithstanding any appeal and without the necessity of furnishing any security.

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2004 CarswellQue 4816
Cour supérieure du Québec

Cavalier Specialty Yarn Inc., Re

2004 CarswellQue 4816, EYB 2004-61042

In the matter of a plan fo compromise or arrangement of: Cavalier Specialty Yarn Inc., Debtor, v. Richter & Associés inc., Monitor-interim Receiver-petitioner, and The Registrar for The Registration Division of Beauce and The Registrar for The Register of Personal and Movable Real Rights, Mis en cause

Chaput J.C.S.

Heard: 22 april 2004
Judgment: 26 april 2004
Docket: C.S. Qué. Montréal 500-11-021490-038

Counsel: *Me Neil Peden*, for Debtors
Me Gilles Paquin, for Monitor
Me Arnold Cohen, for Bank of America
Me Denis Lavoie, for Workers'Union

Subject: Insolvency

***Paul Chaput, S.C.J.*:**

1 The Court is seized with a Motion of the Debtor seeking the authorization to complete a transaction, for a vesting order and permission to distribute the proceeds of sale, dated April 19, 2004;

2 The purpose of the Motion is for the Court to authorize the Debtor to sell its property in St-Georges-de-Beauce, Québec, to Sobeys Québec Inc., and for an order vesting the property, free and clear of all rights and charges affecting the property, that the vesting will not be subject in the future to any attack under provisions concerning voidable or reviewable transactions, and for the distribution of the purchase price to certain creditors.

- - - - -

3 The Monitor has filed his sixth and seventh reports since his appointment pursuant to the Initial Order made under the Companies Creditors Arrangement Act (CCAA) on September 23, 2003. That order has been extended to May 31, 2004.

4 At the time of the Initial Order, the Debtor had operations in three plants, including the one in St-Georges, employing approximately 500 workers.

5 According to the Monitor's reports and the testimony of its representative, the joint efforts of the Debtor and the Monitor to develop viable restructuring options have not produced the expected results.

6 In October, the Monitor published notices to attract prospective investors and purchasers.

7 In February 2004, the Court authorized the sale of certain assets of the Debtor's aramid line of products to Stowe-Pharr Mills Inc. (Pharr). That transaction generated $6,150,000.

8 Two of the Debtor's plants have since been shut down, one of which is the St-Georges plant.

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9 The operations there were consolidated with those in the Debtor's Sherbrooke plant.

10 The Monitor has on hand an offer for the sale by Debtor of the St-Georges property of $1,700,000 duly accepted by Debtor on October 27, 2003.

11 It is the Monitor's recommendation that the offer should be accepted.

12 Also, the representative of the Monitor has clearly indicated that there are no other potential purchasers and that these are carrying charges of $18,000 a month.

13 Considering the evidence, in these circumstances, the sale appears to be the best viable alternative. Accordingly, the Court will grant the authorization to sell.

- - - - -

14 According to the allegations in the Motion and the documents filed, the St-Georges property of the Debtor is subject to the registered charges mentioned hereinafter at paragraph 27:

15 The Motion seeks an order that the sold property will be vested free and clear of all charges, more particularly those recited in the preceding paragraph;

16 The attorney for Bank of America has indicated that considering payment to the Bank of the purchase price after payment of the municipal and school taxes, the Bank consents to the cancellation of the rights registered in its favour.

17 The court had raised concerns on its authority to cancel the registered rights and charges. Since the hearing, letters have been filed from La Financière du Québec and the main investors secured under the National Bank Trust Deed indicating that they consent to the Motion.

18 Accordingly, the Court will issue the order for the cancellation of the registered rights.

19 An objection was made by the attorney acting for the Syndicat des Salariés de la filature de St-Georges (CSD) as to the proposed distribution of the proceeds of sale, that they should be held by the Monitor pending determination certain claims by the unionized workers for certain amounts due to them since the Initial Order.

20 Considering the Reimbursement Agreement annexed hereto, the objection is withdrawn and the claim of the unionized workers will be dealt with at a later date upon filing of a motion by the attorney for CSD.

21 *FOR THESE REASONS THE COURT* :

22 *GRANTS* the Debtor's Motion seeking the authorization to complete a transaction, for a vesting order and permission to distribute the proceeds of sale;

23 *DECLARES* that the Motion was validly served and filed;

24 *AUTHORIZES* the Debtor to sign and execute any agreement, contract, deed or to give effect to the offer to sell and transfer the Debtor's St-Georges property more fully described as follows:

DÉSIGNATION

« Un immeuble composé des lots numéros TROIS MILLION SOIXANTE-NEUF MILLE DEUX CENT SOIXANTE-DEUX (3 069 262), TROIS MILLION SOIXANTE-NEUF MILLE DEUX CENT SOIXANTE-TROIS (3 069 263), TROIS MILLION SOIXANTE-NEUF MILLE DEUX CENT SOIXANTE-QUATRE (3 069 264), TROIS MILLION SOIXANTE-NEUF MILLE DEUX CENT SOIXANTE-CINQ (3 069 265), TROIS MILLION SOIXANTE-NEUF

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MILLE DEUX CENT SOIXANTE-SIX (3 069 266), TROIS MILLION SOIXANTE-NEUF MILLE DEUX CENT SOIXANTE-SEPT (3 069 267), TROIS MILLION SOIXANTE-NEUF MILLE DEUX CENT SOIXANTE-HUIT (3 069 268), TROIS MILLION SOIXANTE-NEUF MILLE DEUX CENT SOIXANTE-NEUF (3 069 269) ET DEUX MILLION CINQ CENT CINQUANTE-QUATRE MILLE CENT CINQUANTE (2 554 150), tous du cadastre du Québec, circonscription foncière de Beauce.

Avec toutes les constructions dessus érigées portant le numéro civique 1990, boulevard Dionne (6e avenue ouest), Saint-Georges, Québec.

Avec une servitude d'aqueduc en faveur de l'Immeuble découlant d'un acte intervenu le 31 juillet 1975 devant Me Claude Guertin, notaire et publié au bureau de la publicité des droits de la circonscription foncière de Beauce sous le numéro 276083, de maintenir dans le sol un tuyau d'aqueduc de douze pouces (12 ») de diamètre en bois, avec tous les accessoires permettant d'entretenir, réparer et renouveler ce tuyau au besoin, le tout à charge de remettre les lieux tels que pris.

Sujet à une servitude affectant une partie de l'Immeuble découlant d'un acte intervenu le 26 janvier 1977 devant Me Michel Poisson, notaire et publié sous le numéro 291834 consistant en :

a) un droit de placer, remplacer et entretenir sur chacun des fonds servants y décrit une base de béton dans laquelle est annexé un poteau ayant les instruments d'éclairage de rues et/ou feux de signalisation avec tous autres accessoires nécessaires ou utiles; et le droit de faire opérer lesdits instruments et accessoires;

b) un droit de circuler en tout temps sur les fonds servants, à pied et/ou en véhicule de tous genres, pour exercer tout droit accordé aux termes de cet acte;

c) une interdiction réelle et perpétuelle pour toute personne d'ériger, dans l'avenir, quelque construction ou structure, sur ou au-dessus desdits fonds servants;

d) un droit réel et perpétuel de faire tout le nécessaire pour l'exercice des servitudes ci-avant consenties. »

25 *ORDERS* that upon the execution of the deed of sale, the Monitor and Interim Receiver shall sign and file into the court record a certificate confirming said execution and receipt by the Monitor's attorneys of the sale proceeds, to be disbursed upon registration of said Deed of Sale without any adverse entries (the "Monitor's Certificate");

26 *DECLARES* that the deed of sale to be executed in connection with the offer cannot be attacked or voided as a reviewable transaction and upon execution shall be deemed valid for all intents and purposes;

27 *ORDERS AND DECLARES* that upon the filing of the Monitor's Certificate, the Saint-Georges Property shall be vested absolutely and exclusively in and with the Purchaser, free and clear of and from any and all rights, interests, prior claims, hypothecs, security interests (whether contractual, statutory, or otherwise), mortgages, debts, disputes, estates, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, assignments, judgments, execution, writs of seizure and sale, options, adverse claims, levies, charges, liabilities (direct, indirect, absolute or contingent) or other claims or encumbrances, whether secured, unsecured or otherwise, as provided by law, including:

a) an immovable hypothec granted in favour of Bank of America Canada and Nationsbank, N.A. in the amount of $100,000,000 plus an additional hypothec for an amount equal to 20% thereof, published at the Registration Division of Beauce on May 20, 1999, under number 461826;

b) a movable hypothec without delivery dated May 18, 1999 in the amount of $120,000,000.00 (including a $20,000.00 additional hypothec) in favour of Bank of America, Canada and Nationsbank, N.A., which was published at the Register of Personal and Movable Real Rights on May 19, 1999 under number 99-0080215-0002;

c) an assignment of rank by Trust Général du Canada in favour of Bank of America Canada and Nationsbank, N.A. published at the Registration Division of Beauce on June 14, 1999, under number 462290;

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d) an assignment of hypothecary claims by Bank of America Canada in favour of Bank of America, National Association published at the Registration Division of Beauce on January 7, 2002, under number 475995 and at the Register of Personal and Movable Real Rights on January 3, 2002 under number 02-0000833-0010;

e) a hypothec in the amount of $4,500,000 granted in favour of La Financière du Québec, published at the Registration Division of Beauce on May 14, 2002, under number 477813;

f) a movable hypothec without delivery dated May 13, 2002 in the amount of $5,400,000,00 (including an additional hypothec) which was published at the Register of Personal and Movable Real Rights on May 14, 2002 under number 02-0200569-0001;

g) a hypothec in the amount of $1,200,000 granted in favour of National Bank Trust Inc. published at the Registration Division of Beauce on May 14, 2002, under number 477814 and at the Register of Personal and Movable Real Rights on May 14, 2002 under number 02-0200716-0001;

h) a prior notice of the exercise of a hypothecary recourse published by Bank of America, National Association at the Registration Division of Beauce on October 17, 2003, under number 10,803,646;

28 *AUTHORIZES*the Monitor, once the Deed of Sale has been executed, to register a copy of this Order to effect the cancellation of the Registered Rights;

29 *ORDERS* the Registrar of the Registration Division of Beauce to accept for registration a copy of this Order, along with the Deed of Sale, on the title of the immoveable described above and to cancel the rights and charges registered under numbers 461826, 462290, 475995, 477813, 477814 and 10, 803, 646;

30 *ORDERS* the Registrar of the Register of Personal and Movable Real Rights to accept this Order for registration and to cancel, with respect only ot the Assets (as defined in the Deed of Sale) the rights and charges registered under numbers 99-0080215-0002, 02-0000833-0010, 02-0200569-0001 and 02-0200716-0001;

31 *DECLARES* that the vesting of the Saint-Georges Property pursuant to the present Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable nor shall it be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Companies' Creditors Arrangement Act* or the *Bankruptcy and Insolvency Act* or any other applicable federal or provincial legislation;

32 *ORDERS* that the net proceeds of the sale of the St-Georges Property be remitted to the Monitor and Interim Receiver;

33 *ORDERS* the Monitor and Interim Receiver to pay, from the product of sale, the Debtor's outstanding municipal and school taxes relating to the St-Georges Property and the fee payable to Groupe Sogeco Inc. under the offer, and to remit the balance of the proceeds of sale to Bank of America, National Association in partial satisfaction of its claim;

34 *DECLARES* that the present Order with regard to the motion shall have full force and effect in all of the provinces and territories in Canada;

35 *DECLARES* that this court seeks and requests the aid and recognition of any Court or administrative body in any province of Canada, and any Canadian Federal Court or administrative body as well as any court or administrative body in any of the States of the United States of America and any Federal Court or administrative body of the United States of America including, without limitation, the United States Bankruptcy Court, Western District of North Carolina, Charlotte Division, to assist the Debtors and the Monitor and Interim Receiver to carry out the terms of the Order to be rendered;

36 *APPROVES* the Monitor's Sixth Report;

37 *ORDERS* service of a copy of the present order, including the Annex, on all creditors named above in paragraph 27;

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38 *ORDERS* provisional execution of the Order to be rendered with regard to the present motion notwithstanding any appeal and without the necessity of furnishing any security;

39 *THE WHOLE WITHOUT COSTS*, unless contested.

Solicitors of record:

McCarthy Tétrault, for Debtors

Goldstein Flanz Fishman, for Monitor

Ogilvy Renault, for Bank of America

Melançon Marceau Grenier & Sciortino, for Workers'Union

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2004 CarswellQue 4817
Cour supérieure du Québec

Cavalier Specialty Yarn inc., Re

2004 CarswellQue 4817, EYB 2004-61044

In the matter of a plan of compromise or arrangement of: Cavalier Specialty Yarn inc. and Cavalier Specialty Yarn Company U.S.A., Debtors, v. Richter & Associés inc., Monitor-interim Receiver-petitioner, and The Registrar for Sherbrooke Land Registry Division and The Registrar for The Register of Personal and Movable Real Rights, Mis en cause

Chaput J.C.S.

Heard: 22 april 2004
Judgment: 26 april 2004
Docket: C.S. Qué. Montréal 500-11-021490-038

Counsel: *Me Neil Peden*, for Debtors
Me Gilles Paquin, for Monitor
Me Arnold Cohen, for Bank of America
Me Denis Lavoie, for Workers'Union

Subject: Insolvency

***Paul Chaput, S.C.J.*:**

1 The Court is seized with a Motion of the Monitor/Interim Receiver (Monitor) seeking the authorization to complete a transaction, for a vesting order and permission to distribute the proceeds of sale, dated April 19, 2004, as amended verbally on April 22, 2004, the whole with respect to the Sherbrooke facility of the Debtors.

2 The purpose of the Motion is for the Court to authorize the Monitor to enter into the Agreement of Purchase and Sale already signed by the purchaser 9139-4841 Québec Inc. (9139), and for orders that upon completion of the transactions contemplated in that Agreement the property sold will vest in 9139, free and clear of all rights and charges affecting the property, that the vesting will not be subject in the future to any attack under provisions concerning voidable or reviewable transactions, and for the distribution of the purchase price to certain creditors.

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3 The Monitor has filed his seventh report since his appointment pursuant to the Initial Order made under the Companies Creditors Arrangement Act (CCAA) on September 23, 2003. That order has been extended to May 31, 2004.

4 At the time of the Initial Order, the debtors had operations in three plants, employing approximately 500 workers.

5 According to the Monitor's report and the testimony of its representative, the joint efforts of the Debtors and the Monitor to develop viable restructuring options have not produced the expected results.

6 In October, the Monitor published notices to attract prospective investors and purchasers.

7 In February 2004, the Court authorized the sale of certain assets of the Debtors' aramid line of products to Stowe-Pharr Mills Inc. (Pharr). That transaction generated $6,150,000.

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8 Two of the Debtors' plants have since been shut down.

9 Extensive efforts have been made by the Monitor to interest investors or purchasers for the Debtor's specialty facility in Sherbrooke.

10 A first offer was put in by Pharr for the Sherbrooke Business, excluding the plant for which the Monitor has received a separate offer.

11 These combined offers, if accepted, would generate $5,527,000. But selling to these purchasers would mean closing the plant and terminating the employment of the 250 workers presently employed at the Sherbrooke facility.

12 No agreement was signed following these offers. But a break-fee of $100,000 to keep Pharr interested has been agreed to by the Monitor should he recommend another offer for approval.

13 A second offer was put in by 9139 at $5,700,000 for the plant, raw materials, work in progress, finished goods and goods in transit.

14 It is the Monitor's recommendation that 9139's offer should be accepted, as the price offered is higher, the sale to 9139 would permit the ongoing operations of the plant and save the jobs of the 250 workers presently employed.

15 Also, the representative of the Monitor has clearly indicated that there are no other potential purchasers. Should the proposed transaction with 9139 not be completed, in all likelihood the Sherbrooke plant will close down in the near future and the facility liquidated.

16 In these circumstances, the sale to 9139 appears to be the best viable alternative. Accordingly, the Court will authorize the Monitor to enter into the Agreement of Purchase and Sale with 9139.

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17 According to the allegations in the Motion and the documents filed, the Sherbrooke facility of the Debtors is subject to the following charges:

a) an immovable hypothec dated May 18, 1999 in the amount of $100,000,000.00, plus an additional hypothec for an amount equal to 20% thereof, in favour of Bank of America, National Association on behalf of itself and other lenders, along with various pledges and assignments relating thereto, was published, *inter alia*, at the land registrer of the Registry Office of the Sherbrooke Registration Division on May 21, 1999 under number 486693; an assignment of hypothecary claims by Bank of America Canada in favour of Bank of America, National Association was published, *inter alia*, at said Registry Office on January 7, 2002 under number 511388 and the Prior Notice related thereto published under number 10 810,416;

b) a movable hypothec without delivery dated May 18, 1999 in the amount of $120,000,000.00 (including a $20,000,000.00 additional hypothec) in favour of Bank of America, Canada and Nationsbank, N.A., which was published at the Register of Personal and Movable Real Rights on May 19, 1999 under number 99-0080215-0002; an assignment of hypothecary claims by Bank of America Canada in favour of Bank of America, National Association was published at the Register of Personal and Movable Real Rights on January 3, 2002 under number 02-0000833-0010 and the Prior Notice related thereto published under number 03-0553697-0002;

c) a movable hypothec without delivery dated May 18, 1999 in the amount of $120,000,000.00 (including a $20,000,000.00 additional hypothec) in favour of Bank of America, Canada and Nationsbank, N.A., which was published at the Register of Personal and Movable Real Rights on May 19, 1999 under number 99-0080215-0001; an assignment of hypothecary claims by Bank of America Canada in favour of Bank of America, National

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Association was published at the Register of Personal and Movable Real Rights on January 3, 2002 under number 02-0000833-0010 and the Prior Notice related thereto published under number 03-0553697-0001;

d) an assignment of rank by Trust Général du Canada in favour of Bank of America Canada and Nationsbank, N.A., published, *inter alia*, at the land register of the Registry Office of the Sherbrooke Registration Division on June 15, 1999 under number 487939 (this assignment is now without object following the discharge of the underlying hypothec which was held by Trust Général du Canada);

e) an immovable hypothec in favour of La Financière du Québec dated May 13, 2002 in the amount of $4,500,000, along with various pledges and assignments relating thereto, which was published, *inter alia*, at the land register of the Registry Office of the Sherbrooke Registration Division on May 14, 2002 under number 514942 and a movable hypothec without delivery dated May 13, 2002 in the amount of $5,400,000,00 (including an additional hypothec) which was published at the Register of Personal and Movable Real Rights on May 14, 2002 under number 02-0200569-0001;

f) a hypothec in favour of National Bank Trust Inc., as trustee for Investors, dated May 13, 2002 in the amount of $1,200,000, along with various pledges and assignments of the same date relating thereto, which was published, *inter alia*, at the land register of the Registry Office of the Sherbrooke Registration Division on May 14, 2002 under number 514946 and in the Register of Personal and Movable Real Rights on May 14, 2002 under number 02-0200716-0001;

g) a legal hypothec in favour of Matériaux Économiques Inc., a person having taken part in the construction or renovation of an immoveable, published on October 20, 2003 against the Sherbrooke Property under number 10 806 087 and a Prior Notice of exercise of a hypothecary right with respect thereto, published on March 11, 2004 under number 11 138 233;

h) a legal hypothec in favour of Construction Olivier & Lyonnais Inc., a person having taken part in the construction or renovation of an immoveable, published on October 23, 2003 against the Sherbrooke Property under number 10 816 965 and a Prior Notice of exercise of a hypothecary right with respect thereto, published on February 19, 2004 under number 11 090 678;

i) prior claims, legal hypothecs or other rights, whether published or not, in favour of the City of Sherbrooke and in favour of the Commission Scolaire de la Région-de-Sherbrooke for the recovery of any of their respective claims.

18 The Motion seeks an order that the sold property will be vested in 9139 free and clear of all charges, more particularly those recited in the preceding paragraph;

19 The attorney for Bank of America has indicated that considering payment to the Bank of the purchase price less the break fee of $100,000, the municipal and school taxes and the $60,000 holdback for the two construction claims, the Bank consents to the cancellation of the rights registered in its favour.

20 In addition, as regards prior claims which could be raised against the purchase price, the Monitor and Bank of America have entered into the Reimbursement Agreement annexed hereto.

21 Since the hearing, letters have been filed from La Financière du Québec, Matériaux Économiques Inc., Construction Olivier & Lyonnais Inc. and the main investors secured under the National Bank Trust Deed indicating that they consent to the Monitor's Motion.

22 Accordingly, the Court will issue the order for the cancellation of the registered rights.

23 *FOR THESE REASONS THE COURT* :

24 *GRANTS* the Monitor's Motion seeking the authorization to complete a transaction, for a vesting order and permission to distribute the proceeds of sale, dated April 19, 2004, as amended verbally on April 22, 2004;

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25 *DECLARES* that the Motion was validly served and filed;

26 *AUTHORIZES* the Monitor and Interim Receiver to enter into the Agreement for Purchase and Sale (the « Assets Purchase Agreement ») attached to the Motion;

27 *DECLARES* that, upon execution, the Assets Purchase Agreement will be valid and enforceable;

28 *AUTHORIZES* the Monitor and Interim receiver to sign and execute any agreement, contract, deed or any other document ancillary or related to the Assets Purchase Agreement which could be required or useful to give full and complete effect thereto;

29 *DECLARES* that once duly executed, the Assets Purchase Agreement cannot be attacked or voided as a reviewable transaction;

30 *ORDERS and DECLARES*that upon the completion of the transactions contemplated by the Assets Purchase Agreement, the Assets (as defined in said Agreement), including: the property bearing civic address 95 Burlington Street, Sherbrooke, Québec, more fully described as follows:

Description

The lot number 2 800 746 Cadastre du Québec, Registration Division of Sherbrooke.

As the property now subsists with all its rights, members, and appurtenances, without exception or reserve of any kind.

30 shall be vested absolutely and exclusively in 9139-4841 Québec Inc., free and clear of and from any and all rights, interests, prior claims, hypothecs, security interests (whether contractual, statutory, or otherwise), mortgages, debts, disputes, estates, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, assignments, judgments, execution, writs of seizure and sale, options, adverse claims, levies, charges, liabilities (direct, indirect, absolute or contingent) or other claims or encumbrances, whether secured, unsecured or otherwise, as provided by law, including those mentioned in paragraph 17 above;

31 *AUTHORIZES* the Monitor, once the Deed of Transfer of the Sherbrooke property has been executed to register a copy of this Order to effect the cancellation of the registered rights;

32 *ORDERS,* upon the filing of a copy of this Order, the Registrar for the Sherbrooke Registration Division to cancel the registration pursuant to the Deeds published under numbers 486693, 487939, 514942, 514946, 511388, 11138233, 11090678, 10806087, and the Registrar for the Register of Personal and Movable Real Rights to cancel; with respect only to the Assets (as defined in the Assets Purchase Agreement) the registrations published under numbers 99-00880215-0002, 02-0000833-0010, 03-0553697-0002, 99-0080215-0001, 03-0553687-0001, 02-0200569-0001, 02-0200716-0001, subject to the rights of the creditors on the proceeds of the sale;

33 *DECLARES* that the vesting of the Assets pursuant to the present Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtors and shall not be void or voidable nor shall it be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Companies' Creditors Arrangement Act* or the *Bankruptcy and Insolvency Act* or any other applicable federal or provincial legislation;

34 *AUTHORIZES* the Monitor and Interim Receiver to distribute the proceeds of the Sherbrooke Transaction and to pay the sums resulting from said transaction to;

a) Stowe-Pharr Mills, Inc.: up to a sum of $100,000.00 in complete satisfaction of the Debtor's and/or Monitor's obligations to pay a break-fee pursuant to the closing of the sale of the Sherbrooke property;

b) the City of Sherbrooke, the sum of $81,367, plus the interest on the arrears estimated at $6,800, subject to adjustment, in complete satisfaction of its claims;

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c) the CSRS, the sum of $12,757 in complete satisfaction of its claims;

d) the Monitor and Interim Receiver the sum of $60,000.00 to be withheld pending the determination of the validity of the claims of Matériaux Économiques Inc. and Construction Olivier & Lyonnais Inc.;

e) Bank of America, National Association : the balance of the proceeds in partial satisfaction of its claim;

35 *AUTHORIZES* the Monitor and Interim Receiver to use the holdback of $60,000 to pay to Matériaux Économiques Inc. and Construction Olivier & Lyonnais Inc. the amount of their respective claims to the extent that same has been declared valid and secured by a valid legal hypothec against the Sherbrooke Property by final judgment of a Court of competent jurisdiction or by a settlement;

36 *AUTHORIZES* the Monitor and Interim Receiver to pay any balance of the holdback, if any, to Bank of America, National Association;

37 *DECLARES* that the present Order shall have full force and effect in all of the provinces and territories in Canada;

38 *DECLARES* that this Court seeks and requests the aid and recognition of any Court or administrative body in any province of Canada, and any Canadian Federal Court or administrative body as well as any Court or administrative body in any of the States of the United States of America and any Federal Court or administrative body of the United States of America including, without limitation, the United States Bankruptcy Court, Western District of North Carolina, Charlotte Division, to assist the Debtors and the Monitor and Interim Receiver to carry out the terms of the present Order;

39 *APPROVES* the Monitor's Seventh Report;

40 *ORDERS* service of a copy of the present order, including the Annex, on all creditors named above in paragraph 17;

41 *ORDERS* provisional execution notwithstanding any appeal and without the necessity of furnishing any security;

42 *THE WHOLE WITHOUT COSTS*.
Solicitors of record:
McCarthy Tétrault, for Debtors
Goldstein Flanz Fishman, for Monitor
Ogilvy Renault, for Bank of America
Melançon Marceau Grenier & Scirotino, for Workers'Union

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2011 QCCS 6030
Cour supérieure du Québec

Boutique Jacob inc., Re

2011 CarswellQue 12499, 2011 QCCS 6030, 210 A.C.W.S. (3d) 304, EYB 2011-198295

In the matter of the plan of compromise or arrangement of: . . . Boutique Jacob inc., 9101-2096 Québec inc. and 9192-4126 Québec inc., Petitioners, c. Pricewaterhousecoopers inc., Monitor

Castonguay J.C.S

Audience: 20 septembre 2011
Jugement: 20 septembre 2011
Motifs écrits: 14 novembre 2011
Dossier: C.S. Qué. Montréal 500-11-039940-107

Avocat: *Me Guy Martel, Me Joseph Reynaud, Me Danny Duy Vu*, pour Boutique Jacob inc.
Me Simon Seida, pour la CIBC
Me Marc Duchesne, pour Pricewaterhousecoopers inc.

Sujet: Insolvency; Corporate and Commercial

***Castonguay J.C.S*:**

MOTIFS DU JUGEMENT DONT LE DISPOSITIF FUT SIGNÉ LE 20 SEPTEMBRE 2011

1 Boutique Jacob inc., 9101-2096 Québec inc. et 9192-4126 Québec inc. (ci-après collectivement désignées sous le vocable « Boutique Jacob »), demande au Tribunal d'homologuer l'arrangement proposé à ses créanciers et approuvé par ceux-ci.

2 Boutique Jacob requiert également du Tribunal diverses ordonnances, dont l'une vise une réorganisation corporative impliquant une compagnie liée à Boutique Jacob, mais ne faisant pas l'objet des procédures sous l'égide de la *Loi sur les arrangements avec les créanciers des compagnies* [1] (ci-après la « Loi »).

2 *LES FAITS*

3 Le Tribunal prononçait le 18 novembre 2010 une ordonnance initiale en vertu des articles 10 et 11 de la Loi et visant particulièrement Boutique Jacob (tel que ci-haut définie), ainsi que Basco L.P., une société liée à Boutique Jacob.

4 Depuis cette date, quelque sept autres ordonnances visant la suspension des recours contre Boutique Jacob et Basco furent prononcées par le Tribunal, dont la septième, datée du 11 août 2011, établissait la date butoir du 19 septembre 2011.

5 À cette même occasion, soit le 11 août 2011, le Tribunal sanctionnait la tenue d'une assemblée des créanciers de Boutique Jacob et Basco prévue pour le 13 septembre 2011, à l'occasion de laquelle ceux-ci soumettraient pour approbation leur Plan d'arrangement.

6 Cette dernière ordonnance permettait également à Boutique Jacob et Basco de modifier, avec l'accord des contrôleurs, leur Plan d'arrangement avant sa présentation :

> ORDERS that after the Creditors Meeting (and both prior to and subsequent to the obtaining of the Sanction Order), the Petitioners, in consultation with the Monitor, may at any time and from time to time modify, amend, vary or supplement

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the CCAA Plan, without the need for obtaining an Order or providing notice to the Affected Creditors, if the Monitor determines that such modification, amendment, variation or supplement would not be prejudicial to the interests of the Affected Creditors under the CCAA Plan or the Sanction Order and is necessary or useful in order to give effect to the substance of the CCAA Plan or the Sanction Order. The Monitor shall post on the Monitor's Website, as soon as possible, any such modification, amendment, variation or supplement to the CCAA Plan;

7 De fait, le Plan d'arrangement soumis aux créanciers prévoyait spécifiquement la possibilité pour Boutique Jacob de procéder à une réorganisation. Il s'agit de l'article 6.2 ainsi rédigé :

6.2 The Petitioners and Basco shall take actions as may be necessary or appropriate to effect any Restructuring Transactions deemed appropriate or desirable by the Petitioners, after consultation with the Monitor, including all of the transactions described in this Plan and the transactions necessary or appropriate to simplify the Petitioners and Basco' structure and to effect a restructuring of their respective businesses. The form of each Restructuring Transaction shall, where applicable, be determined by each of the Petitioners, Basco and their successors party to any Restructuring Transaction, and shall be approved by the Monitor, provided, however, that the Petitioners and Basco reserve the right to undertake transactions in lieu of or in addition to such Restructuring Transactions as the Petitioners and Basco may deem necessary or appropriate under the circumstances and as approved by the Monitor. Notwithstanding the foregoing or any other provision of this Plan, the implementation of any of the Restructuring Transactions or other transactions undertaken in accordance with this Section 6.2 shall not affect the distributions under this Plan.

8 Par ailleurs, « Restructuring Transactions » est ainsi défini à la clause 1.1. du Plan d'arrangement :

Restructuring Transactions » means those steps and transactions which may be necessary or desirable to give effect to this Plan, which steps and transactions may include one or more incorporations, mergers, amalgamations, consolidations, arrangements, continuations, restructurings, conversions, liquidations, winding-ups, dissolutions, transfers, reorganizations, repayments, redemptions, exchanges, cancellations, discharges or other transactions;

9 Effectivement, le 12 septembre 2011, Boutique Jacob transmettait à tous les intéressés un ajout à son Plan d'arrangement et traitant de sa réorganisation corporative.

10 Le Plan d'arrangement et la réorganisation corporative furent donc soumis et approuvés par les créanciers de Boutique Jacob le 13 septembre 2011.

11 Voici comment Boutique Jacob décrit sa réorganisation en ordre séquentiel :

1. Joseph Basmaji transfère ses actions de catégorie B qu'il détient dans General à Groupe Jacob Inc. (« Groupe ») en contrepartie d'actions de Groupe de façon à ce que toutes les actions de General soient détenues par Groupe pour les fins de la liquidation subséquente de General.

2. Groupe transfère certains actifs et passifs, à l'exception (i) des actions que Groupe détient dans Boutique, 9101-2088 Québec Inc. (« Retail Holdco ») Ipco et General ainsi que (ii) des réclamations inter sociétés, s'il y a lieu, de Jacob USA Inc., Retail Holdco, Ipco, General, Jacob Canada Inc. (« Jacob Canada »), Jacob Inc. et Basco, à 3092-7271 Québec Inc. (« Joco ») pour une contrepartie égale à la juste valeur marchande des biens transférés.

3. Basco et Ipco transfèrent à 9182-6065 Québec Inc. (« Realco ») leur excédent d'encaisse en contrepartie chacun d'un billet à demande.

4. Le capital versé de chaque catégorie d'actions de Boutique, Retail Holdco, Ipco et Général est réduit à 1.00 $, sans contrepartie, pour les fins de la liquidation de ces entités.

5. Jacob Canada est liquidée dans Retail Holdco.

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6. Les réclamations inter sociétés entre Basco et Boutique sont réglées par voie de compensation et, s'il y a lieu, le solde de toute réclamation inter sociétés est annulé sans contrepartie. Immédiatement après, Basco est liquidée dans Ipco et General de telle façon que Ipco et General possèdent une participation indivise dans chacun des biens transférés qui est proportionnelle à sa participation indivise dans chacun des autres biens et assument les passifs sur la base de leur intérêt respectif dans Basco.

7. Dans l'ordre, Boutique, Retail Holdco, Ipco et Général sont liquidées. Chacune des liquidations entraîne le transfert à Groupe de tous les biens des entités liquidées, et Groupe devient redevable des dettes et obligations des entités liquidées, sans novation.

8. Après l'étape 7, Groupe transfère les réclamations inter société de Realco à Joco en contrepartie du paiement par Joco de leur juste valeur marchande.

9. Boutique modifie ses statuts de constitution pour changer sa dénomination pour une compagnie à numéro.

10. Groupe modifie ses statuts de constitution pour changer sa dénomination pour « Boutique Jacob Inc. » (« Nouvelle Boutique »).

11. Toutes les réclamations inter sociétés entre Nouvelle Boutique et Joco sont réglées par voie de compensation et le solde dû par Nouvelle Boutique à Joco après la compensation fait l'objet d'une sûreté de troisième rang grevant les actifs de Nouvelle Boutique.

12. Realco prête 3 millions (sic) de dollars à Nouvelle Boutique selon une convention de prêt subordonné faisant l'objet d'une sûreté de deuxième rang grevant les actifs de Nouvelle Boutique.

12 C'est ainsi que Boutique Jacob demande au Tribunal d'approuver non seulement le Plan d'arrangement, mais également la réorganisation envisagée.

13 Pour ce faire, elle invoque les articles 6, 9 et 10 de la Loi ainsi que l'article 411 de la *Loi sur les sociétés par actions du Québec*[2] (ci-après la « L.S.A. »), en vigueur depuis le 14 février 2011.

14 Le Tribunal juge utile de reproduire l'article 6(2) de la Loi :

6 (2) [Modifications des statuts constitutifs] Le tribunal qui homologue une transaction ou un arrangement peut ordonner la modification des statuts constitutifs de la compagnie conformément à ce qui est prévu dans la transaction ou l'arrangement, selon le cas, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

15 Ainsi, un des critères imposés par la Loi consiste à s'assurer que la modification est « légale au regard du droit fédéral ou provincial ».

16 Dans la présente affaire, le droit applicable est provincial. En effet, les compagnies devant être liquidées, de même que Groupe Jacob inc., qui prendra ultimement le nom de Boutique Jacob, sont des créatures provinciales.

17 Cela étant, même si aucune preuve ne fut offerte au Tribunal quant à la solvabilité ou non de Groupe Jacob inc., le Tribunal peut déduire du cheminement de la réorganisation envisagée que Groupe Jacob inc. est solvable.

18 Si Boutique Jacob s'arrime dans ses procédures à l'article 411 L.S.A., le Tribunal juge utile de reproduire également les articles 414 et 415 L.S.A. visant un arrangement proposé par une société solvable :

411. Le tribunal, lorsqu'il statue dans le cadre d'une demande d'approbation d'une proposition faite en vertu de la Loi sur la faillite et l'insolvabilité (Lois révisées du Canada (1985), chapitre B-3) ou de toute autre demande dont il est saisi en

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application de la Loi sur les arrangements avec les créanciers des compagnies (Lois révisées du Canada (1985), chapitre C-36), peut ordonner toute mesure qu'il juge appropriée, dont notamment :

1^{0} la modification des statuts d'une société pour y ajouter toute disposition que la présente loi autorise à y prévoir et pour y remplacer ou y supprimer toute disposition qui y est prévue;

2^{0} l'émission par la société, selon les modalités fixées par le tribunal, de titres de créance, convertibles ou non en actions de toute catégorie de celle-ci ou assortis du droit ou de l'option d'acquérir de telles actions;

> 30 la nomination ou le remplacement des administrateurs au sein du conseil d'administration de la société.

(. . .)

> 414. Toute société en mesure d'acquitter son passif à échéance peut, en cas d'insuffisance des dispositions de la loi ou lorsque leur application est difficilement réalisable ou trop onéreuse dans les circonstances, demander au tribunal d'approuver l'arrangement qu'elle propose.

La demande qui concerne une société régie par une des lois énumérées à l'annexe 1 de la Loi sur l'Autorité des marchés financiers doit être notifiée à l'Autorité, sauf s'il s'agit d'un émetteur fermé au sens de la réglementation prise en application de la Loi sur les valeurs mobilières qui n'est pas régi par une autre loi mentionnée à cette annexe.

(. . .)

> 415. L'arrangement soumis à l'approbation du tribunal peut, entre autres, porter sur l'un ou plusieurs des objets suivants :

1^{0} la modification des statuts de la société pour ajouter toute disposition que la présente loi autorise à y prévoir et pour remplacer ou supprimer toute disposition qui y est déjà prévue;

2^{0} la fusion de la société avec une autre société ou avec une autre personne morale en vue de former une société;

3^{0} le fractionnement des activités de la société;

4^{0} l'aliénation des biens de la société lorsque, par suite de cette aliénation, la société ne peut poursuivre des activités substantielles;

5^{0} l'échange de valeurs mobilières, de titres de participation ou de titres de créance d'une société contre de l'argent, des valeurs mobilières, des titres de participation, des titres de créance ou d'autres biens de la société ou d'une autre personne morale;

6^{0} la dissolution et la liquidation de la société;

7^{0} la modification des activités de la société ou des affaires internes de celle-ci, lorsque la modification porterait atteinte aux droits du détenteur d'un droit d'option ou d'un droit d'acquisition relativement aux valeurs mobilières ou à des titres de participation de cette société;

8^{0} la limitation du droit des créanciers de la société, ou d'un groupe de ceux-ci, d'exiger qu'une obligation de la société soit exécutée entièrement, correctement et sans retard;

9^{0} l'expulsion d'un actionnaire.

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19 Ces articles de la L.S.A., en vigueur depuis peu de temps, créent de nouveaux droits pour les sociétés québécoises et se veulent un reflet de droits similaires déjà octroyés par la Loi canadienne sur les sociétés par actions[3] (ci-après la « Loi canadienne »).

20 Voici les commentaires du législateur à l'égard de ces nouvelles dispositions :

411. Commentaire

Cette disposition a pour objet d'accorder au tribunal les pouvoirs nécessaires pour réaliser, à l'égard d'une société insolvable (ou en voie de le devenir), une réorganisation, sans que pour cela il soit tenu d'accomplir toutes les formalités prévues par la loi proposée, notamment d'obtenir l'autorisation des actionnaires.

Cette disposition correspond à celles des paragraphes (1) à (3) de l'article 191 de la LCSA. Les lois provinciales similaires prévoient généralement des dispositions au même effet.

(. . .)

414. **Commentaire**

Cette disposition prévoit, pour une société solvable, la possibilité, au moyen d'un arrangement, de réaliser un objet permis par la loi sans procéder conformément aux règles prévues par la loi pour atteindre cet objet, lorsque les dispositions prévoyant ces règles sont insuffisantes ou lorsque leur application est difficilement réalisable ou encore trop onéreuse dans les circonstances.

L'arrangement est permis par l'article 192 de la LCSA. Il existe dans toutes les lois provinciales similaires.

La loi proposée permet l'arrangement non seulement dans les cas où l'application des dispositions de la loi est difficilement réalisable, mais également en cas d'insuffisance des dispositions de la loi ou lorsque l'application des dispositions de la loi est trop onéreuse, en termes monétaire ou d'effort.

(. . .)

415. **Commentaire**

L'article 415 de la loi proposée énonce certains des objets sur lesquels peut porter un arrangement.

Les objets visés aux paragraphes 1^{0} à 6^{0} correspondent à ceux visés par les sous-paragraphes a) à f) et g) de l'article 192 de la LCSA.

L'objet visé par le paragraphe 7^{0} s'inspire du sous-paragraphe h) du paragraphe (1) de l'article 192 de l'OBCA : il reconnaît que la modification des activités de la société ou des affaires internes de celle-ci peut modifier les droits des détenteurs d'un droit d'option ou d'un droit d'acquisition relativement aux valeurs mobilières ou à des titres de participation de la société.

En pratique, la société peut n'avoir aucun lien de droit avec les détenteurs de tels droits; elle peut même ignorer leur existence. Cette disposition assure une sécurité juridique à la société, à l'occasion d'un arrangement, lorsque des droits d'option ont été créés sur ses valeurs mobilières ou titres de participation.

Le paragraphe 8^{0} vise à permettre de faire un arrangement dont l'objet est la modification des obligations de la société envers tous ses créanciers ou un groupe d'entre eux. Il s'inspire du paragraphe (i) de l'article 288 du BCBCA.

Le paragraphe 9^{0} vise à permettre l'expulsion d'un actionnaire.

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21 D'ailleurs, l'auteur Paul Martel [4] en vient à la même conclusion sur la portée de l'article 411 L.S.A. :

> 19-342. Pour les sociétés provinciales, le mécanisme de la réorganisation ne leur était pas ouvert par la *Loi sur les compagnies*, mais ceci a changé avec la nouvelle *Loi sur les sociétés par actions.* Les articles 411 à 413 de cette loi reproduisent presque intégralement l'article 191 de la *Loi sur les sociétés par actions*, de sorte que les commentaires que nous avons faits sur cette dernière disposition s'appliquent à eux.

22 Puisque l'intention du législateur québécois était de créer des mécanismes similaires à ceux prévus aux articles 191 et 192 de la Loi canadienne, il est utile de reproduire ceux-ci :

> 191. (1) Au présent article, la réorganisation d'une société se fait par voie d'ordonnance que le tribunal rend en vertu :
>
> a) soit de l'article 241;
>
> b) soit de la *Loi sur la faillite et l'insolvabilité* pour approuver une proposition;
>
> c) soit de toute loi fédérale touchant les rapports de droit entre la société, ses actionnaires ou ses créanciers.
>
> Pouvoirs du tribunal
>
> (2)L'ordonnance rendue conformément au paragraphe (1) à l'égard d'une société peut effectuer dans ses statuts les modifications prévues à l'article 173.
>
> Pouvoirs supplémentaires
>
> (3)Le tribunal qui rend l'ordonnance visée au paragraphe (1) peut également :
>
> a) autoriser, en en fixant les modalités, l'émission de titres de créance, convertibles ou non en actions de toute catégorie ou assortis du droit ou de l'option d'acquérir de telles actions;
>
> b) ajouter d'autres administrateurs ou remplacer ceux qui sont en fonctions.
>
> Réorganisation
>
> (4) Après le prononcé de l'ordonnance visée au paragraphe (1), les clauses réglementant la réorganisation sont envoyées au directeur, en la forme établie par lui, accompagnées, le cas échéant, des documents exigés aux articles 19 et 113.
>
> Certificat
>
> (5) Sur réception des clauses de réorganisation, le directeur délivre un certificat de modification en conformité avec l'article 262.
>
> Effet du certificat
>
> (6) La réorganisation prend effet à la date figurant sur le certificat de modification; les statuts constitutifs sont modifiés en conséquence.
>
> Pas de dissidence
>
> (7) Les actionnaires ne peuvent invoquer l'article 190 pour faire valoir leur dissidence à l'occasion de la modification des statuts constitutifs conformément au présent article.
>
> 192. (1) Au présent article, « arrangement » s'entend également de :

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a) la modification des statuts d'une société;

b) la fusion de sociétés;

c) la fusion d'une personne morale et d'une société pour former une société régie par la présente loi;

d) le fractionnement de l'activité commerciale d'une société;

e) la cession de la totalité ou de la quasi-totalité des biens d'une société à une autre personne morale moyennant du numéraire, des biens ou des valeurs mobilières de celle-ci;

f) l'échange de valeurs mobilières d'une société contre des biens, du numéraire ou d'autres valeurs mobilières soit de la société, soit d'une autre personne morale;

f.1) une opération de fermeture ou d'éviction au sein d'une société

g) la liquidation et la dissolution d'une société;

h) une combinaison des opérations susvisées.

Cas d'insolvabilité de la société

(2) Pour l'application du présent article, une société est insolvable dans l'un ou l'autre des cas suivants :

a) elle ne peut acquitter son passif à échéance;

b) la valeur de réalisation de son actif est inférieure à la somme de son passif et de son capital déclaré.

Demande d'approbation au tribunal

(3) Lorsqu'il est pratiquement impossible pour la société qui n'est pas insolvable d'opérer, en vertu d'une autre disposition de la présente loi, une modification de structure équivalente à un arrangement, elle peut demander au tribunal d'approuver, par ordonnance, l'arrangement qu'elle propose.

Pouvoir du tribunal

(4) Le tribunal, saisi d'une demande en vertu du présent article, peut rendre toute ordonnance provisoire ou finale en vue notamment :

a) de prévoir l'avis à donner aux intéressés ou de dispenser de donner avis à toute personne autre que le directeur;

b) de nommer, aux frais de la société, un avocat pour défendre les intérêts des actionnaires;

c) d'enjoindre à la société, selon les modalités qu'il fixe, de convoquer et de tenir une assemblée des détenteurs de valeurs mobilières, d'options ou de droits d'acquérir des valeurs mobilières;

d) d'autoriser un actionnaire à faire valoir sa dissidence en vertu de l'article 190;

e) d'approuver ou de modifier selon ses directives l'arrangement proposé par la société.

Avis au directeur

(5) La personne qui présente une demande d'ordonnance provisoire ou finale en vertu du présent article doit en donner avis au directeur, et celui-ci peut comparaître en personne ou par ministère d'avocat.

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Clauses de l'arrangement

(6) Après le prononcé de l'ordonnance visée à l'alinéa (4)*e*), les clauses de l'arrangement sont envoyées au directeur en la forme établie par lui, accompagnés, le cas échéant, des documents exigés par les articles 19 et 113.

Certificat d'arrangement

(7) Dès réception des clauses de l'arrangement, le directeur délivre un certificat d'arrangement conformément à l'article 262.

Prise d'effet de l'arrangement

(8) L'arrangement prend effet à la date figurant sur le certificat d'arrangement. »

23 Le Tribunal constate qu'effectivement, les dispositions de l'article 411 L.S.A. et celles de l'article 191 de la Loi canadienne visent les mêmes buts et s'adressent à des sociétés en état d'insolvabilité.

24 Cette même constatation vaut pour les articles 414 et 415 L.S.A. et l'article 192 de la Loi canadienne, sauf que celles-ci s'adressent à des sociétés solvables.

25 La particularité de la présente affaire est que l'on importe dans une réorganisation une société solvable, alors que celle-ci ne recherche pas nécessairement un arrangement au sens des articles 414 et 415 L.S.A.

26 Le fait que l'article 411 L.S.A. ainsi que l'article 191 de la Loi canadienne définissent intrinsèquement l'auteur de la réorganisation comme une société insolvable, peuvent-ils faire échec à l'ajout d'une société solvable dans l'ensemble de la réorganisation?

27 Le Tribunal est d'avis que non, et ce, pour les raisons suivantes.

28 Soulignons d'emblée que nos tribunaux ont déjà approuvé une réorganisation sous l'égide de l'article 191 de la Loi canadienne, alors que cette réorganisation affectait également une compagnie solvable [5] .

29 Toutefois, dans cette affaire, le juge Gascon s'attarde principalement sur le caractère raisonnable du Plan d'arrangement :

[33] Turning to the fairness and reasonableness of a CCAA Plan requirement, its assessment requires the Court to consider the relative degrees of prejudice that would flow from granting or refusing the relief sought. To that end, in reviewing the fairness and reasonableness of a given plan, the Court does not and should not require perfection.

30 Il s'agit là, bien sûr, du critère fondamental à considérer, la réorganisation corporative passant au second plan.

31 Dans la présente affaire, aucune objection quant au Plan d'arrangement ne fut soulevée et le Tribunal doit respecter le choix et la décision des créanciers en cause.

32 Quant à la réorganisation corporative, le législateur a voulu accorder aux sociétés québécoises une flexibilité qui n'existait pas auparavant. Le choix des termes utilisés aux articles 411 et 414 en fait foi. Ainsi, l'article 411 indique que le Tribunal « peut ordonner toute mesure qu'il juge appropriée », tandis que l'article 414 va encore plus loin en permettant à la société « en cas d'insuffisance des dispositions de la loi ou lorsque leur application est difficilement réalisable ou trop onéreuse dans les circonstances, demander au Tribunal d'approuver l'arrangement qu'elle propose. »

33 Fort de cette discrétion, le Tribunal doit cependant s'assurer que les droits des créanciers ayant approuvé le Plan ne seront pas affectés en raison de cette réorganisation de la société.

34 Il y a plus. Le Tribunal doit également s'assurer que les droits des intéressés de la compagnie solvable ne seront pas affectés par cette réorganisation ni par le Plan d'arrangement proposé, à moins qu'ils n'y consentent, comme c'est le cas en l'espèce.

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35 Par ailleurs, et vu la nature hybride de la réorganisation envisagée en raison des sociétés en cause, le Tribunal doit également s'assurer que cette réorganisation poursuit un objectif commercial légitime.

36 À ce sujet, voici ce que Boutique Jacob plaidait :

> 4. The Petitioners submit that the Restructuring Transactions will have no impact on the treatment of the Claims which are subject to compromise under the CCAA Plan. The Restructuring Transactions are intended to simplify the existing corporate and organizational structure for the Petitioners and Basco and combine their respective businesses and assets in a more tax efficient corporate structure. They will include the liquidation of duplicative entities and businesses under Canadian law.

37 Dans la présente affaire et en raison de l'identité des parties en cause, des sociétés impliquées et du cheminement suivi, le Tribunal conclut que les droits des intéressés de Groupe Jacob ne seront pas affectés par la réorganisation ou encore par le plan d'arrangement soumis par Boutique Jacob et que l'objectif poursuivi est commercialement légitime.

Appendix

SUPERIOR COURT (COMMERCIAL DIVISION)

CANADA

PROVINCE OF QUEBEC

DISTRICT OF

MONTREAL

No:

500-11-039940-107

DATE:

September 20, 2011

PRESENT:

THE HONOURABLE

MR. JUSTICE MARTIN CASTONGUAY, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BOUTIQUE JACOB INC.

and

9101-2096 QUÉBEC INC.

and

9192-4126 QUÉBEC INC.

Petitioners

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and

PRICEWATERHOUSECOOPERS INC.

Monitor

and

GROUPE JACOB INC.

Mis-en-Cause

SANCTION ORDER

CONSIDERING the Petitioners*' Motion for an Order Sanctioning the Plan of Reorganization and Compromise and Other Relief* (the « *Motion* »), pursuant to Sections 6, 9 and 10 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the « *CCAA* ») and Section 411 of the Quebec *Business Corporations Act*, R.S.Q., c. S-31.1 (the « *QBCA* ») and other legislation set forth in the restructuring transactions notice provided in the CCAA Plan Supplement 1 - Restructuring Transactions, dated September 12, 2011 and annexed hereto as *Appendix A* (as may be further modified, amended or supplemented, the « *Restructuring Transactions Notice* »), the affidavit of Joseph Basmaji in support thereof, the Monitor's Fourteenth (14th) Report dated September 16, 2011, the plan of reorganization and compromise (as modified, amended, or supplemented from time to time, the « *CCAA Plan* ») and the submissions of respective counsel for the Petitioners and the Monitor, and other interested parties;

GIVEN the provisions of the Initial Order granted by this Court in this matter on November 18, 2010, as subsequently amended and restated, the Claims Procedure Order granted by this Court on February 10, 2011, and the Creditors' Meeting Order granted by this Court on August 11, 2011;

GIVEN the provisions of the CCAA and the QBCA;

WHEREFORE, THE COURT:

1. *GRANTS* the Motion.

Definitions

2. Any capitalized terms not otherwise defined in this Order shall have the meaning ascribed thereto in the CCAA Plan and the Creditors' Meeting Order, as the case may be.

Service and Meeting

3. *DECLARES* that the notices given of the presentation of the Motion are proper and sufficient, and in accordance with the Creditors' Meeting Order.

4. *DECLARES* that there has been proper and sufficient service and notice of the Meeting Materials, including the CCAA Plan, the Resolution for the approval of the CCAA Plan and the Notice to Creditors sent in connection with the Creditors' Meeting, to all Affected Creditors, and that the Creditors' Meeting was duly convened, held and conducted in conformity with the CCAA, the Creditors' Meeting Order and all other applicable orders of the Court.

CCAA Plan Sanction

5. *DECLARES* that:

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a) the CCAA Plan and its implementation (including the implementation of the Restructuring Transactions) have been approved by the Required Majorities of the Affected Creditors Class in conformity with the CCAA;

b) the Petitioners and Basco have complied with the provisions of the CCAA and all of the orders made by this Court in the context of these CCAA Proceedings in all respects;

c) the Court is satisfied that the Petitioners, New Boutique Jacob (as such term is defined in the Restructuring Transactions Notice) and Basco have not done or purported to do anything that is not authorized by the CCAA; and

d) the CCAA Plan (and its implementation, including the implementation of the Restructuring Transactions) is fair and reasonable, and in the best interests of the Petitioners, Basco, the Affected Creditors, the other stakeholders of the Petitioners and all other Persons stipulated in the CCAA Plan.

6. *ORDERS*that the CCAA Plan and its implementation, including the implementation of the Restructuring Transactions, are sanctioned and approved pursuant to Section 6 of the CCAA and Section 411 of the QBCA and that, as at the date on which all conditions precedent to the implementation of the CCAA Plan, as set out in Section 8.1 of the CCAA Plan, have occurred or been satisfied or waived, the whole as confirmed pursuant to the Monitor's Certificate (the « Plan Implementation Date »), will be effective and will enure to the benefit of and be binding upon the Petitioners, New Boutique Jacob, Basco, the Affected Creditors, the other stakeholders of the Petitioners and all other Persons stipulated in the CCAA Plan.

7. *ACKNOWLEDGES* the intervention of Groupe Jacob Inc. as mis-en-cause to these proceedings.

CCAA Plan Implementation

8. *DECLARES* that the Petitioners, New Boutique Jacob, Basco and the Monitor, as the case may be, are authorized and directed to take all steps and actions necessary or appropriate, as determined by the Petitioners, New Boutique Jacob and Basco in accordance with and subject to the terms of the CCAA Plan, to implement and effect the CCAA Plan, including the Restructuring Transactions, in the manner and the sequence as set forth in the CCAA Plan, the Restructuring Transactions Notice and this Order, and such steps and actions are hereby approved.

9. *ORDERS* that on the Plan Implementation Date, in the sequence as set forth in the Restructuring Transactions Notice, the appropriate directors and officers of the Petitioners, Basco and New Boutique Jacob shall be authorized and directed to issue, execute and deliver any and all agreements, documents, securities and instruments contemplated by the CCAA Plan, and to perform their respective obligations under such agreements, documents, securities and instruments as may be necessary or desirable to implement and effect the CCAA Plan, including the Restructuring Transactions, and to take any further actions required in connection therewith.

10. *ORDERS* that all matters provided in the CCAA Plan, including the Restructuring Transactions, shall be effected and shall be deemed to have timely occurred, in the manner and the sequence as set forth in the Restructuring Transactions Notice, the terms of which may be amended, supplemented or otherwise modified from time to time, with the approval of the Monitor and in accordance with the CCAA Plan and the applicable Law, and shall be effective without any requirement or further action by the creditors, security holders, directors, officers, managers or partners of any of the Petitioners, Basco or New Boutique Jacob.

11. *DECLARES* that the Petitioners, Basco and New Boutique Jacob shall be entitled to request one or more order(s) from this Court, including vesting order(s) under the CCAA, which shall provide for the transfer and assignment of assets to the Petitioners, Basco, New Boutique Jacob or other entities referred to in the Restructuring Transactions Notice, free and clear of any Financial Charges (as defined in paragraph 19 of this Order), as necessary or desirable to implement and effect the Restructuring Transactions as set forth in the Restructuring Transactions Notice.

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12. *ORDERS*that, from and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults of each of the Petitioners and Basco, then existing or previously committed by any of the Petitioners or Basco or caused by any of the Petitioners or Basco, directly or indirectly, or non-compliance with any covenant, undertaking, positive or negative pledge, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease, deed, instrument, license, permit, or other agreement of whatever nature, written or oral, and any and all amendments or supplements thereto (individually, an « Instrument »), existing between such Person and any of the Petitioners or Basco, arising directly or indirectly from (i) the filing by the Petitioners under the CCAA, (ii) the implementation of the CCAA Plan (including the Restructuring Transactions), (iii) the borrowing of funds or receipt of proceeds, as the case may be, under the Exit Loan Facilities, and (iv) the execution and delivery of, and the performance by New Boutique Jacob of its obligations under the Exit Loan Facilities, including the granting of Financial Charges, and any and all notices of default and demands for payment under any Instrument, including any guarantee arising from such default, shall be deemed to have been rescinded and shall be of no further force or effect.

13. *DECLARE* that, pursuant to section 411 of the QBCA and in accordance with the Restructuring Transactions Notice, the paid-up capital of each of Boutique, 9101-2096 Québec Inc. and 9192-4126 Québec Inc. is reduced to $1.00 for no consideration.

14. *DECLARES* that any entities listed in the Restructuring Transactions Notice to be liquidated and to be dissolved pursuant to the Restructuring Transactions shall be deemed liquidated and dissolved for all purposes without the necessity for any other or further action by or on behalf of any Person, including the Petitioners or Basco or their respective security holders, directors, officers, managers or partners or for any payments to be made in connection therewith, provided, however, that the Petitioners and Basco shall cause to be filed with the appropriate Governmental Authority articles, agreements or other documents of dissolution for the dissolved entities listed in the Restructuring Transactions Notice to the extent required by applicable Law.

15. *DECLARES* that, subject to the performance by the Petitioners and Basco of their obligations under the CCAA Plan, and in accordance with Section 8.1(2)(f) of the CCAA Plan, any and all contracts, leases, agreements or other arrangements (the « Agreements ») to which the Petitioners or Basco are a party and that have not been terminated including as part of the Restructuring Transactions, or repudiated in accordance with the terms of the Initial Order, will be and remain in full force and effect, unamended, as at the Plan Implementation Date, and no Person who is a party to any such Agreements may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of dilution or other remedy) or make any demand under or in respect of any such Agreements and no automatic termination will have any validity or effect by reason of:

a. any event that occurred on or prior to the Plan Implementation Date and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults, events of default, or termination events arising as a result of the insolvency of the Petitioners and of Basco);

b. the insolvency of the Petitioners, Basco or any affiliate thereof or the fact that the Petitioners, Basco or any affiliate thereof sought or obtained relief under the CCAA or the QBCA or any other applicable legislation;

c. any of the terms of the CCAA Plan or any action contemplated therein, including any transfer or such other transaction or step contemplated under the Restructuring Transactions Notice;

d. any settlements, compromises or arrangements effected pursuant to the CCAA Plan or any action taken or transaction effected pursuant to the CCAA Plan; or

e. any change in the control, transfer of equity interest or transfer of assets of the Petitioners, Basco or any affiliate thereof, or of any entity in which any of the Petitioners and Basco held an equity interest arising from the implementation of the CCAA Plan (including the Restructuring Transactions Notice) or the transfer of any asset as part of or in connection with the Restructuring Transactions Notice.

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16. *DECLARES* that the determination of Proven Claims in accordance with the Claims Procedure Order and the Creditors' Meeting Order shall be final and binding on the Petitioners, Basco and all Affected Creditors.

Releases and Discharges

17. *CONFIRMS*the releases contemplated by Section 6.3 of the CCAA Plan.

18. *ORDERS* that, without limitation to the Claims Procedure Order, any Holder of a Claim, including any Affected Creditor and any Holder of a Secured Claim who did not file a Proof of Claim Form in accordance with the provisions of the Claims Procedure Order, shall be and is hereby forever barred from making any Affected Claim against the Petitioners, Basco and New Boutique Jacob and any of their respective successors and assigns, and shall not be entitled to any distribution under the CCAA Plan, and that such Affected Claim is forever extinguished.

19. *ORDERS* that all Affected Creditors having an Affected Claim of any nature against the Petitioners, Basco or New Boutique Jacob shall, at the request of the Petitioners, Basco or New Boutique Jacob, from and after the Plan Implementation Date, without delay, execute and deliver to the Petitioners, Basco or New Boutique Jacob such releases, discharges, authorizations and directions, instruments, notices and other documents as the Petitioners, Basco or New Boutique Jacob may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges (as defined hereunder) with respect to such Affected Claims of any nature against the Petitioners, Basco or New Boutique Jacob, the whole at the expense of the Petitioners, Basco and New Boutique Jacob, as the case may be.

> For the purpose of this Order, « Financial Charge » means any and all legal causes of preference (as such term is defined in Article 2647 of the *Civil Code of Québec*), any instrument, document or statutory entitlement that evidences, constitutes or secures an obligation of the Petitioners, Basco or New Boutique Jacob or a Claim against the Petitioners, Basco or New Boutique Jacob for the payment of money or the performance of any other obligation of any whatsoever, whether or not such obligation or Claim has been proven in accordance with the Claims Procedure Order and the Creditors′ Meeting Order, including any mortgage, charge, priority, security interest, lien, pledge, construction lien, statutory lien (whether for taxes or otherwise), claim for lien, construction lien or statutory lien (whether for taxes or otherwise), claim for royalty, judgment, execution or writ of execution and order of this Court creating a charge, lien or encumbrance on the assets of the Petitioners and Basco.

20. *ORDERS* that, upon payment in full in cash of the DIP Claims in accordance with the CCAA Plan, CIBC, shall at the request of the Petitioners, without delay, execute and deliver to the Petitioners such releases, discharges, authorizations and directions, instruments, notices and other documents as the Petitioners may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charge with respect to the DIP Claims, the whole at the expense of the Petitioners.

21. *PRECLUDES* the prosecution against the Petitioners, Basco, New Boutique Jacob and any other successor in interest, whether directly, derivatively or otherwise, of any claim, obligation, suit, judgment, damage, demand, debit, right, cause of action, liability or interest released, discharged or terminated pursuant to the CCAA Plan.

Accounts with Financial Institutions

22. *ORDERS*that Mr. Joseph Basmaji, President of Boutique, or any other person appointed by Mr. Joseph Basmaji, is empowered to take all required acts with any and all financial institutions with which the Petitioners or Basco have or will have accounts (the « Accounts ») to affect the transfer of, or changes to, the Accounts in order to facilitate the implementation of the CCAA Plan and the transactions contemplated thereby, including the Restructuring Transactions.

Effect of failure to implement CCAA Plan

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23. *ORDERS* that, in the event that the Plan Implementation Date does not occur, Affected Creditors shall not be bound to the valuation, settlement or compromise of their Affected Claims at the amount of their Proven Claims in accordance with the CCAA Plan, the Claims Procedure Order or the Creditors' Meeting Order. For greater certainty, nothing in the CCAA Plan, the Claims Procedure Orders, the Creditors' Meeting Order or in any settlement, compromise, agreement, document or instrument made or entered into in connection therewith or in contemplation thereof shall, in any way, prejudice, quantify, adjudicate, modify, release, waive or otherwise affect the validity, enforceability or quantum of any Claim against the Petitioners or Basco, including in the CCAA Proceedings or any other proceeding or process, in the event that the Plan Implementation Date does not occur.

Charges created in the CCAA Proceedings

24. *ORDERS* that, upon the Plan Implementation Date, all CCAA Charges against the Petitioners or Basco or their property created by the CCAA Initial Order or any subsequent orders shall be determined, discharged and released.

Fees and Disbursements

25. *ORDERS AND DECLARES* that, on and after the Plan Implementation Date, the obligation to pay the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Petitioners and Basco, in each case at their standard rates and charges and including any amounts outstanding as of the Plan Implementation Date, in respect of the CCAA Plan, including the implementation of the Restructuring Transactions, shall become obligations of New Boutique Jacob.

Exit Financing

26. *ORDERS* that the Petitioners are authorized and empowered to execute, deliver and perform any credit agreements, instruments of indebtedness, guarantees, security documents, deeds, and other documents required in connection with the Exit Loan Facilities and the term loan to be provided by 9182-6065 Québec Inc. (the « RealCo Loan ») to New Boutique Jacob (collectively, the « Exit Loan and Security Documents »), and New Boutique Jacob is authorized to perform all of their respective obligations under and in connection with the Exit Loan and Security Documents.

Stay Extension

27. *EXTENDS* the Stay Period in respect of the Petitioners and Basco until the Plan Implementation Date.

28. *ORDERS* that all orders made in the CCAA Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or inconsistent with, this Order, the Creditors' Meeting Order, or any further Order of this Court.

Monitor

29. *ORDERS* that all Monitor's reports filed with this Court (the « Monitor's Reports ») be an are hereby approved, that all actions and conduct of the Monitor in connection with the Claims, the CCAA Charges, the CCAA Plan and the CCAA Proceedings, including the actions and conduct of the Monitor disclosed in the Monitor′s Reports, are hereby approved, and that the Monitor has satisfied all of its obligations up to and including the date of this Order.

30. *APPROVES* all conduct of the Monitor in relation to the Petitioners and Basco and bars all Claims against the Monitor arising from or relating to the services provided to the Petitioners or Basco prior to the date of this Order, save and except any liability or obligation arising from a breach of its duties to act honestly, in good faith and with due diligence.

31. *ORDERS* that no proceedings shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court, on notice to the Monitor and upon further order securing, as security for costs, the solicitor and his own client costs of the Monitor in connection with the proposed action or proceeding.

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32. *DECLARES* that the protections afforded to PricewaterhouseCoopers Inc., as Monitor and as officer of this Court pursuant to the terms of the Initial Order and the other Orders made in the CCAA Proceedings shall not expire or terminate on the Plan Implementation Date and, subject to the terms hereof, shall remain effective and in full force and effect.

33. *ORDERS* that the Monitor shall be discharged of its duties and obligations pursuant to the CCAA Plan, this Order and all other Orders made in the CCAA Proceedings, upon the filing with this Court of a certificate of the Monitor certifying that all of its duties in relation to the claims procedure and all matters relating thereto as set out in the Claims Procedure Order and all other matters for which it is responsible under the CCAA Plan or pursuant to the Orders of this Court made in the CCAA Proceedings, are completed to the best of the Monitor's knowledge.

34. *ORDERS AND DECLARES* that any distributions under the CCAA Plan and this Order shall not constitute a « distribution » and the Monitor shall not constitute a « legal representative » or « representative » of the Petitioners for the purposes of section 159 of the *Income Tax Act* (Canada), section 270 of the *Excise Tax Act* (Canada), section 14 of the *Act Respecting the Ministère du Revenu* (Québec), section 107 of the *Corporations Tax Act* (Ontario), section 22 of the *Retail Sales Tax Act* (Ontario), section 117 of the *Taxation Act, 2007* (Ontario) or any other similar federal, provincial or territorial tax legislation (collectively the « Tax Statutes ») given that the Monitor is only a disbursing agent under the CCAA Plan, and the Monitor in making such payments is not « distributing », nor shall be considered to « distribute » nor to have « distributed », such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of it making any payments ordered or permitted hereunder, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made under the CCAA Plan and this Order and any claims of this nature are hereby forever barred.

35. *ORDERS AND DECLARES* that the Monitor, the Petitioners, New Boutique Jacob and Basco, as necessary, are authorized to take any and all actions as may be necessary or appropriate to comply with applicable Tax withholding and reporting requirements. All amounts withheld on account of Taxes shall be treated for all purposes as having been paid to the Affected Creditors in respect of which such withholding was made, provided such withheld amounts are remitted to the appropriate Governmental Authority.

Claims Officers

36. *DECLARES* that, in accordance with paragraph *27* hereof, any claims officer appointed in accordance with the Claims Procedure Orders shall continue to have the authority conferred upon, and to the benefit from all protections afforded to, claims officers pursuant to Orders in the CCAA Proceedings.

General

37. *DECLARES*that any of the Petitioners or Basco or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of this Order on notice to the service list.

38. *DECLARES* that this Order shall have full force and effect in all provinces and territories in Canada.

39. *REQUESTS* the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order, including the registration of this Order in any office of public record by any such court or administrative body or by any Person affected by the Order.

Provisional Execution

40. *ORDERS* the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

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THE WHOLE, without costs.

Montreal, September 20, 2011

Honourable Martin Castonguay, J.S.C.

Appendix

APPENDIX A

Court File No. 500-11-039940-107

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 REORGANIZATION AND COMPROMISE

OF

BOUTIQUE JACOB INC., 9101-2096 QUÉBEC INC. and 9192-4126 QUÉBEC INC.

AMENDED AND RESTATED PLAN SUPPLEMENT 1 RESTRUCTURING TRANSACTIONS [6]

September 19, 2011

Amended and Restated Plan Supplement and Restructuring Transactions Notice Under the CCAA Plan

Reference is made to the plan of reorganization and compromise of Boutique Jacob Inc., 9101-2096 Québec Inc. and 9192-4126 Québec Inc. (collectively, the « *Petitioners* ») pursuant to the *Companies' Creditors Arrangement Act* (Canada) (as such plan may be amended, varied or supplemented from time to time in accordance with its terms and the terms of the creditors' meeting order rendered by the Québec Superior Court of Justice, Commercial Division, in connection with the creditors' meetings, the « *Plan* »). Unless otherwise specified herein, all capitalized terms used herein shall have the meanings ascribed to them in the Plan.

Section 6.2 of the Plan provides that the Petitioners and Basco I.P. L.P (»*Basco* ») shall take any actions as may be necessary or appropriate to effect any transactions deemed appropriate or desirable by the Petitioners, after consultations with the Monitor, including all of the transactions necessary or appropriate to simplify the Petitioners and Basco's structure and to effect a combination of their respective businesses. The transactions contemplated in Section 6.2 of the Plan are known, collectively, as the « *Restructuring Transactions* ».

The Restructuring Transactions generally are intended to simplify the existing corporate and organizational structure for the Petitioners and Basco and combine their respective businesses in a more tax efficient corporate structure. They will include combination of duplicative entities and businesses under Canadian law.

The form of each Restructuring Transaction shall, where applicable, be determined by each of the Petitioners, Basco and their successors party to any Restructuring Transaction, and shall be approved by the Monitor, provided, however, that the Petitioners and Basco reserve the right not to effect one or more of the Restructuring Transactions or to undertake transactions in lieu of or in addition to such Restructuring Transactions as the Petitioners and Basco may deem necessary or appropriate under the circumstances and as approved by the Monitor.

This notice specifies the proposed timing for each Restructuring Transaction. Except as otherwise specified, the steps outlined herein are intended to occur in a sequential order. Therefore, except as set forth in the Sanction Order or as otherwise noted herein or in a Plan supplement, each Restructuring Transaction shall be conditional upon completion of the Restructuring Transaction set forth in the immediately preceding step. All actions as may be necessary or appropriate to effect the Restructuring Transactions as set forth herein shall be in place prior to the Plan Implementation Date, with the appropriate documents,

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agreements and funding necessary to implement all such transactions in escrow until their release in the manner and sequence set forth below.

The structure of each Restructuring Transaction and, where applicable, the form of documentation concerning such transaction shall be determined by each of the Petitioners, Basco and their successors party to such Restructuring Transaction with the approval of the Monitor.

The liquidation of an entity shall, except as otherwise indicated below, result in all of the property of such liquidating entity being assigned, conveyed and transferred to the entity into which it is liquidated (the « *Parent Entity* ») except for amounts receivable from the Parent Entity and the Parent Entity becoming liable for the full amount of all of the liabilities of such liquidating entity except amounts payable to the Parent Entity to the complete release, discharge and exoneration of such liquidating entity and such, without novation of the obligations and, as soon as practicable following each liquidation, the liquidating entity shall be dissolved.

STEPS WHICH SHALL OCCUR SEQUENTIALLY ON THE PLAN IMPLEMENTATION DATE

1. Joseph Basmaji transfers the class B shares he holds in the capital of 9192-4126 Québec Inc. (« General ») to Groupe Jacob Inc. (« Groupe ») in exchange for shares in the capital of Groupe.

2. Groupe transfers all of its assets and certain liabilities, except for the shares it holds in the capital of each of Boutique Jacob Inc. (« Boutique »), 9101-2088 Québec Inc. (« Retail Holdco »), 9101-2096 Québec Inc. (« IPCo ») and General and for inter-company receivables from and inter-company payables to, if any, Jacob USA Inc., Retail Holdco, IPCo, General, Jacob Canada Inc. (« Jacob Canada »), Jacob, Inc. and Basco, to 3092-7271 Québec Inc. (« Joco ») or such other entity as determined by the Petitioners for fair market value consideration.

3. Each of Basco and IPCo transfers to 9182-6065 Québec Inc. (« Realco ») its excess cash on hand each in exchange for an inter-company receivable from Realco.

4. The paid-up capital of each class of shares in the capital of each of Jacob Canada, Boutique, Retail Holdco, IPCo and General is reduced to $1.00 for no consideration.

5. Jacob Canada is liquidated into Retail Holdco.

6. Any portion of inter-company receivables and payables between Basco and Boutique are settled by offset and any residual inter-company receivables of Basco from Boutique is cancelled for nil consideration. Immediately after, Basco is liquidated into each of IPCo and General where each of IPCo and General receives an undivided interest in each of the properties of Basco and assumes all liabilites based on their respective ownership interest in Basco.

7. Boutique, Retail Holdco, IPCo and General are each liquidated into Groupe in sequential order.

8. After completion of step 7, Groupe transfers its inter-company receivables from Realco and certain liabilities to Joco or such other entity as determined by the Petitioners for fair market value consideration.

9. Boutique amends its certificate of incorporation to change its name to a numbered company.

10. Groupe amends its certificate of incorporation to change its name to Boutique Jacob Inc. (« New Boutique Jacob »).

11. Any portion of inter-company receivables and payables between New Boutique Jacob and Joco are settled by offset and any residual inter-company receivables of Joco from New Boutique Jacob remains outstanding and is secured by a third ranking security interest on the assets of New Boutique Jacob.

12. Realco lends an amount of $3 million to New Boutique Jacob under a subordinated loan agreement with a second ranking security interest on the assets of New Boutique Jacob.

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13. New Boutique Jacob grants a third ranking security interest on its assets to secure its subordinated debt to Joseph Basmaji, if any.

14. New Boutique Jacob borrows funds under the Exit Loan Facilities.

STEPS WHICH SHALL OCCUR ON OR AFTER THE PLAN IMPLEMENTATION DATE BUT AFTER STEP 14 ABOVE

15. Affected Claims are settled, compromised and released upon payment by New Boutique Jacob of (i) the first installment on the First Installment Date in respect of Affected Claims paid in full at such time in accordance with the Plan, and (ii) the second installment on the Second Installment Date in respect of all other Affected Claims.

Notes de bas de page

1 L.R.C. 1985, ch. C-36.

2 *Loi sur les sociétés par actions* (Québec), L.R.Q. c. S-31.1.

3 L.R.C. (1985), ch. C-44.

4 Paul MARTEL, *Les aspects juridiques de la société par actions au Québec*, Éditions Wilson & Lafleur Martel ltée, 2011, p. 19-103, par. 19-342.

5 *In Re AbitibiBowater inc.*, Montréal, n[0] 500-11-036133-094, 23 septembre 2010, j. Gascon, par. 33.

6 The Petitioners have expressly reserved the right, at any time on or prior to the Plan Implementation Date, to supplement, modify or amend this Plan Supplement 1.

Fin du document

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2015 CarswellQue 5917
Quebec Superior Court

Montreal, Maine & Atlantic Canada Co. / Montreal, Maine & Atlanique Canada Cie c. Richter Advisory Group Inc. / Richter Groupe Conseil inc.

2015 CarswellQue 5917

Dans l'Affaire du Plan de Transaction ou d'Arrangement de: Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada CIE), Débitrice et Richter Advisory Group Inc. (Richter Groupe Conseil Inc.), Contrôleur et Compagnie de Chemin de Fer Canadien Pacifique, Opposante

Gaétan Dumas J.C.S.

Audience: 17 juin 2015
Jugement: 13 juillet 2015
Dossier: C.S. Saint-François 450-11-000167-134

Avocat: Me Patrice Benoit, Me Alexander Bayus, pour Montréal, Maine & Atlantic Canada Co.
Me Sylvain Vauclair, pour Richter Groupe Conseil Inc. (Richter Advisory Group inc.)
Me Alain Riendeau, Me Enrico Forlini, Me André Durocher, Me Brandon Farber, pour Compagnie de chemin de fer Canadien Pacifique

Sujet: Insolvency

Résumé

Bankruptcy and insolvency

***Gaétan Dumas J.C.S.*:**

1 Le tribunal est saisi d'une requête en approbation d'un plan d'arrangement accepté à l'unanimité lors d'une assemblée des créanciers de la débitrice tenue à Lac-Mégantic le 9 juin 2015.

2 Ce plan d'arrangement fait suite à la tragédie ferroviaire qui a coûté la vie à 48 personnes, et a dévasté le centre-ville de la ville de Lac-Mégantic le 6 juillet 2013.

3 Après une ordonnance initiale prononcée par notre collègue, Martin Castonguay, j.c.s., en août 2013, le soussigné s'est vu assigner le présent dossier.

4 Plus de 40 jugements et ordonnances ont été rendus par le soussigné dans le cadre du présent dossier.

5 Comme le rappelait le soussigné dans un jugement rendu le 17 février 2014:

> [26] Les procédures en vertu de la LACC avaient pour but de poursuivre, dans la mesure du possible, l'exploitation du chemin de fer afin de desservir les nombreuses municipalités et les nombreux clients situés le long de son parcours. Elles avaient également pour but de mettre en place un processus de vente afin de procéder à la vente des actifs de MMA et de MMAR en tant qu'entreprises en exploitation (*as a going concern*). Railroad Acquisition Holdings (RAH) a été la soumissionnaire gagnante pour la quasi-totalité des actifs des sociétés pour lesquelles le tribunal a autorisé la vente le 23 janvier 2014.

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[27] Les procédures en vertu de la LACC avaient également pour but de maintenir les emplois du personnel spécialisé qui travaille toujours chez la requérante, et ce, afin de maximiser la valeur des actifs de la requérante et idéalement pour assurer que les emplois soient maintenus après la vente.

[28] Selon l'entente d'achat d'actifs, RAH devrait conserver le poste de la majorité des employés actuels de MMA.

[29] Les procédures en vertu de la LACC avaient également pour but de mettre en place un processus de réclamation pour éviter que plusieurs recours judiciaires soient menés en parallèle et pour traiter efficacement les réclamations de toutes les parties intéressées, y compris les familles des victimes et les détenteurs de réclamations liées au déraillement.

6 L'importance de conserver un chemin de fer pour les industries desservies n'a pas besoin de plus amples explications.

7 Ce premier objectif a été atteint dès février 2014, soit moins de sept mois après la tragédie ferroviaire, par la vente des actifs de la débitrice avec les ordonnances nécessaires pour pouvoir parfaire la vente des actifs. Il reste donc à compléter le deuxième but clairement exprimé dès le départ par la débitrice, à savoir d'indemniser les victimes de cette tragédie ferroviaire pour laquelle la débitrice a presque immédiatement reconnu sa responsabilité.

8 Le tribunal ne reprendra pas ici l'historique complet du dossier, puisque tous les jugements rendus précédemment en font amplement état. Qu'il suffise de rappeler que le soussigné a rendu un jugement le 27 mai 2015 résumant les faits depuis le début du dossier ainsi que le jugement rendu par le soussigné par le 17 février 2014 qui faisait état de la situation à l'époque.

9 Par contre, il est important de rappeler que dès février 2014, le soussigné s'est questionné sur l'obligation de déposer un plan d'arrangement viable pour la continuation du sursis d'exécution et sur la question de savoir si un plan d'arrangement pouvait prévoir la liquidation d'une compagnie, ou si le plan devait obligatoirement prévoir une restructuration complète de l'entreprise.

10 Puisque le déroulement du dossier semble être la suite logique de ce qu'affirme le soussigné aux pages 8 à 30 du jugement du 17 février 2014, et puisque plus de 4 000 créanciers se fient à l'orientation donnée au dossier, il nous semble important de rappeler ce que mentionne le soussigné dans ce jugement, à savoir:

Obligation de déposer un plan d'arrangement viable pour la continuation du sursis des procédures

[57] Il existe depuis fort longtemps un débat sur l'obligation de déposer un plan d'arrangement si l'on désire bénéficier de la *LACC*.

[58] Avant les amendements de 2009, il existait même un débat sur l'autorité des tribunaux d'autoriser la liquidation d'une compagnie sans l'acceptation d'un plan d'arrangement. L'article 36 *LACC* (L.C. 2007, c.36) adopté en 2007 prévoit:

36. (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce, malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants:

a) la justification des circonstances ayant mené au projet de disposition;

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b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

[59] Avant cet amendement, aucune disposition de la loi ne permettait expressément la liquidation partielle ou totale des actifs d'une compagnie.

[60] Les tribunaux utilisaient leurs pouvoirs inhérents pour autoriser la vente des actifs hors du cours ordinaire des affaires.

[61] L'auteure Shelley C. Fitzpatrick [1] mentionnait que la flexibilité de la *LACC* permettait la liquidation d'actifs excédentaires. Le débat découlait plutôt du fait que plusieurs tribunaux ont autorisé la liquidation d'actifs qui n'entraient pas dans cette catégorie:

> As is evident from the comments of Blair J.A. in Metcalfe, one of the major strengths of the CCAA is its flexibility in meeting any particular fact situation. Clearly, Parliament intended to allow a downsizing of redundant assets as part of the restructuring process. Such downsizing would assist in returning the debtor company to profitability and thereby enable it to remain in business. (page 41)
>
> The courts, however, have permitted asset sales that extend well beyond a sale of redundant assets as part of a downsizing of operations. There are a variety of liquidation scenarios. On one end of the spectrum is a sale of assets to various purchasers who do not intend to continue the operations of any part of the debtor's business. On the other end of the spectrum is a sale to a single purchaser who does intend to continue operating the debtor's business. Somewhere in the middle is a sale to one or more purchasers who do intend to continue certain parts of the debtor's business on a going concern basis.

[62] L'auteur Bill Kaplan [2] abonde dans le même sens en précisant que les tribunaux provinciaux à travers le Canada s'accordent sur la possibilité d'autoriser la liquidation d'actifs sous la *LACC*, mais que la jurisprudence n'est pas constante en ce qui a trait à la façon dont on permet cette liquidation:

> « *We will see later that there is no consensus among the Alberta Court of Appeal, the Ontario Courts and the British Columbia Court of Appeal considering the proper exercise of that jurisdiction, but there is no disagreement that there is jurisdiction under the CCAA to approve a liquidation of assets*. » (page 94)

[63] Il y avait donc un débat sur les circonstances dans lesquelles une liquidation d'actifs sous la *LACC* pouvait être autorisée tant en ce qui a trait aux actifs visés qu'à l'obligation ou non de soumettre la liquidation au vote des créanciers.

Arguments favorables à la liquidation

[64] Dans certains cas, la liquidation d'actifs par le biais de la *LACC* est préférable à la liquidation sous un autre régime d'insolvabilité et c'est pourquoi certains tribunaux l'ont permise. Le fait de poursuivre les activités de la compagnie peut avoir pour effet d'augmenter sa valeur lors d'une liquidation et ainsi améliorer le sort des créanciers et des diverses parties prenantes [3].

[65] Selon l'auteure Fitzpatrick [4], ce courant jurisprudentiel a été enclenché par les affaires suivantes:

> « *The line of cases that, in obiter, "endorse" liquidating CCAAs can be traced to two early authorities: Re Amirault Fish Co. and Re Associated Investors of Canada Ltd.* »

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> **[Citations omises]**

[66] Elle réfère également à d'autres décisions [5] qui ont justifié la liquidation d'actifs dans l'intérêt des créanciers. Il est à noter que ces décisions sont issues de tribunaux ontariens qui au fil du temps ont été autrement plus proactifs qu'ailleurs au Canada pour autoriser la liquidation d'actifs sous la *LACC*, nous y reviendrons:

> *In Re Anvil Range Mining Corp.*, [...] *Farley J. referred to Olympia & York and Lehndorff as support for the principle that "the CCAA may be used to effect a sale, winding up or liquidation of a company and its assets in appropriate circumstances*".

> *It is important to note that in Anvil Range, Farley J. also mentioned "maximizing the value of the stakeholders pie ". In Lehndorff, Farley J. stated that it appeared to him that "the purpose of the CCAA is also to protect the interests of creditors " which may involve a liquidation or downsizing of the business, "provided the same is proposed in the best interests of the creditors generally".*

[67] Dans un deuxième temps, et c'est ici l'argument qui suscite le plus de controverse, les professionnels qui interviennent dans le cadre d'une liquidation encourent des risques moindres si la liquidation est faite sous la *LACC* que si elle procédait sous la *Loi sur la faillite et l'insolvabilité (LFI)*. En effet, lorsqu'un administrateur est nommé sous la *LFI* et qu'il prend possession et administre les actifs de la compagnie, celui-ci engage sa responsabilité [6]. Sous la LACC, la compagnie demeure propriétaire de ses actifs et continue d'assurer ses opérations, ce qui n'engage pas la responsabilité d'un tiers, ce qui peut contribuer à rassurer les créanciers sur la gestion de l'entreprise.

Arguments défavorables à la liquidation

Utilisation contraire à l'objectif de la loi

[68] Le premier argument à l'encontre de la liquidation d'actifs autres qu'excédentaires est que l'objectif de la *LACC* n'est pas de permettre la liquidation d'une entreprise et qu'il existe d'autres régimes, comme la *LFI*, sous lesquels la liquidation devrait se dérouler. Dans l'affaire *Hongkong Bank of Canada c. Chef Ready Foods Ltd* [7] la Cour d'appel de la Colombie-Britannique définit l'objectif de la LACC et le rôle du tribunal comme suit:

> *The purpose of the CCAA. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue business*. [...] *When a company has recourse to the CCAA., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure*.

[69] Cette interprétation est supportée par la décision de la Cour d'appel de la Colombie-Britannique dans *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.* [8] dont nous discuterons plus loin.

[70] Au Québec, la Cour d'appel sous la plume du juge Louis Lebel, abondait dans le même sens et établissait une distinction entre la *LACC* et la *LFI*. Elle mentionnait dans *Banque Laurentienne du Canada c. Groupe Bovac Ltée* [9] :

> *26 Plus que vers la liquidation de la compagnie, cette Loi est orientée vers la réorganisation de l'entreprise et sa protection pendant la période intermédiaire, au cours de laquelle l'on procédera à l'approbation et à la réalisation du plan de réorganisation. A l'inverse, la Loi sur la faillite (L.R.C. 1985, c. B-3) recherche la liquidation ordonée* (**sic**) *des biens du failli et la répartition du produit de cette liquidation entre les créanciers, suivant l'ordre de priorité définie par la Loi. La Loi sur les arrangements répond à un besoin et à un objectif distinct, du moins selon l'interprétation qui lui a été généralement donnée depuis son adoption. On veut soit prévenir la faillite, soit faire émerger l'entreprise de cette situation.*

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[71] Toutefois, comme le soulève Shelley C. Fitzpatrick [10], la situation demeure non résolue, car aucune cour d'appel au Canada ne s'est récemment penchée sur la question à savoir si la liquidation d'actifs sous la *LACC* est conforme à son objectif.

Les créanciers garantis accomplissent indirectement ce qu'ils ne peuvent faire directement

[72] Comme mentionné un peu plus tôt, la liquidation d'actifs sous la *LACC* a l'avantage de réduire les risques qu'engagent les professionnels qui y sont impliqués. Dans le cas d'une liquidation sous la *LFI*, les créanciers garantis doivent verser une indemnité à ces professionnels pour pallier à ces risques. Bien qu'ils doivent faire de même lors d'une liquidation sous la *LACC*, l'indemnité est inévitablement moindre, car le risque encouru est diminué. Ainsi, avec l'accord de la compagnie débitrice, les créanciers garantis procèdent à une liquidation des actifs de la compagnie sous la *LACC* sans n'avoir jamais eu l'objectif de s'entendre sur un plan d'arrangement ou de voir la compagnie survivre, ce qui est contraire à l'objectif de la loi [11] .

Iniquités envers les diverses parties prenantes

[73] Comme le rappelle la Cour d'appel de l'Ontario dans l'affaire *Metcalfe* [12] , la *LACC* a été adoptée lors de la grande dépression des années 1930 et avait pour objectif de réduire le nombre de faillites d'entreprises et par le fait même le taux de chômage anormalement élevé. Au fil du temps, les tribunaux ont accordé une visée sociale à cette loi qui doit maintenant servir l'intérêt des investisseurs, créanciers, employés et autres parties prenantes impliquées dans une entreprise.

[74] Cette évolution a eu pour effet de pousser les tribunaux à prendre des positions plus politiques que judiciaires dans certains cas, et ce, dans l'intérêt plus large de la collectivité.

[75] Le fait d'inclure ces critères sociaux dans le processus décisionnel des tribunaux a parfois pour effet de créer certains traitements inégaux entre les diverses parties prenantes impliquées. En effet, il est rare que les intérêts des investisseurs, des créanciers, des employés et des autres parties prenantes se rejoignent dans une même solution. Cette situation s'est produite dans l'affaire *Re Pope & Talbot Ltd.* [13] dans laquelle la Cour suprême de la Colombie-Britannique a autorisé la vente d'actifs de la compagnie non pas à celui qui présentait l'offre la plus lucrative, mais bien à une compagnie qui proposait de continuer les activités de l'entreprise, et ce, malgré l'existence d'une offre plus élevée. Essentiellement, le tribunal a déterminé que l'intérêt de la collectivité et du maintien des emplois dans cette entreprise devait primer sur l'obtention du meilleur prix et de la satisfaction des créanciers, ce que décrie l'auteure Fitzpatrick [14] :

> The court is essentially making a legislative statement grounded in public policy as to whether the community of Nanaimo is better off with pulp mill jobs as opposed to construction/golf course jobs (or whatever alternative use the site would have been put to). It is difficult to see the evidentiary basis upon which the court could come to the conclusion that the interests of the employees, suppliers and the community of Nanaimo outweighed obtaining the best price for the assets.

[76] L'auteure soulève également un point intéressant dans ce passage en mentionnant que le tribunal prend une position législative. En effet, comme elle le soulève plus loin, ce type de position à caractère social devrait être laissé au pouvoir législatif et non aux tribunaux [15] .

Impacts sur les droits des tiers

[77] Lorsqu'une compagnie est placée sous la protection de la *LACC*, ses fournisseurs n'ont pas à remplir leurs obligations contractuelles si la compagnie ne le souhaite pas ou si elle n'entend pas exécuter ses obligations corrélatives [16] .

[78] Dans l'affaire *Pope & Talbot*, Canfor, un fournisseur de Pope & Talbot, s'est vu imposer de continuer à remplir ses obligations contractuelles envers Pope & Talbot par ordonnance du tribunal à l'occasion de la demande initiale. De plus, le tribunal a ordonné de surseoir au droit de Canfor de mettre fin au contrat la liant à Pope & Talbot, et ce, malgré les inexécutions contractuelles de cette dernière [17] .

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[79] Ainsi, Pope & Talbot, et par le fait même ses créanciers, pouvaient maintenir le contrat en vie sans remplir leurs obligations et éventuellement le transférer à un acheteur de l'entreprise. Cette situation a pour effet d'accorder plus de droits aux créanciers de la compagnie qui bénéficie de la protection de la *LACC* que la compagnie elle-même si elle ne bénéficiait pas de cette protection, et ce, aux dépens de fournisseurs tels Canfor [18] . Pour reprendre une métaphore employée dans le texte de Shelley C. Fitzpatrick, les créanciers utilisent la loi comme une épée leur permettant d'obtenir une meilleure position stratégique et donc un prix supérieur pour les actifs de la compagnie et non comme un bouclier permettant de maintenir le statu quo comme il se doit [19] .

Circonstances et paramètres de la liquidation

[80] Le nouvel article 36 de la loi règle la question du pouvoir des tribunaux de permettre la liquidation. Par contre, il donne très peu d'indications quant à la façon dont le tribunal devra exercer ce pouvoir. Le nouvel article 36 prévoit tout de même que le tribunal pourra autoriser la liquidation sans l'accord des créanciers.

Diverses applications de la discrétion exercée par les tribunaux

Ontario

[81] Comme nous l'avons mentionné précédemment, les tribunaux ontariens sont significativement plus actifs qu'ailleurs au Canada dans l'exercice de leur discrétion d'autoriser la liquidation d'actifs sous la *LACC*. Ainsi, des liquidations ont été autorisées sans qu'un plan d'arrangement ait été préalablement approuvé.

[82] C'est le cas dans *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* [20] . Alors que l'organisme faisait face à des poursuites de près de 8 milliards de dollars de victimes ayant contracté diverses maladies par des transfusions de sang contaminé, le tribunal a autorisé le transfert de ses actifs à d'autres organismes avant qu'un plan d'arrangement ait été proposé aux créanciers. Le juge Blair justifie sa décision par la flexibilité de la *LACC* qui lui permet d'agir de la sorte et par les circonstances en l'espèce qui en font la meilleure solution [21] :

> *[45] It is very common in CCAA restructurings for the Court to approve the sale and distribution of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument and it is that very flexibility which gives it its efficacy.*
>
> [...]
>
> *[46]* [...] *There is no realistic alternative to the sale and transfer that is proposed and the alternative is a liquidation/ bankruptcy scenario, which, on the evidence would yield an average of about 44% of the purchase price which the two agencies will pay. To forego that purchase price supported as it is by reliable expert evidence would in the circumstances be folly, not only for the ordinary creditors but also for the Transfusion Claimants, in my view.*

[83] L'auteur Bill Kaplan donne également l'exemple de l'affaire *Re Anvil Range Mining Corp.* [22] dans laquelle le tribunal a autorisé la liquidation des actifs de la compagnie suite à un plan d'arrangement qui n'avait été voté que par les créanciers garantis. Le plan prévoyait que seuls les créanciers garantis étaient autorisés à voter et que les créanciers non garantis ne recevraient aucun montant des suites de la liquidation. Le tribunal s'appuya sur le fait que ces derniers créanciers n'en souffriraient aucun préjudice, car, peu importe la solution retenue, la liquidation ne permettrait en aucun cas de leur verser une quelconque indemnité [23] .

[84] Bill Kaplan résume la position des tribunaux ontariens quant à la liquidation d'actifs sous la *LACC* comme suit, tout en précisant qu'elle s'éloigne de celle des autres provinces [24] :

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> The Ontario authority demonstrates not only that the courts in Ontario have embraced liquidating CCAAs, but will approve asset sales under the CCAA without requiring that a plan of arrangement be filed. That is not an approach sanctioned by the Alberta Court of Appeal, or apparently by the British Columbia Court of Appeal, nor as we shall see, is it an approach that as met favour with Courts in the province of Quebec.

Colombie-Britannique

[85] La situation en Colombie-Britannique est intéressante, car jusqu'à récemment les tribunaux de cette province emboîtaient le pas aux tribunaux ontariens lorsqu'il s'agissait d'autoriser la liquidation d'actifs sous la *LACC*. Toutefois, la situation a été diamétralement modifiée depuis la décision *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.* [25]

[86] Dans cette décision, la Cour d'appel de la Colombie-Britannique conclut que, conformément à l'objectif de la *LACC*, elle ne peut octroyer la protection de la *LACC* lorsque la compagnie débitrice n'a pas l'intention de proposer un plan d'arrangement à ses créanciers. Comme l'explique Bill Kaplan [26] :

> The Court of Appeal observed that the fundamental purposes of the CCAA was to facilitate, comprises and arrangements between companies and their creditors. Section 11, the stay provision, was merely ancillary to that fundamental purpose, and should only be granted in furtherance of that fundamental purpose. While the filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11, the Court concluded that a stay should not be granted if the debtor company does not intend to propose a compromise or arrangement to its creditors.

Alberta

[87] La jurisprudence en Alberta est plus exigeante qu'ailleurs qu'au Canada lorsque vient le temps d'autoriser une liquidation d'actifs sous la *LACC*. L'affaire *Royal Bank c. Fracmaster Ltd.* [27] en est un bon exemple. En effet, la Cour d'appel de l'Alberta a profité de cette décision pour prendre position sur les conditions qui devraient guider le tribunal lors de l'autorisation d'une liquidation sous la *LACC* [28] :

> « *Although there are infrequent situations in which a liquidation of a company's assets has been concluded under the CCAA, the proposed transaction must be in the interests of the creditors generally [...] There must be an ongoing business entity that will survive the asset sale [...] A sale of all or substantially all of the assets of the company to an entirely different entity with no continued involvement by former creditors and shareholders does not meet this requirement*. »
>
> **[citation provenant du texte *Liquidating CCAAs: Discretion Gone Awry*?]**

[88] En imposant la condition de la survie de l'entreprise pour qu'une liquidation des actifs sous la *LACC* soit autorisée, l'affaire *Fracmaster* a eu pour effet de rendre cette procédure significativement plus difficile à obtenir en Alberta qu'ailleurs au Canada [29] .

Québec

[89] Selon l'auteur Bill Kaplan, les tribunaux québécois exigent qu'il existe une preuve matérielle de la structure générale et du contenu d'un éventuel plan d'arrangement à être présenté aux créanciers avant d'octroyer la protection de la *LACC* à une compagnie [30] .

[90] Au soutien de ses dires, il invoque la décision *Re Boutiques San Francisco Incorporées* [31] . Dans cette affaire, le tribunal refuse d'octroyer la protection de la loi sous l'article 11 *LACC* au motif que le plan présenté par la compagnie débitrice était incomplet [32] :

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> 20 As a result, while it is receptive to issue some Initial Order to allow the BSF Group the possibility to avail itself of some of the protections of the CCAA under the circumstances, the Court will not grant all the conclusions sought at this stage because of this situation and the lack of information on the proposed plan.

[91] Au soutien de cette décision, le tribunal réfère au jugement du juge LeBel de la Cour d'appel dans *Banque Laurentienne du Canada c. Groupe Bovac Ltée* [33] :

> *56* [...] *Si les art.4 et 5 indiquent que l'ordre de convoquer les créanciers ou, le cas échéant, les actionnaires de la compagnie dépend de la discrétion du juge, l'exercice de celui-ci suppose l'existence d'un élément de base. Cet événement survient lorsqu'une transaction ou un arrangement "est proposé". Il faut que, matériellement, existe un projet d'arrangement. L'on ne peut se satisfaire d'une simple déclaration d'intention. Autrement, l'on transforme radicalement les mécanismes de la Loi. On fait de celle-ci une méthode pour obtenir un simple sursis, sans que l'on ait à établir qu'il existe un projet d'arrangement et sans que l'on puisse faire évaluer sa plausibilité. La Loi n'est pas formaliste. Elle n'exige pas que le projet d'arrangement soit incorporé dans le texte de la requête. Il peut se retrouver dans des documents annexes, dans des projets de lettres aux créanciers, pourvu que l'on puisse indiquer au juge, auquel on demande la convocation de l'assemblée, qu'il existe et que l'on puisse en décrire les éléments principaux*. [...]
>
> *57 Non seulement cette nécessité se dégage-t-elle du texte de Loi mais correspond-elle aussi aux exigences d'un exercice suffisamment éclairé de la discrétion du tribunal de convoquer les créanciers et actionnaires et, dans certains cas, d'émettre des ordres de sursis en vertu de l'art. 11*.
>
> *58 En l'absence d'une description du projet d'arrangement des éléments principaux, certaines des informations nécessaires pour permettre au tribunal d'exercer sa discrétion en connaissance de cause font défaut. Elles sont requises pour assurer la prise en compte des intérêts de tous les groupes concernés. En effet, les conséquences de la mise en oeuvre des mécanismes de la Loi sur les arrangements avec les créanciers des compagnies sont plus draconiennes, particulièrement pour les créanciers garantis et comportent, à l'inverse, moins de risques d'abord pour la débitrice, puisque le recours infructueux à la Loi ou le rejet de ces propositions n'entraîne pas la faillite. Par surcroît, l'on peut arrêter toutes les procédures de réalisation des créanciers, de quelque nature que ce soit, pour des périodes indéterminées*.
>
> *59 Le recours à la Loi suppose un contrôle judiciaire. Il appartient au juge de peser, au départ, l'intérêt pour l'entreprise de présenter une proposition, la plausibilité de sa réussite, les conséquences de cette proposition et des ordres de sursis qui sont demandés pour les créanciers, les risques qu'elle ferait courir pour ses créanciers garantis, le juge doit examiner ces intérêts divers avant d'autoriser la convocation des créanciers et de déclencher la mise en oeuvre de la Loi. La Loi n'est pas une législation conçue pour accorder, sans conditions ni réserves, des termes de grâce à des débiteurs en difficulté. Elle se veut une loi de réorganisation d'entreprises en difficulté. À ce titre, saisi de la demande de convocation d'une assemblée et de sursis, le juge doit être en mesure d'apprécier, d'abord si l'entreprise est susceptible de survivre pendant la période intermédiaire jusqu'à l'approbation du compromis puis s'il est raisonnable d'estimer que l'accord projeté est réalisable. Pour savoir s'il est réalisable, l'une des conditions de base est d'en connaître les termes essentiels, quitte à ce que ceux-ci soient précisés ou modifiés par la suite*. [...]

92 Malgré les dires de l'auteur Kaplan, il ne semble pas que cette exigence de présenter des preuves matérielles suffisantes d'un éventuel plan d'arrangement ait été suivie uniformément par les tribunaux québécois. L'affaire *Re Papier Gaspésia Inc.* [34] en est un exemple alors que la protection de la loi a été accordée sans que des éléments d'un plan d'arrangement aient été présentés.

93 Comme le mentionne la Cour d'appel dans cette même cause [35] , le processus de vente d'actif en l'espèce devra être soumis à l'accord des créanciers:

> « *[14] Par ailleurs, l'appel d'offres permis à certaines conditions par le jugement de première instance n'équivaut pas à liquidation pure et simple, malgré qu'on puisse le considérer comme l'amorce d'un éventuel processus de liquidation, qui pourrait cependant ne pas avoir lieu si un acheteur se manifestait et se montrait intéressé à la relance*

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> *de l'entreprise (quoique cela paraisse peu probable). En outre, afin d'assurer la protection de l'intérêt des créanciers (dont les requérantes), le premier juge ordonne que leur soient soumis les termes et conditions de cet appel d'offres, les recommandations d'acceptation ou de refus des soumissions reçues et le mode de distribution du prix de vente, le tout par le biais d'un amendement au plan d'arrangement déjà proposé (voir par. 101 du jugement de première instance). Non seulement ce plan d'arrangement doit-il être présenté aux créanciers, mais il doit en outre être homologué par la Cour supérieure. S'il y a lieu, les requérantes pourront s'assurer alors que leurs droits soient convenablement protégés (notamment en réclamant la constitution d'une classe particulière de créanciers) et elles pourront s'adresser au tribunal dans ce but. Les requérantes pourront aussi, ce qu'elles n'ont d'ailleurs pas manqué de faire valoir à plusieurs reprises lors de l'audition, voter contre le plan d'arrangement, s'il ne leur convient pas, ou en déférer au tribunal si elles estiment que leurs droits ne sont pas pris en considération ou sont bafoués*. »
>
> **[Citation omise]**

[94] Ainsi, bien que l'exigence d'un plan d'arrangement pour octroyer la protection de la loi ne soit pas automatique au Québec, on exige tout de même qu'un tel plan soit soumis au vote des créanciers.

La voie à suivre

[95] On se retrouve donc dans une situation où l'application et l'interprétation d'une loi de juridiction fédérale diffèrent de façon importante d'une province à l'autre. Malgré certaines décisions plus drastiques, telles *Fracmaster* ou *Cliffs Over Maple*, il semble faire l'unanimité que la liquidation d'actifs sous la *LACC* est possible, surtout depuis l'adoption de l'article 36 *LACC*. On peut être en désaccord avec cette situation, mais l'état du droit à ce jour est à cet effet.

[96] Il existe toutefois des divergences fondamentales dans l'application de cette discrétion à travers le Canada, et ce, tant en ce qui a trait aux actifs qui peuvent faire l'objet d'une telle liquidation qu'aux critères qui doivent guider le tribunal dans l'application de son pouvoir.

[97] Dans la recherche d'une solution, il faut garder à l'esprit les objectifs de la *LACC* qui doivent guider l'interprétation qu'on en fait et que Kaplan résume comme suit [36] :

> The judicial and academic pronouncements all identify the following general policy objectives: maximization of creditor recovery, minimization of the detrimental impact upon employment and supplier, customer and other economic relationships, preservation of the tax base and other contributions the enterprise makes to its local community, and the rehabilitation of the debtor company.

Solutions proposées par Bill Kaplan

[98] L'auteur Bill Kaplan débute son appréciation de l'état de la jurisprudence en affirmant que les affaires *Fracmaster* et *Cliffs Over Maple* ne viennent pas condamner les liquidations sous la *LACC*. Selon lui, ces deux décisions d'importances viennent surtout prévenir contre un usage abusif de la *LACC* pour effectuer la liquidation des actifs d'une compagnie et mettre l'emphase sur les droits des créanciers qui sont brimés lorsque la liquidation est permise.

[99] Kaplan précise toutefois qu'il est d'avis que l'affaire *Fracmaster* est trop drastique lorsqu'on l'interprète comme posant l'exigence de la survie de l'affaire pour octroyer la protection de la loi. Kaplan voit toutefois une utilité dans la décision quand elle suggère qu'une partie qui requiert la protection de la *LACC*, alors que les objectifs commerciaux en jeu seraient remplis par une d'autres procédures d'insolvabilité, telles la *LFI* ou l'exécution de droits hypothécaires, doit démontrer pourquoi l'application de la *LACC* est nécessaire.

[100] Pour ce qui est du vote des créanciers avant de procéder à une liquidation d'actifs, Kaplan est d'avis que le vote n'est pas nécessaire en tout temps et qu'il revient au tribunal de déterminer lorsqu'il est nécessaire. Il souligne que l'accord du tribunal est nécessaire pour procéder à une telle liquidation, ce qui assure un certain contrôle, et qu'il serait néfaste de rendre le vote obligatoire peu importe la situation, car il s'agit d'un processus long et coûteux. Afin de déterminer s'il doit y avoir un vote,

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le tribunal devrait évaluer le degré d'opposition des créanciers à une telle liquidation et soupeser la valeur des alternatives à une liquidation sous la *LACC*. Il précise que le tribunal doit accorder une plus grande importance aux droits des créanciers qu'à ceux des autres parties prenantes lorsque vient le temps d'évaluer les bénéfices et les inconvénients d'une liquidation sous la *LACC* par rapport aux autres solutions proposées.

[101] Enfin, l'auteur propose de rendre obligatoire la présentation d'un plan d'arrangement aux créanciers dans tous les cas. Il ajoute que ledit plan devrait être présenté à tous les créanciers, incluant les créanciers ordinaires même dans les cas où ces derniers ne recevraient rien de la liquidation des actifs. Cette mesure irait davantage dans l'objectif de la loi qui demeure d'obtenir un arrangement avec les créanciers.

[102] Il est important de préciser que la position proposée dans l'affaire Fracmaster ne ferme pas complètement la porte à la liquidation d'actifs sous la *LACC*. En effet, et je suis également de cet avis, la liquidation d'actifs excédentaires peut et doit être possible sous la *LACC* afin d'assainir les finances de la compagnie. Le critère devrait donc revenir à déterminer si l'affaire, et pas nécessairement la compagnie elle-même, survivra suite au plan d'arrangement.

[103] La solution de Bill Kaplan est intéressante, mais elle a pour effet d'accorder une très grande latitude aux tribunaux, ce qui est à la base même du courant jurisprudentiel qui est aujourd'hui critiqué. L'approche de *Fracmaster* est plus draconienne et a pour effet de restreindre le large pouvoir d'interprétation des tribunaux, mais elle est nécessaire dans les circonstances.

[104] Bien que le soussigné aurait été porté à privilégier la thèse que la *LACC* et la *LFI* sont deux régimes distincts qui s'appliquent à deux types de situations distinctes et qui servent des objectifs distincts, les amendements apportés à la *LACC* et le cas particulier du présent dossier militent pour la possibilité de permettre la liquidation des actifs sous la *LACC*.

[105] Tous les facteurs à prendre en considération mentionnés à l'article 36(3) *LACC* militaient en faveur de l'autorisation d'une vente des actifs. Non seulement cela a permis une réalisation supérieure à ce qui aurait pu être obtenu de n'importe quelle autre façon, elle a aussi permis le maintien d'un chemin de fer indispensable à l'économie régionale.

[106] Le jugement rendu par le soussigné autorisant la vente des actifs a été rendu du consentement de toutes les parties impliquées. D n'y a pas eu appel de ce jugement. Le jugement a donc l'autorité de la chose jugée sur l'opportunité de vendre les actifs de la compagnie.

[107] C'est également en tenant compte de l'intérêt de la collectivité et du maintien des emplois que le tribunal avait permis que la vente puisse se faire même si ce n'était pas au meilleur prix. Finalement, nous avons obtenu le meilleur prix mais il y avait possibilité que ce ne soit pas le cas.

[108] Cela étant dit, que faisons-nous pour la suite du dossier?

[109] Dans l'état actuel du dossier, il semble peu probable qu'un plan d'arrangement puisse être déposé. Il est donc inutile pour le moment de prévoir un processus coûteux de dépôt de preuves de réclamation puisqu'aucun vote ne sera nécessaire si aucun plan d'arrangement n'est proposé.

La seule possibilité de continuation du processus en vertu de la LACC

[110] Plusieurs pourraient être portés à penser qu'il n'y a plus de raison de continuer le présent dossier.

[111] Par contre, la seule lecture du *service list* et la présence des personnes représentées à chaque étape des procédures peuvent laisser penser qu'un arrangement est possible.

[112] Nous avons déjà mentionné qu'exceptionnellement, notre collègue Martin Castonguay avait ordonné le sursis des procédures contre *XL Insurance Company Limited*. Cela a été fait de façon exceptionnelle et pour éviter le chaos et la course aux jugements contre la compagnie d'assurance.

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[113] Nous l'avons déjà dit, en principe, la *Loi sur les arrangements des créanciers et des compagnies* ne s'applique qu'aux compagnies débitrices. Par contre, exceptionnellement, des ordonnances peuvent être rendues pour libérer certains tiers qui participent au plan d'arrangement par une contribution monétaire, mais en échange d'une quittance.

[114] Le soussigné dans l'affaire du plan d'arrangement de la *Société industrielle de décolletage et d'outillage (SIDO)* [37] avait homologué un plan d'arrangement qui prévoyait la quittance à certains tiers en plus des administrateurs.

[115] La juge Marie-France Bich dans un jugement rejetant une requête pour permission d'appeler de ce jugement mentionnait [38] :

> [32] **Les quittances.** L'article 7.2 du plan d'arrangement approuvé par le juge de première instance comporte les dispositions suivantes:
>
> > **Article 7.2 Quittances**
> >
> > À la date de prise d'effet, la Débitrice et/ou les autres Personnes nommées ci-dessous bénéficieront des quittances et des renonciations suivantes, lesquelles prendront effet à l'Heure de prise d'effet:
> >
> > 7.2.1 Une quittance complète, finale et définitive des Créanciers quant à toute Réclamation contre la Débitrice et une renonciation des Créanciers à exercer tout droit personnel ou réel à l'égard des Réclamations;
> >
> > 7.2.2 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation, autre qu'une réclamation visée au paragraphe 5.1(2) LACC, qu'ils ont ou pourraient avoir, directement ou indirectement, contre les administrateurs, dirigeants, employés ou autres représentants ou mandataires de la Débitrice en raison ou à l'égard d'une Réclamation Visée et une renonciation des Créanciers à exercer tout droit personnel ou réel à l'égard de toute telle réclamation;
> >
> > 7.2.3 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation qu'ils ont ou pourraient avoir, directement ou indirectement, contre DCR et Fortin, de même que leurs dirigeants, administrateurs, directeurs, employés, conseillers financiers, conseillers juridiques, banquiers d'affaires, consultants, mandataires et comptables actuels et passés respectifs à l'égard de l'ensemble des demandes, réclamations, actions, causes d'action, demandes reconventionnelles, poursuites, dettes, sommes d'argent, comptes, engagements, dommages-intérêts, décisions, jugements, dépenses, saisies, charges et autres recouvrements au titre d'une créance, d'une obligation, d'une demande ou d'une cause d'action de quelque nature que ce soit qu'un Créancier pourrait avoir le droit de faire valoir à l'encontre de DCR ou Fortin;
> >
> > 7.2.4 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation qu'ils ont ou pourraient avoir, directement ou indirectement, contre la Débitrice ou le Contrôleur ou leurs administrateurs, dirigeants, employés ou autres représentants ou mandataires ainsi que leurs conseillers juridiques à l'égard de toute mesure prise ou omission faite de bonne foi dans le cadre des Procédures ou de la préparation et la mise en oeuvre du Plan ou de tout contrat, effet, quittance ou autre convention ou document créé ou conclu, ou de toute autre mesure prise ou omise relativement aux Procédures ou au Plan, étant entendu qu'aucune disposition du présent paragraphe ne limite la responsabilité d'une Personne à l'égard d'une faute relativement à une obligation expressément formulée qu'elle a aux termes du Plan ou aux termes de toute convention ou autre document conclu par cette Personne après la Date de détermination ou conformément aux modalités du Plan, ni à l'égard du manquement à un devoir de prudence envers quelque autre Personne et survenant après la Date de prise d'effet. À tous égards, la Débitrice et le Contrôleur et leurs employés, dirigeants, administrateurs, mandataires et conseillers respectifs ont le droit de s'en remettre à l'avis de conseillers juridiques relativement à leurs obligations et responsabilités aux termes du Plan; et
> >
> > 7.2.5 Une quittance complète, finale et définitive de la Débitrice quant à toute réclamation qu'elle a ou pourrait avoir, directement ou indirectement, contre ses administrateurs, dirigeants et employés.

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[...]

[37] Or, devant la Cour supérieure, se basant principalement sur l'arrêt de la Cour d'appel de l'Ontario dans *A.T.B. Financial v. Metcalfe & Mansfield Alternative Invesments II Corp.*, l'intimée faisait à cet égard valoir que la quittance en faveur de DCR était légale et appropriée en l'espèce, considérant que cette quittance a un lien raisonnable avec la réorganisation proposée. Dans l'argumentaire écrit remis au juge de première instance, l'intimée citait les passages suivants de l'arrêt *Metcalfe*:

> [113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:
>
> > a) The parties to be released are necessary and essential to the restructuring of the debtor;
> >
> > b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
> >
> > c) The Plan cannot succeed without the releases;
> >
> > d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
> >
> > e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
> >
> > f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
> >
> > g) The releases are fair and reasonable and not overly broad or offensive to public policy.

[38] Manifestement, le juge de première instance a estimé que la quittance dont DCR est bénéficiaire selon la clause 7.2.3 du plan d'arrangement répondait à ces exigences.

[39] Le plan d'argumentation produit par l'intimée devant la Cour supérieure et, de même, le plan d'argumentation déposé aux fins du présent débat citent aussi, entre autres, l'affaire *Muscletech Research and Development Inc.*, où l'on reconnaît la possibilité, dans le cadre d'un arrangement régi par la *L.a.c.c* de stipuler une quittance en faveur du tiers qui finance la restructuration de l'entreprise débitrice. Or, c'est précisément, en l'espèce, le cas de DCR, qui versera une somme considérable afin de soutenir la réorganisation des affaires de l'intimée dans le cadre du plan d'arrangement.

[40] Il n'est pas inutile de reproduire ici quelques-uns des passages de l'affaire *Muscletech*:

> [7] With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:
>
> > the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.

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[8] Moreover, it is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting Claimants did file Proofs Of Claim settling out in detail their claims against numerous Third Parties.

[9] It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), Paperney J. stated at p. 92:

> While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.
>
> [Soulignements ajoutés]

[41] Ultérieurement, la Cour supérieure de justice de l'Ontario, dans une décision rendue dans le même dossier en 2007, écrira que:

> [20] A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behalf of the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of MuscleTech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.
>
> [21] With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.
>
> [...]
>
> [23] The representative Plaintiffs opposing the sanction of the Plan do not appear to be rearguing the basis on which the class claims were disallowed. Their position on this motion appears to be that the Plan is not fair and reasonable in that, as a result of the sanction of the Plan, the members of their classes of creditors will be precluded as a result of the Third Party Releases from taking any action not only against MuscleTech but against the Third Parties who are defendants in a number of the class actions. I have some difficulty with this submission. As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. Not only is it fair and reasonable: it is absolutely essential. There will be no funding and no Plan if the Third

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> Party Releases are not provided. The representative Plaintiffs and all the members of their classes had ample opportunity to submit individual proofs of claim and have chosen not to do so, except for two or three of the representative Plaintiffs who did file individual proofs of claim but withdrew them when asked to submit proof of purchase of the subject products. Not only are the claims of the representative Plaintiffs and the members of their classes now barred as a result of the Claims Bar Order, they cannot in my view take the position that the Plan is not fair and reasonable because they are not participating in the benefits of the Plan but are precluded from continuing their actions against MuscleTech and the Third Parties under the terms of the Plan. They had ample opportunity to participate in the Plan and in the benefits of the Plan, which in many cases would presumably have resulted in full reimbursement for the cost of the product and, for whatever reason, chose not to do so.
>
> [...]
>
> [Soulignements ajoutés]

> [42] Dans le même sens, on pourra consulter la décision de la Cour supérieure dans *Charles-Auguste Fortier inc. (Arrangement relatif à)*, qui fait une étude approfondie de la question et conclut à l'opportunité d'une quittance en faveur de la caution de la société débitrice, caution qui joue un rôle central dans la réorganisation des affaires de celle-ci et sans le concours de laquelle le plan échouera.
>
> [43] La situation de l'espèce est analogue: DCR injectera des sommes substantielles dans la réorganisation de l'intimée en vertu du plan d'arrangement, ce qu'elle ne fera pas si elle ne peut bénéficier de la quittance prévue par la clause 7.2.3. La requête pour permission d'appeler et les observations présentées à l'audience ne permettent pas de conclure que le requérant conteste ce fait ou conteste l'absence d'une autre source de financement, son argument étant plutôt que cette quittance est sans lien avec les activités de l'entreprise. Avec égards, cet argument ne peut être retenu et, à mon avis, il n'a pas de chance raisonnable de succès devant cette Cour. La permission d'appeler ne saurait donc, sur le fondement de ce moyen, être accordée.

[116] La débitrice ne s'en cache pas, elle désire continuer les procédures sous la *LACC* pour ultimement obtenir la libération des administrateurs.

[117] Divers recours collectifs ont été intentés contre la débitrice. Un des recours déposés au Québec et dont les requérants ont produit des requêtes qui ont été remises au 26 février implique non seulement la débitrice et ses administrateurs, mais aussi plus de 35 défendeurs.

[118] Ce sont ces défendeurs que la débitrice veut faire asseoir à la table pour tenter d'en venir à un règlement qui profiterait à tous. Plusieurs de ces défendeurs sont présents à toutes les étapes dans le présent dossier.

[119] Un règlement dans le présent dossier aurait l'avantage d'éviter, à tous ceux qui y participent, des recours judiciaires qui s'échelonneront sur plusieurs années.

[120] Dans l'état actuel du dossier, il est impossible pour un tribunal d'ordonner que les sommes que reconnaît devoir la Compagnie d'Assurance XL soient payées à un créancier plutôt qu'à un autre.

[121] La seule façon pratique, économique et juridiquement possible de régler le présent dossier est que des tiers participent à une proposition d'arrangement qui devra être soumise à la masse des créanciers.

[122] Rien n'empêchera les requérants au recours collectif de continuer les procédures contre les défendeurs qui n'y participeront pas, mais cela leur permettra de participer à la distribution de l'indemnité d'assurance totalisant 25 000 000 $.

[123] Évidemment, pour réussir, il faudra que des tiers participent pour des montants substantiels. Les requérants du recours collectif ne peuvent se voir attribuer les sommes des assurances, ils n'y ont pas droit. Il y a d'autres victimes, pas seulement les requérants en recours collectif. Ces autres victimes ont autant le droit au bénéfice de l'assurance que les requérants en recours collectif. Un autre facteur à tenir en considération est que le gouvernement du Québec par la voix

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de ses procureurs déclare depuis le début qu'il désire que le montant des assurances soit remis aux victimes. Ce souhait a été mentionné lors des différentes auditions, mais ne lie personne pour le moment. Le procureur du gouvernement a aussi déclaré que sa définition de victimes n'est pas la même que celle du tribunal. En effet, une compagnie d'assurance qui aurait indemnisé un commerçant pour la perte d'un immeuble ou pour perte de chiffres d'affaires est aussi une victime de la tragédie ferroviaire. Légalement cette compagnie d'assurance aurait parfaitement le droit de recevoir une part du 25 000 000 $ de XL Assurance.

[124] Le gouvernement du Québec peut bien vouloir préférer les victimes physiques, cela ne lie pas XL Assurance.

[125] Évidemment si la province de Québec a une réclamation de 200 000 000 $ et qu'elle réussit à récupérer des sommes, elle pourra en faire ce qu'elle veut.

[126] La somme de 200 000 000 $ mentionnée semble d'ailleurs conservatrice. Si la province récupère des sommes, elle est en droit d'en faire ce qu'elle veut.

[127] Mais pour le moment, nous sommes dans une situation où il n'y a aucun actif possiblement partageable entre les créanciers. Il est donc inutile d'établir un processus de réclamation très coûteux. D'ailleurs, qui financerait ce processus? Les requérants en recours collectif et le gouvernement du Québec ne peuvent non plus agir comme s'ils étaient les seuls créanciers de MMA. On peut facilement croire que la valeur des réclamations autres dépasse aussi la centaine de millions de dollars. Mais les créanciers entre eux sont souverains. S'ils décident qu'une catégorie de créanciers recevra des sommes alors que d'autres auraient été en droit d'en recevoir, mais y renoncent, ils en ont le droit. Ils en ont peut-être le droit, mais les moyens d'y arriver rapidement ne sont pas nombreux. Pour le moment, les procédures engagées pourraient mener à un tel règlement pourvu qu'un plan soit déposé et que les créanciers l'acceptent. Oublions une proposition concordataire en vertu de la *LFI*, le processus serait trop coûteux dans l'état actuel du dossier. La *LACC* a aussi l'avantage d'être plus flexible. La seule solution possible et rapide est donc celle proposée par la débitrice. Que des tiers participent à l'élaboration d'une proposition. Un apport monétaire est essentiel pour y participer. Si un plan acceptable est proposé, les créanciers pourront l'accepter et pourront décider de catégories de créanciers pouvant participer au partage. Ils pourraient également accepter que des tiers soient libérés.

[128] Si le tribunal lève le sursis des procédures contre XL Compagnie d'Assurance, ce sera le chaos et la course aux jugements.

[129] Le procureur de XL a déjà mentionné au tribunal que son interprétation du contrat lui permet d'affirmer que le contrat d'assurance oblige la compagnie à payer les indemnités en payant le premier arrivé.

[130] D'innombrables recours pourraient donc être intentés contre la débitrice et la compagnie d'assurance et celle-ci n'aurait plus l'obligation de payer lorsqu'une somme de 25 000 000 $ aurait été déboursée.

[131] Les chances d'obtenir un jugement suite à un recours collectif avant les recours intentés par la voie ordinaire seraient illusoires surtout lorsque les défendeurs admettent leur responsabilité.

[132] Le tribunal ne voit pas comment les procédures devant d'autres instances pourraient être suspendues en attendant le résultat du recours collectif. Nul n'est tenu de participer à un tel recours.

12 À la suite de ce jugement, un processus de négociation, avec les tiers potentiellement responsables, débute. C'est cette négociation qui permet la formation d'un fonds d'indemnisation de 430 millions de dollars pour indemniser les victimes de la tragédie ferroviaire qui, rappelons-le, sont toutes créancières de la débitrice.

13 Tous les défendeurs poursuivis dans un recours collectif intenté au Québec ont accepté de participer au fonds d'indemnisation, à l'exception de l'opposante, la compagnie de chemin de fer Canadien Pacifique (CP).

14 L'honorable Martin Bureau, j.c.s. a accordé la requête pour autorisation d'exercer un recours collectif contre le CP et World Fuel Services qui s'est par la suite jointe au groupe contribuant au fonds d'indemnisation.

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15 Le CP refuse de participer au fonds plaidant qu'elle n'est pas responsable de la tragédie ferroviaire. Cela est parfaitement son droit.

16 Par contre, pour les motifs ci-après exposés, il est évident que la contestation de CP n'a pour seul but que de faire avorter le plan d'arrangement proposé ou de se donner un avantage stratégique de négociation qui lui créerait même plus de droits qu'elle n'en aurait, si les parties avaient tout simplement décidé de régler hors cour le recours collectif intenté. Nous y reviendrons.

17 Dans son plan d'argumentation, CP soulève les questions suivantes:

a) L'article 4 de la LACC confère-t-il à un tribunal siégeant en vertu de la LACC la compétence d'homologuer un « plan » qui ne propose pas de transaction ni d'arrangement entre un débiteur en vertu de la LACC et ses créanciers?

b) Si le Tribunal répond à la question a) par l'affirmative, a-t-il compétence en vertu de la LACC pour homologuer une quittance en faveur d'un tiers solvable qui n'est pas « raisonnablement liée à la restructuration » du débiteur en vertu de la LACC?

c) Si le Tribunal répond à la question b) par l'affirmative, a-t-il compétence en vertu de la LACC pour homologuer un « plan » qui contient des quittances en faveur des tierces parties sans rapport avec la résolution de toutes les réclamations contre le débiteur insolvable, c'est-à-dire que les réclamations contre le débiteur ne sont pas visées par le plan et que ce plan ne confère aucun avantage à ce débiteur?

d) Une réponse affirmative à la question b) ou à la question c) constitue-t-elle une interprétation constitutionnelle valide de la compétence du Tribunal pour homologuer un plan d'arrangement ou de transaction en vertu de la LACC?

e) Si le Tribunal répond à toutes les questions précédentes par l'affirmative, le Plan et les conventions de règlement partielles qui en font partie intégrante sont-ils raisonnables, justes et équitables pour toutes les parties concernées, y compris les entités non parties au règlement?

18 Le 31 mars 2015, MMAC dépose un plan de transaction et d'arrangement, dont l'article 2.1 stipule l'objet:

2.1 Objet

Le Plan vise:

a) à proposer un compromis, une quittance, une libération et une annulation complètes, finales et irrévocables de toutes les Réclamations Visées contre les Parties Quittancées;

b) à permettre la distribution des Fonds pour Distribution et le paiement des Réclamations Prouvées, tel qu'il est indiqué aux paragraphes 4.2 et 4.3;

Le Plan est présenté eu égard au fait que les Créanciers, lorsqu'ils sont considérés globalement, tireront un plus grand avantage de sa mise en oeuvre que cela ne serait le cas dans l'éventualité d'une faillite de MMAC.

19 Le *Dix-neuvième rapport du Contrôleur sur le plan d'arrangement de la requérante* du 14 mai 2015 indique le contexte dans lequel le plan a été mis de l'avant par MMAC, et plus précisément, son objectif sous-jacent.

• Les paragraphes 11 et 13 du Dix-neuvième rapport:

« 11. Afin de compenser les créanciers pour les dommages subis en raison du Déraillement, il était clair dès le départ pour toutes les parties intéressées que cela ne pouvait être accompli qu'avec la contribution de tiers potentiellement responsables (les "Tiers"), en échange de quittances totales et finales à l'égard de tout litige pouvant découler du Déraillement.

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[...]

13. Le Plan est le résultat de plusieurs mois de discussions multilatérales entre le conseiller juridique de la Requérante, [...] le Syndic, les principales parties intéressées de la Requérante, soit la province de Québec (la "Province"), les Représentants d'un groupe de créanciers, les avocats des victimes du déraillement dans le cadre des procédures en vertu du Chapitre 11 (les "Conseillers juridiques américains") et l'avocat du Comité officiel des victimes dans le cadre des procédures en vertu du Chapitre 11 (le "Comité officiel") (collectivement les "Principales parties intéressées"), avec les Tiers, qui visaient à négocier des contributions à un Fonds de Règlement au profit des victimes du Déraillement. [...]

[nos soulignés]

20 CP plaide que l'objectif exclusif du plan est par conséquent irréfutable, à savoir le *règlement des réclamations des créanciers victimes contre des tiers potentiellement responsables*, et que le plan ne porte d'aucune façon sur la restructuration de MMAC.

21 Cela est inexact. Si l'on suit la logique du CP, il faudrait obligatoirement que la restructuration de l'entreprise se fasse après l'approbation du plan par les créanciers.

22 Or, il arrive fréquemment que la restructuration soit complétée avant l'approbation du plan par les créanciers. C'est ce qui s'est produit dans le présent dossier.

23 En l'instance, le chemin de fer est sauvé, les emplois sont sauvés et toutes les industries et les municipalités bénéficiant du chemin de fer sont assurées de pouvoir continuer d'en bénéficier.

24 Ce n'est pas parce qu'une partie des objectifs de départ sont atteints qu'il faut faire abstraction de cette réussite.

25 Sans le bénéfice de la *LACC*, les rails de chemin de fer auraient bien pu être vendus à la ferraille. Cette deuxième catastrophe a été évitée.

26 En contrepartie de leurs contributions respectives au Fonds d'indemnisation, les parties quittancées bénéficieront de « Quittances et Injonctions » ayant une portée très générale.

27 MMAC n'est pas une partie quittancée aux termes du plan.

28 Plus précisément, le paragraphe 5.1 du plan prévoit l'exécution (i) de quittances ayant une portée très large en faveur des parties quittancées, et (ii) des injonctions interdisant toute future réclamation contre les parties quittancées:

5.1 Quittances et Injonctions aux termes du Plan

Toutes les Réclamations Visées feront entièrement, définitivement, absolument, inconditionnellement, complètement, irrévocablement et à jamais, l'objet d'un compromis, d'une remise, d'une quittance, d'une libération, d'une annulation et seront proscrites à la Date de Mise en oeuvre du Plan contre les Parties Quittancées.

Toutes les Personnes (peu importe si ces Personnes sont ou non des Créanciers ou des Réclamants) seront empêchées et il leur sera interdit, en permanence et à jamais, i) de poursuivre toute Réclamation, directement ou indirectement, contre les Parties Quittancées, ii) de poursuivre ou d'entreprendre, directement ou indirectement, toute action ou autre procédure à l'égard d'une Réclamation contre les Parties Quittancées ou de toute Réclamation qui pourrait donner lieu à une Réclamation contre les Parties Quittancées, au moyen d'une demande reconventionnelle, d'une réclamation de tiers, d'une réclamation au titre d'une garantie, d'une réclamation récursoire, d'une réclamation par subrogation, d'une intervention forcée ou autrement, iii) de tenter d'obtenir une exécution, une imposition, une saisie-arrêt, une perception, une contribution ou un recouvrement concernant un jugement, une sentence, un décret ou une ordonnance contre les Parties Quittancées ou

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leurs biens relativement à une Réclamation, iv) de créer, de parfaire ou de faire valoir autrement, de quelque manière que ce soit et directement ou indirectement, toute priorité ou charge de quelque nature que ce soit contre les Parties Quittancées ou leurs biens à l'égard d'une Réclamation, v) d'agir ou de procéder de quelque manière que ce soit et à tout endroit quel qu'il soit qui ne serait pas conforme aux dispositions des Ordonnances d'Approbation ou qui ne les respecteraient pas dans toute la mesure permise par les lois applicables, vi) de faire valoir tout droit de compensation, de dédommagement, de subrogation, de contribution, d'indemnisation, de réclamation ou d'action en garantie ou d'intervention forcée, de recouvrement ou en annulation de quelque nature que ce soit à l'égard des obligations dues aux Parties Quittancées relativement à une Réclamation ou de faire valoir un droit de cession ou de subrogation concernant une obligation due par l'une des Parties Quittancées relativement à une Réclamation et vii) de prendre toute mesure destinée à entraver la mise en oeuvre ou la conclusion du présent Plan; il est toutefois entendu que les interdictions précitées ne s'appliqueront pas à l'exécution des obligations aux termes du Plan. Malgré ce qui précède, les Quittances et Injonctions en vertu du Plan prévues au présent paragraphe 5.1i) n'auront aucun effet sur les droits et obligations prévus dans l'Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-Mégantic intervenue le 19 février 2014 entre le Canada et la Province, et ii) ne s'appliqueront pas aux Réclamations Non Visées ni ne seront interprétées comme s'y appliquant.

Malgré ce qui précède, les Quittances et Injonctions en vertu du Plan prévues au présent paragraphe 5.1i) n'auront aucun effet sur les droits et obligations prévus dans l'Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-Mégantic intervenue le 19 février 2014 entre le Canada et la Province, et ii) ne s'appliqueront pas aux Réclamations Non Visées ni ne seront interprétées comme s'y appliquant.

[nos soulignés]

29 En plus de ce qui précède, le paragraphe 5.3 du plan stipule expressément que toute réclamation contre des tiers défendeurs:

a) n'est pas visée par le plan;

b) n'est pas quittancée;

c) pourra suivre son cours;

d) ne sera pas limitée ni restreinte de quelque manière que ce soit quant au montant dans la mesure où il n'y a aucun double recouvrement; et

e) ne constitue pas une réclamation visée.

De plus, le paragraphe 5.3 du plan réitère qu'aucune personne ne peut faire valoir de réclamation contre l'une ou l'autre des parties quittancées.

5.3 Réclamations contre des Tiers Défendeurs

Toute Réclamation d'une Personne, y compris MMAC et MMA, contre les Tiers Défendeurs qui ne sont pas également des Parties Quittancées: a) n'est pas visée par le présent Plan; b) n'est pas libérée, quittancée, annulée ou exclue conformément au présent Plan; c) pourra suivre son cours contre lesdits Tiers Défendeurs; d) ne sera pas limitée ni restreinte par le présent Plan de quelque manière que ce soit quant au montant dans la mesure où il n'y a aucun double recouvrement par suite de l'indemnisation reçue par les Créanciers ou les Réclamants conformément au présent Plan; et e) ne constitue pas une Réclamation Visée aux termes du présent Plan. Pour plus de précision et malgré toute autre disposition des présentes, si une Personne, y compris MMAC et MMA, fait valoir une Réclamation contre un Tiers Défendeur qui n'est pas également une Partie Quittancée, tous les droits de ce Tiers Défendeur d'intenter une action récursoire, d'opposer une demande ou de faire ou de poursuivre autrement des droits ou une Réclamation contre l'une des Parties Quittancées à quelque moment que ce soit seront libérés, quittancés et proscrits à jamais selon les modalités du présent Plan et des Ordonnances d'Approbation.

30 Enfin, le paragraphe 3.3 du plan stipule expressément que certaines réclamations ne sont pas visées par le plan:

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« **3.3 Réclamations Non Visées**

Malgré toute disposition contraire aux présentes, le présent Plan ne compromet pas, ne quittance pas, ne libère pas, n'annule ou ne proscrit pas, ni n'a d'autre incidence concernant:

(a) les droits ou réclamations des Professionnels Canadiens et des Professionnels Américains pour les honoraires et débours engagés ou devant être engagés pour les services rendus dans le Dossier LACC ou le Dossier de Faillite ou s'y rapportant, y compris la mise en oeuvre du présent Plan et du Plan Américain.

(b) dans la mesure où il existe ou peut exister une couverture d'assurance pour ces réclamations aux termes d'une police d'assurance émise par Great American ou un membre de son groupe, y compris, notamment, la Police de Great American, et seulement dans le mesure où une telle couverture d'assurance est réellement fournie, laquelle couverture d'assurance est cédée au Syndic et à MMAC, sans que les Parties Rail World ou les Parties A&D n'aient l'obligation de verser un paiement ou d'effectuer une contribution pour accroître ce que le Syndic ou MMAC obtient réellement aux termes de cette police d'assurance: i) les réclamations de MMAC ou du Syndic (et seulement du Syndic, de MMAC, de leur personne désignée ou, dans la mesure applicable, des Patrimoines) contre les Parties Rail World et(ou) les Parties A&D; et ii) les réclamations des détenteurs de Réclamations dans les Cas de Décès contre Rail World, Inc., à condition, de plus, que tout droit ou tout recouvrement par ces détenteurs d'un droit ou de recouvrement par les détenteurs de Réclamations dans les Cas de Décès par suite de la mesure autorisée au présent sous-paragraphe soit, à tous égards, subordonné aux réclamations du Syndic et de MMAC, ainsi que de leurs successeurs aux termes du Plan, aux termes des Polices précitées, et iii) les Réclamations de MMAC ou du Syndic contre les Parties A&D pour toute prétendue violation de l'obligation fiduciaire ou toute réclamation similaire fondée sur l'autorisation, par les Parties A&D, des paiements aux porteurs de billets et de bons de souscription émis conformément à une certaine convention d'achat de billets et de bons de souscription intervenue en date du 8 janvier 2003 entre MMA et certains porteurs de billets (telle qu'amendée de temps à autre), dans la mesure où de tels paiements résultent de la vente de certains biens de MMA à l'État du Maine.

c) les Réclamations de MMAC et du Syndic en vertu des lois, notamment celles relatives à la faillite et l'insolvabilité, destinées à annuler et(ou) à recouvrer les transferts de MMA, de MMAC ou de MMA Corporation aux porteurs de billets et de bons de souscription émis conformément à cette certaine convention d'achat de billets et de bons de souscription intervenue en date du 8 janvier 2003 entre MMA et certains porteurs de billets (telle qu'amendée de temps à autre), dans la mesure où de tels paiements résultent de la distribution du produit tiré de la vente de certains biens de MMA à l'État du Maine.

(d) les réclamations ou causes d'action de toute Personne, y compris MMAC, MMA et les Parties Quittancées (sous réserve des limitations contenues dans leur Convention de Règlement respective) contre des tiers autres que les Parties Quittancées (sous réserve du paragraphe 3.3 (e)).

(e) les Réclamations ou les autres droits préservés par l'une ou l'autre des Parties Quittancées, tel qu'il est indiqué à l'annexe A.

(f) les obligations de MMAC aux termes du Plan, des Conventions de Règlement et des Ordonnances d'Approbation;

(g) les Réclamations contre MMAC. sauf les Réclamations des Parties Quittancées autres que le procureur général du Canada. Toutefois, sous réserve du fait que les Ordonnances d'Approbation deviennent des ordonnances finales, le procureur général du Canada i) s'est engagé à retirer irrévocablement la Preuve de Réclamation produite pour le compte du ministère des Transports du Canada et la Preuve de Réclamation produite pour le compte du Department of Public Safety and Emergency Preparedness, ii) a consenti à une réaffectation en faveur des Créanciers de tous les dividendes payables aux termes du présent Plan ou du Plan Américain sur la Preuve de Réclamation produite pour le compte du Développement économique Canada pour les régions du Québec, tel qu'il est indiqué à la clause 4.3, et iii) a convenu de ne pas produire de Preuve de Réclamation additionnelle au dossier LACC ou au Dossier de Faillite;

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(h) toute responsabilité ou obligation des Tiers Défendeurs et toute Réclamation contre ceux-ci. pour autant qu'ils ne soient pas des Parties Quittancées, de quelque nature que ce soit à l'égard du Déraillement ou s'y rapportant, y compris, notamment, le Recours Collectif et les Actions dans le Comté de Cook:

(i) toute Personne pour fraude ou des accusations criminelles ou quasi-criminelles qui sont ou peuvent être produites et, pour plus de précision, pour toute amende ou pénalité découlant de telles accusations;

(j) toute Réclamation que l'une des Parties Rail World ou des Parties A&D peut avoir pour tenter de recouvrer auprès de ses assureurs les dépenses, coûts et honoraires d'avocats qu'elle a engagés avant la Date d'Approbation.

(k) les Réclamations qui font partie de celles décrites au paragraphe 5.1 (2) de la LACC.

Tous les droits et Réclamations précités indiqués au présent paragraphe 3.3, inclusivement, sont collectivement appelés les « Réclamations Non Visées » et, individuellement, une « Réclamation Non Visée ».

[nos soulignés]

31 C'est ce qui est fait dire à CP que:

Le plan « ne compromet pas, ne quittance pas, ne libère pas, n'annule ou ne proscrit pas, ni n'a d'autre incidence concernant » les réclamations contre MMAC, c'est-à-dire que les réclamations contre MMAC ne sont pas visées par le plan. MMAC ne fait pas l'objet d'une restructuration.

32 Aussi le CP plaide que:

a) Les réclamations de toutes les « victimes » et même possiblement des parties quittancées pourront être poursuivies, ou de nouveaux recours pourront être intentés, tant au Canada qu'aux États-Unis, contre les entités non parties au règlement, y compris le CP;

b) Les demandeurs, aux termes du recours collectif peuvent continuer leur action en justice contre les défenderesses CP et World Fuel Services, avec le bénéfice supplémentaire que ces défenderesses « héritent » ainsi de la responsabilité de MMAC, alors que celles-ci se voient empêchées de réclamer toute contribution ou indemnité des parties quittancées!

33 C'est d'ailleurs là le principal argument du CP. Ce qu'elle reproche au plan d'arrangement est que CP se retrouve maintenant seule poursuivie dans le recours collectif. Elle se plaint également que, puisqu'elle n'est pas quittancée en vertu du plan, elle pourrait être poursuivie par toutes personnes ayant subi des dommages à la suite du déraillement. Elle se plaint également qu'elle devrait supporter la part qui reviendrait à MMA. Nous y reviendrons.

34 CP résume bien les critères d'exercice du pouvoir discrétionnaire du tribunal dans l'approbation d'un plan, lorsqu'elle mentionne:

a) Le plan doit être strictement conforme à toutes les exigences prévues par les lois et aux ordonnances antérieures du Tribunal;

b) Tous les documents déposés et les procédures entreprises doivent être examinés pour déterminer si toute mesure prise ou supposée avoir été prise est interdite en vertu de la *LACC;*

c) Le plan doit être juste et équitable. [39]

35 CP plaide que le plan est illégal et dépasse la portée autorisée par la *LACC.*

36 Il est vrai qu'au stade de l'audition sur l'homologation, le tribunal doit s'assurer que le processus en vertu de la *LACC* a été suivi sans enfreindre celle-ci et que rien dans le plan proposé n'y soit contraire [40] .

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37 CP plaide qu'une transaction ou un arrangement implique nécessairement la réorganisation des affaires du débiteur.

38 Or, CP fait abstraction du fait que, comme déjà mentionné, la réorganisation des affaires de la débitrice a eu lieu, il y a déjà plus d'un an.

39 D'autre part, le CP allègue:

> Dans tous les cas, au moment de la vente de tous les éléments d'actifs de MMAC à RAH, l'« objectif secondaire » consistant à maximiser la valeur des actifs de MMAC avait été accompli et l'application de la LACC ne pouvait donc plus accomplir un objectif légitime; en effet, toutes les affaires de MMAC, à l'exception de ses passifs, avaient été complètement et définitivement liquidées.

40 Encore une fois, CP semble plaider que, puisque les éléments d'actifs sont vendus, le tribunal devrait mettre fin au processus en vertu de la *LACC*.

41 Cette prétention n'a aucune assise juridique, et a d'ailleurs déjà fait l'objet d'un jugement [41] par le soussigné dans le présent dossier dont personne ne s'est plaint.

42 Il faut rappeler que les représentants de CP ont participé à toutes les auditions présidées par le soussigné.

43 CP plaide à titre subsidiaire que le tribunal n'a pas compétence pour sanctionner les quittances et injonctions prévues en faveur des parties quittancées.

44 En plus d'avoir déjà fait l'objet d'une décision du soussigné dans le présent dossier, le tribunal croit qu'il est maintenant bien établi que les tribunaux peuvent, en vertu de la *LACC*, homologuer des plans d'arrangement qui prévoient des quittances en faveur de tierces parties.

45 Dans l'affaire *Metcalfe* [42] , la Cour d'appel de l'Ontario énonce les critères d'analyse à appliquer afin de déterminer si l'octroi de quittances en faveur de tiers peut être approuvé:

> [113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here - with two additional findings - because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:
>
> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

46 Dans cette affaire, le juge Blair en est venu à la conclusion que les quittances recherchées en faveur des tierces parties sont justifiées. Il conclut également que les quittances doivent être raisonnablement liées au plan:

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> [63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. **In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them.** Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).
>
> [...]
>
> [66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. **The court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51).**
>
> [...]
>
> [69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> [70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

47 Dans l'affaire *Muscletech*[43] , la Cour supérieure de l'Ontario approuve également l'octroi de quittances à des tiers ayant financé un plan de liquidation. Bien qu'il juge que l'opposition aux quittances envisagées est prématurée (cette opposition devant plutôt se faire lors d'une éventuelle requête pour homologation), l'honorable juge Ground conclut néanmoins que la *LACC* permet ce type de quittances:

> [7] With respect to the relief sought relating to Claims against Third Parties the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:
>
>> the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.
>
> [...]
>
> [9] **It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan,**

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> **the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties.**
>
> [11] In any event, it must be remembered that the Claims of the Objecting Claimants are at this stage unliquidated contingent claims which may in the course of the hearings by the Claims Officer, or on appeal to this court, be found to be without merit or of no or nominal value. **It also appears to me that, to challenge the inclusion of a settlement of all or some claims against Third Parties as part of a Plan of compromise and arrangement, should be dealt with at the sanction hearing when the Plan is brought forward for court approval and that it is premature to bring a motion before this court at this stage to contest provisions of a Plan not yet fully developed.**

48 En l'espèce, les quittances recherchées sont une condition essentielle pour la viabilité du plan puisque les parties quittancées sont les seules qui financent celui-ci. Cet élément militant fortement en faveur du caractère juste et raisonnable des quittances recherchées:

> [23] [...] As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. **Not only is it fair and reasonable; it is absolutely essential. There will be no funding and no Plan if the Third Party Releases are not provided.** [44]

49 À titre subsidiaire, CP plaide également que le plan ne peut servir d'outil pour régler des différends entre des tiers solvables, sans octroyer une quittance à MMAC. Cet argument subsidiaire rejoint l'argument du CP qui plaide que le plan a une incidence négative sur les droits du CP.

50 En effet, CP plaide:

> Puisque la responsabilité du CP est, entre autres choses, recherchée sur une base solidaire dans le cadre du recours collectif, et puisque le CP n'est pas une partie quittancée aux termes du plan, ses droits seront directement et considérablement touchés.

51 CP plaide entre autres que le règlement partiel d'un litige multipartite doit être, à tout le moins, un évènement neutre pour les défendeurs non parties au règlement.

52 Elle plaide que le plan ne confère pas au CP le titre de protection ordinaire qu'elle pourrait recevoir au terme d'un règlement partiel d'un recours collectif en droit civil.

53 Comme déjà mentionné, rien n'empêchera CP de se défendre à toute action intentée contre elle. Si elle n'est pas responsable, l'action sera rejetée.

54 Si elle prétend que les dommages ont été causés par la faute d'un tiers, elle peut le plaider sans que ce tiers soit partie aux procédures.

55 En fait, cela donnera même un avantage au CP, qui pourra continuer de plaider que la tragédie est la faute de tous, sauf elle.

56 D'ailleurs, la Cour suprême nous rappelait très récemment que [45] :

> [138] À notre avis, la Cour d'appel a aussi eu raison d'intervenir sur la question des dommages. L'analyse de la juge du procès était entachée d'une erreur déterminante. Elle a fait défaut de tenir compte de la solidarité et de fixer les montants accordés en fonction de la responsabilité respective de chacun des débiteurs solidaires. Comme le souligne la Cour d'appel, « dans toute la mesure où des postes de réclamation pouvaient relever de la responsabilité de plus d'un débiteur solidaire, les remises consenties par M. Hinse rendaient nécessaires l'examen des fautes causales et le partage des parts de responsabilité »: par. 189. M. Hinse aurait dû supporter la part des débiteurs solidaires qu'il a libérés: art. 1526 et 1690 *C.c.Q.*

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[139] La juge de première instance a abordé la question des dommages comme si le Ministre était le seul fautif et que le préjudice de M. Hinse ne découlait que de son « inertie institutionnelle »: par. 75-77. De fait, au lieu de déterminer les montants des dommages-intérêts précisément imputables au PGC, la juge s'en est simplement remise aux revendications de M. Hinse:

Comme, de plus, à la suite de la transaction conclue entre le PGQ et Hinse, ce dernier a amendé sa procédure afin de ne réclamer au PGC que la portion qu'il lui attribue selon les différents chefs de dommages qu'il invoque, pour les fins du présent débat, respectant les dispositions plus haut citées, le Tribunal n'analysera que les demandes adaptées à cette nouvelle réalité et qui ne concernent que le PGC. [par. 22]

[140] À l'exception des dommages-intérêts punitifs, elle a ainsi accordé les sommes réclamées en supposant que M. Hinse les avait correctement limitées à ce qui concerne le PGC uniquement. Or, la part de responsabilité des divers codébiteurs de M. Hinse devait s'évaluer en fonction de la gravité de leur faute respective: art. 1478 *C.c.Q.* La juge ne pouvait pas s'en tenir simplement à la répartition suggérée par M. Hinse; son rôle d'arbitre des dommages-intérêts exigeait qu'elle fixe elle-même la part de responsabilité de chacun.

[141] Au-delà de cette erreur déterminante, qui fausse tous les chefs de dommages accordés, les fondements à l'appui de chacun étaient en outre déficients.

(1) Dommages pécuniaires

[142] La juge Poulin a condamné le PGC à verser un total de 855 229,61 $ au titre des dommages pécuniaires. Ce montant paraît démesuré compte tenu de la somme de 1100 000 $ déjà versée à ce chapitre par le PGQ aux termes de la transaction intervenue entre ce dernier et M. Hinse. Au minimum, il appartenait à M. Hinse de démontrer que les sommes visaient des compensations distinctes. Il ne l'a pas fait. La ventilation des sommes accordées révèle d'ailleurs que rien ne justifiait les montants réclamés.

57 Bref, si CP n'est pas responsable, l'action sera rejetée contre elle.

58 Si elle est responsable, et que des tiers également responsables ont été quittancés, CP sera libérée de la part des débiteurs solidaires qui ont été libérés.

59 En fait, ce qui serait injuste, serait que CP bénéficie d'une quittance alors qu'elle n'a pas contribué financièrement au plan, contrairement aux autres codéfendeurs.

60 CP plaide également qu'elle devrait être libérée de sa quote-part de la part de responsabilité avec MMA.

61 Il ne relève certainement pas de la juridiction du juge soussigné d'en décider.

62 Le juge saisi du recours contre CP en décidera.

63 Quant à la question constitutionnelle soulevée dans le plan d'argumentation de CP et pour lequel des avis en vertu de l'article 95 *Cpc* ont été expédiés, le tribunal prend acte du peu d'insistance du CP à plaider cet argument lors de l'audition.

64 Le tribunal fait siens les arguments proposés par le Procureur général du Canada lorsqu'il affirme:

4. Le 15 mai 2015, le PGC recevait un avis de la part de la Compagnie de Chemin de fer Canadien Pacifique (CP) en vertu de l'article 95 du *Code de procédure civile (Cpc).*

5. CP ne conteste pas la constitutionnalité de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») ni aucune de ses dispositions.

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• *Plan d'argumentation au soutien de la contestation par la Compagnie de Chemin de Fer Canadien Pacifique du Plan de transaction et d'arrangement*, paragr. 110.

6. CP soutient plutôt que l'homologation par le tribunal, sous l'égide de la *LACC*, du Plan de MMAC, empièterait de manière massive et illégitime sur la compétence des législatures provinciales en matière de propriété et de droits civils.

7. En l'absence d'argument de la part de CP quant à l'applicabilité constitutionnelle, la validité ou l'opérabilité de la *LACC*, l'avis en vertu de l'article *CPC* n'était pas requis.

8. Il faut par ailleurs rappeler que la validité constitutionnelle d'une loi est fonction de son caractère véritable et du fait que celui-ci se rattache à une matière relevant de la compétence de la législature qui l'a adoptée. Le caractère véritable de la loi est déterminé en fonction du but de la loi et de ses effets juridiques. Or, la validité constitutionnelle d'une loi ne dépend pas des effets qu'elle peut produire dans un cas en particulier.

• *Canadian Western Bank c. Alberta*, [2007] 2 S.C.R. 3, paragr. 25-27 (autorités de MMAC, onglet 44).

9. De même, et bien que ce ne soit pas le cas en l'espèce, l'existence d'un conflit entre une loi fédérale et une loi provinciale n'est pas pertinente quant à la validité constitutionnelle de la loi. L'existence d'un conflit de lois pourrait être pertinente en vertu de la doctrine de la prépondérance fédérale - mais cette doctrine aurait pour effet de rendre inopérante la loi provinciale dans la mesure de son incompatibilité avec la loi fédérale.

• Peter HOGG, *Constitutional Law of Canada*, 5 e éd., vol.1, feuilles mobiles, Thomson/Carswell, p. 16-1 -16-3 (autorités du PGC, onglet 1)

10. La *LACC* porte en son caractère dominant et véritable sur l'insolvabilité. Son objet et ses effets favorisent la conclusion de compromis et d'arrangements justes et raisonnables en tenant compte des intérêts des compagnies débitrices, de leurs créanciers, des autres parties intéressées et de l'intérêt public.

• *Century Services Inc. c. Canada (Attorney General)*, [2010] 3 S.C.R. 379, 2010 CSC 60, paragr. 60 (autorités de MMAC, onglet 14)

11. Ainsi, la *LACC* relève manifestement du domaine de la faillite et de l'insolvabilité, un champ de compétence attribué au Parlement par le paragraphe 91(21) de la *Loi constitutionnelle* de 1867.

• *Reference re constitutional validity of the Compagnies Creditors Arrangement Ace* (Dom.) [1934] S.C.R. 659, p. 660 (autorités de MMAC, onglet 46)

12. Il ne fait pas aucun doute que *LACC* n'est pas inconstitutionnelle du seul fait que l'exercice, par les tribunaux, des pouvoirs qui leurs **(sic)** sont conférés produise des effets sur la propriété et les droits civils des parties impliquées, compétence autrement réservée à la législature des provinces

• *Canadian Western Bank c. Alberta*, [2007] 2 S.C.R. 3, paragr. 28 (autorités de MMAC, onglet 44)

« Le corollaire fondamental de cette méthode d'analyse constitutionnelle est qu'une législation dont le caractère véritable relève de la compétence du législateur qui l'a adoptée pourra, au moins dans une certaine mesure, toucher les matières qui ne sont pas de la compétence sans nécessairement toucher sa validité constitutionnelle. »

13. Autrement, l'efficacité de la *LACC* serait complètement paralysée.

• Peter HOGG *Constitutional Law of Canada*, 5 e éd., vol.1, feuilles mobiles, Thomson/Carswell, p. 25-3 (autorités de MMAC, onglet 45)

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14. La *LACC* est constitutionnelle même dans la mesure où les pouvoirs qu'elle octroie aux tribunaux leur permettent d'approuver des plans accordant des quittances à des tiers.

• *Metcalfe & Mansfield Alternative Investments II Corp.*, (Re), 2008 ONCA 587, paragr. 104 (autorités de MMAC, onglet 24)

15. Par ailleurs, le Conseil Privé a confirmé la validité constitutionnelle d'une loi du Parlement, découlant de sa compétence en matière de faillite et d'insolvabilité, permettant à des agriculteurs de conclure des plans d'arrangements avec leurs créanciers sans que ces agriculteurs soient pour autant libérés de leurs dettes.

• *Farmers' Creditors Arrangement Act (FCAA)*, [1937] A.C. 391, p. 403-404 (autorités de MMAC, onglet 49), confirmant *Reference re legislative jurisdiction of Parliament of Canada to enact the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935*, [1936] S.C.R. 384, p. 398 (autorités de MMAC, onglet 48)

16. Par le fait même, dans la mesure où la *LACC* permet aux tribunaux d'homologuer un plan d'arrangement par lequel la compagnie débitrice n'est pas libérée, cette loi est également *intra vires* du pouvoir du Parlement.

17. La nature réparatrice et flexible de cette loi permet aux tribunaux de rendre des ordonnances innovatrices dans la mesure où elles sont faites en conformité avec la loi, ce qui est le cas en l'espèce.

18. D'ailleurs, un plan d'arrangement octroyant des quittances à des tiers mais non à la débitrice principale a déjà été entériné par la Cour fédérale d'Australie.

• *Lehman Brother Australia Ltd. In the matter of Lehman Brothers Australia Ltd ((in liq) No2)*, [2013] FCA 965, paragr. 34-57 (Australie) (autorités de MMAC, onglet 52)

19. Notons également que les doctrines constitutionnelles reconnaissent que, concrètement, « le maintien de l'équilibre des compétences relève avant tout des gouvernements, et doivent faciliter et non miner ce que la Cour [suprême] a appelé un « fédéralisme coopératif ».

• *Canadian Western Bank c. Alberta*, [2007] 2 S.C.R. 3, paragr. 24 (autorités de MMAC, onglet 44)

20. Dans les circonstances, l'avis de question constitutionnelle signifiée par CP aux procureurs généraux, n'a pas sa raison d'être et doit donc être rejeté.

65 Bref, non seulement le soussigné croit que le plan proposé est juste et raisonnable, mais retenir les arguments présentés par le CP déconsidérait la confiance du public envers les tribunaux.

66 En effet, depuis plus de deux ans, les victimes de la terrible tragédie de Lac-Mégantic s'en sont remises au processus judiciaire. Depuis deux ans, toutes les actions faites dans le présent dossier étaient orientées vers la présentation du plan d'arrangement qui fut voté à l'unanimité par les créanciers de la débitrice.

67 Malgré que les ressources judiciaires soient limitées, des ressources considérables ont été mises à contribution pour pouvoir faire en sorte que les victimes de Lac-Mégantic obtiennent justice.

68 Les procureurs et les justiciables des districts de Mégantic, Saint-François et Bedford étaient conscients que les ressources judiciaires utilisées dans le dossier de Lac-Mégantic ne pouvaient être utilisées par eux.

69 L'utilisation de ces ressources judiciaires a eu pour effet de retarder d'autres dossiers.

70 Faire avorter aujourd'hui ce plan d'arrangement pour le seul bénéfice d'un tiers contre qui un recours collectif a été autorisé, alors que ce tiers est partie aux procédures depuis le début, serait injuste et déraisonnable.

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71 Une dernière remarque s'impose. La requérante a déposé sous scellé les quittances et transactions intervenues entre les tiers responsables dans ce dossier. Un jugement du soussigné a été rendu sur la possibilité pour CP de prendre connaissance de ces quittances.

72 CP a été autorisée à prendre connaissance des quittances caviardées. Elle ne connaît donc pas les montants pour lesquels les tiers responsables ont contribués, sauf en ce qui concerne Irving Oil et World Fuel Services qui ont rendu public le montant de leur contribution.

73 Le tribunal s'est interrogé, séance tenante, sur la possibilité pour lui de prendre connaissance de la contribution de chaque tiers qui contribue au fonds d'indemnisation sans que le CP en ait connaissance.

74 En effet, la règle *audi alteram partem* et la règle de la publicité des débats pourraient ne pas être respectées si le tribunal prend en considération une preuve dont n'a pas bénéficié une des parties opposantes.

75 C'est pourquoi, le tribunal n'a pas pris connaissance de la contribution de chaque partie ayant cotisé au fonds d'indemnisation.

76 Le tribunal peut apprécier que la contribution totale de 430 M$ est raisonnable en l'espèce.

77 De plus, le tribunal a été informé tout au long du processus des démarches faites par MMA. Le tribunal a nommé des procureurs pour représenter les victimes de la tragédie de Lac-Mégantic qui ont participé à la négociation pour la constitution du fonds d'indemnisation. Le Gouvernement du Québec a également participé à cette négociation.

78 Puisque le tribunal connaît la somme finale qui sera payée à même le fonds d'indemnisation, il n'est pas nécessaire de savoir le montant exact de participation de chacune des parties. Le tribunal considère raisonnable le règlement intervenu qui a été voté à l'unanimité par les créanciers.

POUR CES MOTIFS. LE TRIBUNAL:

79 *ACCUEILLE* la requête en approbation du plan d'arrangement amendé;

Definitions

80 *ORDERS* that capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Amended Plan of Compromise and Arrangement of the Petitioner dated June 8, 2015 and filed in the court record on June 17, 2015, a copy of which is attached hereto as Schedule "*A*" (the "*Plan*") or in the Creditors' Meeting Order granted by the Court on May 5, 2015 (the "*Meeting Order*"), as the case may be;

Service and Meeting

81 *ORDERS AND DECLARES* that that the Notification Procedures set out in paragraphs 61 to 66 of the Meeting Order have been duly followed and that there has been valid and sufficient notice of the Creditors' Meeting and service, delivery and notice of the Meeting Materials including the Plan and the Monitor's Nineteenth Report dated May 14, 2015, for the purpose of the Creditors' Meeting, which service, delivery and notice was effected by (i) publication on the Monitor's Website, (ii) sending to the Service List, (iii) mailing of the documents set out in paragraph 64 of the Meeting Order to all known Creditors, by prepaid regular mail, courier, fax or email, at the address appearing on a Creditor's Proof of Claim, and (iv) publication of the Notice to Creditors in the Designated Newspapers, and that no other or further notice is or shall be required;

82 *ORDERS AND DECLARES* that the Creditors' Meeting was duly called, convened, held and conducted in accordance with the CCAA and the Orders of this Court in these proceedings, including without limitation the Meeting Order;

Sanction of the Plan

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83 *ORDERS AND DECLARES* that:

a) the Petitioner is a debtor company to which the CCAA applies, and the Court has jurisdiction to sanction the Plan;

b) the Plan has been approved by the required majority of Creditors with Voting Claims in conformity with the CCAA and the Meeting Order;

c) the Petitioner has complied in all respects with the provisions of the CCAA and all the Orders made by this Court in the CCAA Proceedings;

d) the Court is satisfied that the Petitioner has neither done nor purported to do anything that is not authorized by the CCAA; and

e) the Petitioner, Creditors having Government Claims, the Class Representatives, and the Released Parties have each acted in good faith and with due diligence, and the Plan (and its implementation) is fair and reasonable, and in the best interests of the Petitioner, the Creditors, the other stakeholders of the Petitioner and all other Persons stipulated in the Plan;

84 *ORDERS AND DECLARES* that the Plan and its implementation, are hereby sanctioned and approved pursuant to Section 6 of the CCAA;

Plan Implementation

85 *DECLARES* that the Petitioner and the Monitor are hereby authorized and directed to take all steps and actions, and to do all such things, as determined by the Monitor and the Petitioner, respectively, to be necessary or appropriate to implement the Plan in accordance with its terms and as contemplated thereby, and to enter into, adopt, execute, deliver, implement and consummate all of the steps, transactions and agreements, including, without limitation, the Settlement Agreements, as required by the Monitor or the Petitioner, respectively, as contemplated by the Plan, and all such steps, transactions and agreements are hereby approved;

86 *ORDERS* that as of the Plan Implementation Date, the Petitioner, represented by the Trustee, the sole shareholder of the Petitioner, shall be authorized and directed to issue, execute and deliver any and all agreements, documents, securities and instruments contemplated by the Plan, and to perform its obligations under such agreements, documents, securities and instruments as may be necessary or desirable to implement and effect the Plan, and to take any further actions required in connection therewith;

87 *ORDERS* that the Plan and all associated steps, compromises, transactions, arrangements, releases, injunctions, offsets and cancellations effected thereby are hereby approved, shall be deemed to be implemented and shall be binding and effective in accordance with the terms of the Plan or at such other time, times or manner as may be set forth in the Plan, in the sequence provided therein, and shall enure to the benefit of and be binding upon the Petitioner, the Released Parties and all Persons affected by the Plan and their respective heirs, administrators, executors, legal personal representatives, successors and assigns;

88 *ORDERS*, subject to the terms of the Plan, that from and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults of the Petitioner then existing or previously committed by the Petitioner, or caused by the Petitioner, directly or indirectly, or noncompliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, lease, guarantee, agreement for sale, deed, licence, permit or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Petitioner arising directly or indirectly from the filing by the Petitioner under the CCAA and the implementation of the Plan and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under any such agreement shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse the Petitioner from performing its obligations under the Plan or be a waiver of defaults by the Petitioner under the Plan and the related documents;

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89 *ORDERS* that from and after the Plan Implementation Date, and for the purposes of the Plan only, if the Petitioner does not have the ability or the capacity pursuant to applicable law to provide its agreement, waiver, consent or approval to any matter requiring its agreement, waiver, consent or approval under the Plan, such agreement, waiver, consent or approval may be provided by the Trustee, or that such agreement, waiver, consent or approval shall be deemed not to be necessary;

90 *ORDERS* that upon fulfillment or waiver of the conditions precedent to implementation of the Plan as set out and in accordance with Article 6 of the Plan, the Monitor shall deliver the Monitor's Certificate, substantially in the form attached as Schedule "B" to this Order, to the Petitioner in accordance with Article 6.1 of the Plan and shall file with the Court a copy of such certificate as soon as reasonably practicable on or forthwith following the Plan Implementation Date and shall post a copy of same, once filed, on the Monitor's Website;

Distributions by the Monitor

91 *ORDERS* that on the Plan Implementation Date, the Monitor shall be authorized and directed to administer and finally determine the Affected Claims of Creditors and to manage the distribution of the Funds for Distribution in accordance with the Plan and the Claims Resolution Order;

92 *ORDERS AND DECLARES* that all distributions to and payments by or at the direction of the Monitor, in each case on behalf of the Petitioner, to the Creditors with Voting Claims under the Plan are for the account of the Petitioner and the fulfillment of its obligations under the Plan including to make distributions to Affected Creditors with Proven Claims;

93 *ORDERS AND DECLARES* that, notwithstanding:

a) the pendency of these proceedings and the declarations of insolvency made therein;

b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., c. B-3, as amended (the "*BIA*") in respect of the Petitioner and any bankruptcy order issued pursuant to any such application; and

c) any assignment in bankruptcy made in respect of the Petitioner;

the transactions contemplated in the Plan, the payments or distributions made in connection with the Plan and the Settlement Agreements contemplated thereby, whether before or after the Filing Date, and any action taken in connection therewith, including, without limitation, under this Order shall not be void or voidable and do not constitute nor shall they be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other challengeable transaction under the BIA, article 1631 and following of the Civil Code or any other applicable federal or provincial legislation, and the transactions contemplated in the Plan, the payments or distributions made in connection with the Plan and the Settlement Agreements contemplated thereby, whether before or after the Filing Date, and any action taken in connection therewith, do not constitute conduct meriting an oppression remedy under any applicable statute and shall be binding on an interim receiver, receiver, liquidator or trustee in bankruptcy appointed in respect of the Petitioner;

Approval of Settlement Agreements

94 *ORDERS AND DECLARES* that (i) the Petitioner has entered into the Settlement Agreements in exchange for fair and reasonable consideration; (ii) each Settlement Agreement is a good faith compromise, in the best interests of the Petitioner, the Creditors, the other stakeholders of the Petitioner and all other Persons stipulated in the Plan; (iii) each Settlement Agreement is fair, equitable and reasonable and an essential element of the Plan and (iv) each of the Settlement Agreements be and is hereby approved;

95 *ORDERS* that the Settlement Agreements shall be sealed and shall not form part of the public record, subject to further Order of this Court;

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96 *ORDERS AND DIRECTS* the Monitor to do such things and take such steps as are contemplated to be done and taken by the Monitor under the Plan. Without limitation: (i) the Monitor shall hold the Indemnity Fund to which the Settlement Funds will be deposited; and (ii) hold and distribute the Funds for Distribution in accordance with the terms of the Plan and the Claims Resolution Order;

Releases and Injunctions

97 *ORDERS AND DECLARES* that the compromises, arrangements, releases, discharges and injunctions contemplated in the Plan, including those granted by and for the benefit of the Released Parties, are integral components thereof and are necessary for, and vital to, the success of the Plan and that all such releases, discharges and injunctions are hereby sanctioned, approved, binding and effective as and from the Effective Time on the Plan Implementation Date. For greater certainty, nothing herein or in the Plan shall release or affect any rights or obligations provided under the Plan;

98 *ORDERS* that, without limiting anything in this Order, including without limitation, paragraph 19 hereof, or anything in the Plan, any Claim that any Person (regardless of whether or not such Person is a Creditor or Claimant) holds or asserts or may in the future hold or assert against any of the Released Parties or that could give rise to a Claim against the Released Parties whether through a cross-claim, third-party claim, warranty claim, recursory claim, subrogation claim, forced intervention or otherwise, arising out of, in connection with and/or in any way related to the Derailment, the Policies, MMA, and/or MMAC, is hereby permanently and automatically released and the enforcement, prosecution, continuation or commencement thereof is permanently and automatically enjoined and forbidden. Any and all Claims against the Released Parties are permanently and automatically compromised, discharged and extinguished, and all Persons and Claimants, whether or not consensually, shall be deemed to have granted full, final, absolute, unconditional, complete and definitive releases of any and all Claims to the Released Parties;

99 *ORDERS* that all Persons (regardless of whether or not such Persons are Creditors or Claimants) shall be permanently and forever barred, estopped, stayed and enjoined from (i) pursuing any Claim, directly or indirectly, against the Released Parties, (ii) continuing or commencing, directly or indirectly, any action or other proceeding with respect to any Claim against the Released Parties, or with respect to any claim that, with the exception of any claims preserved pursuant to Section 5.3 of the Plan against any Third Party Defendants that are not also Released Parties, could give rise to a Claim against the Released Parties whether through a cross-claim, third-party claim, warranty claim, recursory claim, subrogation claim, forced intervention or otherwise, (iii) seeking the enforcement, levy, attachment, collection, contribution or recovery of or from any judgment, award, decree, or order against the Released Parties or property of the Released Parties with respect to any Claim, (iv) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or the property of the Released Parties with respect to any Claim, (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Approval Orders to the full extent permitted by applicable law, and (vi) asserting any right of setoff, compensation, subrogation, contribution, indemnity, claim or action in warranty or forced intervention, recoupment or avoidance of any kind against any obligations due to the Released Parties with respect to any Claim or asserting any right of assignment of or subrogation against any obligation due by any of the Released Parties with respect to any Claim; and (vii) taking any actions to interfere with the implementation or consummation of this Plan, provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan;

100 *ORDERS* that notwithstanding the foregoing, the Plan Releases and Injunctions as provided in this Order (i) shall have no effect on the rights and obligations provided by the "Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-Mégantic" signed on February 19, 2014 between Canada and the Province, (ii) shall not extend to and shall not be construed as extending to any Unaffected Claims;

101 *ORDERS* that, without limitation to the Meeting Order and Claims Procedure Order, any holder of a Claim, including any Creditor, who did not file a Proof of Claim before the applicable Bar Date shall be and is hereby forever barred from making any Claim against the Petitioner and Released Parties and any of their successors and assigns, and shall not be entitled to any distribution under the Plan, and that such Claim is forever extinguished;

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Charges

102 *ORDERS* that, subject to paragraphs 25 and 27 hereof, upon the Plan Implementation Date, all CCAA Charges against the Petitioner or its property created by the Initial Order or any subsequent orders (as defined in the Initial Order, the "*CCAA Charges*") shall be terminated, discharged and released;

103 *ORDERS* that, notwithstanding paragraph 24 hereof, the Canadian Professionals and U.S. Professionals are entitled to the Administration Charge set out in Article 7 of the Plan as security for the payment of the fees and disbursements of the Canadian Professionals and U.S. Professionals;

104 *DECLARES* that the Canadian Professionals and U.S. Professionals, as security for the professional fees and disbursements owed or to be owed to them in connection with or relating to the CCAA Proceeding including the Plan and its implementation, be entitled to the benefit of and are hereby granted a charge and security in the Settlement Funds, to the exclusion of the XL Indemnity Payment, to the extent of the aggregate amount of $20,000,000.00, plus any applicable sales taxes for the Canadian Professionals (defined in the Plan as the Administration Charge Reserve). The Administration Charge shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances, security or rights of whatever nature or kind or deemed trusts (collectively "*Encumbrances*") affecting the Settlement Funds, to the exclusion of the XL Indemnity Payment, if any;

105 *ORDERS* that the Petitioner shall not grant any Encumbrances in or against the Settlement Funds that rank in priority to, or *pari passu* with, the Administration Charge unless the Petitioner obtains the prior written consent of the Monitor and the prior approval of the Court.

106 *DECLARES* that the Administration Charge shall immediately attach to the Settlement Funds, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

107 *DECLARES* that the Administration Charge and the rights and remedies of the beneficiaries of same, shall be valid and enforceable and shall not otherwise be limited or impaired in any way by: (i) these proceedings and the declaration of insolvency made herein; (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner or any receiving order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement or other arrangement which binds the Petitioner (a "*Third Party Agreement*"), and notwithstanding any provision to the contrary in any Third Party Agreement:

a) the creation of the Administration Charge shall not create or be deemed to constitute a breach by the Petitioner of any Third Party Agreement to which it is a party; and

b) any of the beneficiaries of the Administration Charge shall not have liability to any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the Administration Charge;

108 *DECLARES* that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner and any receiving order allowing such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner, and (iii) the provisions of any federal or provincial statute, the payments or disposition of Settlement Funds made by the Monitor pursuant to the Plan and the granting of the Administration Charge, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law;

109 *DECLARES* that the Administration Charge shall be valid and enforceable as against all Settlement Funds, subject to the Administration Charge Reserve, and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioner, for all purposes;

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110 *ORDERS* that, notwithstanding any of the terms of the Plan or this Order, the Petitioner shall not be released or discharged from its obligation in respect of the Unaffected Claims, including, without limitation, to pay the fees and expenses of the Canadian Professionals and the U.S. Professionals;

Stay of Proceedings

111 *EXTENDS* the Stay Period (as defined in the Initial Order and as extended from time to time) to and including December 15, 2015;

112 *ORDERS* that all orders made in the CCAA Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or inconsistent with, this Order, the Meeting Order, the Claims Resolution Order or any further Order of this Court;

The Monitor

113 *ORDERS* that all of the actions and conduct of the Monitor disclosed in the Monitor's Reports are hereby approved, and *DECLARES* that the Monitor has satisfied all of its obligations up to and including the date of this Order;

114 *ORDERS* that, effective upon the Plan Implementation Date, any and all claims against (a) the Monitor in connection with the performance of its duties as Monitor of the Petitioner up to the Plan Implementation Date, (b) the Released Parties in connection with any act or omission relating to the negotiation, drafting or execution of their respective Settlement Agreements, or the negotiation, solicitation or implementation of the Plan, (c) Creditors having Government Claims in connection with the negotiation, solicitation and implementation of the Plan, and (d) the Class Representatives in connection with the negotiation, solicitation and implementation of the Plan shall, in each case, be and are hereby stayed, extinguished and forever barred and neither the Monitor, the Released Parties, Creditors having Government Claims nor the Class Representatives shall have any liability in respect thereof except for any liability arising out of gross negligence or willful misconduct on the part of any of them, provided however that this paragraph shall not release (i) the Monitor of its remaining duties pursuant to the Plan and this Order (the "*Remaining Duties*") or (ii) the Released Parties from their remaining duties pursuant to their respective Settlement Agreements;

115 *ORDERS* that no action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court on notice to the Monitor and upon such terms as may be determined by the Court;

116 *DECLARES* that the protections afforded to Richter Advisory Group Inc., as Monitor and as officer of this Court, pursuant to the terms of the Initial Order and the other Orders made in the CCAA Proceedings shall not expire or terminate on the Plan Implementation Date and, subject to the terms hereof, shall remain effective and in full force and effect;

117 *DECLARES* that the Monitor has been and shall be entitled to rely on the books and records of the Petitioner and any information provided by the Petitioner without independent investigation and shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information;

118 *DECLARES* that any distributions under the Plan and this Order shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Petitioner for the purposes of section 14 of the Tax Administration Act (Québec) or any other similar provincial or territorial tax legislation (collectively the "*Tax Statutes*") given that the Monitor is only a disbursing agent of the payments under the Plan, and the Monitor in making such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of it making any payments ordered or permitted hereunder or under the Plan, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made or to be made under the Plan or this Order and any claims of this nature are hereby forever barred;

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119 *DECLARES* that the Monitor shall not, under any circumstances, be liable for any of the Petitioner's tax liabilities regardless of how or when such liability may have arisen;

120 *DECLARES* that neither the Monitor, the Released Parties, Creditors having Governmental Claims nor the Class Representatives shall incur any liability as a result of acting in accordance with the Plan and the Orders, including without limitation, this Order, other than any liability arising out of or in connection with the gross negligence or willful misconduct of any of them;

121 *ORDERS* that upon the completion by the Monitor of its Remaining Duties, including, without limitation, distributions made by or at the direction of the Monitor in accordance with the Plan, the Monitor shall file with the Court the Monitor's Plan Completion Certificate, substantially in the form attached as Schedule "C" to this Order (the "*Monitor's Plan Completion Certificate*") stating that all of the Monitor's Remaining Duties have been completed and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties, and upon the filing of the Monitor's Plan Completion Certificate, Richter Advisory Group Inc. shall be deemed to be discharged from its duties as Monitor of the Petitioner in the CCAA Proceedings and released from any and all claims relating to its activities as Monitor in the CCAA Proceedings;

122 *ORDERS AND DECLARES* that the Monitor and the Petitioner, and their successors and assigns, as necessary, are authorized to take any and all actions as may be necessary or appropriate to comply with applicable tax withholding and reporting requirements. All amounts withheld on account of taxes shall be treated for all purposes as having been paid to the Affected Creditors in respect of which such withholding was made, provided such withheld amounts are remitted to the appropriate governmental authority;

General

123 *DECLARES* that the Monitor or the Petitioner may, from time to time, apply to this Court for any advice, directions or determinations concerning the exercise of their respective powers, duties and rights hereunder or in respect of resolving any matter or dispute relating to the Plan, the Claims Resolution Order or this Order, or to the subject matter thereof or the rights and benefits thereunder, including, without limitation, regarding the distribution mechanics under the Plan;

124 *DECLARES* that any other directly affected party that wishes to apply to this Court, including with respect to a dispute relating to the Plan, its implementation or its effects, must proceed by motion presentable before this Court after a 10-day prior notice of the presentation thereof given to the Petitioner and the Monitor in accordance with the Initial Order;

125 *DECLARES* that the Monitor is authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for an order recognizing the Plan and this Order and confirming that the Plan and this Order are binding and effective in such jurisdiction and that the Monitor is the Petitioner's foreign representative for those purposes;

126 *REQUESTS* the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order, including the registration of this Order in any office of public record by any such court or administrative body or by any Person affected by the Order;

127 *ORDERS* that Schedule B to the Amended Plan and the Settlement agreements included therein, save and except for the XL Settlement Agreement, be filed under seal, the whole subject to further Order of this Court;

128 *ORDERS* the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security;

129 *LE TOUT* avec dépens contre la compagnie de chemin de fer Canadien Pacifique.

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appendix "B"

Monitor's Plan Implementation date Certificate

CANADA *PROVINCE OF QUÉBEC* *DISTRICT OF MONTRÉAL*	*SUPERIOR COURT* *Commercial Division* (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

No.: 500-11-

IN THE MATTER OF THE PLAN OF COMPROMISE OF: • Petitioner -and- • Monitor

CERTIFICATE OF THE MONITOR OF • (Plan Implementation)

All capitalized terms not otherwise defined herein have the meanings ascribed thereto in the Plan of Compromise and Arrangement of • pursuant to the *Companies' Creditors Arrangement Act, R.S.C.* 1985, c. C-36, as amended, dated • (as may be amended, restated, supplemented and/or modified in accordance with its terms, the "*Plan*").

Pursuant to section • of the Plan, • (the "*Monitor*"), in its capacity as Court-appointed Monitor of *[DEBTOR]*, delivers this certificate to *[DEBTOR]* and hereby certifies that all of the conditions precedent to implementation of the Plan as set out in section • of the Plan have been satisfied or waived by •. Pursuant to the Plan, the *[Plan Implementation Date]* has occurred on this day. This Certificate will be filed with the Court and posted on the Monitor's Website.

DATED at the City of Montréal, in the Province of Québec, this __________ day of __________, •.

•, in its capacity as the Court-appointed Monitor of [DEBTOR]

Per:

____

Name:

Title:

Schedule "C" — Monitor's Plan Completion Certificate

CANADA *PROVINCE OF QUÉBEC* *DISTRICT OF MONTRÉAL*	*SUPERIOR COURT* *Commercial Division* (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

No.: 500-11-

IN THE MATTER OF THE PLAN OF COMPROMISE OF: • Petitioner -and- • Monitor

CERTIFICATE OF THE MONITOR (Plan Completion)

Recitals:

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A. Pursuant to an Order of the Honourable • of the Québec Superior Court (Commercial Division) (the "*Court*") dated •, • was appointed as the Monitor (the "*Monitor*") of [*DEBTOR*].

B. Pursuant to an Order of the Honourable • of the Court dated • (the "*Sanction Order*"), the Court sanctioned and approved the Plan of Compromise of • pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, dated • (as may be amended, restated, supplemented and/or modified in accordance with its terms, the "*Plan*").

C. Pursuant to the Sanction Order, the Court ordered that upon the completion by the Monitor of its Remaining Duties, including, without limitation, distributions to be made by or at the direction of the Monitor in accordance with the Plan, the Monitor shall file with the Court a certificate stating that all of the Remaining Duties have been completed and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties, and upon the filing of such certificate, • shall be deemed to be discharged from its duties as Monitor of • in the CCAA Proceedings and released from any and all claims relating to its activities as Monitor in the CCAA Proceedings.

D. All capitalized terms not otherwise defined herein shall have the meaning set out in the Sanction Order.

Pursuant to paragraph • of the Sanction Order, • in its capacity as Court-appointed Monitor of • (the "*Monitor*") hereby certifies that the Monitor has completed its Remaining Duties, including, without limitation, distributions to be made by or at the direction of the Monitor in accordance with the Plan and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties.

DATED at the City of Montréal, in the Province of Québec, this __________ day of __________, •.

•, in its capacity as the Court-appointed Monitor of •

Per:

____

Name:

Title:

Notes de bas de page

1 Shelley C. Fitzpatrick, *Liquidating CCAAs - Are We Praying to False Gods?*, dans *Annual Review of Insolvency Law 2008*, Janis P. Sarra, Toronto, Thomson/Carswell, 2008, p.41.

2 Bill Kaplan, *Liquidating CCAAs: Discretion gone Awry?*, dans *Annual Review of Insolvency Law 2008*, Janis P. Sarra, Toronto, Thomson/Carswell, 2008, p.79

3 *Ibid*, p.89.

4 *Supra*, note 1, p. 47.

5 *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24; *Re Olympia & York Developments Ltd* (1995), 34 C.B.R. (3d) 93; *Re Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1.

6 *Supra*, note 2, p.90.

7 (1990), 4 C.B.R. (3d) 311 (CB C.A.).

8 2008 BCCA 327.

9 EYB 1991-63766 (QC C.A.), par. 26.

10 *Supra*, note 1.

11 *Supra*, note 2, p.54, 55.

12 ATB *Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.), par. 51, 52.

13 2009 BCCS 17 (CanLII).

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14 *Supra*, note 1, p.60.

15 *Supra*, note 1, p.61.

16 *Supra*, note 1, p.71.

17 *Supra*, note 1, p.72, 73.

18 *Supra*, note 1, p.73.

19 *Supra*, note 2, p.67.

20 1998 CanLII 14907 (ON S.C.).

21 *Ibid*, par.45, 47.

22 2001 CanLII 28449 (ON S.C.).

23 *Ibid*, par. 12.

24 *Supra*, note 2, p. 103.

25 *Supra*, note 8.

26 *Supra*, note 2, p.85.

27 (1999), 11 C.B.R. (4th) 204 (Alta. Q.A.).

28 *Ibid*, par. 16.

29 *Supra*, note 2, p.112.

30 *Supra*, note 2, p.113.

31 EYB 2003-51913 (QCCS).

32 *Ibid*, par.20.

33 *Supra*, note 9, par.56-59 (EYB 1991-63766).

34 2004 CanLII 41522 (QC C.S.).

35 *Papier Gaspésia inc., Re*, 2004 CanLII 46685 (QC C.A.), par.14.

36 *Supra*, note 2, p.117.

37 460-11 -001833-097, 2009 QCCS 6121.

38 2010 QCCA 403.

39 *Dairy Corporation of Canada Limited (Re)*, (1934) O.R. 436, paragr. 1, 4; *Northland Properties Limited*, (1998) 73 C.B.R. (N.S. 175), paragr. 24 et 29; *Olympia & York Developments Ltd. (Re)*, (1993) 17 C.B.R. (3[d]) 1 (Ont. Gen. Div.), paragr. 1; *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, paragr. 60; *Uniforêt Inc., Re (Trustee of)*, 2002 CanLII 24468, paragr. 14.

40 *Olympia & York Developments Ltd. (Re)*, (1993) 17 C.B.R. (3d) 1 (Ont. Gen. Div.), paragr. 23-26; *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, paragr. 64.

41 Voir jugement du 17 février 2014, p. 22-29, paragr.113-123.

42 *Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587.

43 *Muscletech Research and Development Inc., Re*, 2006 CanLII 34344 (ON SC).

44 *Muscletech Research and Development Inc. (Re)*, 2007 CanLII 5146 Voir aussi: *Sino-Forest Corporation (Re)*, 2012 ONSC 7050, paragr. 74 (autorisation d'appeler refusée, 2013 ONCA 456).

45 *Hinse c. Canada (Procureur général)*, 2015 CSC 35.

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2001 SCC 44, 2001 CSC 44
Supreme Court of Canada

Danyluk v. Ainsworth Technologies Inc.

2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, 2001 CSC 44, [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46, 106 A.C.W.S. (3d) 460, 10 C.C.E.L. (3d) 1, 149 O.A.C. 1, 2001 C.L.L.C. 210-033, 201 D.L.R. (4th) 193, 272 N.R. 1, 34 Admin. L.R. (3d) 163, 54 O.R. (3d) 214 (headnote only), 54 O.R. (3d) 214 (note), 54 O.R. (3d) 214, 7 C.P.C. (5th) 199, J.E. 2001-1439, REJB 2001-25003

Mary Danyluk, Appellant v. Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson, Respondents

McLachlin C.J.C., Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: October 31, 2000
Judgment: July 12, 2001
Docket: 27118

Proceedings: reversing (1998), 41 C.C.E.L. (2d) 19 (Ont. C.A.)

Counsel: *Howard A. Levitt* and *J. Michael Mulroy*, for appellant
John E. Brooks and *Rita M. Samson*, for respondents

Subject: Employment; Public; Insolvency; Family; Civil Practice and Procedure

Headnote

Practice --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Denial of natural justice by employment standards officer did not deprive her decision of its judicial character — Errors made by standards officer rendered decision voidable, but not void — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — Employee was entitled to appropriate consideration of factors relevant to whether court should exercise its discretion — By failing to ensure that employee had received adequate notice and responded to case laid out against her, standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14.

Employment law --- Wages and benefits — Statutory enforcement of payment of wages — Procedure for recovery under statute — Appeal and judicial review

Denial of natural justice by employment standards officer did not deprive her decision of its judicial character — Errors made by standards officer rendered decision voidable, but not void — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — Employee was entitled to appropriate consideration of factors relevant to whether court should exercise its discretion — By failing to ensure that employee had received adequate notice and failing to give her opportunity to respond to case laid out against her, standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14.

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Employment law --- Wages and benefits — Statutory enforcement of payment of wages — Procedure for recovery under statute — Relation to other remedies

Remedy available pursuant to s. 67 of Employment Standards Act did not give employee right of appeal — Director had discretion to deny application for review or to appoint adjudicator to conduct hearing — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — By failing to ensure that employee had received adequate notice and failing to give her opportunity to respond to case laid out against her, employment standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14, s. 67.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submissions

Remedy available pursuant to s. 67 of Employment Standards Act did not give employee right of appeal — Director had discretion to deny application for review or to appoint adjudicator to conduct hearing — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — By failing to ensure that employee had received adequate notice and failing to give her opportunity to respond to case laid out against her, employment standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14, s. 67.

Procédure --- Jugements et ordonnances — Chose jugée et préclusion — Préclusion découlant d'une question déjà tranchée — Principes généraux

Manquement à la justice naturelle de l'agente des normes d'emploi n'a pas fait perdre à sa décision son caractère judiciaire — Erreurs faites par l'agente des normes d'emploi avaient pour effet de rendre sa décision annulable, mais non nulle — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant 300,000 $ à tigre de salaire et de commissions impayés — Employée avait droit à ce qu'il soit donné une considération appropriée aux facteurs pertinents à la question de savoir si le tribunal devait exercer son pouvoir discrétionnaire ou non — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de l'employée d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importante injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14.

Droit du travail individuels --- Salaires et avantages sociaux — Coercition légale au paiement du salaire — Procédure pour recouvrer en vertu de la loi — Appel et révision judiciaire

Manquement à la justice naturelle de l'agente des normes d'emploi n'a pas fait perdre à sa décision son caractère judiciaire — Erreurs faites par l'agente des normes d'emploi avaient pour effet de rendre sa décision annulable, mais non nulle — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant 300,000 $ à titre de salaire et de commissions impayés — Employée avait le droit à ce qu'il soit donné une considération appropriée aux facteurs pertinents à la question de savoir si le tribunal devait exercer son pouvoir discrétionnaire ou non — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de l'employée d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importante injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14.

Droit du travail (rapports individuels) --- Salaire et avantages sociaux — Coercition légale au paiement du salaire — Procédure pour recouvrer en vertu de la loi — Relation avec les autres recours

Recours disponible en vertu de l'art. 67 de la Loi sur les normes d'emploi ne fournissait aucun droit d'appel à l'employée — Directeur avait le pouvoir discrétionnaire de décider de rejeter ou non la demande de révision ou de nommer un décideur et de présider l'audience — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant 300,000 $ à titre de salaire et de commissions impayés — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de

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l'employée d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importante injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14, art. 67.

Droit administratif --- Exigences de la justice naturelle — Droit d'être entendu — Droits procéduraux lors de l'audience — Opportunité de répondre et de faire des représentations

Recours disponible en vertu de l'art. 67 de la Loi sur les normes d'emploi ne fournissait aucun droit d'appel à l'employée — Directeur avait le pouvoir discrétionnaire de décider de rejeter ou non la demande de révision, de nommer un décideur et de présider l'audience — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant le paiement de salaire et de commissions impayés — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de l'employé de 300 000 $ d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importance injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14, art. 67.

The employee claimed that she was owed $300,000 in unpaid wages and commissions by the employer. She filed a complaint under the *Employment Standards Act* (Ont.) for unpaid wages and commissions. The employer denied the claim, alleging that the employee had resigned from her position. The employment standards officer investigated the complaint. The employer responded to the complaint through the standards officer. The standards officer did not inform the employee of the employer's response and did not give her an opportunity to respond. The employee commenced an action against the employer, seeking unpaid wages, commissions, and damages for wrongful dismissal. The standards officer denied the employee's claim for commissions. The standards officer found that the employee was entitled to two weeks' pay in lieu of notice for termination. Rather than applying to the director for a review of the standards officer's decision, the employee chose to pursue a civil action.

The employer's motion to strike out the action was granted, barring the action on the ground of issue estoppel. The motions judge found that the standards officer's decision was final and that the criteria for issue estoppel had been met. The employee appealed unsuccessfully. The Ontario Court of Appeal concluded that the standards officer's decision was final on the ground that neither party had exercised its right of internal appeal. The Court of Appeal confirmed that the standards officer's decision was judicial for the purpose of issue estoppel. The standards officer's failure to observe procedural fairness did not prevent the operation of issue estoppel. Although the standards officer denied the employee natural justice, the employee forfeited her right to judicial review by not applying to the director for a review of the decision. The employee appealed.

Held: The appeal was allowed.

Although it is compelling not to duplicate litigation, the general principles of the estoppel doctrine need re-examination when a claim for $300,000 is barred by a manifestly improper and unfair administrative decision. Issue estoppel is a doctrine of public policy, and the court maintains discretion to relieve against the harsh consequences of estoppel even if the preconditions of issue estoppel are present.

The redress procedures under the *Employment Standards Act* are incapable of dealing with complex questions of law and fact. An oral hearing, at which both parties are in attendance, is not required. Standards officers are not required to have legal training. No monetary limit is placed on the cases that fall within the standards officer's jurisdiction. Procedural defects can be rectified on review to the director. The request for review can, however, be denied. The director has discretion whether to appoint an adjudicator and, consequently, whether to conduct a hearing. Essentially, a right of appeal does not exist.

Because the employee was allowed to bring an action, the employer was not entitled as of right to an imposition of estoppel. Standards officers are required to exercise adjudicative functions in a judicial manner. The adjudication of the employee's claim was of a judicial nature. Denial of natural justice by the standards officer did not deprive her decision of its judicial

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character. The decision remained judicial, as distinct from administrative or legislative decisions. Errors made by the standards officer rendered the decision voidable, but not void. The employee's decision to pursue the civil action rather than applying for review was not fatal to the action. The denial of natural justice by the standards officer was important to the exercise of the court's discretion.

The three preconditions to issue estoppel were established. The employee was entitled to the appropriate consideration of factors relevant to whether the court should exercise its discretion. The legislature did not intend for the statutory proceedings to be the exclusive forum for employment complaints. Because the employee's action was commenced before the standards officer released her decision, the employer knew that it was expected to respond to parallel proceedings. The purpose of the Act is to provide inexpensive and expedited resolutions of employment disputes. By placing excess weight on the statutory decision in terms of issue estoppel, the purpose of the legislation could be undermined. Although the employee had no right of appeal from the standards officer's decision, the employee failed to exercise the opportunity provided to apply for a review of the decision. Few safeguards existed for the parties in the statutory process. The standards officer was ill-equipped to decide complex issues of law. When the employee invoked the statutory process, she was personally vulnerable and facing dismissal. It is likely that the legislature did not intend for the process to become a barrier for claims involving large sums. The standards officer's decision prevented the employee from receiving adequate notice and from responding to the case laid out against her. As such, the employee's claim had not been properly considered or adjudicated. Invoking issue estoppel could result in a significant injustice. Given the cumulative effect of the relevant factors, the court should exercise its discretion and refuse to apply issue estoppel.

L'employée prétendait que son employeur lui devait 300 000 $ à titre de salaire et de commissions impayés. Elle a déposé une plainte, en vertu de la *Loi sur les normes d'emploi*, dans laquelle elle réclamait le salaire et les commissions impayés. L'employeur a nié lui devoir de l'argent et a prétendu que l'employée avait démissionné de ses fonctions. Une agente des normes d'emploi a enquêté sur la plainte. L'employeur a donné une réponse à la plainte de l'employée à l'agente des normes d'emploi. Cette dernière n'en a pas informé l'employée et ne lui a pas donné l'opportunité d'y répondre. L'employée a intenté une action contre l'employeur dans laquelle elle réclamait le salaire et les commissions impayés ainsi que des dommages-intérêts pour congédiement injustifié. L'agente a rejeté la réclamation de l'employée pour les commissions. Elle a conclu que l'employée avait droit à deux semaines de salaire à titre d'indemnité de préavis. Plutôt que de demander au directeur une révision de la décision rendue par l'agente, l'employée a choisi de continuer son action.

La requête en irrecevabilité de l'employeur a été accordée, ce qui a mis un terme à l'action au motif de préclusion découlant d'une question déjà tranchée. Le juge saisi de la requête a conclu que la décision de l'agente des normes d'emploi était définitive et qu'on avait satisfait aux critères de la préclusion. Le pourvoi de l'employée a été rejeté. La Cour d'appel a conclu que la décision de l'agente des normes d'emploi était définitive au motif qu'aucune des deux parties n'avait utilisé le droit d'appel interne. La Cour d'appel a confirmé que la décision de l'agente était judiciaire en ce qui avait trait à la préclusion. Le défaut de l'agente d'avoir respecté l'équité procédurale n'avait pas empêché que la préclusion ait lieu. Même si l'agente des normes d'emploi avait nié à l'employée l'application de la justice naturelle, cette dernière avait renoncé à son droit à la révision judiciaire lorsqu'elle n'avait pas demandé au directeur de réviser la décision. L'employée a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Même s'il est important qu'il n'y ait pas de poursuites en double, les principes généraux de la doctrine de la préclusion doivent être réexaminés lorsqu'ils ont pour effet de permettre à une décision administrative manifestement inappropriée et inéquitable d'empêcher une réclamation de 300 000 $. La préclusion est une doctrine d'ordre public et le tribunal conserve le pouvoir discrétionnaire de remédier aux dures conséquences de celle-ci, mêmes si ses conditions préalables sont présentes.

Les mesures de redressement prévues à la loi ne pouvaient se préoccuper de questions de droit et de fait complexes. On n'exigeait pas la tenue d'une audience verbale à laquelle seraient présentes les deux parties. Les agents des normes d'emploi n'étaient pas tenus d'avoir une formation juridique. La loi ne prévoyait aucune limite pécuniaire aux affaires qui

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pouvaient relever de la compétence de l'agent. Les défaux procéduraux pouvaient être rectifiés en demandant une révision au directeur. La demande de révision pouvait cependant être refusée. Le directeur avait le pouvoir discrétionnaire lui permettant de nommer un décideur, et donc de présider une audience. Il n'existait, essentiellement, aucun droit d'appel.

Puisqu'on a permis à l'employée d'intenter une action, l'employeur n'avait pas le droit d'obtenir de plein droit la préclusion. Les agents de normes d'emploi devaient exercer des fonctions de décideurs de manière judiciaire. La décision relative à la réclamation de l'employée avait une nature judiciaire. Le manquement à la justice naturelle de l'agente des normes d'emploi n'a pas enlevé à la décision rendue par celle-ci son caractère judiciaire. Les erreurs qu'elle a faites ne rendaient pas sa décision nulle, mais plutôt annulable. La décision prise par l'employée de continuer son action, plutôt que de demander une révision de la décision, n'a pas porté un coup fatal à son action. Le manquement à la justice naturelle avait de l'importance relativement à l'exercice par le tribunal de son pouvoir discrétionnaire.

Les trois conditions préalables à la préclusion ont été établies. L'employée avait droit à ce que les facteurs pertinents à la question de savoir si le tribunal devait exercer son pouvoir discrétionnaire soient examinés de façon appropriée. Le législateur ne peut avoir eu l'intention que les procédures prévues par la loi soient le seul forum existant pour les plaintes des employés. Puisque l'action de l'employée a été intentée avant que l'agente des normes d'emploi ne rende sa décision, l'employeur savait qu'il aurait à répondre à des procédures parallèlles. L'objet de la loi était de fournir des moyens peu dispendieux et rapides pour résoudre des litiges relatifs à l'emploi. En accordant un poids excessif à la décision prise en vertu de la loi, dans le contexte de la préclusion découlant d'une question déjà tranchée, l'objet de la loi pourrait être compromis. Même si l'employée n'avait pas de droit d'appel à l'encontre de la décision de l'agente des normes d'emploi, elle a quand même fait défaut d'utiliser la possibilité qui lui était fournie, soit celle qui lui permettait de demander la révision de la décision. La procédure prévue par la loi fournissait peu de garanties pour les parties. L'agente n'avait pas les outils lui permettant de décider de questions de droit complexes. Au moment où l'employée s'est prévalue de la procédure prévue par la loi, elle était vulnérable et faisait face à un congédiement. Le législateur n'avait probablement pas l'intention que ce processus empêche les réclamations portant sur de larges sommes d'argent. En tant que telle, la réclamation de l'employée n'avait pas été évaluée ou décidée de façon appropriée. Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme résultat une grave injustice. Compte tenu de l'effet cumulatif de tous les facteurs pertinents, le tribunal devrait exercer son pouvoir discrétionnaire et refuser d'appliquer la préclusion.

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POURVOI de l'employée à l'encontre du jugement publié à 167 D.L.R. (4th) 385, 99 C.L.L.C. 210-016, 116 O.A.C. 225, 41 C.C.E.L. (2d) 19, 42 O.R. (3d) 235, 27 C.P.C. (4th) 91, 12 Admin. L.R. (3d) 1, 1998 CarswellOnt 4679, [1998] O.J. No. 5047 (C.A. Ont.), qui a maintenu la requête en irrecevabilité de l'action de l'employée pour salaire et commissions impayés au motif de préclusion découlant d'une question déjà tranchée.

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

1 The appellant claims that she was fired from her position as an account executive with the respondent Ainsworth Technologies Inc. on October 12, 1993. She says that at the time of her dismissal she was owed by her employer some $300,000 in unpaid commissions. The courts in Ontario have held that she is "estopped" from having her day in court on this issue because of an earlier failed attempt to claim the same unpaid monies under the *Employment Standards Act*, R.S.O. 1990, c. E.14 ("ESA" or the "Act"). An employment standards officer, adopting a procedure which the Ontario Court of Appeal held to be improper

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and unfair, denied the claim. I agree that in general issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal, but in my view this was not a proper case for its application. A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice. I would allow the appeal.

I. Facts

2 In the fall of 1993, the appellant became involved in a dispute with her employer, the respondent, Ainsworth Technologies Inc., over unpaid commissions. The appellant met with her superiors and sent various letters to them outlining her position. These letters were generally copied to her lawyer, Mr. Howard Levitt. Her principal complaint concerned an alleged entitlement to commissions of about $200,000 in respect of a project known as the CIBC Lan project, plus other commissions, which brought the total to about $300,000.

3 The appellant rejected a proposed settlement from the employer. On October 4, 1993, she filed a complaint under the ESA seeking unpaid wages, including commissions. It is not clear on the record whether she had legal advice on this aspect of the matter. On October 5, the employer wrote to the appellant rejecting her claim for commissions and eventually took the position that she had resigned and physically escorted her off the premises.

4 An employment standards officer, Ms Caroline Burke, was assigned to investigate the appellant's complaint. She spoke with the appellant by telephone and on or about January 30, 1994, met with her for about an hour. The appellant gave Ms Burke various documents, including her correspondence with the employer. They had no further meetings.

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject matter of her ESA claim.

6 On June 1, 1994, solicitors for the employer wrote to Ms Burke responding to the appellant's claim. The employer's letter included a number of documents to substantiate its position. None of this was copied to the appellant. Nor did Ms Burke provide the appellant with information about the employer's position; nor did she give the appellant the opportunity to respond to whatever the appellant may have assumed to be the position the employer was likely to take. The appellant, in short, was left out of the loop.

7 On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she ordered the employer to pay the appellant $2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to $300,000 commission as claimed by you." The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the director for a review of Ms Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

8 The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

II. Judgments

A. Ontario Court (General Division) (June 10, 1996)

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9 The issue before McCombs J. was whether the doctrine of issue estoppel applied in the present case. Following *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.), he concluded that issue estoppel could apply to issues previously determined by an administrative officer or tribunal. In his view, the sole issue to be determined was whether the ESA officer's decision was a final determination. The motions judge noted that the appellant did not seek to appeal or review the ESA officer's decision under s. 67(2) of the Act, as she was entitled to do if she wished to contest that decision. He considered the ESA decision to be final. The criteria for the application of issue estoppel were therefore met. The paragraphs relating to the appellant's claim for unpaid wages and commissions were struck from her statement of claim.

B. Court of Appeal for Ontario (1998), 42 O.R. (3d) 235 (Ont. C.A.)

10 After reviewing the facts of the case, Rosenberg J.A., for the court, identified, at pp. 239-240, the issues raised by the appellant's appeal:

> This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

11 In rejecting these submissions, Rosenberg J.A. grouped them under three headings: whether the ESA officer's decision was final; whether the ESA officer's decision was judicial; and the effect of procedural unfairness on the application of the doctrine of issue estoppel.

12 In his view, the decision of the officer in the present case was final because neither party exercised the right of internal appeal under s. 67(2) of the Act. Moreover, while not all administrative decisions that finally determine the rights of parties will be "judicial" for purposes of issue estoppel, Rosenberg J.A. found that the statutory procedure set out in the Act satisfied the requirements. He considered *Downing v. Graydon* (1978), 21 O.R. (2d) 292 (Ont. C.A.), to be "determinative of this issue."

13 Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel:

> The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to consider and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

14 In Rosenberg J.A.'s view, although ESA officers are obliged to act judicially, failure to do so in a particular case, at least if there is a possibility of appeal, will not preclude the operation of issue estoppel. This conclusion is based on the policy considerations underlying two rules of administrative law:

> These two rules are: (1) that the discretionary remedies of judicial review will be refused where an adequate alternative remedy exists; and (2) the rule against collateral attack. These rules, in effect, require that the parties pursue their remedies through the administrative process established by the legislature. Where an appeal route is available the parties will not be permitted to ignore it in favour of the court process.

15 Rosenberg J.A. noted that if the appellant had applied under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing. This supported his view that the review process provided by the Act is an adequate alternative remedy. Rosenberg J.A. concluded at p. 256:

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In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

16 The court thus applied the doctrine of issue estoppel and dismissed the appellant's appeal.

III. Relevant Statutory Provisions

17 *Employment Standards Act*, R.S.O. 1990, c. E.14

1. In this Act,

. . . . .

"wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

(a) tips and other gratuities,

(b) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,

(c) travelling allowances or expenses,

(d) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies; ("salaire")

. . . . .

6.-(1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

(2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.

. . . . .

65.-(1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, the officer may,

(a) arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled;

(b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement; or

(c) issue an order in writing to the employer to pay forthwith to the Director in trust any wages to which an employee is entitled and in addition such order shall provide for payment, by the employer to the Director, of administration costs in the amount of 10 per cent of the wages or $100, whichever is the greater.

. . . . .

(7) If an employer fails to apply under section 68 for a review of an order issued by an employment standards officer, the order becomes final and binding against the employer even though a review hearing is held to determine another person's liability under this Act.

. . . . .

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67.-(1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled or has found that the employee has no other entitlements or that there are no actions which the employer is to do or is to refrain from doing in order to be in compliance with this Act, the officer may refuse to issue an order to an employer and upon refusing to do so shall advise the employee of the refusal by prepaid letter addressed to the employee at his or her last known address.

(2) An employee who considers himself or herself aggrieved by the refusal to issue an order to an employer or by the issuance of an order that in his or her view does not include all of the wages or other entitlements to which he or she is entitled may apply to the Director in writing within fifteen days of the date of the mailing of the letter mentioned in subsection (1) or the date of the issue of the order or such longer period as the Director may for special reasons allow for a review of the refusal or of the amount of the order.

(3) Upon receipt of an application for review, the Director may appoint an adjudicator who shall hold a hearing.

. . . . .

(5) The adjudicator who is conducting the hearing may with necessary modifications exercise the powers conferred on an employment standards officer under this Act and may make an order with respect to the refusal or an order to amend, rescind or affirm the order of the employment standards officer.

. . . . .

(7) The order of the adjudicator is not subject to review under section 68 and is final and binding on the parties.

68.-(1) An employer who considers themself aggrieved with an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery of service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72(2), apply for a review of the order by way of a hearing.

. . . . .

(3) The Director shall select a referee from the panel of referees to hear the review.

. . . . .

(7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

IV. Analysis

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where, as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *R. v. Farwell* (1894), 22 S.C.R. 553 (S.C.C.), at p. 558, *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), at pp. 267-268. The bar extends both to the cause of action thus adjudicated (variously referred to as claim

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or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G.S. Holmested and G.D. Watson, *Ontario Civil Procedure* (looseleaf updated 2000, release 3), vol. 3 Supp. (Toronto: Carswell, 1984), at 21§17 *et seq.* Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.).

21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision- making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

22 The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D.J. Lange in *The Doctrine of Res Judicata in Canada* (Markham, Ont.: Butterworths, 2000), at p. 94 *et seq.*, including *Robinson v. McQuaid* (1854), 1 P.E.I. 103 (P.E.I. S.C.), at pp. 104-105, and *Bell v. Miller* (1862), 9 Gr. 385 (U.C. Ch.), at p. 386. The modern cases at the appellate level include *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622 (B.C. C.A.), *Rasanen*, *supra*, *Wong v. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182 (Alta. C.A.), *Machin v. Tomlinson* (2000), 194 D.L.R. (4th) 326 (Ont. C.A.), and *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 85 (B.C. C.A.). See also *Thrasyvoulou v. Environment Secretary* (1989), [1990] 2 A.C. 273 (U.K. H.L.). Modifications were necessary because of the "major differences that can exist between [administrative orders and Court orders] in relation, *inter alia*, to their legal nature and the position within the state structure of the institutions that issue them": *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.), at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

23 In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have, however, joined issue on the application of issue estoppel and the relevance of the rule against collateral attack.

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont. C.A.), at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact *distinctly put in issue and directly determined* by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, *once determined*, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-268. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation," *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority of *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:

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> . . . (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies . . . .

26 The appellant's argument is that even though the ESA officer was required to make a decision in a judicial manner, she failed to do so. Although she had jurisdiction under the *Employment Standards Act* to deal with the claim, the ESA officer lost jurisdiction when she failed to disclose to the appellant the case the appellant had to meet and to give the appellant the opportunity to be heard in answer to the case put against her. The ESA officer therefore never made a "judicial decision" as required. The appellant also says that her own failure to exercise her right to seek internal administrative review of the decision should not be given the conclusive effect adopted by the Ontario Court of Appeal. Even if the conditions precedent to issue estoppel were present, she says, the court had a discretion to relieve against the harsh effects of estoppel *per rem judicatem* in the circumstances of this case, and erred in failing to do so.

A. The Statutory Scheme

1. The Employment Standards Officer

27 The *Employment Standards Act* applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum employment standards for the protection of employees. These include hours of work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. It is a rough-and-ready procedure that is wholly inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rapidly than could realistically be expected in the courts. There are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a "review"). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

2. The Review Process

30 The employee, as stated, has no appeal as of right. Section 67(2) of the Act provides that an employee dissatisfied with the decision at first instance may apply to the Director for an administrative review in writing within 15 days of the date of the mailing of the employment standards officer's decision. Under s. 67(3), "the Director *may* appoint an adjudicator who shall

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hold a hearing" (emphasis added). The word "may" grants the Director a discretion to hold or not to hold a hearing. The Ontario Court of Appeal noted this point, but said the parties had attached little importance to it.

31 It seems clear the legislature did not intend to confer an appeal as of right. Where the Director does appoint an adjudicator a hearing is mandated by the Act. Further delay and expense to the Ministry and the parties would follow as a matter of course. The juxtaposition in s. 67(3) of "may" and "shall" (and in the French text, the instruction that the Director "*peut nommer un arbitre de griefs pour tenir une audience*") puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

32 If an internal review were ordered, an adjudicator would then have looked at the appellant's claim *de novo* and would undoubtedly have shared the employer documents with the appellant and given her every opportunity to respond and comment. I agree that under the scheme of the Act procedural defects at the ESA officer level, including a failure to provide proper notice and an opportunity to be heard in response to the opposing case, can be rectified on review. The respondent says the appellant, having elected to proceed under the Act, was required to seek an internal review if she was dissatisfied with the initial outcome. Not having done so, she is estopped from pursuing her $300,000 claim. The appellant says that the ESA procedure was so deeply flawed that she was entitled to walk away from it.

B. The Applicability of Issue Estoppel

1. Issue Estoppel: A Two-Step Analysis

33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (B.C. C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (Ont. C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (N.S. C.A.), at para. 56.

34 The appellant was quite entitled, in the first instance, to invoke the jurisdiction of the Ontario superior court to deal with her various monetary claims. The respondent was not entitled as of right to the imposition of an estoppel. It was up to the court to decide whether, in the exercise of its discretion, it would decline to hear aspects of the claims that were previously the subject of ESA administrative proceedings.

2. The Judicial Nature of the Decision

35 A common element of the preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, is the fundamental requirement that the decision in the prior proceeding be a *judicial* decision. According to the authorities (see, e.g., G.S. Bower, A.K. Turner and K.R. Handley, *The Doctrine of Res Judicata*, 3rd ed. (London: Butterworths, 1996), pp. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, *was* the decision made in a judicial manner? These are distinct requirements:

> It is of no avail to prove that the alleged *res judicata* was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it

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> was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes.

(*The Doctrine of Res Judicata*, para. 20)

36 As to the third aspect, whether or not the particular decision in question was actually made in accordance with judicial requirements, I note the recent *ex curia* statement of Handley J. (the current editor of *The Doctrine of Res Judicata*) that

> The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to *res judicata* estoppels.

("Res Judicata: General Principles and Recent Developments" (1999), 18 *Aust. Bar. Rev.* 214, at p. 215.)

37 The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard *capable* of supporting an issue estoppel? In my opinion, the answer to this question is yes.

(a) The Institutional Framework

38 The decision relied on by Rosenberg J.A. in this respect relates to the generic role and function of the ESA officer: *Downing v. Graydon*, *supra*, *per* Blair J.A., at p. 305:

> In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officers embrace all the important *indicia* of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties.

The parties did not dispute that ESA officials could properly be given adjudicative responsibilities to be discharged in a judicial manner. An earlier legislative limit of $4,000 on unpaid wages (excluding severance pay and benefits payable under pregnancy and parental provisions) was eliminated in 1991 by S.O. 1991, c. 16, s. 9(1), but subsequent to the ESA decision in the present case a new limit of $10,000 was imposed. This is the same limit as is imposed on the Small Claims Court by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 23(1), and O. Reg. 626/00, s. 1(1).

(b) The Nature of ESA Decisions under s. 65(1)

39 An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.

40 One distinction between administrative and judicial decisions lies in differentiating adjudicative from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. The distinction between investigative and adjudicative powers is discussed in *Guay v. Lafleur* (1964), [1965] S.C.R. 12 (S.C.C.), at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in *Thoday v. Thoday* (1963), [1964] P. 181 (Eng. C.A.), at p. 197.

41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objective legal standard to those facts. This is characteristic of a judicial function: D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998) (looseleaf updated 2001, release 2), vol. 1, para. 7:1310, p. 7-7.

42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

(c) Particulars of the Decision in Question

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43 The Ontario Court of Appeal concluded that the decision of the ESA officer in this case was in fact reached contrary to the principles of natural justice. The appellant had neither notice of the employer's case nor an opportunity to respond.

44 The appellant contends that it is not enough to say the decision *ought* to have been reached in a judicial manner. The question is: Was it decided in a judicial manner in this case? There is some support for this view in *Rasanen* Abella J.A., at p. 280:

> *As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them*, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. [Emphasis added.]

45 Trial level decisions in Ontario subsequently adopted this approach: *Machado v. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132 (Ont. Gen. Div.), *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (Ont. Gen. Div.), *Heynen v. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183 (Ont. Gen. Div.), *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (Ont. S.C.J.). The statement of Métivier J. in *Munyal v. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58 (Ont. Gen. Div.), at p. 60, reflects that position:

> The plaintiff relies on [*Rasanen*] and other similar decisions to assert that the principle of issue estoppel should apply to administrative decisions. This is true only where the decision is the result of a fair, unbiased adjudicative process where "the hearing process provides parties with an opportunity to know and meet the case against them".

46 In *Wong*, *supra*, the Alberta Court of Appeal rejected an attack on the decision of an employment standards review officer and held that the ESA decision was adequate to create an estoppel as long as "the appellant knew of the case against him and was given an opportunity to state his position" (para. 20). See also *Alderman v. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535 (B.C. S.C. [In Chambers]).

47 In my view, with respect, the theory that a denial of natural justice deprives the ESA decision of its character as a "judicial" decision rests on a misconception. Flawed the decision may be, but "judicial" (as distinguished from administrative or legislative) it remains. Once it is determined that the decision-maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision-maker erred in carrying out his or her functions. As early as *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (Canada P.C.), it was held that a conviction entered by an Alberta magistrate could not be quashed for lack of jurisdiction on the grounds that the depositions showed that there was no evidence to support the conviction or that the magistrate misdirected himself in considering the evidence. The jurisdiction to try the charges was distinguished from alleged errors in "the observance of the law in the course of its exercise" (p. 156). If the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here), subsequent errors in its exercise, including violations of natural justice, render the decision voidable, not void: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at pp. 584-585. The decision remains a "judicial decision," although seriously flawed by the want of proper notice and the denial of the opportunity to be heard.

48 I mentioned at the outset that estoppel *per rem judicatem* is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer's decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in *Harelkin*, *supra*. In that case a university student failed in his judicial review application to quash the decision of a faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes, including issue estoppel, the *Harelkin* barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

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49 The appellant's position would also create an anomalous situation under the rule against collateral attack. As noted by the respondent, the rejection of issue estoppel in this case would constitute, in a sense, a successful collateral attack on the ESA decision, which has been impeached neither by administrative review nor judicial review. On the appellant's theory, an excess of jurisdiction in the course of the ESA proceeding would prevent issue estoppel, even though *Consolidated Maybrun Mines Ltd.*, *supra*, says that an act in excess of a jurisdiction which the decision-maker initially possessed does not necessarily open the decision to collateral attack. It depends, according to *Consolidated Maybrun Mines Ltd.*, on which forum the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

50 It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

51 In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin*, *supra*, and collateral attack in *Consolidated Maybrun Mines Ltd.*, *supra*.

52 Where I differ from the Ontario Court of Appeal in this case is in its conclusion that the failure of the appellant to seek such an administrative review of the ESA officer's flawed decision was fatal to her position. In my view, with respect, the refusal of the ESA officer to afford the appellant proper notice and the opportunity to be heard are matters of great importance in the exercise of the court's discretion, as will be seen.

53 I turn now to the three preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, at p. 254.

3. Issue Estoppel: Applying the Tests

(a) That the Same Question Has Been Decided

54 A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (Ont. C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

55 The parties are agreed here that the "same issue" requirement is satisfied. In the appellant's wrongful dismissal action she is claiming $300,000 in unpaid commissions. This puts in issue the same entitlement as was refused her in the ESA proceeding. One or more of the factual or legal issues essential to this entitlement were necessarily determined against her in the earlier ESA proceeding. If issue estoppel applies, it prevents her from asserting that these adverse findings ought now to be found in her favour.

(b) That the Judicial Decision which Is Said To Create the Estoppel Was Final

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56 As already discussed, the requirement that the prior decision be "judicial" (as opposed to administrative or legislative) is satisfied in this case.

57 Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.

58 I have already noted that in this case, unlike *Harelkin*, *supra*, the appellant had no right of appeal. She could merely make a request to the ESA Director for a review by an ESA adjudicator. While this may be a factor in the exercise of the discretion to deny issue estoppel, it does not affect the finality of the ESA decision. The appellant could fairly argue on a judicial review application that unlike Harelkin she had no "adequate alternative remedy" available to her as of right. The ESA decision must nevertheless be treated as final for present purposes.

(c) The Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in which the Estoppel is Raised or Their Privies

59 This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: *Machin*, *supra*, *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (Ont. C.A.), *per* Laskin J.A., at pp. 339-340. The mutuality requirement was subject to some critical comment by McEachern C.J.B.C. when sitting as a trial judge in *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 22 B.C.L.R. (2d) 89 (B.C. S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see Holmested and Watson, at 21§24, and G.D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623.

60 The concept of "privity," of course, is somewhat elastic. The learned editors of J. Sopinka, S.N. Lederman, A.W. Bryant in *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), at p. 1088, say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

61 I conclude that the preconditions to issue estoppel are met in this case.

4. The Exercise of the Discretion

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.), Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application." In my view, the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision-makers.

63 In *Bugbusters*, *supra*, Finch J.A. (now C.J.B.C.) observed at p. 11:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schweneke*, *supra*, at paras. 38 and 43:

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> The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask - is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
>
> . . . . .
>
> . . . The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

See also *Braithwaite*, *supra*, at p. 188.

64 Courts elsewhere in the Commonwealth apply similar principles. In *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41 (U.K. H.L.), the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, *per* Lord Keith of Kinkel, at p. 50:

> One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result . . .

65 In the present case Rosenberg J.A. noted in passing at para. 40 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise. He simply concluded, at para. 69:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

66 In my view, it was an error of principle not to address the factors for and against the exercise of the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

67 The list of factors is open. They include many of the same factors listed in *Consolidated Maybrun Mines Ltd.* in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in *Minott*, *supra*. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

(a) The Wording of the Statute from which the Power To Issue the Administrative Order Derives

68 In this case the ESA includes s. 6(1), which provides that:

> No civil remedy of an employee against his or her employer is suspended *or affected* by this Act. [Emphasis added.]

69 This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. (Recent amendments to the Act now require an employee to elect either the ESA procedure or the court. Even prior to the new amendments, however, a court could properly conclude that relitigation of an issue would be an abuse: *Rasanen*, *supra*, *per* Morden A.C.J.O., at p. 293, Carthy J.A., at p. 288.)

70 While it is generally reasonable for defendants to expect to be able to move on with their lives once one set of proceedings - including any available appeals - has ended in a rejection of liability, here, the appellant commenced her civil action against the respondents before the ESA officer reached a decision (as was clearly authorized by the statute at that time). Thus, the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings.

(b) The Purpose of the Legislation

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71 The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In *Bugbusters*, *supra*, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. *Forest Act*, R.S.B.C. 1979, c. 140. The expense claim was allowed *despite* an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, *per* Finch J.A., at p. 11, was that

> . . . a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursements] proceedings [under the *Forest Act*].

A similar point was made in *Rasanen*, *supra*, by Carthy J.A., at p. 290:

> It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking discovery and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

A similar qualification is made in the American "Restatement of the Law," Second: Judgments (2d) (St. Paul, Minn.: American Law Institute Publishers, 1982), s. 83(2)(e), which refers to

> . . . procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

72 I am mindful, of course, that here the appellant chose the ESA forum. Counsel for the respondent justly observed, with some exasperation:

> As the record makes clear, Danyluk was represented by legal counsel prior to, at the time of, and subsequent to the cessation of her employment. Danyluk and her counsel were well aware of the fact that Danyluk had an initial choice of forums with respect to her claim for unpaid commissions and wages. . . . [Factum, para. 71.]

73 Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) The Availability of an Appeal

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: *Harelkin*, *supra*, at p. 592. Here the employee had no *right* of appeal, but the existence of a potential administrative review and her failure to take advantage of it must be counted against her: *Susan Shoe Industries Ltd. v. Ontario (Employment Standards Officer)* (1994), 18 O.R. (3d) 660 (Ont. C.A.), at p. 662.

(d) The Safeguards Available to the Parties in the Administrative Procedure

75 As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

76 Morden A.C.J.O. pointed out in his concurring judgment in *Rasanen*, *supra*, at p. 295: "I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel." Laskin J.A. made a similar point in *Minott*, *supra*, at pp. 341-342.

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(e) The Expertise of the Administrative Decision-Maker

77 In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here. A similar factor operates with respect to the rule against collateral attack:

> . . . where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'être*, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal. (*Maybrun*, *supra*, para. 50.)

(f) The Circumstances Giving Rise to the Prior Administrative Proceedings

78 In the appellant's favour it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to $10,000 is consistent with this view.) As Laskin J.A. pointed out in *Minott*, *supra*, at pp. 341-342:

> . . . employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them . . .

79 On the other hand, in this particular case it must be said that the appellant with or without legal advice, included in her ESA claim the $300,000 commissions, and she must shoulder at least part of the responsibility for her resulting difficulties.

(g) The Potential Injustice

80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

> The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

81 On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case.

V. Disposition

82 I would therefore allow the appeal with costs throughout.

Appeal allowed.

Pourvoi accueilli.

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2006 CarswellOnt 4355
Ontario Superior Court of Justice

Martin v. Goldfarb

2006 CarswellOnt 4355, [2006] O.J. No. 2768

Robert E. Martin (Plaintiff) and Clifford Goldfarb and Farano, Green (Defendants)

Perell J.

Heard: June 19-29, 2006
Judgment: July 7, 2006
Docket: 99-CV-176075A

Counsel: William G. Dingwall, Q.C. for Plaintiff
Geoffrey D.E. Adair, Q.C. for Defendants

Subject: Civil Practice and Procedure; Torts; Contracts

Headnote

Civil practice and procedure --- Limitation of actions — Actions in tort — Specific actions — Actions against particular parties — Barristers and solicitors

Plaintiff corporations were defrauded by investment advisor and went bankrupt — Defendant solicitor was negligent and breached fiduciary duty to client by failing to warn of advisor's fraudulent background — Principal shareholder brought action in personal capacity for damages in 1990 — Action was dismissed on retrial for failure to prove damages — Shareholder as assignee brought action on behalf of corporations in 1999 — Action dismissed — Claim for negligence was barred by six-year limitation period under Limitations Act — Solicitor's misconduct occurred in 1988 and shareholder discovered fraud in 1989.

Civil practice and procedure --- Limitation of actions — General principles — Laches and acquiescence — General

Plaintiff corporations were defrauded by investment advisor and went bankrupt — Defendant solicitor was negligent and breached fiduciary duty to client by failing to warn of advisor's fraudulent background — Principal shareholder brought action in personal capacity for damages in 1990 — Action was dismissed on retrial for failure to prove damages — Shareholder as assignee brought action on behalf of corporations in 1999 — Action dismissed on other grounds — Claim for equitable compensation for breach of fiduciary duty was not barred by laches or limitation period by analogy — Defendants did not provide any evidence of acquiescence by plaintiffs — Shareholder in fact attempted to pursue corporations' claims in first action — Defendants did not show they altered their position in reliance on plaintiffs' conduct — Prejudice suffered of being twice or thrice vexed was matter of res judicata.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Persons subject to — Privies

Plaintiff corporations were defrauded by investment advisor and went bankrupt — Defendant solicitor was negligent and breached fiduciary duty to client by failing to warn of advisor's fraudulent background — Principal shareholder brought action in personal capacity for damages in 1990 — Action was dismissed on retrial for failure to prove damages — Shareholder as assignee brought action on behalf of corporations in 1999 — Action dismissed — Defence of res judicata applied — Plaintiff corporations were privies of shareholder for purpose of litigation — Corporations and shareholder shared grievance at heart of proceedings.

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Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Whether cause of action identical

Plaintiff corporations were defrauded by investment advisor and went bankrupt — Defendant solicitor was negligent and breached fiduciary duty to client by failing to warn of advisor's fraudulent background — Principal shareholder brought action in personal capacity for damages in 1990 — Action was dismissed on retrial for failure to prove damages — Shareholder as assignee brought action on behalf of corporations in 1999 — Action dismissed — Defence of res judicata applied — Corporations' cause of action was same as that of shareholder — Claims of corporations could and should have been advanced in first action — Plaintiffs gave no explanation why they were not joined as plaintiffs or why claims were not assigned to shareholder before first action was tried — Shareholder knew defendants would argue he could not advance corporations' claims — Consistency, judicial economy, finality, and avoidance of duplicative litigation all demanded that claims should have been tried together.

Remedies --- Damages — Practice — Evidence — Burden of proof

Plaintiff corporations were defrauded by investment advisor and went bankrupt — Defendant solicitor was negligent and breached fiduciary duty to client by failing to warn of advisor's fraudulent background — Principal shareholder as assignee brought action on behalf of corporations — Action dismissed — Plaintiffs failed to prove they actually suffered loss from defendants' breach of duty — Plaintiffs could not rely on simple before-and-after theory to quantify loss without providing reliable evidence of their net worth before fraud occurred — Plaintiffs suffered unrelated losses as result of their own poor business decisions and market turndown that were at least equal to loss claimed.

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Demeter v. British Pacific Life Insurance Co. (1983), 43 O.R. (2d) 33, 2 C.C.L.I. 246, 37 C.P.C. 277, 150 D.L.R. (3d) 249, [1983] I.L.R. 1-1689, 1983 CarswellOnt 494 (Ont. H.C.) — referred to

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Erlanger v. New Sombrero Phosphate Co. (1878), (1877-78) L.R. 3 App. Cas. 1218, (sub nom. *New Sombrero Phosphate Co. v. Erlanger)* 48 L.J. Ch. 73, 27 W.R. 65, 39 L.T. 269 (U.K. H.L.) — followed

Fenerty v. Halifax (City) (1920), 53 N.S.R. 457, 50 D.L.R. 435, 1920 CarswellNS 13 (N.S. C.A.) — referred to

Foss v. Harbottle (1843), 67 E.R. 189, 2 Hare 461 (Eng. V.-C.) — followed

Gleeson v. J. Wippell & Co. (1977), [1977] 3 All E.R. 54, [1977] 1 W.L.R. 510, 121 Sol. Jo. 157 (Eng. Ch. Div.) — considered

Hartum v. Sitko (2004), 43 Alta. L.R. (4th) 333, (sub nom. *Hartum v. Sitko)* 366 A.R. 75, 2004 ABQB 854, 2004 CarswellAlta 1563, [2005] 9 W.W.R. 531 (Alta. Q.B.) — referred to

Henderson v. Henderson (1843), 67 E.R. 313, 3 Hare 100, [1843-60] All E.R. Rep. 378 (Eng. V.-C.) — followed

Hercules Management Ltd. v. Ernst & Young (1997), [1997] 2 S.C.R. 165, 1997 CarswellMan 198, 211 N.R. 352, 115 Man. R. (2d) 241, 139 W.A.C. 241, (sub nom. *Hercules Managements Ltd. v. Ernst & Young)* 146 D.L.R. (4th) 577, 35 C.C.L.T. (2d) 115, 31 B.L.R. (2d) 147, [1997] 8 W.W.R. 80, 1997 CarswellMan 199 (S.C.C.) — followed

Hodgkinson v. Simms (1994), [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 1994 CarswellBC 438, 1994 CarswellBC 1245 (S.C.C.) — considered

Hoque v. Montreal Trust Co. of Canada (1997), (sub nom. *Hoque v. Montreal Trust Co.)* 162 N.S.R. (2d) 321, (sub nom. *Hoque v. Montreal Trust Co.)* 485 A.P.R. 321, 1997 CarswellNS 427 (N.S. C.A.) — followed

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Hoque v. Montreal Trust Co. of Canada (1998), [1998] 1 S.C.R. x, 167 N.S.R. (2d) 400 (note), 502 A.P.R. 400 (note), 227 N.R. 288 (note) (S.C.C.) — followed

House of Spring Gardens Ltd. v. Waite (1990), [1991] 1 Q.B. 241, [1990] 2 All E.R. 990, [1990] 3 W.L.R. 347 (Eng. C.A.) — referred to

Hoystead v. Commissioner of Taxation (1925), 95 L.J.P.C. 79, [1926] A.C. 155, [1925] All E.R. Rep. 56, [1926] 1 W.W.R. 286, 1925 CarswellFor 5 (Australia P.C.) — referred to

Las Vegas Strip Ltd. v. Toronto (City) (1996), 34 M.P.L.R. (2d) 233, 38 C.R.R. (2d) 129, 30 O.R. (3d) 286, 13 O.T.C. 308, 1996 CarswellOnt 3426 (Ont. Gen. Div.) — considered

Las Vegas Strip Ltd. v. Toronto (City) (1997), 32 O.R. (3d) 651, 99 O.A.C. 67, 1997 CarswellOnt 1279 (Ont. C.A.) — considered

Lindsay Petroleum Co. v. Hurd (1874), C.R. [6] A.C. 337 at 381, 1874 CarswellOnt 270, L.R. 5 P.C. 221, 22 W.R. 492 (Ontario P.C.) — followed

M. (K.) v. M. (H.) (1992), 142 N.R. 321, (sub nom. *M. c. M.)* [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, 57 O.A.C. 321, 14 C.C.L.T. (2d) 1, 1992 CarswellOnt 841, 1992 CarswellOnt 998 (S.C.C.) — followed

M. Tucci Construction Ltd. v. Lockwood (2000), 2000 CarswellOnt 3032, 8 B.L.R. (3d) 113 (Ont. S.C.J.) — referred to

M. Tucci Construction Ltd. v. Lockwood (2002), 2002 CarswellOnt 365 (Ont. C.A.) — referred to

Machin v. Tomlinson (1999), 1999 CarswellOnt 4306, 46 O.R. (3d) 550, 17 C.C.L.I. (3d) 74, 42 C.P.C. (4th) 58, 3 M.V.R. (4th) 18 (Ont. S.C.J.) — considered

Martin v. Goldfarb (1997), 1997 CarswellOnt 1568, 31 B.L.R. (2d) 265, 30 O.T.C. 321 (Ont. Gen. Div.) — referred to

Martin v. Goldfarb (1998), 1998 CarswellOnt 3319, 112 O.A.C. 138, 163 D.L.R. (4th) 639, 42 C.C.L.T. (2d) 271, 41 O.R. (3d) 161, 44 B.L.R. (2d) 158 (Ont. C.A.) — followed

Martin v. Goldfarb (1999), 239 N.R. 193 (note), 123 O.A.C. 199 (note), [1999] 1 S.C.R. x (S.C.C.) — referred to

Martin v. Goldfarb (2002), 2002 CarswellOnt 43 (Ont. S.C.J.) — referred to

Martin v. Goldfarb (2003), 2003 CarswellOnt 4553, 179 O.A.C. 24, 233 D.L.R. (4th) 571, 68 O.R. (3d) 70 (Ont. C.A.) — referred to

Maynard v. Maynard (1950), [1951] S.C.R. 346, [1951] 1 D.L.R. 241, 1950 CarswellOnt 128 (S.C.C.) — referred to

McIlkenny v. Chief Constable of the West Midlands (1981), [1981] 3 W.L.R. 906, (sub nom. *Hunter v. Chief Constable of West Midlands)* [1982] A.C. 529, [1981] 3 All E.R. 727 (U.K. H.L.) — referred to

Sweet & Maxwell Ltd. Coulthard v. Disco Mix Club Ltd. (1999), [2000] 1 W.L.R. 707, [1999] 2 All E.R. 457, [1999] E.M.L.R. 434, [1999] F.S.R. 900 (Eng. Ch. Div.) — referred to

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Thoday v. Thoday (1963), [1964] 1 All E.R. 341, [1964] P. 181, [1964] 2 W.L.R. 371 (Eng. C.A.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 31 C.C.E.L. (3d) 216, 9 Admin. L.R. (4th) 161, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276 (S.C.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 38 — referred to

Limitations Act, R.S.O. 1990, c. L.15
Generally — referred to

s. 45(1)(g) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 21 — referred to

ACTION against solicitor for damages for negligence and breach of fiduciary duty.

***Perell J.*:**

Introduction and Overview

1 The events that are the subject matter of this action are almost nineteen years old, and they already have been the subject of two trials and two appeals to the Court of Appeal for Ontario. This is the third trial about the same circumstances and about the same claims for common law damages or equitable compensation. Not surprisingly, the defendants plead the technical defences of limitation periods, *laches*, cause of action estoppel (*res judicata*) and abuse of process.

2 In 1988, eighteen years ago, the defendants Clifford Goldfarb, who is a lawyer, and the law firm Farano, Green, with which Mr. Goldfarb was associated, acted for the plaintiff, Robert Edward Martin, who is now 78 years of age. He was then a wealthy 60-year old entrepreneur with a net worth alleged to be in excess of $18 million, having made his fortune by buying and selling land and by owning and operating a golf club and nursing, retirement, and group homes.

3 Mr. Martin, who is now a night watchman living modestly in Florida, lost his fortune, allegedly because of the activities beginning in 1987 of Nigel Stephen Axton, a convicted fraudster and disbarred lawyer.

4 In the action now before the court, Mr. Martin, as the assignee of two of his corporations, Martinvale Estates Limited ("Martinvale Estates") and Newmarket Golf and Country Club Limited ("Newmarket Golf Club") seeks to have Mr. Goldfarb and the law firm Farano, Green pay common law damages or equitable compensation to restore the lost fortune.

5 In accordance with an assignment agreement with Richter & Partners Inc., the Trustee in Bankruptcy of both Martinvale Estates and Newmarket Golf Club, the recovery of any compensation in this action is payable to Mr. Martin and the Trustee as follows: (a) the first $50,000 to the Trustee; (b) the next $500,000 to Mr. Martin; and (c) the balance allocated 25% to the Trustee and 75% to Mr. Martin.

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6 In support of this claim for compensation, Mr. Martin alleges solicitor's negligence and a breach of fiduciary duty. The fundamental allegation against Mr. Goldfarb is that while acting for Mr. Martin and his corporations, Mr. Goldfarb failed to disclose Mr. Axton's background to Mr. Martin, which, in turn, allowed Mr. Axton and his cronies to take, imperil, and ultimately eradicate the assets that comprised the fortune of Mr. Martin and of his corporations, Martinvale Estates and Newmarket Golf Club, all of whom were petitioned into bankruptcy in September 1990.

7 Assuming liability is established, the theory of the causation and quantification of Mr. Martin's claim for compensation is that: (a) Martinvale Estates and Newmarket Golf Club owned assets, primarily land; (b) the assets had an "equity" value of $13,959,764 (which is determined by deducting the value of genuine encumbrances from the fair market value of the land); (c) the corporations lost their assets because of the activities of Mr. Axton and his associates through a business enterprise known as the FP Group of Companies; (d) but for Mr. Goldfarb's failure to warn about Mr. Axton, the corporations would not have lost their assets; and (e) therefore, the equity value of the lost assets should now be restored to Mr. Martin as the assignee of the corporations.

8 I will refer to this theory of causation and quantification of the claim for compensation as the "before-and-after" theory because it posits that before Mr. Goldfarb's breach of fiduciary duty, the assets of Martinvale Estates and Newmarket Golf Club, net of genuine liabilities, had a value of $13,959,764 and after Mr. Goldfarb's breach of fiduciary duty their value was zero. Mr. Martin, as the assignee of Martinvale Estates and Newmarket Golf Club, therefore, claims damages or equitable compensation of $13,959,764.

9 Mr. Martin also makes a separate case for compensation in the amount of $875,000 for one particular example of Mr. Axton's pilfering of assets known as the 412-414 Jarvis Street, Toronto, transaction. Mr. Martin alleges that Mr. Goldfarb's involvement and breach of fiduciary duty with respect to this particular transaction caused Martinvale Estates to suffer an $875,000 loss. This claim, however, would be subsumed if the court accepted the before-and-after theory. Put somewhat differently, if the approximately $14 million claim is not proven, then Mr. Martin, nevertheless, claims the lesser sum of $875,000 based on a breach of fiduciary duty linked to the 412-414 Jarvis Street, Toronto, transaction.

10 The first step in Mr. Martin's claim for damages or equitable compensation is, of course, to establish Mr. Goldfarb's liability and the vicarious liability of his law firm, Farano, Green, and at the opening of the trial, Mr. Martin brought a motion for summary judgment pursuant to Rule 21 of the *Rules of Civil Procedure* on the claim for breach of fiduciary duty. That motion was successful, and I granted a summary judgment that the defendants breached their fiduciary duty to Martinvale Estates and Newmarket Golf Club.

11 However, this summary judgment was without prejudice to the defences of limitation periods, *laches*, cause of action estoppel, abuse of process, causation, and contributory negligence, and the summary judgment was without prejudice to the determination of the quantification of the quantum of Mr. Martin's claim for damages or equitable compensation.

12 The outcome of the motion for summary judgment was that the trial began with a finding of breach of fiduciary duty, which, in any event, had largely been admitted in the defendants' statement of defence. Liability for breach of fiduciary duty had also been conceded in the first of the appeals to the Court of Appeal. The finding of liability in the immediate action, however, was subject to the collection of technical defences and to the quantification of the plaintiff's claim.

13 I digress to note that at the beginning of trial, I was advised that third party proceedings brought by the defendants against Aleksandra Kurowska-Barrie, another lawyer who was involved in Mr. Axton's activities, had been settled and that Ms. Kurowska-Barrie was withdrawing her defence to the main action. Accordingly, I dismissed the third party claim without costs, but I reserved judgment on the matter of Mr. Martin's claim for costs against Ms. Kurowska-Barrie for the withdrawal of her defence to the action now before the Court.

14 At the trial, the case for Mr. Martin was comprised of his testimony, the testimony of Fred Roth, an appraiser, and the testimony of Perry Phillips, a chartered accountant, along with reading in portions of Mr. Goldfarb's evidence from the earlier trial. The case for Mr. Goldfarb and Farano, Green was comprised of reading in the examination, cross-examination, and re-

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examination of Arthur Shaw, who was a consultant in the health care industry and familiar with the regulation, operation, and financial aspects of nursing homes and retirement centres and who had reviewed some of the business activities of Mr. Martin's corporations.

15 Given the *in limine* determination of liability for breach of fiduciary duty, the trial was in the main an assessment of the claims for compensation of Martinvale Estates and Newmarket Golf Club. At the trial, Mr. Martin's tactical and strategic approach was to rely on the before-and-after theory and to argue that the law associated with breach of fiduciary duty shifted the onus of proof onto the defendants to prove that Martinvale Estates and Newmarket Golf Club had not suffered a loss.

16 At the trial, the tactical and strategic approach of Mr. Goldfarb and Farano, Green was to rely on the technical defences and to attack the before-and-after theory. They argued that the plaintiff's theory failed both as a matter of causation and quantification. They also argued that Mr. Martin was contributorily negligent.

17 The approach of the defendants was entirely negative in the sense that they did not offer a competing qualification of the losses suffered by the corporations. The defendants denied that the onus was on them to prove that no losses had been suffered from their breach of fiduciary duty. Rather, they asserted that Mr. Martin had the onus of proving that the corporations had suffered a loss and that he had failed to meet this onus.

18 As I will explain below in detail, in my opinion, the approach of Mr. Martin failed and the approach of Mr. Goldfarb and Farano, Green largely succeeded. I conclude that Mr. Martin's action should be dismissed because: (a) the technical defence of issue estoppel succeeded, and it bars or precludes the corporations' claims; and (b) in any event, Mr. Martin has failed to prove the quantum of the losses, in any, suffered by Martinvale Estates and Newmarket Golf Club.

19 The latter conclusion may be restated as follows. In my opinion, Mr. Martin proved: (a) a breach of fiduciary duty; and (b) that the breach could have caused Martinvale Estates and Newmarket Golf Club to suffer a loss; however, he failed to prove the amount of any loss suffered by Martinvale Estates and Newmarket Golf Club.

20 In order to explain these conclusions, I must discuss all of a complicated procedural history, a complex factual matrix, and several difficult legal issues including the matters of onus of proof and causation. I will also discuss the defendants' submission that Mr. Martin's claim for compensation should be reduced by the principles of contributory negligence. Having regard to my other conclusions, it is not necessary to come to a decision on this point, and I will comment only briefly about this argument.

21 I will begin the discussion by setting out what is admitted in the defendants' statement of defence. Then, I will describe the histories of the immediate action and its predecessor action, which included the two trials and the two appeals. This review of the history of the actions, which includes an analysis of the judgments, is necessary not only because it explains how the current action comes before the Court but also because in order to determine the merits of the technical defences of limitation periods, *laches*, cause of action estoppel, and abuse of process, it is necessary to understand all the proceedings that have adjudicated the claims arising from the events of nineteen years ago. Next, I will discuss the technical defences. Then, I will make my main findings of fact and consider the problems of causation and quantification of common law damages or equitable compensation. Here, the prior decisions of the Court of Appeal are authorities with respect to several legal issues that arise in the current action, including the issues of causation and quantification of loss. Lastly, I will make a brief comment about the plea of contributory negligence and then I will conclude the judgment.

Additional Introductory Matters

22 Before completing the introduction and overview and commencing the discussion proper, it is helpful to address three general matters. First, I mention that although I have read and will discuss the judgments in the 1990 Action, in making my finding of facts, I have done so on the basis of the evidence presented at this trial and not based on findings made by Lederman, J. in the earlier action. For factual matters, I have proceeded without the restraint of any issue estoppel arising from the earlier action. My conclusion, which I will explain below, that the immediate action should be dismissed for cause of action estoppel, is an application of a different branch of *res judicata*.

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23 Second, it is helpful at the outset to comment briefly about the credibility and reliability of the witnesses at the trial and about how I treated their testimony. Those comments follow:

(a) I found Mr. Martin to be credible but not wholly reliable. He was credible because I believe he was honest and attempted to speak truthfully. His evidence, however, was not wholly reliable because, as he repeated almost *ad nauseam*, his memory of the events, which was not good at the first trial, which occurred almost eight years after the events, was worse at this trial, with the passage of ten more years. Moreover, I got the impression that Mr. Martin did very little, if anything, to prepare for this trial. When showed exhibits or the transcript of his evidence from the prior trial, he was able to refresh his memory, but it would have been preferable had he not waited until his cross-examination to exercise this capability.

(b) I accept the evidence of Mr. Roth about the market value of the lands he appraised as of January 22, 1990. There was no reason not to accept Mr. Roth's evidence. His appraisal of the market value of lands owned by the Newmarket Golf Club and of an adjoining property owned by Martinvale Estates was not challenged in cross-examination or by a competing appraisal of the property. As will, however, be seen below, the problem with Mr. Roth's testimony was not its truth but its utility. As I will explain, what was required was an appraisal of the lands as of around August 1988 not an appraisal as of January 1990.

(c) I found Mr. Phillips, who was asked to identify the loss in equity of Martinvale Estates and Newmarket Golf Club to be a credible witness, once again, in the sense that he was honest and attempted to speak truthfully. However, there were problems of reliability and utility with respect to his testimony. Beginning with utility, the thrust of Mr. Phillips testimony was essentially to present the mathematics of the before-and-after theory and of the 412-414 Jarvis Street, Toronto, transaction. His testimony was thus essentially argument and not evidence, and it suffered from some errors and omissions in the calculations that were identified during cross-examination. More fundamentally, the value of Mr. Phillips' testimony suffered because there were serious weaknesses in the application of the before-and-after theory. These weaknesses will become clearer when I discuss the problems of causation and quantification later in these Reasons for Judgment.

(d) I obviously could not form any impression of the credibility or reliability of Mr. Goldfarb, who did not testify at the trial. Portions of his evidence from the prior trial were read into the record as admissions. By and large, these admissions were relevant only to the issue of liability for breach of fiduciary duty and made little contribution to resolving the issue of the quantification of the losses of Martinvale Estate and Newmarket Golf Club.

(e) I also could not form any impression of Arthur Shaw because I only had the transcript of his testimony from the first trial. In any event, in reaching my conclusions, his evidence had little influence.

24 As the third preliminary matter, in my opinion, it is helpful at the outset to demarcate four months as benchmarks for the discussion that follows:

(a) The first month is November 1987, which is the approximate date when Mr. Martin met a man who was then known to Mr. Martin as Nigel or Nigel Stephens, but who was in truth Mr. Axton.

(b) The second month is August 1988, which is the month when Mr. Martin and his corporations retained Mr. Goldfarb to act on some transactions.

(c) The third month is August 1989, which is the date when Mr. Martin realized that he and his corporations had been victimized by Mr. Axton and when Mr. Martin finally learned about Mr. Axton's nefarious background.

(d) The fourth month is September 1990, when Mr. Martin, Newmarket Golf Course, and Martinvale Estates were petitioned into bankruptcy.

The Admissions from the Pleadings

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25 In the statement of defence in this action, it is admitted that:

(a) Mr. Martin was the sole shareholder of Martinvale Estates and a 75% shareholder of Newmarket Golf Club;

(b) In 1988 and 1989, Mr. Goldfarb and Farano, Green were retained to act from time to time for Martinvale Estates or Newmarket Golf Club on some real estate and commercial transactions;

(c) Mr. Goldfarb had at all material times knowledge that Mr. Axton had been convicted of fraud in the Province of Ontario;

(d) Mr. Goldfarb was aware that Mr. Axton was associated in some capacity with what came to be known as the FP Group of Companies;

(e) Mr. Goldfarb was aware that Mr. Axton was associated in some capacity with Garth Anthony, Cathy Headon, and Al Disterheft;

(f) Mr. Goldfarb was aware that the FP Group of Companies, Mr. Anthony, Mr. Headon, or Mr. Disterheft were in some manner associated with Mr. Martin, Martinvale Estates, and Newmarket Golf Club in connection with some of the real estate and commercial transactions for which the defendants were retained to act;

(g) Mr. Goldfarb and Farano, Green did not advise Mr. Martin, Martinvale Estates, and Newmarket Golf Club as to the true identity and background of Mr. Axton; and,

(h) Mr. Martin brings this action as assignee of the claims of Newmarket Golf Club and Martinvale Estates pursuant to an assignment in writing from Richter & Partners the discharged trustee of the bankrupt estates. The assignment was approved by the Bankruptcy Court on July 30, 1999.

The History of Mr. Martin's Actions against Mr. Goldfarb and Farano, Green

26 On January 11, 1990, Mr. Martin commenced action 90-CQ-044653 (the "1990 Action") against Clifford Goldfarb, Aleksandra Kurowska-Barrie, and Farano Green claiming damages in the amount of $10 million for solicitor's negligence and, in a subsequently amended statement of claim, for breach of fiduciary duty.

27 The amended statement of claim in the 1990 Action pleaded that "the defendants, knowing that the plaintiff [Mr. Martin] relied upon the veracity of Axton and his associates, never warned the plaintiff of the past background of Axton nor did they disclose these facts to the plaintiff" and that "had the defendants disclosed this information to the plaintiff, he would not have entered into the arrangement with the F.P. Group of companies to permit them to be his financial consultants and advisors."

28 The statement of claim in the 1990 Action pleaded further that "as a result of the breaches of fiduciary duty and negligence of the defendants, the plaintiff became insolvent in a short span of time" and that "the plaintiff estimates his damages to be, *directly and indirectly*, approximately $10,000,000." [my emphasis added] The indirect damages would appear to be a reference to the damages of Martinvale Estates and Newmarket Golf Club and other corporations associated with Mr. Martin.

29 The 1990 Action was tried between September and December 1996, and by judgment dated May 7, 1997, Lederman, J. concluded that the Mr. Goldfarb and Farano, Green had breached their fiduciary duty as of July 28, 1988. Lederman, J.'s judgment is reported at (1997), 31 B.L.R. (2d) 265 (Ont. Gen. Div.).

30 Numerous aspects of the 1990 Action need to be highlighted for the purposes of the action now before the Court, particularly for the analysis of the technical defences and for the discussion of the causation and quantification of the claim for equitable compensation. I highlight the following:

(a) The plaintiff in the 1990 Action is just Mr. Martin, but his $10 million claim for damages included the claims of Martinvale Estates and Newmarket Golf Club. As will be revealed, the Court of Appeal will ultimately hold that Mr. Martin could not assert claims that belonged to his corporation, but the allegation of breach of fiduciary duty and the claims of

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the associated corporation, including the assessment of the quantum of the claim for compensation, were adjudicated by Lederman, J. Thus, from the commencement of the 1990 Action, it was known that Mr. Martin's associated corporations had claims for solicitor's negligence or breach of fiduciary duty against the defendants.

(b) Lederman, J. notes in his reasons for judgment that Martinvale Estates and Newmarket Golf Club had been petitioned into bankruptcy but no attempt was made under s. 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 to request the trustee to bring the action or to obtain leave of the Court to bring the action on behalf of the bankrupt estates. In other words, no explanation was offered as to why Martinvale Estates and Newmarket Golf Club were not added as parties to the 1990 Action.

(c) Before and during the trial of the 1990 Action, the defendants took the position that Mr. Martin could not personally assert the claims of his associated corporations. However, in a legal conclusion that was later overruled by the Court of Appeal, Lederman, J. held that this objection could not be raised by the defendants. Lederman, J. reasoned that because the status issue had been raised in an interlocutory motion that challenged the pleadings, which motion was decided by Wright, J., there was an issue estoppel precluding the defendants from raising this defence at the trial.

(d) Mr. Martin's position about the assessment of damages in the 1990 Action was that he was entitled to be put in as good a position as he would have been had Mr. Goldfarb advised him about Mr. Axton, which advice would have ended his engagement with the FP Group, which eventually led to his bankruptcy. Mr. Martin repeats this position at the current trial.

(e) The defendants' position about the assessment of damages in the 1990 Action was that: first, Mr. Martin suffered no loss because he had little or no equity in the projects; and second, if he suffered a loss it emanated from causes independent of Mr. Axton, including losses associated with: (i) the Kingston Road project; (ii) the Jarvis Street project; (iii) a nursing home project in St. Petersburg, Florida; (iv) a joint venture with one Dr. Kerr, Mr. Martin's friend and another entrepreneur with respect to developing a plastic engine or pump; and (v) the collapse of the real estate market in Ontario in 1990. The defendants repeat this position at the current trial.

(f) In resolving the competing positions of the parties to the 1990 Action, Lederman, J. analyzed the Supreme Court of Canada's decisions in *Canson Enterprises Ltd. v. Boughton & Co.* (1991), 85 D.L.R. (4th) 129 (S.C.C.) and *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.). I will have something brief to say about these decisions later in these Reasons for Judgment.

(g) Lederman, J. concluded that where there is a breach of fiduciary duty, the plaintiff bears the onus of proving that a loss was caused by the breach. The victim must establish a loss and adduce evidence to quantify the loss. In Lederman, J.'s view, it was not the case that a loss was presumed with the onus being on the defendant to rebut the presumed losses. Rather, the victim of a breach of fiduciary duty must prove a loss and then the onus falls on the fiduciary to show the loss would have been happened anyway.

(h) After acknowledging: (i) the difficulties of proof that confronted Mr. Martin; (ii) that the evidence adduced by Mr. Martin was "not the most satisfactory;" and (iii) that the causes of loss included the breach of fiduciary duty but also "a combination of Mr. Martin's own conduct in his acquisitions before the defendants' duty arose, acquisitions made subsequent to the duty arising and other intervening events, including the economic downturn", Lederman J. concluded that given the breach of fiduciary duty, he ought to do the best he could on the available evidence, even if it amounted to "guesswork" and even if the result was "arbitrary at best." This generous approach to Mr. Martin's claim was ultimately criticized by the Court of Appeal.

(i) Mr. Martin was awarded damages of approximately $6 million and pre-judgment interest of approximately $3 million for a total award of approximately $9 million.

31 Mr. Goldfarb and Farano, Green appealed the judgment granted in the first trial, and by order dated August 26, 1998, the Court of Appeal for Ontario set aside Lederman, J.'s judgment with respect to the assessment of damages. The Court of

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Appeal's judgment written by Finlayson, J.A. (Carthy, J.A. and Then J., *ad hoc* concurring) is reported as *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (Ont. C.A.).

32 Numerous aspects of the judgment of the Court of Appeal need to be highlighted for the purposes of the action now before the Court, particularly for the analysis of the technical defences and for the analysis of causation and quantification of loss. I highlight the following:

(a) The Court of Appeal stated that there were three issues on the appeal: (i) the causal connection between Mr. Goldfarb's breach of fiduciary duty in failing to alert Mr. Martin about Mr. Axton and the damages suffered by Martin's corporations; (ii) Lederman's J.'s failure to distinguish between Mr. Martin's personal losses and the losses suffered by the corporations he controlled; and (iii) the lack of cogent evidence to support the $9 million judgment.

(b) In resolving the issue of causation, like Lederman, J., the Court of Appeal analyzed the Supreme Court of Canada's decisions in *Canson Enterprises Ltd. v. Boughton & Co.* (1991), 85 D.L.R. (4th) 129 (S.C.C.) and *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.).

(c) The Court of Appeal concluded that causation was established because Mr. Goldfarb's breach of fiduciary duty denied Mr. Martin the opportunity to review his relationship with Mr. Axton and the Frog Pond Group in the light of the knowledge that he should have had of Mr. Axton's background.

(d) The Court of Appeal held, however, that since there was no finding that Mr. Goldfarb was complicit in Mr. Axton's fraud, there was no basis for directly attributing to Mr. Goldfarb all of the consequences of Mr. Axton's conduct after July 28, 1988. The Court of Appeal held that all of Mr. Martin's losses could not be attributed to Mr. Goldfarb's breach of fiduciary duty. Finlayson, J.A. stated at p. 179:

> There is a causal connection between the breach of duty and the harm done, but the harm cannot be quantified by the "before" and "after" approach advocated by Martin. He is not entitled to blame his solicitors for his total ruin. It is not at all clear that his initial decisions to expand and "go public" were not fatal to the financial health of his corporations. Moreover, he must show a direct personal loss that is attributable to transactions that his corporations entered into following July 28, 1988.

(e) The Court of Appeal concluded that Lederman, J. had erred by treating the losses of Mr. Martin's corporations, including Martinvale Estates and Newmarket Golf Club, as losses recoverable by Mr. Martin. This treatment ignored the legal status of a corporation distinct from its shareholders and the rule from *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (Eng. V.-C.) that where a wrong is occasioned to a corporation, a shareholder has no claim for damages in respect of that wrong. See *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.).

(f) The Court also noted that this treatment of the claims was unfair to the creditors of the corporations. Finlayson, J.A. stated at p. 180:

> This point is in no manner an academic one. The corporate losses are translated into losses to those who looked to the corporate assets for payment of loans and trade debts. Upon a realization of these assets in a bankruptcy, the creditors are paid first, in order of priority, and the shareholders are paid last. By purporting to compensate Martin for what are in fact and law the losses of the corporations, the trial judge permitted Martin to jump to the front of the queue to the prejudice of all creditors of these corporations: see *R. v. Ruhland* (1998), 123 C.C.C. (3d) 262 (Ont. C.A.) at p. 269.

(g) The Court of Appeal concluded that Martin was entitled to only those losses he incurred personally in respect of transactions involving Axton that occurred after July 28, 1988. As already noted above, the Court also concluded that it was an error to conclude that differentiating the losses of the corporations from Mr. Martin's personal losses was precluded by an issue estoppel arising from an interlocutory motion about the pleadings in the action.

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(h) The Court of Appeal concluded that the burden lay on Mr. Martin to prove the quantum of the losses suffered personally as a consequence of Mr. Goldfarb's breach of fiduciary duty.

(i) The Court of Appeal concluded that the identification and quantification of Mr. Martin's personal damages and of the damages generally was wholly unsatisfactory and remitted the matter back to Lederman, J. to determine the proper award of damages.

(j) The Court of Appeal noted that the generous approach of Lederman, J. to the assessment of damages was not appropriate. Finlayson, J.A. stated at p. 187:

> I have concluded that it is a well established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guesswork. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.

(k) Finlayson, J.A. commented about the before-and-after theory used by Mr. Martin to quantify the losses. Finlayson, J.A. stated at pp. 187-188:

> The respondent called no evidence that would assist in proving and identifying losses on a transaction by transaction basis. Instead, Martin testified and gave evidence of having a net worth of approximately $18 million as of August 1, 1988. His position at trial was that he had been rendered insolvent by October of 1989 as a result of the previously described machinations of Axton. ....
>
> Even accepting that it was appropriate for Martin to equate his personal losses to the aggregate of the losses suffered by his corporations because of the diminution of his equity interest in the corporations as shareholder, the record does not disclose any reliable evidence of what were the values of these corporations before July 28, 1988. Without that initial aggregate figure, we have no benchmark from which to deduct pre-Goldfarb and non-Axton transactions to arrive at the aggregate loss suffered at the hands of Axton.

(l) The Court of Appeal observed that the quality of evidence advanced by Mr. Martin to quantify the losses was unsatisfactory. Finlayson, J.A. stated at p. 189:

> There is simply no excuse for such a shoddy proffer of evidence by a plaintiff in an action is which he seeks damages in the millions. Assuming without acknowledging that Martin is entitled to be directly compensated for the loss of his corporate assets as a means of recognizing the reduced value of his equity interest in the various companies, the means to value those assets prior to July 28, 1988 was fully within the control of Martin. We have in evidence the unaudited financial statements of these corporations, and with respect to all of them, their underlying worth was in real estate consisting of nursing homes, the golf course and other land. The explanation that Martin is bankrupt because of the activities of Axton and cannot afford to retain forensic experts to put together a credible estimate of damages does not justify his counsel dumping on the trial judge the responsibility for pulling a figure out of the air.

33 The situation at the end of 1998 was that the Court of Appeal: (i) confirmed that there had been a breach of fiduciary duty; and (ii) confirmed that by denying Mr. Martin or his corporations the opportunity to end their dealings with Mr. Axton, the breach could cause damage; but (iii) concluded that the claims that Mr. Martin had had litigated were not his to claim; and (iv) directed that Mr. Martin's personal claims were to be assessed at a new trial.

34 Mr. Martin sought leave to appeal to the Supreme Court of Canada. Mr. Martin's application for leave to appeal was dismissed with costs on February 18, 1999 [[1999] 1 S.C.R. x (S.C.C.)].

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35 In May 1999, Mr. Martin entered into an Assignment Agreement with Richter & Partners as discharged trustee of the bankrupt estates. The agreement assigned to Mr. Martin any cause of action possessed by Martinvale Estate or Newmarket Golf Club. The assignment was approved by Cumming, J. by order dated July 30, 1999.

36 On September 8, 1999, Mr. Martin commenced the action now before the Court. The current action replicates the allegation of negligence and breach of fiduciary duty and it relies on the identical factual circumstances that were the subject matter of the original trial before Lederman, J. and the problems of causation and quantification are the identical problems of which the Court of Appeal spoke.

37 In December 2001, Lederman, J. presided over the second trial of Mr. Martin's claim for compensation, now for his own personal losses. The claim for the losses of Martinvale Estate and Newmarket Golf Club was left for the action commenced in 1999, which is the action now before the Court.

38 By judgment dated January 3, 2002, Lederman, J. dismissed Mr. Martin's action due to his failure to prove any personal claim. Lederman, J.'s judgment is reported at [2002] O.J. No. 6 (Ont. S.C.J.). He stated that the quality of evidence presented on the assessment was no better than adduced in the original proceeding and was insufficient to found any claim for direct personal loss.

39 Mr. Martin appealed a second time to the Court of Appeal. The Court of Appeal's judgment is reported at (2003), 68 O.R. (3d) 70 (Ont. C.A.). The Court of Appeal dismissed his second appeal on November 20, 2003.

The Technical Defences

40 The above background of some of the facts and of the history of the 1990 Action is sufficient to address the technical defences advanced by Mr. Goldfarb and Farano, Green to the action now before the Court. The technical defences would preclude Mr. Martin from asserting the claims of Martinvale Estates and Newmarket Golf Club

41 The defences of *laches*, limitation periods, cause of action estoppel, and abuse of process are especially technical in the immediate circumstances because there was a seven-day trial that I have decided on the merits against Mr. Martin. However, if I am wrong in dismissing the action on its merits, then the defendants would be entitled to rely on their technical defences.

42 As I will explain, it is my opinion that the defences of limitation periods and *laches* do not apply but that Mr. Martin's action on behalf of the corporations is barred by cause of action estoppel. Because of my conclusion about cause of action estoppel, it is not necessary to say much about the doctrine of abuse of process, which has come to be used as an alternative when the technical elements of cause of action estoppel are not satisfied.

The Limitation Period Defence and Laches

43 The first technical defence to consider is whether a limitation period precludes the claims. The question to be determined is whether Mr. Martin's claim on behalf of Martinvale Estates and Newmarket Golf Club is barred by the *Limitations Act*, R.S.O. 1990, c. L.15 or by analogy to the Act. The second technical defence, which is closely related to the first, is that of *laches*.

44 The claim of Martinvale Estates and Newmarket Golf Club sounds both in solicitor's negligence, which has a six-year limitation period under s. 45 (1) (g) of the *Limitation Act*, and also in breach of fiduciary duty, which has no limitation period under that Act, but which cause of action may be barred by a limitation period by analogy: *Canadian Microtunnelling Ltd. v. Toronto (City)*, [2002] O.J. No. 1399 (Ont. S.C.J.), affd. [2004] O.J. No. 4823 (Ont. C.A.); *Companhia de Seguros Imperio v. Heath (REBX) Ltd.* (2000), [2001] 1 W.L.R. 112 (Eng. C.A.); *Sweet & Maxwell Ltd. Coulthard v. Disco Mix Club Ltd.*, [1999] 2 All E.R. 457 (Eng. Ch. Div.).

45 A claim for solicitor's negligence was brought in the 1990 Action by Mr. Martin personally, but it could have also been brought by the corporations, although the decision to do so would then have rested with the corporations' trustee in bankruptcy, unless the claim was assigned to Mr. Martin, as it now has been.

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46 The claims for solicitor's negligence and for breach of fiduciary duty on behalf of the corporations were not brought until the immediate action commenced in September 1999, which was 11 years after Mr. Goldfarb's misconduct and 10 years after Mr. Martin discovered the true character of Mr. Axton. The claim for solicitor's negligence was barely mentioned during the trial, and from the nature of the argument that I heard, it seems to have been conceded that the claim for solicitor's negligence is statute barred. I conclude that the claim for solicitor's negligence is indeed statute barred because the corporations' cause of action for solicitor's negligence was known to exist in or about 1989 and it was not pursued until 1999.

47 The more difficult question is whether the claim for breach of fiduciary duty, an equitable cause of action, should be barred by a limitation period by analogy. Here, I conclude that the claim for breach of fiduciary duty is not barred.

48 There is a fulsome discussion of the application to claims of breach of fiduciary duty (an equitable claim) of limitation periods by analogy in the judgment of La Forest, J. in the Supreme Court of Canada's judgment in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.). The facts of the case, which involved an action by a daughter against her father for damages for incest, need not concern us here, and the significance of the case is that it recognizes that there is a long tradition of courts of equity applying statutory limitation periods by analogy, particularly when the equitable court's jurisdiction was concurrent or auxiliary with the jurisdiction of the common law courts but also where equity was exercising an exclusive jurisdiction, as it would be in situations of fiduciary obligations.

49 As I read, La Forest, J.'s judgment, the source of equity's jurisdiction to apply a limitation period by analogy was as a manifestation of the doctrine of *laches* and it included a residual discretion to take into account the justice and equity of any particular case. In para. 96 of his judgment, La Forest, J. states:

> Historically, statute of limitation did not apply to equitable claims, and as such courts of equity developed their own limitation defences. Limitation by analogy was one of them, but the more important development was the defence of *laches*.

50 Referring to the leading cases of *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 (Ontario P.C.) and *Erlanger v. New Sombrero Phosphate Co.* (1878), (1877-78) L.R. 3 App. Cas. 1218 (U.K. H.L.), where the doctrine of *laches* is explained, La Forest, J. states in para. 98 of his judgment:

> The rule developed in *Lindsay* is certainly amorphous, perhaps admirably so. However, some structure can be derived from the cases. A good discussion of the rule and of *laches* in general is found in Meagher, Gummow and Lehane, *supra*, [*Equity Doctrines and Remedies* (Sydney: Butterworths: 1984)] at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:
>
>> It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb....
>
> Thus there are two distinct branches to the *laches* doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger *laches* under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, *laches* must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

51 I note in particular the last two sentences of this passage from La Forest, J's judgment, which make it clear that to establish the defence of *laches*, a defendant must establish either: (a) that the plaintiff's delay in advancing his or her equitable claim amounts to acquiescence, that is, the delay amounts to an acceptance of the defendant's misconduct; or (b) that the delay would make the prosecution of the claim unjust for some reason, including the defendant having altered his or her position in reasonable reliance that the plaintiff would not be pursuing the claim.

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52 In the case at bar, Mr. Goldfarb did not testify and the defendants did not provide or point to any evidence that would establish acquiescence by Mr. Martin or the corporations. The reality is that there was no acquiescence; rather, Mr. Martin sought to pursue the corporations' claims, until the Court of Appeal's application of the rule from *Foss v. Harbottle*, *supra*, established that he could not do so.

53 Further, the defendants did not show that they had altered their position or suffered some prejudice that would establish *laches*. The prejudice that the defendants can point to is that of been twice or thrice vexed with the prosecution of the same claims and with having to respond to the same evidence. This prejudice is more a matter of *res judicata* than a matter of *laches*.

54 I conclude that it would not be appropriate to apply a limitation period by analogy or the doctrine of *laches* to bar the corporations' claim for breach of fiduciary duty.

Res Judicata as a Defence: Cause of Action Estoppel and the Abuse of Process Defence

55 The idea of *res judicata* ("a matter adjudicated") is a matter of public policy, and it presents the legal rule that a final judgment on the merits by a court of competent jurisdiction is binding and determinative of the rights of the parties or their privies in all later suits with respect to fundamental issues decided in the former suit (issue estoppel) and with respect to causes of actions and defences that were decided (cause of action estoppel) or could and ought to have been decided in the former suit (the rule from *Henderson v. Henderson* (1843), 67 E.R. 313, 3 Hare 100 (Eng. V.-C.)).

56 The leading cases about issue estoppel are: *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.); *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (S.C.C.); *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)* (1966), [1967] 1 A.C. 853 (U.K. H.L.); *Thoday v. Thoday* (1963), [1964] P. 181 (Eng. C.A.).

57 The leading cases about cause of action estoppel and about the rule from *Henderson v. Henderson* are: *Grandview (Town) V. Goering*, *supra*; *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (N.S. C.A.), leave to appeal to the S.C.C. refused (1998), 167 N.S.R. (2d) 400 (note) (S.C.C.); *Maynard v. Maynard* (1950), [1951] 1 D.L.R. 241 (S.C.C.); *Fenerty v. Halifax (City)* (1920), 50 D.L.R. 435 (N.S. C.A.); *Hoystead v. Commissioner of Taxation* (1925), [1926] A.C. 155 (Australia P.C.).

58 The general idea behind *res judicata* is that as a matter of justice and good sense, if a claim, defence, or issue has been adjudicated, then the adjudication is binding on the parties to the proceedings and their privies, and, therefore, the claim, defence, or issue should not be re-adjudicated in a second proceeding. There should be an end to litigation, and a party and his or her privies should not be harassed with duplicative proceedings. These ideas are linked to Latin maxims such as: "*interest reipublicae ut sit finis litium*" ("it is in the public interest that there should be an end to litigation"); and *nemo debet bis vexari si constet curiae quot sid pro una et eadem causa* ("no man ought to be twice troubled or harassed if it appears to the court that it is for one and the same cause").

59 The effect of the rule of *res judicata* is preclusive. It prevents a party and his or her privies from asserting a position, a claim, or defence. Issue estoppel precludes a litigant from asserting a position that is inconsistent or contrary to a fundamental point decided in a past proceeding in which the litigant or his or her privies participated. Cause of action estoppel precludes a litigant and his or her privies from asserting a claim or a defence that it asserted (cause of action estoppel) or had an opportunity of asserting in past proceedings (the rule from *Henderson v. Henderson*).

60 The public policy or rationale for the doctrine of *res judicata* is that the preclusive effect of the rule advances consistency, judicial economy, conclusiveness, finality, and the avoidance of repeat or duplicative litigation in the administration of civil justice, most especially in situations where a party or privy to a party has had his or her day in court. In *Danyluk v. Ainsworth Technologies Inc.*, *supra*, Binnie, J. stated at p. 473:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of the allegations when first called upon to do so. A litigant to use the vernacular, is only entitled to

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> one bite at the cherry. . . . . An issue, once decided, should generally not be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

61 The rule of *res judicata* applies to parties and their privies. The idea behind privity is that a participant in the second proceeding should be bound by the determination in a previous proceeding because of his or her relationship, called privity, with a party in that prior proceeding. Conversely, a third party cannot benefit or be burdened by an estoppel. For the third party, the past proceedings are *res inter alios acta* ("a thing done between others").

62 Privity, which is not a precise concept, can be established by blood (heirs and successors), title (for example, landlord and tenant), or community of interest. More generally, privity is established if there is a sufficient degree of identification between persons such that it would be just to hold that the decision to which one is a party should be binding in proceedings to which the other is a party: *Bank of Montreal v. Mitchell* (1997), 143 D.L.R. (4th) 697 (Ont. Gen. Div. [Commercial List]), affd. (1997), 151 D.L.R. (4th) 574 (Ont. C.A.); *Machin v. Tomlinson* (1999), 46 O.R. (3d) 550 (Ont. S.C.J.); *Banque nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce* (2001), 195 D.L.R. (4th) 308 (Ont. C.A.); *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Ont. Gen. Div.), affd. (1997), 32 O.R. (3d) 651 (Ont. C.A.); *Gleeson v. J. Wippell & Co.,* [1977] 3 All E.R. 54 (Eng. Ch. Div.); Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: LexisNexis Butterworths, 2004), pp. 151-55.

63 In the immediate case, I conclude that Martinvale Estates and Newmarket Golf Club are privies of Mr. Martin. While corporate law may treat his corporations as distinct legal entities, for the purposes of the litigation before the Court, the reality is that one could hardly find a greater degree of identification than between Mr. Martin and Martinvale Estates and Newmarket Golf Club. Moreover, they all share the grievance that is at the heart of all the proceedings, which is that Mr. Goldfarb did not tell Mr. Martin about Mr. Axton.

64 Related to the rule of *res judicata* is the doctrine of abuse of process, which, in turn, is related to the Court's inherent jurisdiction to control its own proceedings. The doctrine of abuse of process does a variety of things including precluding a person from asserting a cause of action, defence, or position when to do so would manifestly be unfair to a party or would bring the administration of justice into disrepute among right-thinking people.

65 The leading cases about the doctrine of abuse of process in the context of duplicative litigation are: *Toronto (City) v. C.U.P.E., Local 79* (2003), 232 D.L.R. (4th) 385 (S.C.C.); *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), a para. 55 *per Goudge, J.A.*, dissenting (approved [2002] 3 S.C.R. 307 (S.C.C.)); *House of Spring Gardens Ltd. v. Waite,* [1990] 2 All E.R. 990 (Eng. C.A.); *Demeter v. British Pacific Life Insurance Co.* (1983), 43 O.R. (2d) 33 (Ont. H.C.), affd. (1984), 48 O.R. (2d) 266 (Ont. C.A.); *McIlkenny v. Chief Constable of the West Midlands* (1981), [1982] A.C. 529 (U.K. H.L.); *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Ont. Gen. Div.), affd. (1997), 32 O.R. (3d) 651 (Ont. C.A.).

66 Some authorities have suggested that cause of action estoppel and issue estoppel are subclasses of the doctrine of abuse of process because the duplicative proceeding is abusive and should be precluded on this ground. Other authorities have viewed the doctrine of abuse of process as supplementary to cause of action estoppel and issue estoppel. In any event, the doctrine of abuse of process has been used to preclude repetitious or duplicative claims, defences, or positions that do not satisfy the technicalities of a cause of action estoppel.

67 In the case at bar, Mr. Goldfarb and Farano, Green rely on cause of action estoppel and abuse of process to preclude the claim for breach of fiduciary duty advanced by Martinvale Estates and Newmarket Golf Club. The defendants argue that the claim of the corporations could and should have been finally adjudicated by Lederman, J. as a part of the 1990 Action and not in this proceeding.

68 There is an irony and a subtlety in this argument. As the above history of the proceedings reveals, the 1990 Action did in fact adjudicate the claims of the corporations, but the Court of Appeal negated that adjudication because of the rule from *Foss*

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v. Harbottle and, in effect, the Court ruled that the only claim that was before the Court for adjudication was the personal claim of Mr. Martin, who could not advance the claims of the corporations unless they were made parties to the proceedings.

69 Had the claims of the corporation been adjudicated to a final determination, then there could have been an instance of cause of action estoppel if a subsequent proceeding was brought to re-litigate those claims. However, since a final adjudication of the corporations' claims did not occur in the 1990 Action, the defendants argue that the adjudication of the corporations' claim could and ought to have occurred as a part of the 1990 Action.

70 All that would have been required for an adjudication of the corporations' claims in the 1990 Action was their joinder as parties to the action, which perhaps might even have been done as late as the appeal to the Court of Appeal or the second trial before Lederman, J. Thus, the defendants rely on the rule from *Henderson v. Henderson* and the doctrine of abuse of process and submit that the corporations' claims are now precluded because they could and should have been adjudicated as a part of the 1990 Action.

71 The rule from *Henderson v. Henderson* is an extension of the policies that underlie *res judicata*, and it adds the idea that parties and privies are obliged to bring forward their whole case with respect to a matter in dispute to avoid duplicative litigation. The often quoted statement of this extension of *res judicata* comes from the judgment of Wigram, V.C. in *Henderson v. Henderson* (1843), 3 Hare 100 (Eng. V.-C.) at p. 115 where he stated:

> The plea of *res judicata applies*, except in a special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.[emphasis added]

72 The problem with Wigram, V.C.'s statement is that it begs the question of when a point "properly belongs" to the subject of the litigation. There are two parts to the problem. First, there is the issue of whether, the cause of action could have been brought forward and second, there is the problem of whether it should have been brought forward.

73 A very helpful case for understanding the ambit of the rule from *Henderson v. Henderson* is *Hoque v. Montreal Trust Co. of Canada*, *supra*. In this case, Dr. Haque and his companies were indebted to Montreal Trust under a loan agreement. In 1993, Montreal Trust alleged default and commenced a foreclosure action. By this time, Dr. Haque was a bankrupt, and although his trustee in bankruptcy took advice about the existence of counterclaims and set-offs, it decided not to defend the foreclosure proceeding. In 1994, Dr. Haque obtained an assignment of his estate in bankruptcy's claims against the trust company, and he sued the trust company for damages alleging, amongst other things, that the loan agreement was unconscionable and that in enforcing its security, the trust company had committed acts of trespass and conversion. He also alleged that the trust company had disclosed confidential information and had acted in an abusive and disrespectful manner causing him financial loss and mental distress. The trust company moved for an order dismissing Dr. Hoque's action on the grounds of *res judicata*.

74 Reversing the decision of the chamber's judge, the Nova Scotia Court of Appeal barred all of Dr. Hoque's claims except the claims relating to breach of confidence and abusive conduct. Cromwell, J.A., writing the judgment for the Court, stated that the rule from *Henderson v. Henderson* did not apply simply because a cause of action or defence "could" have been asserted in the past proceeding; rather, it applied when a cause of action or defence "should" have been asserted in the past proceeding.

75 Cromwell, J.A. stated that in determining whether a matter should have been raised, a Court should consider a variety of factors. Factors favouring the application of the rule from *Henderson v. Henderson* included: the second proceeding being in essence a collateral attack against the earlier judgment; the second proceeding relying on evidence that could have been discovered for the past proceeding with reasonable diligence; the second proceeding relying on a new legal theory that could have been advanced for the past proceeding; and whether, in all the circumstances, the second proceeding constituted an abuse of process.

76 Factors favouring not applying the rule from *Henderson v. Henderson* included: the second proceeding being a separate and distinct cause of action and whether the first judgment was on default because there was authority that *res judicata* should be applied more carefully and in a more limited way when it is based on a default.

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77 Applying these factors, Cromwell, J.A. concluded that most of Dr. Hoque's claims were precluded but that claims relating to breach of confidence and abusive conduct stood independent of the foreclosure adjudication and could be advanced without inconsistency to the validity and the enforcement of the trust company's security.

78 Returning to the circumstances of the case at bar and the defendants' plea of *res judicata*, in my opinion, the claims of the corporations now being advanced could and should have been advanced in the 1990 Action. All that was required for that to occur was the joinder of the corporations to the 1990 Action.

79 No explanation was offered as to why the joinder of the corporations could not have occurred in the 1990 Action. No explanation was offered as to whether proceedings were or were not or could or could not have been brought in the bankruptcy proceedings to pursue the corporations' claims for breach of fiduciary duty. No explanation was offered as to why the assignment of the claims of the corporation that Mr. Martin obtained in 1999 in order for him to have carriage of the action now before the court could not have been obtained some time between 1990 and 1996, when the 1990 Action was tried.

80 During the 1990 to 1996 period, Mr. Martin was put on notice that the defendants were taking the position that Mr. Martin could not advance the claims of his corporation without having them as parties before the Court. Even if he believed that he could advance their claims without joining them to the 1990 Action, one would have thought that out of an abundance of caution and to negate the threat to his own action, he would have obtained the assignment of the corporations' claims. The current action demonstrates that he was able to obtain the necessary assignments.

81 The corporations' cause of action was one and the same as the cause of action advanced by Mr. Martin. The damages suffered by each, if any, may have been different, but the source of Mr. Goldfarb's and Farano, Green's liability was the singular fact that Mr. Goldfarb breached his fiduciary duty by not telling Mr. Martin about Mr. Axton. Mr. Martin was the person to make this complaint, and the factors of consistency, judicial economy, conclusiveness, finality, and the avoidance of repeat or duplicative litigation in the administration of civil justice, all demand that this complaint be made simultaneously by Mr. Martin on his own behalf and on behalf of his corporations and not consecutively with one action in 1990 and another action in 1999.

82 I therefore conclude that Mr. Martin's action should be dismissed on the grounds of cause of action estoppel.

83 Because of my conclusion that the rule from *Henderson v. Henderson* applies, it is not necessary for me to opine about whether it would manifestly be unfair or it would bring the administration of justice into disrepute among right-thinking people to allow Martinvale Estates and Newmarket Golf Club to advance the claims that could and should have been advanced in the 1990 Action. Resort to the doctrine of abuse of process is redundant in the circumstances of the case at bar.

Findings of Fact and the Problems of Causation and Quantification

84 Assuming my conclusions about the technical defences are incorrect, I would still dismiss Mr. Martin's action on the ground that although he proved a breach of fiduciary duty and that the breach could cause damages, he failed to prove that Martinvale Estates and Newmarket Golf Club actually did suffer a loss from the breach of fiduciary duty.

85 In order to explain this alternative ground for dismissing Mr. Martin's action, it is necessary to set out my findings of fact from this trial and then to discuss why Mr. Martin's arguments about common law damages or equitable compensation have failed. In particular, I will explain why his before-and-after theory for the global assessment of damages has fatal flaws and why he failed to prove any loss, including any loss from the Jarvis Street transaction.

The Rise and Unfortunate Fall of Mr. Martin, Martinvale Estates and Newmarket Golf Club

86 Mr. Martin father was an American attorney who moved to Canada, where Mr. Martin was born. Mr. Martin's parents operated small businesses in Southern Ontario, including several nursing and group homes, and eventually Mr. Martin's father, along with a partner, developed a golf course in Newmarket.

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87 When Mr. Martin was about nineteen or twenty years of age, a car accident disabled his father, and Mr. Martin was asked to leave school to come to the aid of his family. Mr. Martin did so, and thus his formal education ended. Mr. Martin began to manage and to assist in the operation of his father's businesses.

88 It would seem that not long after leaving school, Mr. Martin married his childhood sweetheart. She operated a beauty salon business in London, Ontario, and Mr. Martin ran a company that manufactured beauty supplies. He also assisted his father in constructing the golf course in Newmarket.

89 Mr. Martin's parents were operating nursing homes and group homes for mental patients, and Mr. Martin was offered the opportunity to purchase some of these enterprises, beginning with a nursing or group home in Newmarket, Ontario and later a nursing home in Bradford, Ontario. He accepted the offer, and began to own and operate or to rent to other operators what I will call "care facilities." He also operated some residential rental properties.

90 Most of the properties and the care facility businesses were owned by Mr. Martin through Martinvale Estates. The nursing homes in Newmarket and Bradford were eventually owned by T.L.C. Nursing Centres Inc. Some of the care facilities were bought and sold; others were bought and refurbished or expanded. Mr. Martin's holdings grew.

91 Mr. Martin's rudimentary business plan was two-fold. The first part of the plan was to operate the care facilities with close attention to expenses because revenue streams were often subject to government regulation that restricted the number of residents or the prices that could be charged. Mr. Martin said that it often took some time, but the goal was to make each enterprise profitable. The second and more important part of the plan was that the landholdings for the care facilities and the land holdings associated with the golf course were to be held as long-term investments. Mr. Martin apparently sold several care facilities at substantial profits, and he re-invested the money in land and care facilities. Mr. Martin was and remains confident that in the long term, land values always increase.

92 Sometime in the 1980s, Mr. Martin inherited Newmarket Golf Club, which owned the clubhouse portion of the golf course. Mr. Martin also inherited adjoining golf course lands, which were put under the ownership of Martinvale Estates. Mr. Martin bought out his father's minority interest partner, whom Mr. Martin believed was mismanaging the course and pilfering funds. This buy-out was at a very favourable price. With one Max Thompson, a professional golfer, as a new minority partner, Mr. Martin improved the performance of the golf course and additional revenues were earned by encouraging the use of the course and its clubhouse with its dining facilities as a venue for golf tournaments.

93 Around 1986 or 1987, Mr. Martin decided to expand his business empire. A Mr. George Crothers, a member of the golf club suggested to Mr. Martin that he could raise money for his businesses through the mechanism of a reverse takeover of a dormant public corporation. Although Mr. Martin had no experience at the helm of a public corporation, Mr. Martin followed up on his suggestion, and he was assisted by Mr. Gunnar Helgason, who was associated with a venture capital firm known as Pagun Capital and by a lawyer at the Toronto law firm of Blaine, McMurtry.

94 In a corporate reorganization T.L.C. Nursing Centres Limited ("T.L.C.-Ltd.") sold its assets to T.L.C. Nursing Centres Inc., ("T.L.C.-Inc.") which was incorporated on March 9, 1987. T.L.C.-Inc. became the wholly owned subsidiary of T.L.C. Properties Inc. ("T.L.C.-Properties"), which was the public corporation established by the reverse takeover.

95 Around the time of the reverse takeover, Mr. Martin also followed up on an employee's suggestion that there was a rest home being constructed in Sudbury called Champlain Lodge that Mr. Martin ought to acquire. Mr. Martin was impressed with this project, which was nearly completed when the developer ran out of funds. Mr. Martin's advisors suggested that the Sudbury Project could be acquired by a limited partnership syndication. In the syndication, one of Mr. Martin's corporations would be the general partner.

96 Although he had no experience with syndications, once again, Mr. Martin agreed with a suggestion to expand his enterprise and to take on greater risks than had been his custom, and a limited partnership was created. Mr. Martin testified that the performance guarantees of the general partner to the limited partnership were onerous, but that the syndication of the

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Sudbury property was, nevertheless, a successful venture, and he testified that he made a considerable profit and he benefited by a management contract. Mr. Martin's testimony during cross-examination, however, made me doubt whether his corporation ever did realize a profit from the Sudbury project.

97 Mr. Martin decided to look for a similar syndication project in Toronto, and his search led him to Garth Anthony, who owned a nursing home on Kingston Road in Toronto. Mr. Anthony, who was a real estate agent, however, was not prepared to sell the nursing home, but he was prepared to sell two apartment buildings that he owned across the street from the nursing home, which could be redeveloped for a nursing home. The address of these apartments was 500-504 Kingston Road.

98 Mr. Martin agreed to purchase 500-504 Kingston Road with a purchase price of $3.4 million, and he did so through T.L.C.-Properties. The purchase of 500-504 Kingston Road took place in the fall of 1987, and during this transaction, Mr. Martin first met Mr. Goldfarb, who was acting for Mr. Anthony.

99 Mr. Martin's plan was to syndicate the 500-504 Kingston Road property in a similar fashion to the project in Sudbury. However, the Toronto project had serious difficulties because it was necessary to hire contractors for a major reconstruction and it was necessary to vacate the existing tenants from the apartments. Mr. Martin hired a company known as Burbrook Developments (1987) Inc. ("Burbrook") to be the contractor. This company was associated with Mr. Anthony. Burbrook would act as general contractor for a fixed price of $1.6 million to renovate and convert the property to a retirement home facility. Another corporation associated with Mr. Anthony would arrange for the eviction of the tenants. Construction was to be completed by the end of 1998.

100 Mr. Martin understood that Burbrook was a company owned by Mr. Anthony or a group with which Mr. Anthony was associated, known as the FP Group, (the FP being the initials for "Frog Pond"). The other associates of this group were Cathy Headon, a mortgage broker, Al Disterheft, and a man using the name Nigel Stephens.

101 It would seem that Mr. Anthony must have introduced Mr. Martin to Mr. Disterheft, Mr. Axton and Ms. Headon, whose ability to arrange mortgages impressed Mr. Martin. He was having difficulty raising a mortgage to finance the construction of the 500-504 Kingston Road project, and Ms. Headon was able to find a mortgage, notwithstanding that the security provided by the property was temporally being diminished by the state of renovation and by removal of the tenants.

102 Mr. Martin initially thought that the man he knew as Nigel or Nigel Stephens was a contractor, and it was only much later, and too late, that he learned that Nigel was Nigel Stephen Axton.

103 It appears that from the outset of their association, Mr. Martin was taken in by the members of the FP Group, who increasing provided him with financial and business advice. Mr. Martin was becoming very busy. He had businesses spread out across the province, and he had a new venture in St. Petersburg, Florida, where he planned to purchase a large nursing home. Sometime in 1988, he began flying to Florida for several days each week.

104 The busy Mr. Martin was prepared to listen and to accept the advice of the F.P. Group. One item of advice offered was that Mr. Martin could obtain quicker legal services if he hired a new lawyer. They suggested that Mr. Goldfarb at the firm Farano, Green should be hired. Mr. Martin was thus introduced to Mr. Goldfarb by Mr. Axton. As already noted, it is admitted that Mr. Goldfarb was aware of Mr. Axton's background and did not inform Mr. Martin about what he knew. It is admitted that in this regard that Mr. Goldfarb breached his fiduciary duty to Mr. Martin.

105 Mr. Goldfarb was retained for what was supposed to be the third syndication project, the first being the project in Sudbury and the second being 500-504 Kingston Road. More particularly, Mr. Goldfarb was retained to act on the purchase of a property at 412-414 Jarvis Street in the City of Toronto.

106 Although Mr. Martin had known Mr. Anthony and Mr. Axton for only about 6 to 8 months and notwithstanding that their business connection for 500-504 Kingston Road project was already a troubled one with serious problems associated with removing the tenants, obtaining a building permit, complying with the zoning standards, completing the construction, and

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determining the number of beds permitted for the nursing home, the 412-414 Jarvis Street purchase was to be a joint venture between Mr. Martin's enterprise and the F.P. Group.

107 The agreement of purchase and sale was signed by Burbrook and Martinvale Estates as purchaser, each as to an undivided 50% interest. By direction, the purchaser of the Jarvis Street property was 412-414 Jarvis Street Properties Limited, which was a corporation owned by Martinvale Estates and Burbrook, each as to a 50% interest.

108 Unknown to Mr. Martin, the purchase of 412-414 Jarvis Street was what is sometimes described as a "flip." It was a transaction where the ultimate purchaser is unaware that an intermediate purchaser has turned over the property for a profit at inflated purchase price beyond the genuine market value of the property.

109 In this particular case, the registered owner of 412-414 Jarvis Street was 708534 Ontario Limited, which agreed to sell the property to Zomba Inc. for $3,250,000. Zomba Inc., in turn, had agreed to sell the property for $3,675,000 to Burbrook and Martinvale Estates. Thus, Zomba made $425,000.00 from "flipping" the property.

110 The $3.6 million purchase price of the Jarvis Street property was fully financed. A first mortgage of $1.8 million was assumed. 708534 Ontario Limited took back a second mortgage for $1.0 million and Frog Pond Capital Corp. advanced $875,000.00, of which $450,000 was paid to 708534 Ontario Limited and $425,000 went to Zomba Inc. The loan of $875,000 from Frog Pond Capital Corp. was secured by a third mortgage on the 412-414 Jarvis Street property.

111 Mr. Martin testified that Mr. Goldfarb did not discuss the details of this transaction with him and the reporting letter was sent only to Mr. Anthony. Mr. Martin said he would not have agreed to purchase the Jarvis Street property, if he had known that the purchase price had been marked up. Mr. Martin testified that he had no idea that the property had been flipped and that he thought that his partner, Mr. Anthony, and his lawyer, Mr. Goldfarb, would have protected him.

112 Although he was not aware of the flip, Mr. Martin was aware that Frog Pond Capital Corp. was borrowing the $875,000 to fund the third mortgage loan to finance the purchase of Jarvis Street. The lender to Frog Pond Capital Corp. was the Royal Bank. As security for the loan from the Royal Bank, Frog Pond Capital Corp. assigned the third mortgage to the Royal Bank. Additional collateral security for the Royal Bank was provided by assignment of mortgages.

113 Martinvale Estates mortgaged a property in the Township of Georgina to Frog Pond Capital Corp. Inc., which mortgage was assigned to the Royal Bank, in order to support the borrowing from the Royal Bank. Thus, Martinvale Estates incurred a contingent liability. I foreshadow the discussion below, to note that there was no evidence presented to me that Martinvale Estates was ever called on to make any payment on this contingent liability. It is possible that the Royal Bank was repaid. I simply do not know.

114 In any event, Mr. Martin was now deeply involved with Mr. Anthony and the others at the FP Group including Mr. Axton. The FP Group was involved with Mr. Martin in the construction and the proposed development and syndication of both the Kingston Road and the Jarvis Street properties. The Jarvis Street project had a similar set of problems as the Kingston Road project, including difficulties associated with reconstruction and the eviction of existing tenants. It is convenient to note here that both projects were significant cash drains and neither project was ever completed by Mr. Martin or his corporations.

115 Members of the FP Group began to make other acquisitions with Mr. Martin, including what was described as the CBC Building in Toronto. Mr. Martin understood that he had paid half of the purchase price and that Mr. Anthony, Mr. Axton, and Ms. Headon had paid the other half. He testified that he later learned that he had in fact paid the whole price.

116 In any event, through his various corporations, Mr. Martin was in an expansionary mood, and for the purposes of this trial it is helpful to divide the projects into two classes. In the first class are transactions where Mr. Axton and his cronies were not involved or were only very modestly involved, perhaps to the extent of being kept advised and of making suggestions or recommendations to Mr. Martin, but with management and control remaining with him. The following transactions can be placed in the first class of what may be called non-Axton transactions:

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(a) T.L.C. St. Petersburg, Florida - This was a project beginning in or about January 1988 by a Martin corporation along with a corporate partner from Pennsylvania. The aim of the project was to acquire a very large nursing home in St. Petersburg that had fallen on hard times. The state government had imposed a moratorium that had the effect of reducing occupancy (and the associated income stream) for this nursing home from 273 patients to 100 patients. Mr. Martin hoped to have the moratorium lifted.

(b) The Dr. Kerr investments — This was a project by one Dr. Kerr to develop a plastic engine. Mr. Martin apparently made a commitment to provide funding or to purchase rights from Dr. Kerr.

117 In the second class of transactions are transactions in which the FP Group played some substantive role. Included in this group were Hawkesbury Villas, Preston Springs, and University Avenue, Windsor.

118 Whether it was from the pressures of expansion or for other reasons, Mr. Martin's business were not performing well during the 1988 period. The financial statements of Martinvale Estates financial statements for the year ending November 1988 reveal a loss from operations before depreciation of approximately $1.0 million. (This loss was covered by the sale of several properties.) The consolidated financial statements for T.L.C.-Properties for the year ending December 1988 (which include accounting for T.L.C.-Inc. and for the Kingston Rd. subsidiary, amongst other subsidiaries) reveal a loss before depreciation and before a provision for a loss on Kingston Rd. of approximately $800,000. The notes to the T.L.C.-Properties statement indicate that there was a substantial amount of debt and a significant deficiency in assets and that "the future of the company will depend upon its ability to attain profitable operations and receive continued financial support in the form of loans and guarantees from related parties." The financial statement of Martinvale Estates indicates that it had loaned approximately $1.5 million to affiliated corporations, including T.L.C.-Properties.

119 I was not provided with the 1988 financial statements for Newmarket Golf Course. Its statement for the year ending December, 1987 reveals a net loss before depreciation of approximately $55,000.

120 Mr. Martin increasingly placed his business affairs under the steerage of the FP Group. He hired the group to be his financial and business advisers on a healthy monthly retainer, and he established an office in their new premises on Bay Street, which were a marked improvement from their former shabby offices on Dupont Street in Toronto.

121 Axton, Anthony, and Headon were now sporting very expensive vehicles, and in hindsight, it may be that all of their success was being financed by exorbitant or unmerited fees or worse by their pilfering funds and assets belonging to Mr. Martin or his corporations.

122 Mr. Martin allowed Mr. Axton and his cronies to have almost total control over many of his business affairs. He was taken in by what may have been schemes and deceptions and by a myriad of corporations associated with the FP Group. Mr. Martin was told what he or his corporations owed and he was told how he ought to make payments, including payments to the FP Group. Mr. Martin did not second guess what he was told, and he would sign documents without checking whether he might be signing more than what had been explained to him by Ms. Kurowska-Barrie, who was the in-house lawyer for the F.P. Group.

123 Mr. Martin was even scolded for managing his own businesses. He received a memorandum from "Nigel" dated December 2, 1988. The memorandum states:

> Please help us to help you. Why are you paying us to help you when you act on your own without our advice, or worse yet, question our advice when we give it? You have great strengths in your knowledge of your business. Let us do the organization, push the paperwork, arrange the cheques and money transfers so that you wont (sic) have overdrafts in some accounts with funds in others. Listen to Cathy, she can tell you how to keep the bank happy, she has ways of finding out, and also she can obtain all the funds you require.

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124 Mr. Martin succumbed, and he testified that he would simply sign without reading the blizzard of documents that were placed before him. Mr. Martin said he trusted Mr. Axton and his associates, and he admitted that in hindsight it was a foolish thing to do. The purport of his testimony is that he did not know what was happening, and Mr. Axton took advantage of him.

125 Mr. Martin was undoubtedly very foolish and very gullible, but I formed the impression that he was not quite as ignorant or naïve as he portrayed. He was and is an intelligent man and even with an imperfect and un-refreshed memory, he revealed to me that he understood the nature of some sophisticated business transactions. I believe that he understood, at least, that Martinvale Estates and Newmarket Golf Club had undertaken an aggressive expansion that would present very challenging cash flow and financing problems until more than one new project could become sustainable.

126 In or about August 1989, a serious cash flow problem presented itself. The Royal Bank was pressing for payment of some indebtedness, and to address this situation, Mr. Martin privately arranged a $400,000 net loan from one Perkins on the security of the golf course lands. Because he was rushing off to Florida, Mr. Martin gave the cheque to Mr. Axton with instructions to use the funds to cover the Royal Bank's demand and also to pay tuition for Mr. Martin's son. Instead of using the funds for these purposes, Mr. Axton applied $392,000 of the funds to retire some of the alleged indebtedness to the FP Group.

127 When Mr. Martin returned from Florida, he was shocked to learn what Mr. Axton had done with the money from the Perkins loan. Although he did not immediately say anything, Mr. Martin was now very suspicious of Mr. Axton. Mr. Martin undertook his own detective work, and very late at night in the summer of 1989, he broke into the private offices and the vault of the FP Group. It was during these investigations that he learned about Nigel Stephens' true identity and about his criminal record. Mr. Martin testified that in light of the documents he discovered, he now believed that he had been defrauded by Mr. Axton.

128 The testimony and the evidence presented at the trial leaves me unable to know or describe precisely what happened next, apart from stating that within about twelve or thirteen months, Martindale Estates and Newmarket Golf Club were in bankruptcy.

129 However, I do know from reading Lederman, J.'s judgment that in November, 1989, Martin and his companies sued Axton and members of the FP Group for damages for fraud, misappropriation, and conversion. Unfortunately, before the action against Mr. Axton came on for trial, Mr. Martin, Martinvale Estates and Newmarket Golf Club Ltd. went into bankruptcy. Remarkably, Mr. Axton purchased the cause of action from the trustee in bankruptcy and, not surprisingly, being the plaintiff by assignment and also the defendant of the fraud action, Mr. Axton called no evidence, and O'Brien, J. dismissed the misappropriation action in February 1991.

130 For present purposes, nothing turns on the outcome of the trial decided by O'Brien, J. apart from the outcome providing motivation for Martinvale Estates and Newmarket Golf Club to recover their lost fortune from Mr. Goldfarb and Farano, Green. For present and practical purposes, the problem becomes one of determining the losses suffered by these corporations between August 1988, when Mr. Goldfarb breached his fiduciary duty, and August 1989, when Mr. Martin discovered that he had been duped by Mr. Axton.

The Assessment of Loss — Causation and Quantification

131 Mr. Martin's argument is that Martinvale Estates, and Newmarket Golf Club should be compensated for what they lost because of the combination of Mr. Axton's fraudulent activities, which eroded the assets of the corporations, and Mr. Goldfarb's breach of fiduciary duty, which denied the corporations the opportunity to avoid the erosion. Mr. Martin further submits that Martinvale Estates and Newmarket Golf Club lost everything.

132 Mr. Martin's arguments raise problems of causation and of quantification. These problems have been considered and to a large extent resolved by Lederman, J. and by the Court of Appeal in the first appeal in the 1990 Action. I say this not as a matter of *res judicata* but as a matter of *stare decisis.*

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133 As a matter of precedent, you could hardly find a judgment that was more on "all fours" with the case at bar than Finlayson, J.A.'s judgment. As a matter of legal principles, his judgment analyzed the problems of causation and quantification in the same circumstances that are present in the case at bar.

134 Mr. Martin's argument is that once a breach of fiduciary duty is established then the onus shifts to the fiduciary to prove that the beneficiary suffered no loss. For the reasons expressed by Lederman, J. and by Finlayson, J.A., I reject this argument. In this regard, Finlayson, J.A. stated at p. 184 of his judgment:

> Having concluded that Martin is entitled to only the damages that he suffered personally as a result of the breach of fiduciary duty as a result of the breach of fiduciary duty occasioned by Goldfarb's conduct once he was engaged in July 1998, the burden lay on Martin to prove those losses.

135 Lederman, J. stated at paras. 89-90 of his judgment:

> Coming then to the second issue of who has the burden of proving the loss resulting from the breach of the fiduciary duty, the principle is not that once a breach of fiduciary duty is established, losses are presumed to flow from the breach and the defence bears the onus of proving which losses did not flow from the breach. The plaintiff must establish the loss arising from the breach and the defendant only bears the onus of trying to prove, if it so chooses, that the loss would have been suffered regardless of the breach.
>
> Certainly, the general rule is that the plaintiff must establish that it suffered a loss and adduce evidence to quantify that loss. Moreover, with specific regard to fiduciary duty cases, the structure of analysis always seems to be "what loss flows from this breach." It is not, "what loss has the defence proven did not flow from the breach". The onus is only on the defendant if it offers the affirmative defence that the loss would have happened anyway. This conclusion would seem entirely consistent with the above noted statement of La Forest J. [in *Hodgkinson v. Simms*, *supra*,] that "where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach" (p. 200).

136 Four points emerge from Finlayson J.A.'s analysis. First, Mr. Goldfarb's breach of fiduciary duty could cause a loss to Martinvale Estates and Newmarket Golf Club. Second, the onus was on Martinvale Estates and Newmarket Golf Club to establish the quantification of the loss caused by Goldfarb's breach of fiduciary duty. Third, if Martinvale Estates and Newmarket Golf Club chose to employ a global before-and-after theory to quantify their loss, they must provide reliable evidence to establish an initial aggregate figure or "benchmark" of what were the values of these corporations. Fourth, the corporations are not entitled to blame Mr. Goldfarb for their total ruin, and "pre-Goldfarb and non-Axton transactions" must be deducted to determine the losses caused by Mr. Goldfarb's breach of fiduciary duty.

137 Because of the work performed by Finlayson, J.A. in the first appeal of the 1990 Action, it is not necessary and it may be otiose for me to say much about the cases he relied on to fix these four major points. The four points emerge from his analysis (and for that matter also from the helpful analysis of Lederman, J.) of *Canson Enterprises Ltd. v. Boughton & Co.*, *supra*, and *Hodgkinson v. Simms*, *supra.* For present purposes, all that needs be said is that I rely on and, in any event, I am bound to follow and apply the authority of the Court of Appeal's judgment in *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (Ont. C.A.).

138 Applying the four analytical points to my findings of fact for the case at bar and, for the moment, putting to the side Martinvale Estates' claim for losses arising from the Jarvis Street transaction, the first two points favour Martinvale Estates and Newmarket Golf Club, but the second two points are unfavourable, and in the end result, Martinvale Estates' and Newmarket Golf Club's claims fail because of the absence of any initial benchmark value and because deducting the losses from "pre-Goldfarb and non-Axton transactions" might also reduce their claims to zero.

139 As I think was made very clear by Finlayson J.A.'s judgment in the 1990 Action, it fell on Martinvale Estates and Newmarket Golf Club to provide an initial aggregate figure or "benchmark" of what were the values of these corporations at the

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point at which Mr. Goldfarb breached his fiduciary duty. I believe this point also emerges from Lederman, J.'s judgment, but he was found to be too generous in using guesswork to arrive at an assessment of the losses caused by the breach of fiduciary duty.

140 In the 1990 Action, the valuation date for the benchmark was July 28, 1998. On the evidence presented at this trial, I have selected the near equivalent valuation date of August, 1998.

141 There is no reliable evidence of the value of Martinvale Estates' and Newmarket Golf Club's assets as of August 1998.

142 As noted at the outset of these Reasons for Judgment, Martinvale Estates and Newmarket Golf Club claim that they lost $13,959,764, which was determined by deducting the value of genuine encumbrances from the fair market value of the land as of December 8, 1988. The evidence adduced during the cross-examination of Mr. Martin indicated that Mr. Phillips might have omitted three legitimate mortgages (that is, non-Axton mortgages) with a value of $2,430,000 (Klaiman mortgage, $2.25 million; Willowdale mortgage, $80,000; and Toronto Dominion Bank, $100,000). This would reduce the loss claim to approximately $11.5 million.

143 In making his calculations, Mr. Phillips uses Mr. Roth's appraisal evidence to provide the market value of two substantial assets of these corporations (which according to Mr. Phillips' calculations amounted to about 86% of their combined equity). Mr. Roth opines that the market value of lands owned by Martinvale Estates that adjoined the golf course together with the value of the golf course lands owned by Newmarket Golf Club was between $13,255,000 to $14,730,000. However, Mr. Roth's valuation date for the benchmark is as of January 1990. This is the wrong valuation date, and his valuation undoubtedly overstates the value of the land as of the proper valuation date of August 1998, because land values in January 1990 were at the peak of what had been a rising real estate market since at least August 1998.

144 In his calculation of the loss of equity of Martinvale Estates and Newmarket Golf Club, Mr. Phillips arbitrarily picks the mid-point of Mr. Roth's valuations and then uses a statement of net worth dated December 8, 1988 for the benchmark values of the other assets of the corporations. Apart from the fact that, once again, the wrong valuation date is selected, the statement of net worth is useless and has no probative value in the exercise of determining the benchmark value for the before-and-after theory. The net worth statement was probably prepared by Mr. Martin, but he did not recall it. And if he was the source of the valuations in the net worth statement, he did not justify those values and whether the values were realistic or just wishful thinking remains a mystery.

145 My own assessment is that the proof offered by Mr. Phillips is useless and his, Mr. Roth's, and Mr. Martin's testimony was inadequate to establish a proper valuation of the losses of Martindale Estates and Newmarket Golf Club at the valuation date of August, 1988.

146 Still putting aside the matter of the claim 412-414 Jarvis Street, Toronto, transaction, this last conclusion is obviously fatal to Mr. Martin's claim in the immediate action. However, the claims might have been moribund anyway because in determining what the corporations lost, it is necessary to deduct or not include losses from "pre-Goldfarb and non-Axton transactions."

147 Based on the evidence, I heard at the trial, and recalling that Martindale Estates or Newmarket Golf Course had historically covered the losses of associated corporations, I assess the losses associated with "pre-Goldfarb and non-Axton transactions" as having a value of approximately $10 million broken down as follows:

(a) The loss on the St. Petersburg, Florida project was about $1.0 million.

(b) The investment with Dr. Kerr for his plastic engine was a loss of approximately $3.0 million, and may have been more, because mortgages registered to Dr. Kerr or to members of his family totaled $4.6 million.

(c) The investment in the Kingston Road project was about a $5.0 million loss, having regard to the wasted expense of the construction contract and the purchase price.

(d) The operating losses of the nursing home, retirement home, or group home businesses were about a $1.0 million.

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148 As a possible additional "non-Axton transaction," there is the circumstance that Mr. Martin's corporations had historically overcome cash flow problems and the operating losses of the nursing, retirement, and group homes by selling or mortgaging assets. With the benefit of hindsight, it can be said that independent of the activities of Mr. Axton, this business strategy entails that Mr. Martin's corporations would have been confronted with the problem of weathering the economic storm of the early 1990's, when land values plummeted and interest rates soared. While Mr. Martin's enterprises had survived previous storms of the economy, they were not at the same time engaged in an aggressive business expansion program that was rife with problems and whose financial success was unproven.

149 The idea that Mr. Martin's corporations' descent into bankruptcy was caused by an inability to weather the economic storm was pursued by the cross-examination of Mr. Martin, but he refused to even admit that the high interest rates would have been a problem. Nevertheless, I think that there is considerable strength in the idea that the economic conditions of the 1990's are a source of loss that is independent of Mr. Axton's activities and Mr. Goldfarb's breach of fiduciary duty. However, I am unable to quantify the amount of this loss.

150 I asked Mr. Adair, Mr. Goldfarb's counsel, whether the losses from some Axton transactions "post-Goldfarb" should also be deducted from the calculation of loss attributable to Mr. Goldfarb's breach of fiduciary duty, and he answered in the negative. My own view, however, is that this answer may be incorrect. To illustrate, although 412-414 Jarvis Street was an Axton-touched transaction, given Mr. Martin's expansionary mood, it is quite possible that Mr. Martin would have proceeded with this transaction with other partners, as he did with the St. Petersburg, Florida project. Put somewhat differently, the losses arising from the Jarvis Street project or from Hawkesbury Villas, Preston Springs, and University Avenue, Windsor may be attributable to bad business decisions and not fraudulent activities of Mr. Axton or his cronies. In any event, based on the evidence and Mr. Adair's concession, I cannot quantify this possible source of loss.

151 It may be that the "pre-Goldfarb and non-Axton transactions" would have by themselves eroded much of the value of the assets of Martinvale Estates and Newmarket Golf Club. However, apart from $10 million of losses, I am unable to derive a figure for the losses from these transactions. All I can say is that there are substantial losses that Mr. Martin cannot connect to Mr. Goldfarb's breach of fiduciary duty. More to the point, he has not quantified any loss attributable to the breach of fiduciary duty. I conclude that an assessment of damages or equitable compensation based on the before-and-after theory fails

152 The claim for compensation based on the Jarvis Street transactions falls next to be considered.

153 I have reviewed the facts associated with this transaction above, and will not repeat them here save to highlight three facts: (i) the loss caused by the flip was $425,000; (ii) the $425,000 loss was suffered by 412-414 Jarvis Street Properties Limited, not by Martindale Estates; and (iii) Martindale Estates incurred a contingent liability of $875,000 by providing collateral security for the loan from the Royal Bank that funded the third mortgage for the Jarvis Street property.

154 The authority of the rule from *Foss v. Harbottle*, *supra*, discussed earlier in the context of the Court of Appeal's first judgment in the 1990 Action, applies again, and Martinvale Estates cannot claim the $425,000 loss directly suffered by 412-414 Jarvis Street Properties Limited.

155 As for its own direct loss, while Martinvale Estates guaranteed repayment of the $875,000 loan made by the Royal Bank and provided collateral security, there was no evidence that Martinvale Estates paid anything on this contingent liability, and thus this potential source of damage was not developed factually at the trial and is, therefore, not recoverable. See *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (Ont. C.A.) at p. 180 and *Martin v. Goldfarb* (2003), 68 O.R. (3d) 70 (Ont. C.A.) at para. 10.

The Plea of Contributory Negligence

156 This brings me to the matter of Mr. Goldfarb's plea that Mr. Martin was contributorily negligent and that the principles of contributory negligence should be applied in the context of a claim for breach of fiduciary duty.

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157 Since a fiduciary relationship presupposes a vulnerable or reliant person who is the beneficiary of the relationship and a fiduciary who is obliged to act loyally and in the interest of the beneficiary, I have doubts about whether it is appropriate to apply the principles of contributory negligence in this context. However, having regard to my conclusions that Mr. Martin's claim should be dismissed on the basis of a technical defence and on the grounds of inadequacy of proof, it is not necessary, nor, in my view, is it desirable to say anything more the merits of this plea.

158 I simply note that the following authorities were relied on, largely by analogy, to advance the argument that the plea was tenable in law: *M. Tucci Construction Ltd. v. Lockwood*, [2000] O.J. No. 3192 (Ont. S.C.J.), affd. [2002] O.J. No. 424 (Ont. C.A.); and *Hartum v. Sitko*, [2004] A.J. No. 1327 (Alta. Q.B.).

Conclusion

159 For the reasons set out above I dismiss Mr. Martin's action brought as the assignee of Martinvale Estates and Newmarket Golf Club.

160 The final matter to resolve is the issue of costs, including the costs of the withdrawn defence of Ms. Aleksandra Kurowska-Barrie. If the parties cannot agree about these matters, then they may make submissions to me in writing, beginning with Mr. Martin's submissions within 45 days of the release of these Reasons for Judgment, to be followed by Mr. Goldfarb's submissions within a further 15 days. Mr. Martin has a right to reply within a further 10 days.

Action dismissed.

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2006 BCSC 1192
British Columbia Supreme Court

Royal Bank v. United Used Auto & Truck Parts Ltd.

2006 CarswellBC 1943, 2006 BCSC 1192, [2006] B.C.W.L.D. 5536, [2006] B.C.W.L.D. 5549, [2006] B.C.W.L.D. 5550, [2006] B.C.J. No. 1178, 151 A.C.W.S. (3d) 931, 24 C.B.R. (5th) 102

Royal Bank of Canada (Petitioner) and United Used Auto & Truck Parts Ltd. and Others (Respondents)

Century Services Inc. (Petitioner) and VECW Industries Ltd. and Others (Respondents)

E. Rice J.

Heard: June 5-8, 2006
Judgment: August 3, 2006*
Docket: Vancouver H990076, H990085

Counsel: W.A. Pearce, QC for Applicant, Mr. Mott
K. Jackson, D. Westgeest (Articled Student) for PricewaterhouseCoopers Inc.

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

Headnote

Bankruptcy and insolvency --- Administration of estate — Trustees — Removal

Bankrupt had acquired almost 150 acres of land prior to bankruptcy — In 2000, bankrupt was declared bankrupt and trustee in bankruptcy was appointed — Certain portions of bankrupt's lands were sold, all with vigorous opposition from bankrupt — Bankrupt commenced two actions against purchasers and trustee claiming damages for breach of trust, deceit and conspiracy, alleging that court-approved sales were not made in good faith for valuable consideration and that purchasers were not bona fide purchasers for value — First action was dismissed as abuse of process, and second action, which was identical to first action in all material respects, was dismissed on basis of res judicata — Bankrupt sought removal of trustee so that new trustee could advance claim on bankrupt's behalf — Bankrupt brought application for removal of trustee for alleged breaches of fiduciary duty — Application dismissed — Cause of action proposed and issues sought to be advanced arose from same relationship and same subject matter as was adjudicated in previous proceedings — Bankrupt had opportunity to raise issues as interested party during sale approval applications — Bankrupt was unsuccessful in seeking leave to appeal approvals of sale — Evidence in hands of bankrupt was discoverable with reasonable diligence prior to sale approval proceedings and bankrupt's two unsuccessful actions — Evidence offered by bankrupt in opposition to proposed sales included all allegations in case at bar, and would constitute re-litigation of same issues — Proposed action barred in its entirety by doctrine of issue estoppel — If requirements of issue estoppel had not been strictly met, proposed action would have been dismissed as abuse of process and impermissible collateral attack on previous judgments — Special circumstance did not exist to warrant refusal to apply estoppel.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Introduction — Where abuse of process

Bankrupt had acquired almost 150 acres of land prior to bankruptcy — In 2000, bankrupt was declared bankrupt and

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trustee in bankruptcy was appointed — Certain portions of bankrupt's lands were sold, all with vigorous opposition from bankrupt — Bankrupt commenced two actions against purchasers and trustee claiming damages for breach of trust, deceit and conspiracy, alleging that court-approved sales were not made in good faith for valuable consideration and that purchasers were not bona fide purchasers for value — First action was dismissed as abuse of process, and second action, which was identical to first action in all material respects, was dismissed on basis of res judicata — Bankrupt sought removal of trustee so that new trustee could advance claim on bankrupt's behalf — Bankrupt brought application for removal of trustee for alleged breaches of fiduciary duty — Application dismissed — Cause of action proposed and issues sought to be advanced arose from same relationship and same subject matter as was adjudicated in previous proceedings — Bankrupt had opportunity to raise issues as interested party during sale approval applications — Bankrupt was unsuccessful in seeking leave to appeal approvals of sale — Evidence in hands of bankrupt was discoverable with reasonable diligence prior to sale approval proceedings and bankrupt's two unsuccessful actions — Evidence offered by bankrupt in opposition to proposed sales included all allegations in case at bar, and would constitute re-litigation of same issues — Proposed action barred in its entirety by doctrine of issue estoppel — If requirements of issue estoppel had not been strictly met, proposed action would have been dismissed as abuse of process and impermissible collateral attack on previous judgments.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Bankrupt had acquired almost 150 acres of land prior to bankruptcy — In 2000, bankrupt was declared bankrupt and trustee in bankruptcy was appointed — Certain portions of bankrupt's lands were sold, all with vigorous opposition from bankrupt — Bankrupt commenced two actions against purchasers and trustee claiming damages for breach of trust, deceit and conspiracy, alleging that court-approved sales were not made in good faith for valuable consideration and that purchasers were not bona fide purchasers for value — First action was dismissed as abuse of process, and second action, which was identical to first action in all material respects, was dismissed on basis of res judicata — Bankrupt sought removal of trustee so that new trustee could advance claim on bankrupt's behalf — Bankrupt brought application for removal of trustee for alleged breaches of fiduciary duty — Application dismissed — Cause of action proposed and issues sought to be advanced arose from same relationship and same subject matter as was adjudicated in previous proceedings — Bankrupt had opportunity to raise issues as interested party during sale approval applications — Bankrupt was unsuccessful in seeking leave to appeal approvals of sale — Evidence in hands of bankrupt was discoverable with reasonable diligence prior to sale approval proceedings and bankrupt's two unsuccessful actions — Evidence offered by bankrupt in opposition to proposed sales included all allegations in case at bar, and would constitute re-litigation of same issues — Requirements of issue estoppel met for each issue raised in proposed claim and sufficient connection existed to create privity — Proposed action barred in its entirety by doctrine of issue estoppel.

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Generally — referred to

Rules considered:

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R. 19(24) — referred to

App. B, s. 2(2)(c) — referred to

APPLICATION by bankrupt for order removing trustee in bankruptcy for alleged breaches of fiduciary duty.

***E. Rice J.*:**

Introduction

1 This is an application for an order pursuant to s. 14.04 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), removing PricewaterhouseCoopers ("PWC") as trustee in bankruptcy for United Used Auto & Truck Parts Ltd., Seiler Holdings Ltd., and VECW Industries Ltd., and United Used Auto Parts (Storage Div.) Ltd. (together "United"), and appointing George Abakhan, licensed trustee, in its place.

2 The applicant is Ian Mott, an officer, director, major shareholder, and creditor of one or more of the United companies. The sole purpose of the application is to provide creditors of United with a trustee that has the capacity to sue PWC for alleged breaches of fiduciary duty as trustee of the bankrupt estate and court-appointed receiver of the assets of the estate.

3 The application arises from the court-approved sales of certain lands owned by United in Surrey, B.C. (the "United Lands"). In particular, it concerns a sale in 2001 to the Pacific National Exhibition (the "PNE") of lots 3 to 6 and 8 to 20 of the United Lands (the "PNE Lands").

4 It is alleged that PWC, as United's trustee and receiver, failed in a fiduciary duty owed to United's creditors to maintain and enhance the value of the United Lands and to obtain a fair price on the sales. PWC denies these allegations and contends

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in any event that any legal action commenced now on those claims is *res judicata* and so barred either because the claims have been adjudicated in this Court before or because Mr. Mott should have but failed to raise them in earlier court proceedings.

5 The parties sought and obtained directions from Mr. Justice Tysoe on April 12, 2006. His Lordship directed that PWC was at liberty to raise the issue of *res judicata* on this application in advance of determining whether to replace PWC as United's trustee.

Background

6 For many years, United operated a used auto parts business in Surrey, B.C. near the Patullo Bridge. It managed at the same time to assemble about 150 acres of land, some of which it used in its auto parts business, and some it kept vacant for redevelopment. This activity all took place under the direction of Mr. Mott.

7 As far back as 1994, United was under pressure of foreclosure of the United Lands from the Royal Bank. In May of that year, to forestall foreclosure, United entered into a forbearance agreement whereby the bank agreed to forbear from foreclosing until May of 1997. The agreement was extended a number of times through to 1998.

8 Beginning in about June 1997, the PNE and United had discussions on and off about the sale to PNE of the PNE Lands.

9 In March 1998, United entered into another forbearance agreement with another charge holder on the United Lands, R.A. Aziz. By that agreement, United was required to put the United Lands on the market for sale and undertake an aggressive sales and marketing program. United entered into a one-year listing agreement with Colliers.

10 Meanwhile, in about January 1998, United had made an informal proposal to the secured creditors whereby United would sell $25 million worth of the United Lands by September 1998. In that time, however, there were no sales.

11 In September 1998, three years of taxes were unpaid on the United Lands, and United obtained financing through another charge holder, Century Services. With that, United owed the Royal Bank about $6 million, Century Services about $5 million, Aziz about $6 million, and there were also other charges over the United Lands.

12 The Royal Bank and Century commenced foreclosure proceedings in January 1999. They obtained orders nisi on February, 4 1999.

13 United resisted applications for conduct of sale by the mortgagees in early 1999. It entered into another forbearance agreement with Aziz. The agreement included a repayment plan that required United to achieve various sales targets or a refinancing of the property by July 1999. United failed to meet the targets and sold none of the properties. In about July 1999, United consented to an order granting joint conduct of sale of the United Lands to the Royal Bank, Century, and Aziz.

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14 On August 16, 1999, Century and the Royal Bank obtained an appraisal from Burgess, Austin, Cawler & Associates valuing the United Lands at $44.4 million based on industrial-salvage zoning. The appraisal was updated on September 23, 1999, valuing the lands at $23 million to $25 million if sold en bloc and $30.5 million if sold in individual lots. Century and the Royal Bank then agreed to list the United Lands for $32 million en bloc. Accordingly, on October 12, 1999, they entered into a listing agreement putting the asking prices at $49.6 million in total based on selling the lots individually and $32 million on an en bloc basis.

15 On November 8, 1999, United commenced proceedings under the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). Ernst & Young was appointed as a monitor and was granted conduct of sale of the United Lands.

16 On February 23, 2000, in the CCAA proceeding, the court approved a sale of the United Lands to Cape Developments, Oxford Properties, and GE Capital for $30 million. That sale was subject to two conditions: first, that Cape could rezone the property, and second, that Cape could be satisfied of the environmental condition of the property. Cape never cleared its conditions, and although an extension was negotiated, Cape failed to increase the deposit in accordance with the extension agreement. In the result, that transaction collapsed.

17 Meanwhile, on April 27, 2000, CB Richard Ellis provided a report for Mr. Mott valuing part of the United Lands, consisting of lots 22 through 32 (the "Group Five Lands"), at $28,400,000 based on highway-commercial zoning. A letter from Mr. Ellis to Mr. Mott on May 23, 2000, stated that the total United Lands excluding the Group Five Lands were worth $750,000 to $800,000 per acre.

18 In May 2000, Ernst & Young issued its ninth monitor's report. It was negative about United's conduct and ability to organize. The report stated that the prospects for restructuring appeared to be significantly poorer than when the Cape offer had been accepted earlier in the year.

19 The monitor remained of the view that United's operations could be financially viable in due course under competent management. However, the monitor accused Mr. Mott of improperly dealing with funds generated from the sale of its "P.M.S.I." inventory, which should have been held strictly in trust. The report stated:

> It is common ground that the management of United lacks the skills to achieve the restructuring without significant professional assistance. However, even that professional assistance is without effect if management is not prepared to accept and execute professional advice it received in a prompt and efficient manner.

The report also alleged that United had filed a false affidavit and had breached a court order not to give further security.

20 In June 2000, Mr. Justice Tysoe granted the Royal Bank and Century conduct of sale of the United Lands, and they entered into a further listing agreement with Colliers to list the lands en bloc for $32 million as well as on an individual lot basis. The CCAA proceedings were terminated the next month. United was declared bankrupt, and PWC was appointed as the trustee in bankruptcy. United appealed, but the appeal was dismissed on August 8, 2000. PWC was later replaced as the

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trustee for United Used Auto Parts (Storage Div.) Ltd., but remained in that position for the rest of the United companies.

21 By this time, the administrative charges on the United Lands had risen to approximately $850,000. The interest costs on the mortgages were running at about $300,000 per month. In August 2000, Mr. Justice Tysoe approved the sale of lot 1 of the United Lands for $2.4 million, and on September 1, 2000, he appointed PWC as the receiver of the assets and undertaking of United with conduct of sale of all but lots 1, 7, and the Group Five Lands. Conduct of sale of lot 1 and the Group Five Lands remained with the Royal Bank and Century. Lot 7 was the subject of a separate foreclosure proceeding and was sold on November 27, 2000, to a numbered company owned by Advance Lumber for $2,525,000.

22 On February 6, 2001, PWC, acting as the receiver, filed applications under the Royal Bank and Century foreclosure actions for an order for sale of the PNE Lands and the right to purchase lot 2 for $12,572,600. The purchaser was a numbered company controlled by the PNE. PWC also applied for an order that lot 21 be sold to a numbered company related to Ralph's Auto Supply for $1,250,000.

23 Mr. Ritchie Clark appeared as counsel for Mr. Mott and for United itself on the sale applications. Although he brought no counter-application on behalf of United, Mr. Clark objected to the sale on several grounds, including alleged failures by PWC to adequately inform the other parties as to who were the purchaser's backers, to provide information on the negotiation history, to properly market the property, and to obtain a price at fair market value. Mr. Clark applied for an adjournment, which was refused, and Mr. Justice Shaw approved the sales on February 9, 2001. Later that month, Mr. Justice Tysoe granted PWC conduct of sale of the Group Five Lands.

24 On March 9, 2001, Mr. Mott sought leave to appeal the orders for sale granted by Mr. Justice Shaw. The application was dismissed.

25 The original sale of the PNE Lands to the PNE failed to close because the PNE wished to also acquire lot 7, which had been sold to Advance Lumber in a separate foreclosure proceeding. However, on May 11, 2001, PWC brought another application based on a renewed agreement with the PNE. It was for an order that the PNE Lands and the right to purchase lot 2 be sold to the PNE for $12,572,600 and that lots 27 to 32 (the "Replacement Lands"), which formed part of the Group Five Lands, be sold to a company related to Advance Lumber for $2,146,000. On May 15, 2001, after a hearing May 11 and 14, 2001, Mr. Justice Thackray approved these sales.

26 Mr. Mott and his son, Howard Mott, appeared at the hearing before Mr. Justice Thackray without counsel and made submissions opposing the sale. They requested an order directing a trial on the issue of constructive expropriation, but made no formal application to support the order. Mr. Justice Thackray dismissed their request, saying that such an application was not technically before him. Mr. Justice Thackray found further that the Motts had failed to establish a foundation for their allegations of conspiracy and fraud.

27 Mr. Mott sought leave to appeal Mr. Justice Thackray's ruling, but his application was dismissed on May 18, 2001. A further application by Mr. Mott to vary the Court of Appeal's order of May 18, 2001, and to stay Mr. Justice Thackray's orders approving the sales was similarly dismissed by the Court of Appeal on May 20, 2001.

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28 After completion of the sale of the PNE Lands, the court made further orders granting Aziz conduct of sale of the remainder of the Group Five Lands, being lots 22 to 26. In about August 2002, the court made a vesting order in the foreclosure actions, approving the sale of lot 24 to Ralph's Auto Supply for $1,130,000. On October 3, 2003, Mr. Justice Tysoe granted a vesting order approving the sale of the remaining lots 22, 23, 25, and 26 to R & R Trading Co. Ltd. for $2,644,800.

The First Mott Action

29 On May 31, 2000, Mr. Mott, on behalf of himself and Moe-Villa Investments Ltd., a fourth mortgagee of the United Lands, commenced B.C. Supreme Court Action No. S013035 (the "First Mott Action") against the PNE, PWC, and Advance Lumber. Concurrently, he filed certificates of pending litigation against 24 lots within the United Lands. His claim was for damages for breach of trust, deceit, and conspiracy. He alleged that the court-approved sales were not made in good faith for valuable consideration and that the defendant purchasers were not *bona fide* purchasers for value.

30 The endorsement on the writ provided:

> Moe-Villa Investments Ltd. claim a mortgage over the lands... and claim its security interest in the land which is being compromised by the tortuous [*sic*] and deceitful conduct of the Defendants in this action and in Supreme Court of B.C. action numbers H99076 and H99085. Ian Mott claims damages and title of the lands is being wrongfully [*sic*] transferred away by errors of the court and the parties to the action participated and wrongfully dealt in ways to deprive the Plaintiffs of their interest in the lands as set out in the attached schedules... These lands are being taken without proper compensation to the Plaintiffs. Fair market value was not paid by the purchasers presently on title... The Plaintiffs claim against the Defendants, and each of them, for damages [*sic*] and loss resulting from, breach of trust, deceit, and conspiring to transfer to the Defendant purchasers P.N.E...., 617548 B.C. LTD., ADVANCE LUMBER LTD. and 606703 B.C. LTD. the aforesaid interests in parcels of land unlawfully for less than fair market value, and contrary to the *Bankruptcy and Insolvency Act, R.S.C.* and the *Company Act, R.S.B.C.* The Defendants conspired to depress the market value of the lands and the Defendant purchasers obtained the lands the lands [*sic*] and interests in the lands owned by the Plaintiffs for less than true market value. The said purchases of lands were not made in good faith for valuable consideration and the Defendant purchasers are not bona fide purchasers for value.

31 PWC applied to dismiss that action as an abuse of process, and the application was heard before Madam Justice Allan on August 23, 2001. Madam Justice Allan, upon reading the materials and hearing argument, ruled that all the issues in the new action had either been raised or should have been raised in the previous sale approval proceeding before Mr. Justice Thackray, who had dismissed the allegations of conspiracy as groundless.

32 Included in her findings of fact and law were the following:

> [para. 8]... Mr. Mott's son made extensive submissions on that application, alleging serious improprieties by the Receiver and the P.N.E. Specifically, Mr. Mott alleged a conspiracy between the Receiver and the P.N.E., to have the P.N.E. obtain land at price advantageous to the P.N.E., and disadvantageous to Mr. Mott.
>
> [para. 22]... In essence, the plaintiffs seek the return of the lands, and damages to compensate them for the Receiver selling those lands to the P.N.E. for less than fair market value, and deceitfully.
>
> [para. 25]... the plaintiffs filed additional affidavits asserting that Colliers did not permit prospective purchasers of the

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> lands to make offers because Colliers was reserving certain parcels for purchase by the P.N.E.
>
> [para. 26]... The plaintiffs suggest that numerous matters were not before Mr. Justice Thackray, and that with respect to some issues, he was confused and did not understand them.
>
> [para. 31]... Mr. Mott seeks to pursue the claim that the defendants acted wrongfully and deprived the plaintiffs of their lands without proper compensation. He alleges the lands were "wrongfully transferred away by errors of the courts."
>
> [para. 33] Both plaintiffs claim for damages as a result of the defendants' breach of trust, deceit, and conspiracy to depress the market values of the lands. Mr. Mott alleges a wrongful sale of the lands, and seeks to have those transactions reversed.
>
> [para. 34] These issues have all been raised in previous proceedings and litigated. There are no new parties to the litigation. There is no "fresh evidence" that was not or could not have been discovered in previous litigation. The proposed evidence of Mr. Seilor and Mr. Lutor who were apparently unsuccessful in making offers to purchase portions of the lands does not raise a new issue.
>
> [para. 35] Mr. Justice Thackray devoted 18 paragraphs of his careful and lengthy reasons for judgment to the alleged conspiracy alleged by Mr. Mott, and dismissed it as groundless.
>
> [para. 37] The PNE has been judicially determined to be a bona fide purchase for value. Allegations against Advance Lumber cooperating with PNE and Colliers, the realtor acting as agent for PWC, were canvassed before Thackray J. and have no merit.
>
> [para. 38] I conclude that the plaintiff's application is an abuse of process and should be dismissed pursuant to Rule 19(24)(d).
>
> [para. 45]... So, pursuant to Rule 19(24), there will be two orders of special costs.

The Second Mott Action

33 On June 13, 2001, Mr. Mott commenced another action, B.C. Supreme Court Action No. S013957 (the "Second Mott Action"), against the existing and additional defendants. He filed certificates of pending litigation against the Group Five Lands. A similar application was made to strike the action under Rule 19(24) as an abuse of process. It was heard on September 26, 2002, before Mr. Justice Davies, who found that the endorsement in the Second Mott Action was "virtually identical" to the endorsement on the First Mott Action. Mr. Justice Davies held that because the Second Mott Action was "in all material respects identical to an action which has already been struck by this court as an abuse of process, it must be dismissed on the basis of *res judicata*."

The Proposed Statement of Claim

34 In the proposed action underlying the application before me, the claims against PWC are detailed in a draft statement of claim submitted on behalf of Mr. Mott. As a pleading it is overloaded with redundancies, evidence, and conjecture, but it also manifests a number of allegations, which may be excerpted as follows:

Proposed Statement of Claim

Statement of Claim Para. No.	**Allegation:**
4-5	PWC accepted appointment as Trustee and failed to disclose to the court and United's creditors its conflict in dealing with the PNE sale when PWC was also the auditor for PNE. PWC should never have accepted an appointment as Receiver because of the conflict that existed between the interests of the

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	secured creditors and unsecured creditors.
6-7, 18	PWC failed to exercise its duty to take reasonable care, supervision and control of the debtor's property, specifically by failing to preserve the values of the property and enhance those values where it would have been prudent and feasible, and by failing to market the properties in a manner which would achieve the best possible price. PWC failed to appear at a public hearing in Surrey, July 31, 2000, to oppose a down zoning to remove salvage use from land zoned "Industrial Salvage" ("I.S."). PWC could have opposed the down zoning successfully on the basis that the down zoning constituted contravention of an agreement between the United and the City of Surrey in 1985. PWC knew or ought to have known that the proposed down zoning was part of a plan by Surrey to upgrade the use of the area where the United Lands were situate for commercial use, and it knew that commercially zoned lands were much more valuable than lands zoned for salvage or lands zoned for industrial use.
8-9	PWC failed to take reasonable steps to enhance the value of the subject lands before placing them on the market for sale by applying for a rezoning of the subject lands for commercial use or by not requesting Surrey counsel on July 31, 2000 to postpone the final passage of the down zoning to give it an opportunity to prepare rezoning applications.
10, 18	PWC locked the doors of the twelve business operations of United and proceeded to liquidate the assets without any prior notice to United, knowing that closing the businesses would put into jeopardy the nonconforming use of the United Lands and the premium value associated with that use, and knowing that United was revitalizing its business and the CCAA monitor's forecast income from operations would amount to approximately $866,000. PWC caused United to lose profits from the time of business closure to the present and in the future.
11	PWC listed the properties of United for sale without first taking advantage of the material change in Surrey's planning objectives to upgrade the area for commercial use and when it set an en bloc listing price of $32 million dollars which was an unconscionably low price having regard to the fair market value of the properties if sold as individual lots.
12	PWC failed to list the properties on MLS in a timely fashion and discouraged offers from potential purchasers who were interested in acquiring individual lots, with a view to accommodating the wishes of PWC's client, the PNE, which needed a large assembly of land to stay in place while it was in the process of deciding on its own site relocation. PWC failed to obtain a fair and reasonable return for the sale of the United Lands over reasonable period of time on a program that would give the properties as broad exposure as possible and encourage sales of individual lots but at the same time allowing consideration of en bloc offers that included premiums for the value of large blocks of land.
13	PWC failed to secure access as to the individual lots or to commence proceedings to enforce contractual rights claiming damages,, with the result that the lots bordering on the perimeter road were sold for substantially less than fair market value.
17	PWC sold the PNE Lands to the PNE for $12,572,600 based on a price of $185,000 per acre, which was substantially less than fair market value, knowing at the time that the PNE had secured the necessary commitment from the City of Surrey to rezone the subject lands for commercial purposes, and that if the lands were rezoned, their value would more than triple the price that was agreed upon. PWC further failed to take into account the following: (a) the earlier expressions by the PNE of its willingness to pay full market value; (b) the scarcity of large blocks of land that would suit the needs of the PNE, and the fact that the PNE Lands were the PNE's first choice of all potential sites it had reviewed over a number of years; (c) the fact that the PNE was under a time constraint to acquire lands for a new site because of the expiry of an existing lease; (d) the fact that the Province of British Columbia, which owned the PNE, had the financial ability to pay not only full market value but a premium as well.
20	PWC entered into a tri-partite agreement with PNE and Advance Lumber whereby PWC sold six lots (the "Replacement Lands") from the Group Five area to Advance Lumber, and Advance sold lot 7 of the United Lands to the PNE, and failed to advise the court of the following: (a) its conflict of interest in dealing with the PNE, an important client of PWC; (b) information regarding the commitment that Surrey had made to rezone the lands to permit commercial use, including a casino;

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(c) the sale price of Lot 7, which would have provided the court with a good indicator of the value of the PNE Lands;
(d) information about PWC's failure to take appropriate steps to preserve and enhance property values and to market the properties in a manner to achieve the best possible price;
(e) information as to its complete failure to drive a hard bargain with the PNE.

21 PWC also breached its fiduciary duty by:
(a) misinforming the court of the proper status for the zoning of the Replacement Lands and misinforming the court that salvage use on the subject lands would not likely be permitted by Surrey when PWC knew the opposite to be true;
(b) discouraging the court from placing any value on an offer for one of the lots in the Replacement Lands which reflected a premium value based on the intended salvage use;
(c) misinforming the court that United's inventory had been sold off;
(d) misinforming the court that the sale price for the Replacement Lands was approximately $10,000 below market value when in fact a fair price for the Replacement Lands may well had been in excess of $2 million above the actual sale price;
(e) misinforming the court that the Group Five Lands had been actively marketed for a long time before the agreement and purchase of sale to Advance was entered into.

22 PWC failed to make the PNE accountable for the difference between the fair market value of the Replacement Lands and the actual sale price of the same.

23 PWC failed to obtain the best possible price for the remaining lots by setting a low benchmark in the sale of the Replacement Lands, in causing those lots bordered on the perimeter road to lack access, and failing to secure commercial zoning or to commence salvage operations to preserve the nonconforming salvage premium.

The Doctrine of Res Judicata

35 In British Columbia, applications to have actions dismissed on the basis of *res judicata* are brought under Rule 19(24), which enables the court to dismiss an action if it is "unnecessary, scandalous, frivolous, or vexatious", or is "otherwise an abuse of the process of the court."

36 The doctrine of *res judicata* and the related rules against abuse of process and collateral attack are designed to ensure that once a cause of action or the issues within it have been finally determined by the courts, they cannot be brought forward again. The goal is to bring litigation between two parties to a definitive end and to prevent one party from pursuing the other in the courts more than once over the same cause or the same issues: *Fenerty v. Halifax (City)* (1920), 53 N.S.R. 457, 50 D.L.R. 435 (N.S. C.A.). Other policy reasons underlying the doctrine are to prohibit duplicative litigation and avoid potentially inconsistent results, undue costs, and inconclusive proceedings: *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (S.C.C.).

37 In *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544 (S.C.C.) at p. 555, Dickson J. explained the operation of the doctrine of *res judicata* and its two main branches: cause of action estoppel and issue estoppel. He wrote:

> In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel *per rem judicatam*. This form of estoppel, as Diplock L.J. said in *Thoday v. Thoday* [[1964] P. 181.], at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. ... The second species of estoppel *per*

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> *rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation* [(1921), 29 C.L.R. 537.], at p. 561:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

(a) Cause of Action Estoppel

38 Cause of action estoppel applies to bar proceedings that allege the same cause of action between the same parties if that cause has already been determined by the courts. However, despite its name, it is not so strictly limited. Cause of action estoppel also applies to bar subsequent proceedings covering the same subject matter and arising out of the same relationship between the parties, even though the second litigation may be based on a different legal description or conception of the cause: *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.* (1980), 19 B.C.L.R. 59, 109 D.L.R. (3d) 729 (B.C. C.A.), at pp. 64 -65, cited with approval in *Chapman v. Canada*, 21 B.C.L.R. (4th) 272, 2003 BCCA 665 (B.C. C.A.) at para. 17.

39 This broader definition of cause of action estoppel recognizes that parties to an action have a duty to bring their whole case to the court's attention and not to reserve some aspect of the matter against the possibility of a decision in the opponent's favour as a means of preserving a way to come at the opponent again. As Wigram V.C. explained in *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 (Eng. V.-C.), at 319:

> In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, in which the parties exercising reasonable diligence, might have brought forward at the time.

40 This description of the doctrine was quoted with approval by our Court of Appeal in *Lehndorff Management*, *supra*, where Carrothers J.A. gave the following further explanation of the doctrine's scope:

> The maxim *res judicata* does not apply to distinct causes of action (*Hall v. Hall and Hall's Feed & Grain Ltd.* (1958), 15 D.L.R. (2d) 638 (Alta.C.A.)), but it does apply where the second action arises out of the same relationship, and the same subject matter, as the adjudicated action, although based upon a different legal conception of the relationship between the parties (*Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C.C.A.)). It also applies not only to points on which the court in the first action was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the first litigation and which the parties, exercising reasonable diligence, might have brought forward at the time (*Winter v. Dewar*, 41 B.C.R. 336, [1929] 2 W.W.R. 518, [1929] 4 D.L.R. 389 (C.A.)).

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41 Where a party seeks to pursue a second action against the same foe, the court must be satisfied that the new cause of action alleged is truly separate and distinct from the old, and not merely a new portrayal of the same subject matter, such as tort rather than contract. Litigants may not simply characterize the facts of the first action in a different way to avoid the application of *res judicata.*

42 PWC cites *M.R.S. Trust Co. v. 374961 B.C. Ltd.*, 31 B.C.L.R. (3d) 247, [1997] B.C.J. No. 13 (B.C. S.C. [In Chambers]), for its similarities to the case at bar. M.R.S. brought foreclosure proceedings on a mortgage in default against Giovanni Zen, a covenantor under the mortgage. Zen was represented at the hearing for an order nisi and conduct of sale of the property. The court ordered personal judgment against Zen at that time.

43 Zen subsequently commenced an action claiming breach of contract, breach of trust, and breach of a duty of care arising from M.R.S.'s conduct during the foreclosure proceedings. Zen claimed that following the hearing, he had ceased to be a party to the foreclosure proceedings and was unable to protect his interest in seeing that the highest price possible was obtained for the property. M.R.S., in turn, sought a declaration that Zen's action was estopped by the doctrine of *res judicata*.

44 The court held that Zen did not cease to be a party to the foreclosure proceedings. As a party with a vital interest at stake, he had standing to seek the court's assistance in obtaining the maximum sale price. Because the same parties were involved, the doctrine of *res judicata* could apply. The facts upon which Zen based his claims were all known before the order approving the sale was granted. Additionally, the issue that Zen sought to raise, that is, M.R.S.'s alleged failure to ensure the maximum possible price, was before the court at the earlier hearing. The court found that secondary issues relating to the sale price, such as waste, vandalism, and security issues, were relevant to the issues to be decided in the foreclosure and should have been raised at that time. The court stated at para. 37:

> To Zen's contention that his claim is in tort and is therefore a distinct cause of action from the issues on the foreclosure the short answer is that the subject matter, the sale of the property, and the duties of M.R.S. (if such they were) were all matters within the competence and purview of the Court in the foreclosure. Recasting these issues in positive terms as a "duty" on the part of M.R.S. does not create a fundamentally different cause which could be separately litigated.

(b) Issue Estoppel

45 The second branch of the doctrine of *res judicata* prevents litigants from attempting to re-litigate the same point or issue against the same party even though the overall cause of action now being pursued may be different. Where a material fact or issue in a proceeding has already been determined by a court of competent jurisdiction, that fact or issue may not be attacked or thrown into dispute in subsequent proceedings among the same parties: *Danyluk*, *supra*, at para. 54.

46 In *Danyluk* and *Angle*, *supra*, and the Supreme Court of Canada adopted the three-part test for issue estoppel first framed by Lord Guest in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)* (1966), [1967] 1 A.C. 853 (U.K. H.L.) at p. 935:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in

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> which the estoppel is raised or their privies.

47 Issue estoppel applies to any issue of fact, law, and mixed fact and law that is necessarily bound up with the determination of that issue in a prior proceeding: *Danyluk*, *supra*, at para. 54. However, it acts to bar further proceedings on such issues only in circumstances where it is clear from the facts that the question has already been decided: *R. c. Van Rassel*, [1990] 1 S.C.R. 225, 53 C.C.C. (3d) 353 (S.C.C.) at para. 32.

Abuse of Process

48 As Madam Justice Allan did in the First Mott Action, the court may, in the alternative to applying the doctrine of *res judicata*, apply the doctrine of abuse of process, which was recently restated by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.) at para. 35:

> Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
>
>> ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

49 The doctrine of abuse of process is more flexible than *res judicata* and is typically invoked where the requirements of issue estoppel are not strictly met, yet it is apparent that the applicant is attempting to re-litigate a matter or to otherwise undermine the consistency and finality of judicial decision-making.

Collateral Attack

50 Another closely related doctrine to that of *res judicata* or abuse of process is the rule against collateral attack on final judgments. In *R. v. Wilson*, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577 (S.C.C.), the Supreme Court of Canada stated the rule as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

51 In *Roeder v. Lang Michener Lawrence & Shaw*, 2005 BCSC 1784, [2005] B.C.J. No. 2830 (B.C. S.C.) at para. 23, Rogers J. stated:

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> A proceeding is a collateral attack when it asserts facts inconsistent with a previous factual determination by a court that had jurisdiction to make it, or when the proceeding seeks relief that is inconsistent with a previous disposition by a similarly competent court. To be a collateral attack it is not necessary that the proceeding bluntly assert that the previous order should be set aside.

52 Thus, if the present proceedings are found to be a collateral attack on the orders of Justices Shaw, Tysoe, Thackray, Allan, or Davies, or on any of the orders of the Court of Appeal refusing Mr. Mott leave to appeal, the proposed action may be struck as an abuse of the court's process.

Discretion for Special Circumstances

53 The application of an estoppel to bar future litigation is not automatic, nor is it guaranteed. As Finch J.A. (as he then was) explained in *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1, 159 D.L.R. (4th) 50 (B.C. C.A.) at para. 32:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of judicial discretion to achieve fairness according to the circumstances of each case.

54 The same principle applies to cause of action estoppel and the doctrines of *res judicata*, abuse of process, and collateral attack in general. A court must retain a residual discretion to refuse to apply any form of estoppel when do to so would be contrary to the requirements of justice. As the Supreme Court of Canada explained in *Danyluk*, *supra*, at para. 33: "The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case."

Position of United

55 United argues that the breaches of fiduciary duty alleged against PWC have not been raised before now and so constitute a new cause or causes of action that must be brought before the court for resolution.

56 According to United, the only issue before Mr. Justice Thackray during the applications for approval of sales of the United Lands was whether or not a fair price had been secured in all of the circumstances. It says that the court was not asked to consider what duty of care the receiver had with respect to preserving the goodwill of the business and the property, nor was the court asked to consider the nature of the duty of the receiver to achieve the best possible price, a duty that United says was owed to all interested parties, including the bankrupt and the shareholders of the bankrupt. The court was not called upon to make a ruling whether the receiver had breached its fiduciary duty to preserve the property and to achieve the highest price for the property. Therefore, a person appearing at the applications for approval could not possibly succeed on a request for a trial so that such allegations could be judicially determined, and neither of the parties could have reasonably expected that that the outcome of the sale approval would bar a future action for breach of fiduciary duty. United relies on the comments of Finch J.A. (as he then was) in *Bugbusters*, *supra*, to argue that a reasonable expectation of that kind is required before a party can be estopped from pursuing further action.

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57 Referring to *Bennett on Receiverships*, 2nd ed, (Toronto: Carswell, 1999) at p. 182-83 and p. 247, United says that the courts will generally follow the recommendation of a receiver and leave it to the receiver to assess offers to purchase a debtor's assets, accepting that the price put forward by the receiver is the best possible price obtainable. It is uncertain whether United means to imply that the court did not apply itself to the independent duty that it has to ensure a fair price during the sale approval proceedings. Certainly the implication seems to be that the court did not seriously consider the issues related to PWC's wrongful conduct, which Mr. Mott raised during the sale approval hearings.

58 United contends that due to the summary nature of the proceedings, which does not permit oral or documentary discoveries or interrogatories, Mr. Justice Thackray was not in a position to judge the sufficiency of the evidence relating to these allegations of wrongdoing. It is on this basis that United distinguishes the case of *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]), in which *res judicata* was found to apply to claims of breach of duty and negligence against a receiver that had been the subject of detailed evidence and full argument in an earlier proceeding.

59 United argues that it never had the opportunity to bring forward its claims of breach of fiduciary duty. Even if Mr. Justice Thackray had directed a trial as Mr. Mott had requested, the issue of breach of fiduciary duty could not have been tried at that time as it had no relationship whatever to constructive expropriation, which was the basis advanced for the deceit and conspiracy claims.

60 Moreover, United says that although Mr. Justice Thackray was entitled to refuse to order a trial of the issue, the reasons that he provided with respect to allegations of conspiracy and fraud had no judicial weight because he had already determined that the issue was not properly before him. United says that Madam Justice Allan was therefore wrong in her view that Mr. Justice Thackray had considered all of the issues, that it was wrong for Mr. Justice Davies to concur, and that it would be wrong for this court to make a similar finding with respect to the allegations and issues in the proposed statement of claim.

61 United argues that both Madam Justice Allan and Mr. Justice Davies should have recognized that the evidence required to succeed in the claim of constructive expropriation would not be sufficient to support a claim of conspiracy, which necessitated a new action against PWC. United claims that this was confirmed by Mr. Justice Thackray when he expressed his view that the matter was not before him. According to United, a tort of conspiracy requires collusion and an agreement of the parties acting together to injure an individual. That is distinct from what is required to prove a constructive expropriation, on the grounds advanced before Mr. Justice Thackray, and it is different again from what is required to prove a breach of fiduciary duty, on the grounds alleged in this action.

62 United cites *Caswan Environmental Services Inc., Re*, 287 A.R. 11, 2001 ABQB 240 (Alta. Q.B.) at p. 197, as support for its contention that the courts have recognized the impracticality, for the sake of justice, of forcing certain actions to be tried together:

> The principle of avoiding litigation by installment [*sic*] must be tempered by practical considerations. The plaintiff's original application for declaratory relief would have bogged down the judicial process if it were coupled with an action for resultant damages. Common sense dictates that a determination as to the validity of the competing security interests should have been made before a damage claim was advanced. ... It is unlikely that any court would have granted leave to

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sue an interim receiver for damages until a declaration as to the entitlement of the goods was made. In practical terms there was no way in which a damage claim could have proceeded contemporaneously with the declaratory relief sought.

63 United also says that Madam Justice Allan should have realized that she could dispose of the First Mott Action on the basis of lack of jurisdiction, and had she done so, *res judicata* would not arise to bar the proposed claims. According to United, because it was bankrupt, the *BIA* dictates what proceedings could be brought to set aside a sale, and leave was required, but not obtained, to begin the First Mott Action. As the *BIA* provides a complete code on the subject, United says Madam Justice Allan could, and should, have concluded that there was no jurisdiction to hear the action. The same argument appears to be made against the decision of Mr. Justice Davies in the Second Mott Action.

64 On the question of mutuality of parties, United argues that the proposed action involves different parties in that Mr. Abakhan, as the new trustee for United, would bring the action against PWC itself for acts and omissions committed when acting as both receiver and trustee. United says that the previous actions involved PWC only as a representative of United. Moreover, on the application for a trial of the issue of constructive expropriation, Mr. Mott represented himself personally, and United was not represented at the hearings, thus according to United, the parties to the various proceedings are not the same and no estoppel may bar the proposed action.

65 Finally, United asserts that the proposed action is based on new evidence that could not have been discovered with reasonable diligence at or before the earlier proceedings. Alternatively, United argues that this new evidence constitutes a "special circumstance" sufficient to permit the court to refuse to apply an estoppel should grounds for one be made out. United describes the new evidence as follows:

(a) information that prior to entering into the agreement of purchase and sale with the PNE, Surrey had made a commitment to the Province to re-zone the lands to permit commercial use of the PNE Lands including a casino;

(b) information about the sale price of lot 7 from Advance Lumber to the PNE, which would have provided the court with a good indicator of value;

(c) information showing the lack of any offers and counter-offers leading up to the agreement of purchase and sale with respect to the PNE which is evidence from which an inference can be drawn that PWC failed in its duty to aggressively seek the best possible price; and

(d) evidence which demonstrates the ease with which PWC was able to commence a salvage parts operation on lot 24 to maintain salvage zoning for that lot and evience from which the court can infer the court was misled by PWC as to the non-salvage use of the Replacement Lands.

Position of PWC

66 PWC says that the complaints in the proposed statement of claim are essentially the same as those that were raised in the sale approval proceedings and also in both the First and Second Mott Actions. The Mott Actions were not confined to allegations of conspiracy. They included claims of breach of trust and deceit. PWC prepared a list of passages from the affidavits and submissions filed in the sale approval application before Mr. Justice Thackray and in the First Mott Action before Madam Justice Allan, as well as quotations from the learned justices' judgments, which demonstrate that the issues now raised were all before the court in those earlier proceedings. These passages are as follows:

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(a) "the receiver... is seemingly beholden to making a transaction with the P.N.E. to the detriment of the interest of the United Group creditors." (May 10, 2001, affidavit of Ian Mott, para. 49)

(b) the Trustee seems only to be interested in serving only the interests of the secured creditors, the Royal Bank and Century Services and includes Aziz in this group. (May 10, 2001, affidavit of Ian Mott, para. 56; May 14, 2001, submissions of H. Mott, page 26, lines 2-5)

(c) "The Trustee's actions, taken individually and as a whole unreasonably favor the interests of the PNE and are a betrayal of his duty to the interests of the ordinary creditors. The Trustee as appointed auditor of the PNE is favoring the interests of the PNE and as Trustee in Bankruptcy of the United Group defrauding the ordinary and other creditors." (May 10, 2001, affidavit of Ian Mott, para. 61; May 14, 2001, submissions of H. Mott, page 27, lines 32-39)

(d) "... United's interests and those of the secured and unsecured creditors who will not be paid by the sale to the P.N.E. are not being properly served by the trustee who ought to be acting in good faith and without any appearance of conflict. The fact is that the trustee PricewaterhouseCoopers (P.W.C.) is both a trustee of the United Group of Companies in bankruptcy as well as the appointed auditors of the P.N.E." (May 10, 2001, affidavit of Ian Mott, para. 64; May 14, 2001, submissions of H. Mott, page 28, lines 29-37)

(e) "... we don't think the trustee is acting on behalf of the best interests of all the creditors. We feel he's acting only in the interest of the major secured creditors." (May 14, 2001, submissions of H. Mott, page 16, lines 19-23)

(f) "... it's not clear to me that the trustee is representing the unsecured creditors at all." (May 14, 2001, submissions of H. Mott, page 49, lines 25-27)

(g) "... the trustee and receiver, for any bankruptcy, never mind one as big as this, and as complex as this, should never be in conflict. They should be totally independent parties..." (May 14, 2001, submissions of I. Mott, page 49, lines 36-40)

(h) "the Motts questioned the propriety of the PricewaterhouseCoopers being both the receiver and the trustee." (May 15, 2001, reasons for judgment of Thackray J., para. 7)

(i) "[Mr. Mott's] submission was grounded upon assertions of improprieties. The Court on several occasions informed Mr. Mott that to establish the improprieties, that went so far as to allege fraud, it was necessary for him to produce evidence." (May 15, 2001, reasons for judgment of Thackray J., para. 50)

(j) Mr. Mott then deposed as to the 'inappropriate actions' of the trustee and concluded that the trustee was intent on raising quick liquid cash to finance his receivership and sought the easy route of disposing of the inventory and chattels of the businesses for a value 'well below its actual market value.' He added:

> 61. The Trustee's actions, taken individually and as a whole unreasonably favour the interests of the PNE and are a betrayal of his duty to the interests of the ordinary creditors. The Trustee as appointed auditor of the PNE is favouring the interest of the PNE and as Trustee in Bankruptcy of the United Group defrauding the ordinary and other creditors.

I asked Mr. Mott if I was correct in reading this to mean that Mr. Mott was alleging fraud on the part of the trustee. He said that I was. (May 15, 2001, reasons for judgment of Thackray J., paras. 65 and 66)

(k) "... in recommending this sale at what we now realize was a grossly inadequate sum, the Receiver had a duty to the Court to disclose its own conflict of interest. Unknown to Mr. Clark and his client and not disclosed to the Court was the fact that the Receiver was and remains this purchaser's auditors." (May 2001, Outline of I. Mott, page 6, par. 2(aa))

(l) "The Plaintiffs claim against the Defendants, and each of them, for damages and loss resulting from breach of trust, deceit, and conspiring to transfer to the Defendant purchasers... the aforesaid interests in parcels of land

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> unlawfully for less than fair market value... The Defendants conspired to depress the maket [*sic*] of the lands and the Defendant purchasers obtained the lands the lands [*sic*] and intersts [*sic*] in the lands owned by the Plaintiffs for less than true market value." (Endorsement to Amended Writ of Summons dated August 15, 2001, in the First Mott Action)

> (m) "The relief which the Plaintiffs seek in the present action is the return of the subject lands to the United Group... and for additional damages, including the loss of profits suffered by the Plaintiffs which resulted from wrongful interference with contractual arrangements, misrepresentations, deceit, breach of trust and other illegal actions on the part of the Defendants..." (August 18, 2001, affidavit of Ian Mott sworn in the First Mott Action, para. 6)

> (n) "... the PNE, Colliers International, the Receiver/Trustee (PricewaterhouseCoopers Inc.), the City of Surrey, the Province of B.C., Golders Associates, and others have worked in concert to frustrate and prevent fair value marketing of the subject lands by delaying the public listing of the individual lots until December 200, by discouraging prospective purchasers from making offers, and by refusing to process offers on the subject lands from prospective purchasers." (August 18, 2001, affidavit of Ian Mott sworn in the First Mott Action, para. 14)

> (o) "[Mr. Mott is] claiming damages, once the land's returned, for the improper conduct. He's alleging for the first time breach of trust, deceit. The word "conspiring" or "conspiracy" has come up in his mind and from his mouth before without him even knowing the meaning of that. The — what he's saying is that, according to his affidavit evidence, is that the Royal Bank, Century Services, the receiver, Advance Lumber, the Aziz group and the PNE in particular, have worked together to transfer the lands to the PNE, and of course to Advance in this case, for amounts that clearly are not anywhere near the fair market value, and they've done so deceitfully, and that is dishonestly." (August 22, 2001, submissions of P. Formby, counsel for Mr. Mott, in the First Mott Action, page 51, lines15-29)

> (p) "And that history, I'd like to be very clear, I don't think it's ever been properly presented before the court. And — and to do it properly, It would take a trial, and the simply cases with respect to what there — what happened thereafter with the — I would say the powerful players as opposed to those that didn't have any power with respect to the conduct of the receiver in an application, what will be alleged obviously, you know, is that there's grave misgivings with respect to the duty, the fiduciary duty of the receiver being breached, where there's an application I believe where the Royal Bank to have this particular receiver appointed, PricewaterhouseCoopers. And this is a court appointed receiver that should know of its particular duty with respect to all interested parties, not just to secured creditors." (August 22, 2001, submissions of P. Formby in the First Mott Action, page 66, lines 32-45)

> (q) "Both plaintiffs claim for damages as a result of the defendants' breach of trust, deceit, and conspiracy to depress the market values of the lands. Mr. Mott alleges a wrongful sale of the lands, and seeks to have those transactions reversed." (August 23, 2001, reasons for judgment of Allan, J., para. 33)

> (r) "[PWC] had a duty to pursue... the contract that [the United Group] had with the City of Surrey." (September 26, 2002, submissions of I. Mott in the Second Mott Action, pages 32-33)

67 PWC submits that Mr. Mott should not be permitted to continue to litigate these same claims simply by recasting his grievance as a breach of fiduciary duty owed by PWC, or even by introducing some new fact. PWC argues that this amounts to litigating by instalment, and the court ought not to permit it or force PWC to bear the hardship resulting from having to defend further litigation: *Melcor Developments Ltd. v. Edmonton (City)* (1982), 37 A.R. 532, 136 D.L.R. (3d) 695 (Alta. Q.B.)

68 In response to Mr. Mott's argument before Madam Justice Allan that some of the allegations were never "properly framed in any type of claim other than in opposition to the sale of the lands" and so no cause of action was ever advanced against PWC in the prior proceedings, PWC argues that any of the issues now raised are issues that either were raised or should have been raised in any event because they formed part of the same subject matter of the earlier litigation: See

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Henderson and *Chapman*, *supra.*

69 PWC contends that each of the allegations of misconduct on the part of PWC as trustee and receiver were raised in affidavits and argument during the sale approval proceeding and that these allegations were fundamental to Mr. Justice Thackray's decision in that he could not have approved the sale if he found that any of these allegations had merit. As the sale was approved, the issues must be deemed to have been finally determined: *Toronto Dominion Bank*, *supra*, citing *Bank of America Canada v. Willann Investments Ltd.*, 23 C.B.R. (3d) 98, [1993] O.J. No. 3039 (Ont. Gen. Div.)

70 On the issue of mutuality of the parties, PWC says, firstly, that mutuality is not lost by replacing PWC with Mr. Abakhan as the trustee in bankruptcy for United. Regardless of what individual or company is acting as trustee, the trustee was a party to the foreclosure actions and certainly had the opportunity to appear on the relevant hearings. Whether or not it chose to do so is, according to PWC, irrelevant; a party is bound by a decision in which they could have participated: *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 22 B.C.L.R. (2d) 89, 47 D.L.R. (4th) 431 (B.C. S.C.), at 438.

71 PWC also argues that there is no loss of privity because of the fact that Mr. Mott purported to appear on his own behalf as a creditor and shareholder of United in some of the proceedings and on behalf of United itself in others. PWC argued that according to the judgment of Mr. Justice Tysoe in *Lang Michener v. American Bullion Minerals Ltd.*, 2006 BCSC 504, [2006] B.C.J. No. 685 (B.C. S.C.), there is a residual power in the directors of a company to oppose the enforcement of security on behalf of a company, and this is clearly what Mr. Mott was doing. In doing so, Mr. Mott raised any and all arguments that could have been made on behalf of the trustee and the estates of the bankrupt companies.

72 Accordingly, PWC argues that the parties to the proposed action are the same as were parties to the previous proceedings, and mutuality is not lost. PWC relies on Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at p.1088, where the learned editors note that: "it is impossible to be categorical about the degree of interest which will create privity." Mutuality will arise where there is "a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party."

73 As regards any special circumstances, PWC cautions that the courts have treated the discretion to refuse to apply *res judicata* as a very limited one, and "the fact that harsh results follow the application of the doctrine has not deterred its application by the courts": *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385 (S.C.C.); *Manolescu v. Manolescu*, 47 C.B.R. (4th) 77, 2003 BCSC 1094 (B.C. S.C.) at para. 10.

Analysis

74 For all the details provided in the proposed Statement of Claim as to the wrongdoing of PWC, I agree with the submission of PWC that, essentially, the claims sought to be advanced boil down to the following:

(a) PWC as receiver failed to obtain the best possible price for the sale of the United Lands, which were worth more than the amount for which they were sold;

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(b) the PNE was the audit client of PWC, and, as a result of that relationship, PWC was in a conflict of interest and participated in a conspiracy with the PNE and the City of Surrey (among others) to sell the United Lands to the PNE at less than fair market value;

(c) PWC failed to preserve the industrial-salvage zoning of some of the lots in the United Lands, resulting in a reduction of the value of those lots;

(d) PWC failed to apply for rezoning of some of the United Lands to highway-commercial, such that the potential value of the United Lands was not realized; and

(e) PWC failed to market the United Lands properly.

75 In my view, the cause of action proposed in the draft statement of claim, and the issues sought to be advanced, arise from the same relationship and the same subject matter as was adjudicated in the proceedings before Mr. Justice Thackray, Madam Justice Allan, and Mr. Justice Davies. The facts and issues now raised were squarely before the court in the sale approval proceeding and in both Mott Actions.

76 Mr. Mott admits that he had the opportunity to be heard, and was heard, as an interested party during the sale approval applications before Mr. Justice Thackray. Mr. Mott argued strenuously that the sale ought not to be approved. In his submissions and affidavit evidence, he put before the court each of the allegations regarding PWC's conduct that are set out above as being the issues to be determined in the proposed action, including specifically the alleged conflict of interest, conspiracy to sell at less than fair market value, and each failure to perform those actions that would have resulted in obtaining the best possible price for the United Lands. I cannot accede to United's contention that it had no opportunity to make these claims.

77 As Madam Justice Allan noted, Mr. Justice Thackray issued lengthy and carefully considered reasons for his decision to approve the sale. Leave to appeal was sought and dismissed. These same arguments were again brought before Madam Justice Allan and then again before Mr. Justice Davies. Both found that the issues had been litigated and determined such that it would be an abuse of the court's process to review them once again. No appeal was taken of either of these decisions.

78 Mr. Mott now advances a few items of evidence that apparently did not come into his hands until after the two Mott Actions were concluded. I find that some of this evidence was discoverable with reasonable diligence prior to the sale approval proceedings and certainly prior to the Mott Actions. The rest I do not weigh as critical. Although it may not have been discoverable prior to the sale approval proceeding, it does not bring to light any new issue or cause of action formerly unknown or unpursued by Mr. Mott, nor is it likely that this evidence would have substantially altered the outcome of the previous proceedings.

79 While it is correct to say that breach of fiduciary duty, constructive expropriation, and conspiracy are each distinguishable as causes of action, the record shows that the evidence and argument offered to oppose the sale in the hearing before Mr. Justice Thackray included all of the allegations that Mr. Mott would now seek to prove in the case at bar. The same is true for both the Mott Actions, in which the claim alleged was not conspiracy alone but also breach of trust and deceit, which require much the same evidence as against PWC as the breaches of fiduciary duty now alleged. Any minor differences in the facts and issues raised in the proposed action belonged, in every case, to the subject matter of the earlier litigation. Mr. Mott has simply changed the legal description of his claim to facilitate re-litigation of the same issues.

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80 I also accept PWC's argument that the requirements of issue estoppel are met for each issue now raised in the proposed statement of claim. There is sufficient connection to create privity. The appointment of a new trustee will not undermine the mutuality of parties required for the application of issue estoppel to the issues in the proposed action. The parties involved in all the previous proceedings include PWC, United, and Mr. Mott as either named parties or interested parties. The fact that Mr. Mott appeared variously in his capacity as shareholder, creditor, or director of United does not, in my view, seriously affect the mutuality requirement in this case. As Mr. Mott concedes that the previous decisions were final, and as I have found that the same issues were litigated, the proposed action is barred in its entirety by the doctrine of issue estoppel.

81 However, even if the requirements of issue estoppel were not strictly met, I would dismiss the proposed action as an abuse of process and impermissible collateral attack on the judgments of Mr. Justice Thackray, Madam Justice Allan, and Mr. Justice Davies. Many of United's arguments are directed at challenging various aspects of Madam Justice Allan and Mr. Justice Davies' reasons for judgment. Yet Mr. Mott does not appear to have attempted an appeal of either decision. He has chosen instead to recast his claim yet again to avoid the outcome of those judgments.

82 Mr. Mott raises an interesting argument that the summary nature of an application for sale ought to be considered a "special circumstance" leading the court to refuse to apply an estoppel that would bar a trial of an action where the evidence may be much more thoroughly tested. The record shows, however, that this same argument was presented to Mr. Justice Thackray and Madam Justice Allan and was not accepted by either of them. The court, by its own account, carefully addressed the issues arising between these parties, even though the issues were brought forward in a summary proceeding.

83 As regards the argument that Madam Justice Allan should have disposed of the action on the basis of lack of jurisdiction, clearly that is an issue that should have been put before Madam Justice Allan with resort to the Court of Appeal if necessary. It is not an issue for this court to resolve in the case at bar.

84 Similarly, as to the statements in Mr. Justice Thackray's reasons for judgment with respect to the allegations of fraud and conspiracy and his refusal to direct a trial on the issue of constructive expropriation, Mr. Mott was entitled to seek leave to appeal that decision and did so. The Court of Appeal dismissed his leave application. Mr. Mott then applied further to stay the decision and vary the order of the Court of Appeal. Again, his application was dismissed. It is not for this court to sit in further judgment of the sufficiency and accuracy of those reasons or the orders they support.

85 Nothing advanced in the current proceeding or sought to be advanced in the proposed action alters the fact that all the material facts and issues underlying the breaches of duty now alleged were raised, considered, and rejected either explicitly or implicitly in the finding that the sales of the United Lands were made for fair market value through an appropriate process approved by the court.

86 Two judges of this court have declared that to adjudicate further on the matters brought before the court in the First and Second Mott Actions would be an abuse of process. Nothing arises in the present proceedings to change that view. I can find no special circumstances sufficient to militate against the application of the doctrines of *res judicata*, abuse of process, and collateral attack. Mr. Mott has had the opportunity to have his objections to the sale and his allegations of misconduct by PWC heard. This is a strong case for bringing finality to the litigation. To allow the trustee to commence the proposed action would be inconsistent with three previous orders of this court, and I can find no compelling reason for taking such a course.

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Conclusion

87 Mr. Mott's overriding contention has been that the United Lands were sold at less than fair market value for wrongful reasons. The court rejected that contention expressly in the sale approval application before Mr. Justice Thackray. Two other judges have declined to permit that claim and its related issues to be re-litigated. In my view, the claims sought to be pursued are *res judicata* and an abuse of process.

88 The sole reason for the application to remove PWC as trustee was to provide United with a trustee that had the capacity to sue PWC so that these same issues could be re-opened. As there is no reason to re-open the claims, there is no reason to remove PWC as trustee at this time. The application is dismissed with costs as scale 3.

Application dismissed.

Footnotes

* A corrigendum issued by the court on August 16, 2006 has been incorporated herein.

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2003 SCC 63
Supreme Court of Canada

Toronto (City) v. C.U.P.E., Local 79

2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 SCC 63, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 31 C.C.E.L. (3d) 216, 59 W.C.B. (2d) 334, 9 Admin. L.R. (4th) 161, J.E. 2003-2108, REJB 2003-49439

Canadian Union of Public Employees, Local 79, Appellant v. City of Toronto and Douglas C. Stanley, Respondents and Attorney General of Ontario, Intervener

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: February 13, 2003
Judgment: November 6, 2003 *
Docket: 28840

Proceedings: affirming (2001), 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40 (Ont. C.A.); affirming (2000), 23 Admin. L.R. (3d) 72 (Ont. Div. Ct.)

Counsel: Douglas J. Wray and Harold F. Caley for appellant
Jason Hanson, Mahmud Jamal and Kari M. Abrams for respondent City of Toronto
No one for respondent Douglas C. Stanley
Sean Kearney, Mary Gersht and Meredith Brown for intervener Attorney General of Ontario

Subject: Labour; Criminal; Civil Practice and Procedure; Public; Evidence

Headnote

Labour law --- Labour arbitrations — Jurisdiction of arbitration board — Scope — Jurisdictional error — Exceeding jurisdiction

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Labour law --- Labour arbitrations — Review of award — Judicial review — General principles

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Practice --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Nature of prior proceedings — Criminal

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As

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matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Practice --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Introduction — Where abuse of process

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Practice --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Administrative law --- Standard of review — General principles

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Droit du travail collectif --- Arbitrages relatifs aux relations de travail — Compétence du tribunal d'arbitrage — Étendue — Erreur de compétence — Excès de compétence

Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de l'employé et son défaut de le faire a rendu manifestement déraisonnable sa décision finale, soit que l'employé avait été congédié sans cause.

Droit du travail collectif --- Arbitrages relatifs aux relations de travail — Contrôle de la décision arbitrale — Contrôle judiciaire — Principes généraux

Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de l'employé et son défaut de le faire a rendu manifestement déraisonnable sa décision finale, soit que l'employé avait été congédié sans cause.

Procédure --- Jugements et ordonnances — Chose jugée et préclusion découlant d'une question déjà tranchée — Chose jugée — Nature des procédures antérieures — Procédures pénales

Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre

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Procédure --- Jugements et ordonnances — Chose jugée et préclusion découlant d'une question déjà tranchée — Chose jugée — Introduction — Lorsqu'il s'agit d'un abus de procédure

Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de l'employé et son défaut de le faire a rendu manifestement déraisonnable sa décision finale, soit que l'employé avait été congédié sans cause.

Procédure --- Jugements et ordonnances — Chose jugée et préclusion découlant d'une question déjà tranchée — Préclusion découlant d'une question déjà tranchée — Principes généraux

Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de l'employé et son défaut de le faire a rendu manifestement déraisonnable sa décision finale, soit que l'employé avait été congédié sans cause.

Droit administratif --- Norme de contrôle — Principes généraux

Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de l'employé et son défaut de le faire a rendu manifestement déraisonnable sa décision finale, soit que l'employé avait été congédié sans cause.

A municipality employed O as a recreation instructor. O was charged with the sexual assault of a boy under his supervision. O was convicted following a trial by judge alone. The trial judge found that O was not credible. The conviction was affirmed on appeal.

The municipality fired O a few days after his conviction. O grieved his dismissal. At the grievance hearing, the municipality submitted the complainant's testimony from the criminal trial and the notes of O's supervisor, who had spoken to the complainant at the time. The municipality did not call the complainant to testify. O testified that he did not sexually assault the complainant.

The grievance arbitrator ruled that the criminal conviction was admissible as prima facie, though not conclusive, evidence that O had sexually assaulted the complainant. No new evidence or evidence of fraud at trial was introduced at the arbitration. The arbitrator held that the presumption raised by the criminal conviction was rebutted and that O had been dismissed without cause.

The municipality applied for judicial review of the arbitrator's decision. The application was granted. The union appealed and the appeal was dismissed. The union appealed.

Held: The appeal was dismissed.

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Per Arbour J. (McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie JJ. concurring):

The doctrine of abuse of process applied to bar the relitigation of O's conviction. O was convicted in a criminal court and he has exhausted all his avenues of appeal. O's conviction had to stand, with all its consequent legal effects. As a matter of law, the arbitrator was required to give full effect to the conviction and, in failing to do so, he erred in law and reached a patently unreasonable conclusion. The evidence before the arbitrator could lead him to conclude only that the municipality had established just cause for O's dismissal.

The standard of review for the arbitrator's decision regarding whether the union was entitled to relitigate the issue decided against O in the criminal proceeding was correctness. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is complex and lies at the heart of the administration of justice. The application of the governing principles of res judicata and abuse of process is clearly outside the sphere of expertise of a labour arbitrator.

The doctrine of issue estoppel did not apply in this case because the requirement of mutuality of parties had not been met. Furthermore, a reversal or relaxation of the long-standing application of the mutuality requirement was not necessary. The primary concerns in this case were the integrity of the criminal process and the authority of a criminal verdict, and not some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple vexation.

Similarly, the doctrine of collateral attack, which focuses on the order itself and its legal effect, was not responsive to the real concerns at play in this case. The union's position was an implicit attack on the correctness of the factual basis of the decision in the criminal proceeding, not a contest about whether that decision had legal force, which it clearly did.

The primary focus of the doctrine of abuse of process is the integrity of the adjudicative function of the courts. The motive of the party who seeks to relitigate and whether he or she is a plaintiff or a defendant are not decisive factors in the application of the bar against relitigation. An attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum is improper. Relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that doing so will enhance the credibility and effectiveness of the adjudicative process as a whole, such as, for example, when the first proceeding is tainted by fraud or dishonesty or when new evidence, previously unavailable, conclusively impeaches the original result.

The common law doctrines of issue estoppel, collateral attack, and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse, as the Court of Appeal did, a self-standing and independent finality principle either as a separate doctrine or as an independent test to preclude relitigation.

Per LeBel J. (concurring) (Deschamps J. concurring): The case was appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of collateral attack and issue estoppel. The appropriate standard of review for whether a criminal conviction may be relitigated in a grievance proceeding is correctness. That question is one of law and requires an arbitrator not only to interpret the Ontario Labour Relations Act and the Ontario Evidence Act but also to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue at the heart of the administration of justice.

The arbitrator's decision that O's criminal conviction could be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. The arbitrator's failure to do so was sufficient to render patently unreasonable his decision that O had been dismissed without cause, a decision within the arbitrator's area of specialized expertise and reviewable on a deferential standard.

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In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. In this case there were two standards of review at play. On the fundamental legal question of whether O's criminal conviction could be relitigated, the arbitrator was subject to a standard of correctness. On the question of whether O had been dismissed for just cause, a question at the core of the arbitrator's expertise, the standard was patent unreasonableness. The arbitrator's failure to decide correctly the fundamental relitigation question was sufficient to lead to a patently unreasonable outcome. The application of the patent unreasonableness standard is not, however, predicated on a finding of incorrectness.

In obiter it was noted that the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Patent unreasonableness has, at times, shaded uncomfortably into what should presumably be its antithesis, the correctness review. It is also becoming increasingly difficult to distinguish patent unreasonableness from its ostensibly less deferential counterpart, reasonableness simpliciter. Although an intermediate standard of reasonableness simpliciter appears to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation, that advantage is outweighed by the drawbacks of the current framework, including the overlap between patent unreasonableness and reasonableness simpliciter, and the difficulty caused by the interplay between patent unreasonableness and correctness. On the assumption that an effective distinction between an unreasonable and a patently unreasonable decision can be made, there are situations in which an unreasonable decision must be allowed to stand, that is, when the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. It is doubtful that such an outcome could be reconciled with legislative intent. It remains to be seen whether, in an attempt to solve these difficulties, courts should move to a two-standard system of review of correctness and a revised, unified standard of reasonableness.

O travaillait pour la municipalité à titre d'instructeur en loisirs. Il a été accusé d'avoir agressé sexuellement un garçon sous sa surveillance. O a été déclaré coupable au terme de son procès devant juge seul. Le juge du procès a conclu que O n'était pas crédible. La déclaration de culpabilité a été subséquemment confirmée en appel.

La municipalité a congédié O quelques jours après sa condamnation. O a déposé un grief contestant son congédiement. Au cours de l'audition du grief, la municipalité a mis en preuve le témoignage du plaignant durant le procès ainsi que les notes du superviseur de O, lequel avait parlé avec le plaignant à l'époque de l'agression. La municipalité n'a pas fait témoigner le plaignant. O a témoigné qu'il n'avait pas agressé sexuellement ce dernier.

L'arbitre de grief a jugé que la déclaration de culpabilité était admissible comme preuve prima facie que O avait agressé sexuellement le plaignant, mais qu'il ne s'agissait cependant pas d'une preuve concluante. Au cours de l'arbitrage, il n'a été présenté aucune preuve nouvelle ni de preuve que le procès était entaché de fraude. L'arbitre a conclu que l'on avait repoussé la présomption découlant de la déclaration de culpabilité et que O avait été congédié sans cause.

La municipalité a demandé le contrôle judiciaire de la décision arbitrale. La demande a été accueillie. Le syndicat a interjeté appel et son pourvoi a été rejeté. Le syndicat a interjeté appel.

Arrêt: Le pourvoi a été rejeté.

Arbour, J. (McLachlin, J.C.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, JJ., souscrivant à l'opinion d'Arbour, J.): La doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité de O. Ce dernier a été condamné par une cour pénale et avait utilisé tous les moyens d'appel dont il disposait. Sa condamnation était valide et devait recevoir son plein effet. L'arbitre avait l'obligation, en droit, de lui donner plein effet. Il a commis une erreur de droit en omettant de le faire, ce qui lui a fait faire une erreur manifestement déraisonnable. La preuve qu'on lui avait présentée lui permettait simplement de conclure que la municipalité avait établi la cause justifiant le congédiement de O.

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La norme de la décision correcte était la norme de contrôle applicable à la décision de l'arbitre qui déterminait si le syndicat pouvait demander la remise en cause de la déclaration de culpabilité. Le droit en matière de remise en cause de questions ayant fait l'objet de décisions judiciaires définitives antérieures est complexe et il joue un rôle central dans l'administration de la justice. L'application des principes de la chose jugée et de l'abus de procédure échappe clairement au domaine d'expertise des arbitres du travail.

La doctrine de la préclusion découlant d'une question déjà tranchée ne s'appliquait pas en l'espèce puisque l'exigence requérant la réciprocité des parties n'était pas respectée. Rien ne justifiait non plus de supprimer ou d'assouplir l'exigence de la réciprocité, établie depuis longtemps. En l'espèce, l'intégrité du processus pénal et l'autorité d'un verdict de culpabilité étaient les considérations primordiales, et non certaines des préoccupations plus traditionnelles de la préclusion découlant d'une question déjà tranchée où l'accent est mis sur l'intérêt des parties, comme les dépens et les incidents vexatoires multiples.

De la même façon, la doctrine de la contestation indirecte, qui se concentre surtout sur l'ordonnance elle-même et ses effets, ne répondait pas adéquatement aux préoccupations réelles de l'espèce. Par sa position, le syndicat attaquait implicitement le bien-fondé factuel de la décision en matière pénale; il ne contestait pas la validité juridique de celle-ci, puisqu'elle était manifestement valide.

La doctrine de l'abus de procédure vise principalement l'intégrité de la fonction décisionnelle des tribunaux. Tant les raisons pour lesquelles une partie cherche à obtenir la remise en cause d'une décision que la question de savoir s'il s'agit de la partie plaignante ou défenderesse ne constituent aucunement des éléments décisifs de l'application de l'interdiction de remettre en cause. Il n'est pas approprié d'essayer de contester une décision judiciaire par le biais de la voie interdite de la remise en cause devant un autre forum. La remise en cause a de graves effets préjudiciables et il faut l'éviter à moins que les circonstances ne l'exigent, parce qu'elle est nécessaire pour accroître la crédibilité et l'efficacité du processus décisionnel dans son ensemble, comme lorsque le premier procès est entaché de fraude ou de malhonnêteté ou lorsqu'il existe une nouvelle preuve, qui n'était pas disponible auparavant, permettant d'attaquer de façon concluante le résultat initial.

Les doctrines de common law que sont la préclusion découlant d'une question déjà tranchée, la contestation indirecte et l'abus de procédure répondent adéquatement aux préoccupations qui surgissent lorsqu'il faut pondérer le principe de l'irrévocabilité des jugements et celui de l'équité envers un justiciable particulier. Il n'est donc pas nécessaire, comme l'a fait la Cour d'appel, d'ériger le principe de l'irrévocabilité en doctrine distincte ou critère indépendant pour interdire la remise en cause.

LeBel, J. (souscrivant) (Deschamps, J., souscrivant à l'opinion de LeBel, J.): L'affaire a été à bon droit décidée sur la base de la doctrine de l'abus de procédure, et non sur la base des doctrines plus étroites et techniques que sont la contestation indirecte et la préclusion découlant d'une question déjà tranchée. La norme de la décision correcte était la norme de contrôle applicable à la question de savoir si l'on pouvait remettre en cause une déclaration de culpabilité dans le cadre de procédures d'arbitrage. Il s'agit d'une question de droit qui requiert non seulement que l'arbitre interprète la Loi sur les relations de travail et la Loi sur la preuve, mais également qu'il détermine si certaines doctrines de common law portant sur la remise en question étaient applicables, une question qui était centrale à l'administration de la justice.

L'arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de O pouvait être remise en cause dans le cadre de la procédure d'arbitrage. Il avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de O. Son défaut de le faire suffisait pour rendre manifestement déraisonnable sa décision voulant que O ait fait l'objet d'une congédiement sans cause, décision qui se situait par ailleurs à l'intérieur de son expertise spécialisée et qui ne pouvait être révisée que sur la base d'une norme exigeant la retenue.

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Le tribunal qui révise une décision en fonction de la norme de la décision manifestement déraisonnable n'a pas à identifier quel est le résultat « correct ». En l'espèce, deux normes de contrôle se confrontaient. En ce qui concernait la question fondamentale de savoir si la déclaration de culpabilité de O pouvait être remise en cause, la norme applicable était celle de la décision correcte. Quant à la question de savoir si O avait été congédié pour cause, une question se situant au coeur de l'expertise de l'arbitre, la norme applicable était celle de la décision manifestement déraisonnable. Le défaut de l'arbitre de trancher correctement la question de la remise en cause suffisait pour conclure à l'existence d'une erreur manifestement déraisonnable. Cependant, l'application elle-même de cette norme ne dépend pas d'une conclusion que la décision rendue n'était pas correcte.

Il a été noté, en obiter, que la norme de la décision manifestement déraisonnable ne fournit pas actuellement aux tribunaux réviseurs des paramètres clairs pour l'évaluation des décisions rendues par des décideurs administratifs. Il est arrivé, à certains moments, que la norme de la décision manifestement déraisonnable se soit malheureusement mêlée avec ce qui constitue sans nul doute son antithèse, soit la norme de la décision correcte. Il est également de plus en plus difficile de faire la distinction entre la norme de la décision manifestement déraisonnable et son équivalent, lequel requiert beaucoup moins de retenue, soit la norme de la décision raisonnable simpliciter. Même si la norme intermédiaire de la décision raisonnable simpliciter semble permettre aux tribunaux réviseurs de mieux façonner le degré de retenue nécessaire en fonction d'une situation particulière, il n'en demeure pas moins que cet avantage est englouti par les inconvénients du cadre actuel, y compris le chevauchement existant entre la décision manifestement déraisonnable et la décision raisonnable simpliciter ainsi que la difficulté résultant de l'interaction entre la première et la décision correcte. Même si l'on présume qu'une distinction efficace peut être faite entre une décision déraisonnable et une décision manifestement déraisonnable, il existe quand même des situations où la décision déraisonnable doit être maintenue, lorsque la norme de contrôle applicable est celle de la décision manifestement déraisonnable et que la décision faisant l'objet du contrôle est déraisonnable mais ne l'est pas de façon manifeste. L'on peut douter que ce genre de résultat puisse être concilié avec l'intention du législateur. Il reste à voir si les tribunaux ne devraient pas, pour tenter de résoudre ces difficultés, établir un régime de contrôle comportant deux normes, soit la norme de la décision correcte ainsi qu'une norme de la décision raisonnable révisée et unifiée.

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Statutes considered by *Arbour J.* (*McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie JJ.* concurring):

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

Evidence Act, R.S.O. 1990, c. E.23
s. 22.1 [en. 1995, c. 6, s. 6(3)] — considered

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Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A
s. 48(1) — considered

Statutes considered by *LeBel J.* concurring (*Deschamps J.* concurring):

Evidence Act, R.S.O. 1990, c. E.23
Generally — referred to

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A
Generally — referred to

APPEAL by union from judgment reported at 2001 CarswellOnt 2760, 45 C.R. (5th) 354, (sub nom. *Toronto (City) v. Canadian Union of Public Employees, Local 79)* 55 O.R. (3d) 541, 149 O.A.C. 213, 205 D.L.R. (4th) 280, (sub nom. *City of Toronto v. Canadian Union of Public Employees, Local 79)* 2002 C.L.L.C. 220-014, 37 Admin. L.R. (3d) 40 (Ont. C.A.), dismissing union's appeal from judgment granting employer's application for judicial review of decision of labour arbitrator, reported at 2000 CarswellOnt 1477, [2000] O.J. No. 1570, 2000 C.L.L.C. 220-038, 187 D.L.R. (4th) 323, 23 Admin. L.R. (3d) 72, 134 O.A.C. 48 (Ont. Div. Ct.).

POURVOI du syndicat à l'encontre de l'arrêt publié à 2001 CarswellOnt 2760, 45 C.R. (5th) 354, (sub nom. *Toronto (City) v. Canadian Union of Public Employees, Local 79)* 55 O.R. (3d) 541, 149 O.A.C. 213, 205 D.L.R. (4th) 280, (sub nom. *City of Toronto v. Canadian Union of Public Employees, Local 79)* 2002 C.L.L.C. 220-014, 37 Admin. L.R. (3d) 40 (Ont. C.A.), qui a rejeté son pourvoi à l'encontre du jugement ayant accueilli la demande de contrôle judiciaire présentée par l'employeur contre la décision rendue par l'arbitre de grief, publié à 2000 CarswellOnt 1477, [2000] O.J. No. 1570, 2000 C.L.L.C. 220-038, 187 D.L.R. (4th) 323, 23 Admin. L.R. (3d) 72, 134 O.A.C. 48 (Ont. Div. Ct.).

Arbour J. **(*McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie JJ.* concurring):**

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

5 The arbitrator ruled that the criminal conviction was admissible as *prima facie*, but not conclusive, evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration.

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The arbitrator held that the presumption raised by the criminal conviction had been rebutted and that Oliver had been dismissed without just cause.

III. Procedural History

A. Superior Court of Justice (Divisional Court) (2000), 187 D.L.R. (4th) 323

6 At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Toronto (City) v. C.U.P.E., Local 79* at the same time. (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 64 (S.C.C.), is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellants' argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision," applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each case, the standard for judicial review had been met (para. 86).

B. Court of Appeal for Ontario (2001), 55 O.R. (3d) 541

7 Doherty J.A., for the court, held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing relitigation of issues finally decided in a previous judicial proceeding," the appropriate standard of review was correctness (paras. 22 and 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results and which serves to conserve the resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice:

- Does the *res judicata* doctrine apply?

- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?

- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest and because there was no new evidence presented at arbitration (paras. 103-108).

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IV. Relevant Statutory Provisions

11 *Evidence Act*, R.S.O. 1990, c. E.23

> 22.1(1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,
>
> > (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
> >
> > (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.
>
> (2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.
>
> (3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

> 48.(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. Standard of Review

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), and *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.).)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) (see also *Q.*, *supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

14 Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), where he said, at para. 39:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. *The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard* . . . . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

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15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex, it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. Theses rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (S.C.C.), at para. 21.

16 Therefore, I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. Section 22.1 of Ontario's Evidence Act

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary," that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction - the finding of another court - admissible for the truth of its content, as an exception to the inadmissibility of hearsay (David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 3rd ed. (Toronto: Irwin Law, 2002), at p. 120; M.N. Howard, Peter Crane and Daniel A. Hochberg, *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990), at pp. 33-94 to 33-95).

19 Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary." There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular, where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

20 This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound*, *supra*, at para. 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, affirmed (1984), 48 O.R. (2d) 266 (Ont. C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits." However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *McIlkenny v. Chief Constable of the West Midlands* (1981), [1982] A.C. 529 (U.K. H.L.), at p. 541; see also *Del Core v. College of Pharmacists (Ontario)* (1985), 51 O.R. (2d) 1 (Ont. C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law doctrines and the rebuttal is consequently subject to them.

21 The question, therefore, is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

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C. The Common Law Doctrines

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle." I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being *cause of action* estoppel) which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision, (2) the prior judicial decision must have been final, and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (S.C.C.), at para. 25, *per* Binnie J.). The final requirement, known as "mutuality," has been largely abandoned in the United States and has been the subject of much academic and judicial debate there, as well as in the United Kingdom and, to some extent, in this country (See Garry D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-651). In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

24 The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Toronto (City) v. C.U.P.E., Local 79* case, released concurrently).

25 There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Prof. Watson, *supra*, argues that explicitly abolishing the mutuality requirement, as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Prof. Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

> The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants . . . .

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27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (U.S.S.C. 1979). He describes the offensive use of non-mutual issue estoppel as follows (at p. 631):

> The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc.*, now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

28 Properly understood, our case could be viewed as falling under this second category - what would be described in U.S. law as "non-mutual offensive preclusion." Although, technically speaking, the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-633:

> First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".
>
> Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.
>
> In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

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30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

31 On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Commentary R. 4.01(3) of the *Rules of Professional Conduct*, Law Society of Upper Canada (Toronto: Law Society of Upper Canada, 2002), at pp. 58 and 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12 (S.C.C.); *R. v. Lemay* (1951), [1952] 1 S.C.R. 232 (S.C.C.), at pp. 256-257, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621, at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation." For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson*, *supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.), at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction." Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.), this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk*, *supra*, at para. 20, as follows: "that a *judicial order* pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

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35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), at p. 1007:

> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway*, *supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.), this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.)). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21 (S.C.C.), at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63 (S.C.C.))). Goudge J.A. expanded on that concept in the following terms, at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel*. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined*. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *F. (K.) v. White* (2001), 53 O.R. (3d) 391 (Ont. C.A.), *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.), and *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), affirmed (1987), 21 C.P.C. (2d) 302 at 312 (Man. C.A.)). This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is, in effect, non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-625).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-348):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

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39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *McIlkenny* [H.L.], *supra*, affirming *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (Eng. C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning M.R. endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that, in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court," but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *McIlkenny* [H.L.], *supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (Eng. C.A.), at pp. 304 *et seq.* In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (S.C.C.), at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-518). Although safeguards must be put in place for the protection of the innocent and, more generally, to ensure the trustworthiness of court findings, continuous relitigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *McIlkenny* [H.L.], *supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *McIlkenny* [H.L.], *supra*, and *Demeter*, *supra*) the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process and the importance of preserving its integrity were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the

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> achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the OEA, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *McIlkenny* [H.L.], *supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not, in itself, an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms, such as appeals or judicial review. Indeed, reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Del Core*, *supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted:

> The right to challenge a conviction is subject to an important qualification. *A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so*. Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. *The ambit of this qualification remains to be determined* . . . . [Emphasis added.]

(*Del Core*, *supra*, at p. 22, *per* Blair J.A.)

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely, *Demeter* (H.C.), *supra*, and *McIlkenny* [H.L.], *supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (Ont. H.C.), *F. (K.)*, *supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See, for example, *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (Ont. H.C.) at p. 218, affirmed without reference to this point (1978), 18 O.R. (2d) 714n (Ont. H.C.); *Bomac*, *supra*, at pp. 26-27); *Bjarnarson*, *supra*, at p. 39; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (Ont. H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C. S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Ont. Gen. Div.),

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at p. 115; see also, Paul Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q*. 189, at pp. 196-197; and Watson, *supra*, at pp. 648-651.

50 It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see Martin Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective," in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002*, vol. 1 (Toronto: Lancaster House, 2002), 279. A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that, from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty, (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results, or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *F. (K.)*, *supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably, in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not, in my view, appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

55 In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

D. Application of Abuse of Process to Facts of the Appeal

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56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet, as pointed out by Doherty J.A. (at para. 84):

> Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court - or the jury -, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

VI. Disposition

59 For these reasons, I would dismiss the appeal with costs.

***LeBel J.* (concurring) (*Deschamps J.* concurring):**

I. Introduction

60 I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, but also the *Evidence Act*, R.S.O. 1990, c. E.23, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision that Oliver had been dismissed without just cause - a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard - patently unreasonable, according to the jurisprudence of our Court.

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61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 (S.C.C.), I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in *all* administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may, in fact, obscure the real issue before the reviewing court.

62 In the instant appeal and the appeal in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 64 (S.C.C.), released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that, in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), at para. 149; *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 26; *Chamberlain*, *supra*, at para. 195, *per* LeBel J.).

63 The more particular concern that emerges out of this case and *Toronto (City) v. C.U.P.E., Local 79* relates to what, in my view, is growing criticism with the ways in which the standards of review currently available within the pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, David J. Mullan, "Recent Developments in Standard of Review," in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (October 20, 2000), at p. 26; Jeff G. Cowan, "The Standard of Review: The Common Sense Evolution?" (2003), paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; Frank A.V. Falzon, "Standard of Review on Judicial Review or Appeal," in *Administrative Justice Review Background Papers: Background Papers Prepared by Administrative Justice Project for the Attorney General of British Columbia* (June 2002), at pp. 32-33). Reviewing courts too have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Newfoundland (Workers' Compensation Commission)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. T.D.), at para. 27, illustrate:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

64 The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular representations in a specific case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

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65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

- the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and

- the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

II. Analysis

A. The Two Standards of Review Applicable in this Case

67 Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions - for instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation - typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

(1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941 (S.C.C.) ("*P.S.A.C.*"), at pp. 960-961; and *Ivanhoe inc. c. Travailleurs & travailleuses unis de l'alimentation & du commerce, section 500*, [2001] 2 S.C.R. 565, 2001 SCC 47 (S.C.C.), at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Toronto (City) v. C.U.P.E., Local 79* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his decision as a whole to review on a correctness standard (see *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (S.C.C.), at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without

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just cause. To say that, in the circumstances of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp.*, *supra*, at para. 48).

70 Second, it bears repeating that the application of correctness here is very much a product of the nature of *this particular legal question*: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

71 This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at para. 37; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan*, *supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention" (at para. 37). The critical factor in this respect is expertise.

72 As Bastarache J. noted in *Pushpanathan*, *supra*, at para. 34, once a "broad relative expertise has been established," this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), and *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 (S.C.C.). This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard," an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education*, *supra*, at para. 39; *Canadian Broadcasting Corp.*, *supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe*, *supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 599-600, endorsed in *Pushpanathan*, *supra*, at para. 37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop a body of jurisprudence that is tailored to the specialized context in which they operate.

74 Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentiality the holding of this Court in *Ivanhoe*, *supra*. In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 (S.C.C.)). This appeal does not represent a departure from this general principle.

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75 The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan*, *supra*, at para. 49; *MacDonell c. Québec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71 (S.C.C.), at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

76 However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

(2) The Patent Unreasonableness Standard of Review

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning, having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

(a) The Definitions of Patent Unreasonableness

78 This Court has set out a number of definitions of "patent unreasonableness," each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*C.U.P.E.*"), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (at p. 237). Cory J.'s characterization in *P.S.A.C.*, *supra*, of patent unreasonableness as a "very strict test," which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-964), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

80 In the second category, I would place Iacobucci J.'s description in *Southam*, *supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57).

81 More recently, in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand," drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, at para. 52:

> In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84 at paras. 9-12,

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per Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

82 Similarly, in *C.U.P.E. v. Ontario*, *supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]' (*Southam*, *supra*, at para. 57), *and* so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan*, *supra*, at para. 52)" (para. 165 (emphasis added)).

83 It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario*, *supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

(b) The Interplay between the Patent Unreasonableness and Correctness Standards

84 As I observed in *Chamberlain*, *supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain*, *supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Q.*, *supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

(i) Patent Unreasonableness and Correctness in Theory

85 In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *C.U.P.E.*, *supra*, Dickson J. offered two characterizations of patent unreasonableness that tend to pull in opposite directions (see David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at p. 69; see also H. Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-286).

86 Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*C.U.P.E.*, *supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.) ("*Nipawin*"), at p. 389, and in *C.U.P.E.*, *supra*, at p. 237:

> . . . acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

87 Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment in *Anisminic Ltd. v. Foreign Compensation Commission* (1968), [1969] 2 A.C. 147 (U.K. H.L.). *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a *correctness* basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*," [1970] S.C.R. 425 (S.C.C.) (see Mullan, *Administrative Law*, *supra*, at pp. 69-70; see also *National Corn Growers Assn.*, *supra*, at p. 1335, *per* Wilson J.).

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88 In characterizing patent unreasonableness in *C.U.P.E.*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law*, *supra*, at p. 70).

89 If Dickson J.'s reference to *Anisminic* in *C.U.P.E.*, *supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.*, [1989] 2 S.C.R. 983 (S.C.C.) ("*C.A.I.M.A.W.*").

90 In *C.A.I.M.A.W.*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*C.U.P.E.*, *supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 20).

91 In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but . . . then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review," *supra*, at p. 20; see also David J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264, at pp. 269-270). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see Margaret Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 *Queen's L.J.* 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

92 The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J. concurring) took to patent unreasonableness in *C.A.I.M.A.W.*, *supra*. He wrote, at pp. 1004 and 1005:

> The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.
>
> . . . . .
>
> I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *S.C.F.P., Local 301 c. Québec (Conseil des services essentiels)*, [1997] 1 S.C.R. 793 (S.C.C.) ("*C.U.P.E., Local 301*"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*C.U.P.E., Local 301*, *supra*, at para. 59; see also *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 (S.C.C.), at pp. 771 and 774-775).

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94 This view was recently forcefully rearticulated in *Ryan*, *supra*. Iacobucci J. wrote, at paras. 50-51:

> [W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been . . . . The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> . . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness . . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

95 I think it important to emphasize that neither the case at bar nor the companion case of *C.U.P.E., Local 79*, should be misinterpreted as a retreat from the position that, in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were *two* standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness - whether the employees' criminal convictions could be relitigated - and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness - whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "*rationally supported*"; this standard cannot be met where, as here, what supports the adjudicator's decision - indeed, what that decision is wholly premised on - is a legal determination that the adjudicator was required, but failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable - a conclusion that flows from the applicability of *two separate* standards of review - is very different from suggesting that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

(ii) Patent Unreasonableness and Correctness in Practice

96 While the Court now tends toward the view that La Forest J. articulated in *C.A.I.M.A.W.*, at p. 1004 - "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" - the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [1998] 1 S.C.R. 1079 (S.C.C.), are illustrative:

> Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed, there is very little evidence of the Court according deference to the Board's interpretation of its own

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> statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.

(Lorne Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 *S.C.L.R.* (2d) 37, at p. 49)

98 Professor Ian Holloway makes a similar observation with regard to *W.W. Lester (1978) Ltd. v. U.A., Local 740*, [1990] 3 S.C.R. 644 (S.C.C.):

> In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she . . . reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonability with correctness at law*.

(Ian Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 *Man. L.J.* 28, at pp. 64-65; see also Allars, *supra*, at p. 178.)

99 At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

(c) The Relationship between the Patent Unreasonableness and Reasonableness Simpliciter Standards

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

(i) The Theoretical Foundation for Patent Unreasonableness and Reasonableness Simpliciter

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario*, *supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam*, *supra*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear," the reviewing court should not intervene (*Nipawin*, *supra*, at p. 389).

102 Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, *supra*, that I cited above:

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> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness . . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

(*Ryan*, *supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin*, *supra*, and *C.U.P.E.*, *supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe*, *supra*, for instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (at para. 116).

103 Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it. Both approaches raise their own problems.

(ii) The Magnitude of the Defect

104 In *P.S.A.C.*, *supra*, at pp. 963-964, Cory J. described a patently unreasonable decision in these terms:

> In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational . . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly' " (see Cowan, *supra*, at pp. 27-2; see also Gabrielle Perreault, *Le contrôle judiciaire des décisions de l'administration: de l'erreur juridictionnelle à la norme de contrôle* (Montreal: Wilson & Lafleur, 2002), at p. 116; Suzanne Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (Montreal: Yvon Blais, 2003), at pp. 34-35; P. Garant, *Droit administratif*, 4e éd., vol. 2 (Montreal: Yvon Blais, 1996), at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

> . . . admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest . . . that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.

(Mullan, "Recent Developments in Standard of Review," *supra*, at pp. 24-25)

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Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship & Immigration)* (2000), 184 F.T.R. 246 (Fed. T.D.), at para. 9:

> I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

106 Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focused on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *C.A.I.M.A.W.*, *supra*, at p. 1004, *per* La Forest J.; *Ryan*, *supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers*, *supra*, at pp. 1369-1370, *per* Gonthier J., or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin*, *supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did" (*Ryan*, *supra*, at para. 53).

107 Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *C.A.I.M.A.W.*, *supra*, at pp. 1003-1004, *per* La Forest J., and *Chamberlain*, *supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal . . . is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the . . . standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan*, *supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

108 In the end, the essential question remains the same under both standards: Was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance, because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see Deborah K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser - *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), *55 Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Flazon, *supra*, at p. 33).

109 The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 25).

(iii) The "Immediacy or Obviousness" of the Defect

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110 There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam*, *supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

111 In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see James L.H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above - *i.e.*, attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam*, *supra*, at para. 56) is not clear enough (see David W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 *Sask. L. Rev.* 469, at pp. 486-487). As Elliott notes: "[t]he distinction between a 'somewhat probing examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards" (Elliott, *supra*, at pp. 486-487).

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education*, *supra*, and *Ivanhoe*, *supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

114 Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers*, *supra* (see generally Mullan, "Of Chaff Midst the Corn," *supra*; Mullan, *Administrative Law*, *supra*, at pp. 72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of *C.U.P.E.*, *supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

115 *Southam* itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed. An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem" (para. 57).

116 This brings me to the second problem: In what sense is the defect immediate or obvious? *Southam* left some ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a

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patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident - *i.e.*, clear, obvious, or immediate - is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law*, *supra*, at p. 72; see also *Ivanhoe*, *supra*, at para. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

> In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". *Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective*. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]

This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision" to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did (*Ryan*, *supra*, at para. 53).

118 Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

> . . . whatever it is that makes the decision "patently unreasonable" [must] appear on the face of the record? . . . Or can one go beyond the record to demonstrate - "identify" - why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?

(David Phillip Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law," paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10)

119 As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See in this regard, the comments of Mullan in "Recent Developments in Standard of Review," *supra*, at p. 4.)

120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch - *i.e.*, interpretations that fall outside the range of those that can be "reasonably," "rationally" or "tenably" supported by the statutory language - and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

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121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning," provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously, any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan*, *supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be patently unreasonable) (*National Corn Growers*, *supra*, at pp. 1369-1370, *per* Gonthier J.)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 65, *per* L'Heureux-Dubé J., citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy," in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), 279, at p. 286, and *Ryan*, *supra*, at para. 49).

123 Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

124 On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

125 An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: *i.e.*, this decision is irrational enough to be unreasonable, but not so irrational as to be overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam*, *supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficultly caused at times by the interplay between patent unreasonableness and correctness.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible." While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible - whether its illegibility is evident on a

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cursory glance or only after a close examination - the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case, it cannot be read.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Q.*, *supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

> [*In Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault*, *supra*, at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

129 As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Amendment to the Constitution of Canada*, [1981] 1 S.C.R. 753 (S.C.C.), at pp. 805-806). As the Court elaborated in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at para. 71:

> In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order" . . . . A third aspect of the rule of law is . . . that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

"At its most basic level," as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted,

> . . . societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals . . . are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*.

(See the Honourable Madam Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174, italics in original; see also MacLauchlan, *supra* at pp. 289-291.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (*i.e.*, does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers*, *supra*, courts have come to accept that

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" 'statutory provisions often do not yield a single, uniquely correct interpretation' " and that an expert administrative adjudicator may be " 'better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language' " in a way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J.M. Evans et al., *Administrative Law*, 3rd ed. (Toronto: Emond Montgomery, 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

132 In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps *more* capable) of choosing among reasonable decisions. It is *not* to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

133 On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (*i.e.*, irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at pp. 367-368). As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an *irrational* decision, it seems highly likely that the court has misconstrued the intent of the legislature.

134 Administrative law has developed considerably over the last 25 years since *C.U.P.E. v. New Brunswick Liquor Corp.* This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

* On November 13, 2003, the Supreme Court of Canada issued a corrigendum; the changes have been incorporated herein.

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1998 CarswellOnt 4172
Ontario Court of Appeal

McQuillan v. Native Inter-Tribal Housing Co-operative Inc.

1998 CarswellOnt 4172, [1998] O.J. No. 4361, 114 O.A.C. 303,
20 R.P.R. (3d) 198, 42 O.R. (3d) 46, 83 A.C.W.S. (3d) 485

Mary Ellen McQuillan, Applicant (Appellant) and Native Inter-Tribal Housing Co-operative Inc., Respondent (Respondent)

Laskin, Charron, O'Connor JJ.A.

Heard: August 26, 1998
Judgment: October 27, 1998
Docket: CA C26106

Counsel: *Timothy C. Hogan*, for the appellant.
Michael Lamb, for the respondent.

Subject: Property; Civil Practice and Procedure

Headnote

Practice --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Whether cause of action identical

Appellant landowner used driveway situated between her house and respondent's house — Landowner claimed that by her long use and that of her predecessors in title, she had acquired prescriptive easement over two-foot strip of land on respondent's property — Landowner had brought earlier application based on much of same evidence for declaration of possessory title to same strip of land — Earlier application dismissed and no appeal taken — Landowner brought present application for declaration of prescriptive easement — Application dismissed — Landowner appealed — Appeal dismissed — Entire factual foundation for claim to prescriptive right was equally present on first application — Second application fell clearly within scope of doctrine of res judicata — Limitations Act, R.S.O. 1990, c. L.15.

Practice --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Appellant landowner used driveway situated between her house and respondent's house — Landowner claimed that by her long use and that of her predecessors in title, she had acquired prescriptive easement over two-foot strip of land on respondent's property — Landowner had brought earlier application based on much of same evidence for declaration of possessory title to same strip of land — Earlier application dismissed and no appeal taken — Landowner brought present application for declaration of prescriptive easement — Application dismissed — Landowner appealed — Appeal dismissed — Even if present application was not barred by doctrine of res judicata, issue estoppel would apply — Essential that landowner establish that land used as driveway included disputed two-foot strip of land — Motions judge was not satisfied that use of driveway included strip of land before area was paved in 1988 — Having chosen not to appeal earlier decision, landowner was bound by findings of motions judge.

Easements --- Creation of easements — General

Appellant landowner used driveway situated between her house and respondent's house — Landowner claimed that by her long use and that of her predecessors in title, she had acquired prescriptive easement over two-foot strip of land on respondent's property — Landowner had brought earlier application based on much of same evidence for declaration of possessory title to same strip of land — Earlier application dismissed and no appeal taken — Landowner brought present

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application for declaration of prescriptive easement — Application dismissed — Landowner appealed — Appeal dismissed — Even if present application was not barred by doctrine of res judicata, issue estoppel would apply — Essential that landowner establish that land used as driveway included disputed two-foot strip of land — Motions judge was not satisfied that use of driveway included strip of land before area was paved in 1988 — Having chosen not to appeal earlier decision, landowner was bound by findings of the motions judge.

The parties were neighbours in a residential area. There was a distance of approximately seven feet between their respective houses. The appellant landowner used a driveway situated between her house and the respondent's house. The landowner claimed that by her long use and that of her predecessors in title, she had acquired a prescriptive easement over a two-foot strip of land on the respondent's property. The respondent disputed the landowner's claim to long user. The landowner had brought an earlier application before the same judge and based on much of the same evidence, for a declaration of possessory title to the same strip of land. The earlier application was dismissed and no appeal was taken. Seven months later, the landowner brought the present application for a declaration of prescriptive easement. The application was dismissed. The landowner appealed.

Held: The appeal was dismissed.

On the earlier application, the landowner sought a declaration that the respondent's interest in and title to the strip of land in question had been extinguished under the *Limitations Act* and a declaration entitling her to possessory title to that same land. On the present application, the landowner sought a declaration that she was entitled to a prescriptive easement over the strip of land, a declaration that she was entitled to maintain a right-of-way over the land or, in the alternative, a declaration that she was entitled to a right-of-way by implication. The respondent relied on both res judicata and issue estoppel.

The doctrine of res judicata prevents a person from relying on a claim or defence which he or she had the opportunity of putting before the court in the earlier proceedings but failed to do so. Although in a strict legal sense a different cause of action was advanced on the present application, the landowner was in effect seeking an analogous remedy based on virtually identical facts. It would have been open to the landowner to advance the claim to a prescriptive easement in the earlier application. The entire factual foundation for the claim to a prescriptive right was equally present on the first application. The second application fell clearly within the scope of the doctrine of res judicata in its wider application.

Even if the present application was not barred by the doctrine of res judicata, issue estoppel would apply. It was essential that the landowner establish that the land used as a driveway included the disputed two-foot strip of land. The motions judge was not satisfied that the use of the driveway included the strip of land before the area was paved in 1988. Having chosen not to appeal the earlier decision, the landowner was bound by the findings of the motions judge on this critical issue.

Table of Authorities

Cases considered by *Charron J.A.*:

Angle v. Minister of National Revenue (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 2 N.R. 397, 28 D.T.C. 6278 (S.C.C.) — considered

Hall v. Hall (1958), 15 D.L.R. (2d) 638 (Alta. C.A.) — considered

Henderson v. Henderson (1843), 67 E.R. 313, 3 Hare 100 (Eng. V.-C.) — referred to

Hoystead v. Commissioner of Taxation (1925), [1926] A.C. 155, [1925] All E.R. Rep. 56, [1926] 1 W.W.R. 286 (Australia P.C.) — considered

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Maynard v. Maynard (1950), [1951] S.C.R. 346, [1951] 1 D.L.R. 241 (S.C.C.) — considered

Statutes considered:

Limitations Act, R.S.O. 1990, c. L.15
Generally — referred to

APPEAL by landowner from dismissal of claim for possessory title.

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

1 This proceeding arises from the appellant's use of a driveway situated between her house and the respondent's house. The parties are neighbours in a residential area of London, Ontario. There is a distance of approximately seven feet between their respective houses. The appellant claims that, by her long user and that of her predecessors in title, she has acquired a prescriptive easement over a two-foot strip of land on the respondent's property. The respondent disputes the appellant's claim to long user.

2 However, the issues on this appeal are not all centred around the appellant's user of the two foot strip of land. The matter is complicated by the fact that the appellant had brought an earlier application, before the same judge and based on much the same evidence, for a declaration of *possessory title* to the same strip of land. This earlier application was dismissed on November 27, 1995. No appeal was taken from this dismissal. Seven months later, the appellant brought the present application for a declaration of *prescriptive easement*. This application was dismissed on October 30, 1996. She appeals from this dismissal.

3 The appellant takes the position that the motions judge misapprehended the evidence and that, on the facts, she is entitled to a declaration of prescriptive easement. In the alternative, she argues that any controversy in the evidence should have been resolved by a trial of the issue and that the motions judge erred in dismissing her application.

4 The respondent submits that the appellant has not established a sufficient user of the strip of land and that the motions judge was correct in dismissing her application. The respondent also argues that, regardless of the merits of the present application, the appellant is estopped from bringing a second application on the same subject-matter and that her application should be dismissed on that basis. On this latter issue, the appellant replies that, if the court finds that there exists grounds for the application of the doctrine of estoppel, an exception should be made in this case because of "special circumstances."

5 Before considering the merits of the matter, it is therefore necessary to determine whether the appellant should be estopped from bringing her application. In order to determine this issue, it is important to consider the nature of the earlier application and the findings made by the motions judge. On the earlier application, the appellant sought a declaration that the respondent's interest in and title to the two foot strip of land in question have been extinguished under the *Limitations Act*, R.S.O. 1990, c. L-15 and a declaration entitling her to possessory title to that same land. The motions judge considered the evidence, made certain findings and dismissed the application. He gave the following reasons:

> The applicant seeks a declaration that the respondent's title to a 2' strip of land adjacent to the east boundary of the applicant's property has been extinguished by sections 4 and 15 of the *Limitations Act*. The applicant alleges that she and her predecessors in title have been in open, notorious, continuous, peaceful and exclusive possession of that strip which they have used as part of their driveway since at least 1973.
>
> There is no doubt that the area between the applicant's house at 47 Tecumseh Avenue and the respondent's property at 49 Tecumseh Avenue has been used as a driveway by the occupants of 47 Tecumseh Avenue since 1923. The factual question to be decided is whether that driveway encroached on the respondent's property at 49 Tecumseh Avenue for long enough to extinguish the respondent's title.
>
> Clearly, the driveway encroached approximately 2' onto the property of 49 Tecumseh Avenue after it was paved by the applicant in 1988. Prior to that, the picture is less clear. There are affidavits from various owners of 47 Tecumseh Avenue

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> dating back to 1973 all attesting to the fact that the driveway encroached. Indeed, one of the past owners of 49 Tecumseh Avenue says that the driveway encroached.
>
> The respondent, however, had the property surveyed in 1985 when it purchased 49 Tecumseh Avenue. That survey which is dated January 15, 1985 clearly shows that the respondent's fence and hedge encroached on adjoining properties. However, it doesn't show any encroachment by the applicant's driveway on the respondent's property. Later, when the same surveyor surveyed the property on March 23rd, 1994, there was an encroachment by the applicant's driveway on the respondent's property and it is shown on the survey.
>
> While the anecdotal evidence in the affidavits filed by the applicant is of assistance, it is not sufficient to overcome the clear survey evidence in the survey of Donald Redmond of January 15th, 1985 that the encroachment did not exist at that time. Since the onus is on the applicant to establish the encroachment and possessory title, I find that the onus has not been met and the application is therefore dismissed....

6 On the present application, the appellant seeks a declaration that she is entitled to a prescriptive easement over the two foot strip of land, a declaration that she is entitled to maintain a right-of-way over the land or in the alternative a declaration that she is entitled to a right-of-way by implication over the land in question. Although the respondent raised the issue of estoppel, the motions judge did not find it necessary to decide the issue. He dismissed the application on the basis of the same findings of fact he had made on the earlier application. In particular, he noted the 1985 survey and concluded as follows:

> ...the survey does not show any encroachment on the respondent's property and I am not satisfied that the area between the houses which the applicant and her predecessors in tittle used for parking encroached on the respondent's property before 1988 when the applicant covered the whole of the area with concrete.

7 On this appeal, the respondent relies on both *res judicata* and issue estoppel, two species of the doctrine of *estoppel per rem judicatam*. The two species are distinguished in *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.). Simply put, *res judicata* or "cause of action estoppel" precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. Issue estoppel will prevent a person from relitigating a question where, the cause of action being different, the same question was decided in a final judicial decision in earlier proceedings between the same parties.

Res judicata

8 The respondent does not contend that the cause of action is the same in both applications. Indeed, it is not. The respondent relies rather on a wider principle, often treated as covered by the plea of *res judicata*. The doctrine of *res judicata*, in its wider application, prevents a person from relying on a claim or defence which he or she had the opportunity of putting before the court in the earlier proceedings but failed to do so. This principle was adopted by the Supreme Court of Canada in *Maynard v. Maynard* (1950), [1951] S.C.R. 346 (S.C.C.) at 358-59 citing the often-quoted words of Wigram V.C. in *Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.-C.)

> ... where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

9 The court in *Maynard* also adopted the following excerpt in the judgment of the Judicial Committee in *Hoystead v. Commissioner of Taxation* [(1925), [1926] A.C. 155 (Australia P.C.) at 165] (at 359):

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Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.

If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

10 The respondent argues that the subject-matter of the litigation was the same in both applications. In each application the appellant was seeking a remedy which would entitle her to use the two foot strip of land as part of her driveway. The evidence relied upon in support of each application, although different in some respects, is essentially to the same effect. In these circumstances, the respondent argues that it was incumbent upon the appellant to bring forth all legal arguments arising from the same facts in the course of the first application. Having failed to do so and having not appealed the 1995 decision, the respondent submits that the appellant is bound by the result. She cannot relitigate the matter on the basis of different legal arguments, which could have been advanced in the course of the first application.

11 The principles adopted in *Maynard* are informed on grounds of public policy. For numerous reasons, it is in the public interest that there be an end to proceedings. Duplicative proceedings give rise to a concern for conflicting results and the use of limited resources. Issues of fairness also come into play. While no individual should be subjected to more than one proceeding for the same cause, no one should be unfairly denied access to the courts. For this reason, the scope of the principle adopted by the court in *Maynard* has been restricted in some cases.[1] The application of the doctrine of *res judicata* is also limited when special circumstances can be shown as to why the new proceeding should be allowed to proceed.

12 Upon careful review of the material filed in support of each application in this case, I am persuaded that the respondent's position should be adopted. Although, in a strict legal sense, a different cause of action is advanced on this application, the appellant is in effect seeking an analogous remedy based on virtually identical facts. In each application, the appellant asserted a right to continue to use the two-strip of land on the respondent's property as part of her driveway. It does not appear that it would make any practical difference to the appellant whether this right was asserted by way of possessory title or by way of prescriptive easement. On the facts as presented on the earlier application, it would have been open to advance not only the claim for possessory title but also, in the alternative, the claim to a prescriptive easement. In my view, the appellant's second application falls clearly within the scope of the doctrine of *res judicata* in its wider application.

13 As stated earlier, the doctrine is nonetheless subject to "special circumstances" being shown which militate against its application. The circumstances relied upon by the appellant are the following:

1. she relied on counsel on the earlier application to protect her rights;

2. the application of the doctrine of *res judicata* would result in the merits of the second application not being heard; and

3. she would lose the use of her driveway.

14 In my view, these circumstances do not bring the appellant outside the scope of the doctrine on the facts of this case. The entire factual foundation for the claim to a prescriptive right was equally present on the first application. In these circumstances, it is incumbent upon the appellant to show that her failure to raise that argument did not arise through negligence, inadvertence or accident. She has not done so. To allow her to proceed with the second application would, in my view, run counter to the public policy principles underlying the doctrine.

Issue estoppel

15 Further, it is my view that, even if the present application was not barred by the doctrine of *res judicata*, issue estoppel would apply. In order to succeed on either application, it was essential that the appellant establish that the land used as a driveway included the disputed two foot strip of land. The motions judge made a clear finding on this issue on the first application. He

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held that the driveway included the two foot strip of land since the time it was paved in 1988 but that "prior to that, the picture is less clear." In the end result, the motion judge was not satisfied on the evidence that the use of the driveway included the strip of land before the area was paved in 1988. This finding is equally adverse to the appellant's claim on the present application. Having chosen not to appeal the earlier decision, the appellant is bound by the findings of the motions judge on this critical issue.

16 In light of my conclusion on the issues of *res judicata* and issue estoppel, I do not find it necessary to consider the merits of the application.

17 For these reasons, I would dismiss the appeal with costs.

Appeal dismissed.

Footnotes

1 See, for example, *Hall v. Hall* (1958), 15 D.L.R. (2d) 638 (Alta. C.A.) at 646 where a majority of the court interpreted the principle in *Henderson*, as quoted above in *Maynard*, to be "limited to such matters as arise within one cause of action." The court held that an inquiry into some facts did not prevent an examination of the same facts in a second action so long as the latter was separate and distinct from the first.

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Henderson v Henderson

[1843-60] All ER Rep 378

Also reported 3 Hare, 100; 1 LTOS 410; 67 ER 313

VICE-CHANCELLOR'S COURT

Wigram V-C

4,11 July 1843

20 July 1843

Estoppel - Res judicata - Adjudication by court of competent jurisdiction - Application of plea to every point properly belonging to subject of litigation and available to parties.

Conflict of Laws - Foreign judgment - Defence to proceedings in England - Res judicata.

Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except in special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward a part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

A plea of res judicata in respect of the decision of the Supreme Court of Newfoundland, whence an appeal lay to the Privy Council, held to be good.

Notes

Considered: *Simpson v Fogo* (1863) 1 Hem & M 195. Explained: *Mutrie v Binney* (1887) 35 Ch D 614. Considered: *Worman v Worman* (1889) 43 Ch D 296; *Bake v French*, [1907] 1 Ch 428. Approved: *Hoystead v Taxation Comr*, [1925] All ER Rep 56. Applied: *Green v Weatherill*, [1929] All

ER Rep 428; *West v Automatic Salesman, Ltd*, [1937] 2 All ER 706. Considered: *New Brunswick Rail Co v British and French Trust Corpn*, [1938] 4 All ER 747; *Greenhalgh v Mallard*, [1947] 2 All ER 255; *Breakwell v Breakwell*, [1947] WN 249; *Dixon v Dixon*, [1953] 1 All ER 910. Referred to: *Srimut Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v Katama Natchiar, Shivagunga* (1866) 1 Moo Ind App 50;

Re Henderson, *Nouvion v Freeman* (1887) 57 LJ Ch 367; *Pemberton v Hughes*, [1899] 1 Ch 781; *Pickford v Quirke*, *Pickford v IRComrs* (1927) 44 TLR 15; *Mould v Mould*, [1933] All ER Rep 122; *Marginson v Blackburn Borough Council*, [1938] 2 All ER 539; *EE and Brian Smith (1928) Ltd v Wheatsheaf Mills, Ltd*, [1939] 2 All ER 251; *Winnan v Winnan*, [1948] 2 All LR 862; *Ids Koenigsberg Public Trustee v Koenigsberg*, [1949] 1 All ER 804; *Bright v Bright*, [1953] 2 All ER 939; *Thompson v Thompson*, [1957] 1 All ER 161; *Re A Debtor (No 472 of 1950)* [1958] 1 All ER 581; *Fisher v Fisher*, [1959] 3 All ER 131.

As to res judicata, see 15 HALSBURY'S LAWS (3rd Edn) 184-187; and for cases see 21 DIGEST (Repl) 225 et seq As to pleading a foreign judgment as a defence, see 7 HALSBURY'S LAWS (3rd Edn) 150, 151; and for cases see 11 DIGEST (Repl) 528-531.

Cases referred to:

(1) *Breadalbane v Chandos* (1837) 2 My & Cr 711; 7 LJ Ch 28; 40 ER 811, LC; 11 Digest (Repl) 495, 1166.

(2) *Farquharson v Seton* (1828) 5 Russ 45; 38 ER 944; 21 Digest (Repl) 233, 268.

(3) *Partridge v Uaborne* (1828) 5 Russ 195; 7 LJOSCh 49; 38 ER 1000, LC; 40 Digest (Repl) 107, 818.

(4) *Chamley v Lord Dunsany* (1807) 2 Sch & Lef 690; 25 Digest (Repl) 243, 557.

Also referred to in argument:

Phillips v Hunter (1795) 2 Hy Bl 402; 126 ER 618; 5 Digest (Repl) 871, 7310.

Cottington's Case (1678) cited in 2 Swan 326; 36 ER 640; 11 Digest (Repl) 519, 1331.

White v Hall (1806) 12 Ves 321; 33 ER 122, LC; 11 Digest (Repl) 378, 416.

Henley v Soper (1828) 8 B & C 16; Dan & Ll 38; 2 Man & Ry KB 153; 6 LJOSKB 210; 108 ER 949; 1 Digest (Repl) 348, 272.

Fuller v Willis (1831) 1 My & K 292, n; 39 ER 693, LC; 11 Digest (Repl) 520, 1343.

Alivon v Furnival (1834) 1 CrM & R 277; 3 LJ Ex 241; 149 ER 1084; 2 Digest (Repl) 520, 639.

Cowan v Braidwood (1840) 1 Man & G 882; 9 Dowl 26; Drinkwater, 40; 2 Scott, NR 138; 10 LJCP 42; 133 ER 589; 11 Digest (Repl) 510, 1255.

Becquet v MacCarthy (1831) 2 B & Ad 951; 109 ER 1396; 11 Digest (Repl) 511, 1265.

Houlditch v Marquess of Donegall (1834) 2 Cl & Fin 470; 8 BIiNS 301; 6 ER 1232, HL; 11 Digest (Repl) 520, 1344.

Russell v Smyth (1842) 9 M & W 810; 11 LJ Ex 308; 152 ER 343; 11 Digest (Repl) 512, 1277.

Ferguson v Mahon (1839) 11 Ad & El 179; 3 Per & Dav 143; 9 LJQB 146; 113 ER 382; 11 Digest (Repl) 510, 1254.

Thompson v Derham, *Thompson v Goodman* (1842) 1 Hare, 358; 66 ER 1071; 4 Digest (Repl) 377, 3432.

Demurrer to a bill filed in May 1843, by Bethel Henderson against Elizabeth Henderson, the widow of Jordan Henderson (the plaintiff's deceased brother) Charles Simms and Joanna, his wife (the daughter of Jordan) and J Gadsden (administrator of the estate of Jordan, in England) praying that an account might be taken of what was due to the plaintiff from the estate of Jordan, and of the other debts of Jordan, and of his personal estate, and that the same might be applied in a due course of administration; that an account of the partnership transactions between the plaintiff and Jordan might be also taken; that all

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necessary inquiries might be directed to ascertain the personal estate of William, the father of the plaintiff and Jordan; that so much, if any, of two sums of 8,888 pounds 6s 8d as might be found payable by the plaintiff (he not admitting that any part thereof was so payable) might be applied and administered as part of the assets of Jordan: that the defendants, Elizabeth, the widow, and Simms and his wife, might be restrained by injunction from proceeding with any action to recover the said two sums of 8,883 pounds 6s 8d; and that a commission might be; issued to examine witnesses in Newfoundland. To this bill, the defendants, Elizabeth, the widow, and Simms and his wife, demurred for want of equity want of parties, and multifariousness.

Tinney, Burge and Rolf for the demurrer. Purvis and Bagshawe for the bill.

WIGRAM V-C:

The plaintiff by his bill alleges that he and Jordan, his late brother, were partners in business, one branch of which was carried on at Bristol and the other in Newfoundland, and that, in respect of that partnership, he is a creditor to a large amount on the estate of Jordan, that part of the partnership property was derived from their father, and that all the property which they derived from their father formed part of the assets of the partnership. The plaintiff also alleges that he is a creditor on the estate of Jordan in respect of a private debt, and the bill prays such an account as would comprise all these matters which are in question between the plaintiff and the estate of Jordan. Upon these facts, a decree for an account against Gadsden, the personal representative of Jordan in England, would be of course, and, perhaps, also, if that had been the object of the suit, the decree for an account might have been extended to Elizabeth, the widow, as the personal representative of Jordan in Newfoundland. The widow of Jordan, and Simms and his wife, are, however, before the court in the character of next-of-kin, and there is no pretence for making them parties in that character in a suit for the mere administration of the estate of Jordan. The relief sought against those parties is founded upon the proceedings which have taken place in the court in Newfoundland, and the use which they are about to make of those proceedings in this country. The defendants, who have demurred, insist, in support of their demurrer, first, that all and every part of the matter in question on this bill was concluded by a final decree of the Supreme Court of Newfoundland, dated in June 1841, made in a suit wherein the defendants and William, the son of Jordan, were plaintiffs, and the present plaintiff was defendant, except in so far as that decree is subject to be reviewed in the Privy Council; and, secondly, that by that decree the amount recovered was decreed to be paid to the plaintiffs in that suit as beneficial owners, and that the same thereby ceased to be part of the estate of Jordan, subject to his debts. They insist, moreover, that the proceedings appear upon the bill with sufficient certainty to sustain the decree upon the grounds advanced, and that the only party against whom the plaintiff can proceed to recover his claim, or any part of it, is the defendant Gadsden.

I have read the bill carefully, and, without going minutely through the facts of the case, it is sufficient to say, for the purpose of explaining the order I am about to make, that the original bill in the Supreme Court of Newfoundland claimed an account of the same partnership dealings as those of which accounts are prayed by the present bill, and also sought accounts in respect of the estate of William Henderson, the father, possessed by Bethel on account of Jordan; that the defendant in that suit, who is the plaintiff here, made claims by his answer to the original bill corresponding in substance with those which he makes by his bill in the present suit; that an amended bill, or a bill which the court thought it right to term an amended bill, was afterwards filed by the same plaintiffs against Bethel; and that the amended bill stated and charged that Bethel was largely indebted to the estate of Jordan, on the partnership accounts, but that such accounts could not be taken in consequence of Bethel absenting him

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self from the island and not producing the documents. It further appears that, Bethel having absented himself from the jurisdiction, an order of the Supreme Court was made in February 1840, for taking the amended bill pro confesso, and that the amended bill was by the same order referred to the Master to compute principal and interest due to the plaintiffs, and that the Master made his re-

port in June 1840. It appears, further, that the Supreme Court pronounced its final decree in June 1841, and thereby, after referring to all the antecedent proceedings in the cause, decreed that Bethel Henderson should pay to the widow and two children of Jordan, who were plaintiffs, the sum of 8,883 pounds 6s 8d each, and the costs of the suit. This decree has in effect severed William, the father's, estate from the bulk of the property in question, and the partnership accounts and the private debt are not specifically the subject of adjudication. Upon this decree, Elizabeth, the widow, and Joanna, the daughter of Jordan, and the husband of Joanna have brought their actions in this country.

The bill charges that the proceedings leading to this decree were irregular, that the decree itself was irregular, that a large balance was due to the plaintiff, and that the decree ought not to be enforced, but ought to be reversed by Her Majesty in Council, on appeal, which the plaintiff intends to bring. The bill specially alleges, as one ground of irregularity, that the report of the Master, of 6 June 1840, wholly omitted any notice of the account connected with the partnership, and is confined to the monies alleged to be due from the plaintiff, in respect of the estate of William Henderson, the father, and that a large sum of money is due to the plaintiff on the partnership accounts, as would appear if they were properly taken. On behalf of the defendants, it has been argued that the proceedings on the face of the bill showed that the decree concluded the whole matter, that I could not re-hear that decree, and that it was final and conclusive unless reversed by the Privy Council, the proper appellate tribunal.

Without giving any opinion upon the question whether charges showing that the proceedings in a foreign court were altogether null and void, as being against natural justice, would or not, upon general demurrer, have been treated as null, and have sustained the bill as to the whole of the relief prayed, I have no doubt that mere irregularity in the proceedings is insufficient for that purpose, in a case in which an appeal lies from the colonial court to the mother country, and there is a tribunal competent to reform the errors of the court below, and even to suspend the execution of the decree pending the appeal, if justice requires that it should be suspended. But as the plaintiff in this case argued only that the whole question between the parties was not concluded by the decree, and did not contend that, upon the charges in the bill, I ought to disregard the decree, I assume for the present purpose that I must, upon this demurrer, consider the amount due from Bethel, in respect of William the father's estate, as concluded by the decree of the supreme court, subject only to the appeal to the Privy Council, and that the only question I have now to decide is whether I am to consider the partnership account and the claim of Bethel in respect of the private account as having been likewise the subject of adjudication by the Supreme Court in the island, or whether those items in the general account, which certainly might have been taken in that suit, are to be considered as excepted out of the operation of the decree, under the special circumstances appearing on the Master's report, and the other proceedings stated in the bill.

In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident,

omitted part of their case. The plea of res judicata applies, except in special-case, not only to points upon which

the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

Those who have had occasion to investigate the subject of bills of review in this court will not discover anything new in the proposition I have stated, so far as it may apply to proceedings in this country: and in an application to a court of equity in this country, for its aid against the effect of a proceeding by a court of equity in one of the colonies, I conceive it to be the duty of this court to apply the same reasoning, at least in the absence of charges in the bill, showing that a different principle ought to be applied. The observations of LORD COTTENHAM, LC, in *Breadalbane v Chandos* (1) have an important bearing upon this point. I may mention also *Farquharson v Seton* (2) *Partridge v Usborne* (3) and the judgment of Lea) ELDON, LC, in *Chamley v Ford Dunsany* (4) as showing the general principle to which I have adverted. It is plain that litigation would be interminable if such a rule did not prevail.

Undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule. What art, those circumstances? One circumstance relied upon was that, by the decree of the colonial court of 11 February 1840, the amended bill was only taken pro confesso. The amended bill, it appears, is not, as in this court, the original bill amended and written upon, so that the amended bill wholly supersedes and comes in the place of the original bill, but the amendments are upon a distinct record. The bill in this cause charges that the last bill was in fact and substance an original bill and addressed to different judges and that it was not an amended bill. This charge I might have been bound to take as a fact, if the plaintiff had not, by setting out the amended bill and the final decree, given me an opportunity of judging in what sense only the charge is true. I find that the amended bill proceeds upon and refers to the original bill and to the answer of the defendant thereto, and the final decree of the court recites the whole of the proceedings anterior to the final decree, beginning with the original bill. It is impossible, therefore, to contend with effect that the amended bill, though in a sense distinct from the original bill, as being written upon other paper, leaving the first bill still on the record, was not a continuance of the pleadings in one and the same cause, and this, critically considered, is not inconsistent with the charge in the bill which I have just read.

Another objection was the absence or the irregularity of service upon the plaintiff. Although it is not necessary that I should go into the question respecting the notice, I ought not to disregard the fact that the plaintiff represents that he had, on different occasions, actual notice of the suit, and of the relief which was sought against him by it, however irregularly that notice might have been communicated; and if the plaintiff thought that he might safely disregard the proceedings and abstain from interposing any defence on the ground of their irregularity, I think I ought to consider him as having

relied on the strength of his case for establishing that irregularity by a complaint in the same jurisdiction, or in the Court of Appeal, and not to have relied on being able to set the decree of the Supreme Court at defiance, even while it remained unreversed. I may here recur to the observation, that the omission of the Master to take the partnership accounts is stated in the bill to be an error in the decree, forming one ground for appeal to the Privy Council. The point upon which I have had most difficulty in satisfying myself is this. If the decree of the Supreme Court is conclusive upon one party, it must, I conceive, be conclusive upon both; and, if not conclusive upon both, it ought to be conclusive upon neither. The amended bill alleged that the plaintiffs there were creditors upon the partnership account, but that the accounts

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of the partnership could not be taken, owing to the manner in which the defendant in that suit had acted. These allegations were established as facts by the effect of the order for taking the bill pro confesso, and it appeared to me during the argument that the present defendants (the plaintiffs in Newfoundland) might have a right to say that the accounts not taken by the Master were open for their benefit, by reason that it was the conduct of the defendant alone which had prevented those accounts from being taken. But that, I think, is not a correct view of the case. The decree was to compute what was due to the plaintiffs for principal and interest that is, upon all the accounts in question in the pleadings, including the partnership and private account. The plaintiffs were not compelled to take such a decree, but, having taken it, they are bound by the consequences, and must be taken to have waived any disadvantage to themselves which would result from it.

The conclusion to which I must come, in a case where relief is sought in this court in consequence of errors and irregularities in the decree of a colonial court - an appeal lies from that decree to the appellate jurisdiction in this kingdom is to allow the demurrer. I do not say that my conclusions would have been the same if the proceedings which were impeached had taken pines in a foreign court from which there was no appeal to any superior jurisdiction which a court of equity in this country could regard as certain to administer justice in the case. I express no opinion on that point.

Demurrer allowed.

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2005 BCSC 1784
British Columbia Supreme Court

Roeder v. Lang Michener Lawrence & Shaw

2005 CarswellBC 3087, 2005 BCSC 1784, [2005] B.C.J. No. 2830, [2006] B.C.W.L.D. 1270, 149 A.C.W.S. (3d) 21

John Walter Scott Roeder (Plaintiff) and Lang Michener Lawrence & Shaw, a partnership,Edward A. Bence, Wade D. Nesmith,British Columbia Securities Commission,Robert Samuel Fleming and Linda Joy Murray (Defendants)

Rogers J.

Heard: November 30 - December 2, 2005
Judgment: December 21, 2005
Docket: Vancouver S031554

Counsel: J.H. Frank for Plaintiff
M.G. Armstrong for Defendants, Lang Michener Lawrence & Shaw, a partnership and E.A. Bence
M.L. Skwarok for Defendant, W.D. Nesmith
S.K. Boyle, J.A. Angus for Defendants, British Columbia Securities Commission and L.J. Murray
A.D. McDonell, Q.C. for Defendant, R.S. Fleming

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Grounds — Action frivolous, vexatious or abuse of process — General principles

Applicant was officer of company under jurisdiction of respondent provincial securities commission — In 1995 following investigation and hearing by commission panel on suspect conduct, officer was prohibited from acting as officer and director of publicly traded company for period of 17 years — Following unsuccessful application for leave to appeal commission's decision, officer brought unsuccessful application to revoke 1995 order pursuant to s. 171 of Securities Act — Officer took position that revocation of order was warranted in view of bad advice given by his lawyer who later joined respondent law firm, which firm was retained by commission in connection with its investigation — Commission dismissed application on basis of delay — Officer brought application for leave to appeal commission's decision and simultaneously commenced action for damages for alleged torts committed by defendants in course of their involvement in administrative proceedings — Officer alleged that former counsel communicated confidential information to commission's lawyer which information caused commission to find against him — Respondents brought application pursuant to R. 19(24) of Rules of Court, 1990 to dismiss action — Application granted — Action was clearly abuse of process and warranted dismissal under R. 19(24)(b) as it was nothing more than attempt by officer to get by collateral means what commission legitimately denied — Any order made in favour of officer would be inconsistent with previous disposition of same issue — Commission acted within scope of authority rejecting officer's application to revoke order because of alleged misconduct of lawyer and commission's reasoning was confirmed by court of appeal — Officer had no entitlement to put same argument before different tribunal.

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R. v. Wilson (1983), [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 1983 CarswellMan 154, 1983 CarswellMan 189 (S.C.C.) — considered

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s. 171 — considered

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Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
R. 19(24) — considered

App. B, s. 2(2)(c) — referred to

APPLICATION by defendant to dismiss action for damages in tort.

***Rogers J.*:**

Introduction

1 Inevitably some people who deal with administrative tribunals come away from the experience believing they were wronged by the process, or the outcome, or both. Such folk feel a need for redress. But where do they turn for succor? An appeal within the administrative law milieu might not succeed, and when it does not, what then? Mr. Roeder, the plaintiff in this matter, found himself in that position. Appeals within the system had failed him, so he looked to the civil court for relief. Mr. Roeder has alleged various torts were committed by the defendants in the course of their involvement in the administrative proceeding and that he was harmed thereby. Mr. Roeder seeks to recover damages for that harm.

2 The defendants take the view that Mr. Roeder's statement of claim describes no cause of action, is vexatious, frivolous, or an abuse of process, and that it was commenced out of time. They have applied under Rule 19(24) to dismiss Mr. Roeder's suit.

History

3 The *lis* between Mr. Roeder and the defendants goes back a long way. Readers interested in a detailed history of Mr. Roeder's interaction with the Securities Commission and its agents may find it in this string of decisions:

(a) *Keywest Resources Ltd., Re*, [1995] 14 B.C.S.C.W.S. 9 (B.C. Securities Comm.);

(b) *Keywest Resources Ltd. v. British Columbia (Securities Commission)*, [1995] B.C.J. No. 1883 (B.C. C.A. [In Chambers]);

(c) *Keywest Resources Ltd., Re*, 2003 BCSECCOM 331 (B.C. Securities Comm.);

(d) *Roeder v. Lang Michener Lawrence & Shaw*, 2004 BCSC 80 (B.C. S.C. [In Chambers]); and

(e) *Roeder v. British Columbia (Securities Commission)*, 2005 BCCA 189 (B.C. C.A.).

4 Briefly, though, in the first half of the 1990s Mr. Roeder was a directing mind of Keywest Resources Ltd. Keywest was publicly traded on the Vancouver Stock Exchange. As such it and its officers were subject to the supervisory jurisdiction of the British Columbia Securities Commission ("the Commission").

5 The Commission's staff perceived that certain of Mr. Roeder's activities with respect to Keywest were suspect. The staff initiated an investigation. The investigation culminated in Mr. Roeder receiving notice that he was to be the subject of a hearing before the Commission. The allegations against Mr. Roeder were, generally, that he had acted in a manner that deserved censure. The Commission assigned three of its members to sit on a Panel to conduct the hearing and rule on the allegations. The Panel conducted the hearing in November and December 1994. Mr. Roeder was represented by counsel throughout.

6 In April 1995 the Panel issued its reasons and findings. The Panel determined that Mr. Roeder had acted contrary to the public interest by failing to comply with his obligations as an officer and director of Keywest. The Panel felt that the public

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needed to be protected from Mr. Roeder's machinations so it imposed an order restraining him from acting as a director or officer of a publicly traded company in British Columbia for a period of 17 years. It also ordered that he pay the costs of the proceeding.

7 Mr. Roeder was unhappy with that result. The *Securities Act*, R.S.B.C. 1996, c. 418 stipulates that an appeal from the Commission's decisions lies, with leave, to the Court of Appeal and nowhere else. So, Mr. Roeder applied to the British Columbia Court of Appeal for leave to review the Panel's decision. The leave to appeal was argued in July 1995. Speaking for the court Finch J.A. (as he then was) dismissed Mr. Roeder's application for leave.

8 In October 2000 Mr. Roeder applied to the Commission under s. 171 of the *Act* to revoke or vary the 1995 order. Section 171 clothes the Commission with authority to alter or lift one of its orders if to do so would not be contrary to the public interest. Whether s. 171 is meant to be a second avenue of appeal (as opposed to merely allowing the Commission some flexibility in the face of changing circumstances) is a question for another day. For reasons of its own the Commission agreed to process Mr. Roeder's request to revoke or vary the original order.

9 Mr. Roeder's s. 171 application was founded on a single thread: Mr. Roeder says that in the 1980s he retained and received advice from a solicitor named Mr. Bence. Mr. Roeder says that Mr. Bence gave him advice with respect to, among other things, how he might extract value from ownership of a controlling interest in a publicly traded company after that company's business has failed. Some time after that retainer was finished, Mr. Bence joined the firm Lang Michener Lawrence & Shaw. When the Keywest investigation started after that, the Commission staff retained that firm, and specifically Mr. Nesmith, to advise it with respect to Mr. Roeder and his activity concerning Keywest.

10 Mr. Roeder urged the Commission to revoke or vary the 1995 order because, according to him, Mr. Bence shared confidences with Mr. Nesmith about Mr. Roeder and his ways. Mr. Nesmith then, says Mr. Roeder, used that confidential information to shape the theory of the case against him, and the Commission staff in turn used Mr. Nesmith's plan to obtain the 1995 order sanctioning Mr. Roeder.

11 In February 2003 the Commission convened a hearing to determine whether Mr. Roeder delayed too long in starting his s. 171 application. The Commission considered much evidence on that score. The Commission concluded that Mr. Roeder had been aware since before the 1994 hearing that Mr. Bence and Mr. Nesmith were in the same firm. It found that, despite some uncertainty about Mr. Nesmith's precise role in the process leading up to and including the hearing, Mr. Roeder was aware that Mr. Nesmith was involved in some fashion. It held that because Mr. Roeder knew about Mr. Nesmith's participation in May 1995, and he had done nothing about his complaint arising from that participation until 2000, he had delayed too long and was not entitled to relief from the 1995 order. The Commission therefore dismissed Mr. Roeder's s.171 application.

12 Again, Mr. Roeder was unhappy with the Commission's decision. He applied to the Court of Appeal for leave to reverse it. There was some considerable delay in bringing that application on for hearing. While the appeal was underway, in March 2003 Mr. Roeder started the present action. In it, Mr. Roeder alleges that Mr. Bence, Mr. Nesmith, Mr. Flemming (a junior to Mr. Nesmith), Ms. Murray (an investigator employed by the Commission) and the Commission itself breached various duties owed to him with respect to, among other things, confidential information and fairness of process.

13 As the second appeal was pending, the defendants made an application under Rule 19(24) to dismiss the tort action. Harvey J. heard that application in December 2003 and January 2004. In January 2004 Harvey J. ordered that the whole civil proceeding should be stayed until the Court of Appeal decided the validity of the Commission's s.171 ruling.

14 The s. 171 decision appeal was heard in February 2005. The Court of Appeal dismissed it. Back in Supreme Court, Harvey J. had stayed the civil action only so long as the British Columbia Court of Appeal matter was outstanding. The stay was lifted when the Court of Appeal's decision was released. The defendants then revived their motion to dismiss under Rule 19(24).

15 This history is already complicated, but there is more: in the midst of Harvey J.'s hearing Mr. Roeder produced an amended statement of claim which he proposed to file. The hearing was then adjourned to accommodate the parties and the court's schedule. During the adjournment Mr. Roeder filed an amended statement of claim — but it was a different version of the statement of claim from the one he handed up to Harvey J. Now, strictly speaking Mr. Roeder may have been entitled to

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file that amendment as of right, but doing so at the juncture he did raises two concerns. The first is the advisability of amending pleadings *in the middle* of a motion to dismiss them. It strikes me as unwise to do that. In the middle of a motion the court's ruling is not known; the court might find the pleading satisfactory or it might give the party guidance on how to fix a problem. A party who files an amendment mid-motion may find himself addressing a problem that did not trouble the court, or addressing the problem in an unsatisfactory way. In either case the party has "shot his bolt" by using up his one free amendment, and has put himself to the risk and expense of requiring consent or court order for further amendments. But be that as it may; a party is, within the limits of civil procedure and procedural fairness, entitled to conduct an action as best suits its desires. The other concern is the propriety of filing an amendment in the middle of a motion to strike. That seems to be near to thumbing one's nose at the process. But, again, be that as it may, those concerns do not bear on or determine an issue in this hearing.

16 The amended statement of claim was not, to the defendants' eye, a significant improvement. When the Court of Appeal's decision confirming the Commission's dismissal of Mr. Roeder's s. 171 application came down, Harvey J.'s stay was lifted, and the defendants revived their own Rule 19(24) motion. They addressed that motion to the amended statement of claim Mr. Roeder filed in January 2004. As that motion wound its way toward its hearing date, Mr. Roeder presented a motion of his own: to amend his statement of claim for a third time and to add Keywest Resources Ltd. ("Keywest") as a plaintiff.

The Application

17 It was the defendants' Rule 19(24) motion and Mr. Roeder's application to further amend and to add Keywest that came before me in December 2005. The parties agreed to conduct the Rule 19(24) application on the footing that the third amended statement of claim was, in fact, filed and constitutes the plaintiff's actual pleading. With that filing there will now be two plaintiffs, but their interests and the nature of their claims are coincident with one another, and I will for convenience refer to the plaintiffs as "Mr. Roeder" in the singular throughout.

18 The defendants did not oppose adding Keywest as a plaintiff, subject to the stipulation that the addition was without prejudice to any *Limitation Act* defence that might be available. The plaintiff agreed to that stipulation. There will, therefore, be an order adding Keywest as a plaintiff and authorizing amendments to the statement of claim necessary to identify Keywest and to describe the role it played, the costs it paid, and the damages it claims as a consequence of the first Commission hearing in 1995.

19 Finally, although the defendants raised a limitation defence when they filed their statements of defence way back in 2003, Mr. Roeder did nothing to address it. Nothing, that is, until the week before this application was heard. Then Mr. Roeder filed a reply. In his reply Mr. Roeder asserted that because his claims arise out of a breach of trust they are subject to a 10 year limitation period, or alternatively that the cause of action did not come to Mr. Roeder's attention until September 2000. The defendants objected to the reply, saying that it raises a new cause of action and a reply cannot be used to plead an entirely new kind of claim. Striking the reply was not, however, the subject of the motion before me.

Discussion

20 The defendants all rely on Rule 19(24):

> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> > (a) it discloses no reasonable claim or defence as the case may be,
> >
> > (b) it is unnecessary, scandalous, frivolous or vexatious,
> >
> > (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
> >
> > (d) it is otherwise an abuse of the process of the court,

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> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

21 The defendants say that Mr. Roeder's suit against them is vexatious because it raises issues the Securities Commission has already dealt with, and that his suit is an abuse of process for the same reason. They say as well that the statement of claim does not disclose a reasonable cause of action.

Abuse of Process

22 The defendants observe that Mr. Roeder has fully exhausted his rights of review of the Commission's 1995 decision. They say that this action is a collateral attack on that 1995 decision, and as such is an abuse of the court's process.

23 A proceeding is a collateral attack when it asserts facts inconsistent with a previous factual determination by a court that had jurisdiction to make it, or when the proceeding seeks relief that is inconsistent with a previous disposition by a similarly competent court. To be a collateral attack it is not necessary that the proceeding bluntly assert that the previous order should be set aside. As McIntyre J. said in *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at 599:

> ...It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment...

24 In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (S.C.C.), Arbour J. summed the issue at paragraph 15:

> ... The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex, it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions...

25 The starting point for analysis of the defendant's position is to assess what the previous court did and whether it had the jurisdiction to do it.

26 The *Securities Act* empowers the Securities Commission to govern publicly traded securities in British Columbia. Among its many other duties the Commission is charged with protecting the public interest by maintaining a fair exchange whose operators adhere to a certain standard of integrity. The Commission's interest in Mr. Roeder was clearly focused on protecting the public from his machinations. I think there can be no question that the Commission's decision was within the sphere of authority given it by the *Securities Act*. It had jurisdiction.

27 The focus of Mr. Roeder's civil suit is recovery of damages. Those damages befell him because the Commission Panel made the decision it did. In order to establish the necessary causal link between the defendants' alleged wrong-doing and the damages he claims to have suffered, Mr. Roeder must show on the balance of probabilities that the Panel's decision would have been favorable to him had Mr. Bence not blabbed harmful confidential information to Mr. Nesmith and had Mr. Nesmith not blabbed to Mr. Fleming and the Commission. The statement of claim describes that harmful confidential information thus:

> 18. Bence's representation of Spiral included structuring its initial public offering, arranging for its listing on the Vancouver Stock Exchange and disseminating information on the affairs of Spiral to the public in Information Circulars, Material Change Reports and News Releases.
>
> 19. Bence's representation of Mr. Roeder included the structuring of incentive options, escrow shares, employee remuneration, shareholder loans to the company and general corporate and securities advice to protect his interest in Spiral.

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> 20. Bence also represented Mr. Roeder in the sale of his control interest in Spiral. Bence structured the sale of his interest in stages, *viz* Mr. Roeder's control interest did not pass in one block but was delivered in several smaller blocks, with payment also being made in stages, on the delivery of each smaller block to the purchaser.
>
> 21. During this retainer Mr. Roeder communicated confidential information to Bence on his personal affairs, business affairs, practices and objectives to facilitate representing Mr. Roeder in the matters described above.

28 The Commission rendered a comprehensive set of Reasons for its decision. The Panel spoke through those Reasons — they contain all the findings of fact on which the Panel based its decision. Those Reasons do not refer to Mr. Roeder's dealings with Spiral Engineering Ltd. ("Spiral"). They do not assert or intimate that anything which came out in evidence concerning Spiral influenced the Panel's findings of fact or the penalty the Panel imposed.

29 The Panel's decision fully describes its reasoning. That reasoning was tested by the Court of Appeal in 1995 and found satisfactory. This leads to an inescapable conclusion that the Panel's findings of fact supported its decision and that its findings of fact were unassailable. Those findings of fact do not include an iota reliance on information relating to Mr. Roeder's dealings with Spiral. The Panel did not, therefore, make use of any information that Mr. Bence may have leaked to his confreres.

30 But Mr. Roeder's claim for damages is predicated on the proposition that the Panel did make use of such information and that its decision would have been different had Mr. Bence said nothing to Mr. Nesmith. Put another way, Mr. Roeder must link the defendant's bad behavior to the harm he suffered by establishing that the decision would have been in his favour but for that bad behavior. In effect, Mr. Roeder asks this court to retry the Keywest case, this time excluding the impugned information from Mr. Bence. That is a classic collateral attack — Mr. Roeder wishes this court to make findings of fact inconsistent with the findings of fact the Commission Panel legitimately made. This suit is therefore an abuse of process and for that reason the proceeding must be struck.

31 Furthermore, in 2003 Mr. Roeder actually asked the Commission to set aside the 1995 order on the very same grounds he raises now in his statement of claim. He made that request in the context of his s. 171 application. It was wholly within the Commission's mandate to receive, consider, and rule on Mr. Roeder's s. 171 motion. The Commission is a quasi-judicial body. It is entitled to establish procedures, conduct hearings, and make rulings on matters within its jurisdiction. The effect on Mr. Roeder of the 1995 order and the degree of procedural fairness accorded the parties ahead of that order were equally within the Commission's jurisdiction. The Commission acted within the scope of its authority when in 2003 it rejected Mr. Roeder's argument that the 1995 order should be revoked or varied because of alleged lawyerly misconduct. The Commission's reasoning was tested and confirmed by the Court of Appeal. Mr. Roeder's present suit is simply the same argument put to a different tribunal. It is true that his s. 171 application sought to reverse his ban from trading in public securities while his civil suit seeks damages for that ban. In my view that is a distinction without a difference — in both proceedings Mr. Roeder looks for relief from the burden of the Commission's sanction. The present suit is nothing more than an attempt to get by collateral means what the Commission has legitimately denied him. Any order this court made in Mr. Roeder's favour in this proceeding would be inconsistent with the previous disposition of the same issue by the Commission. For that reason Mr. Roeder's civil action presents another collateral attack on the Commission's decision, *viz*: the Commission's s. 171 decision to dismiss his complaints about the lawyers' behavior. This proceeding is an abuse of process, it offends Rule 19(24), and must be struck.

Limitation Defence

32 The defendants argue that the plaintiff's claim is barred by the expiry of the relevant limitation period. They point out that in its s. 171 decision the Commission found as a fact that in 1995 Mr. Roeder was aware of Mr. Nesmith's continuing involvement in the matter. The Court of Appeal specifically endorsed that finding. The defendants say that all the elements of the causes of action in the present proceeding were known to Mr. Roeder in 1995. They argue that all those causes of action are subject to either a two or a six year limitation period. The present proceeding was started in March 2003 and is, the defendants say, out of time.

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33 Mr. Roeder counters, saying his suit is founded on a fraudulent breach of trust so the limitation period is 10 years, and in any event he was not aware of all the elements giving rise to his cause of action until the year 2000 so if the limitation period is six years his suit was brought in time. Mr. Roeder has reduced those two positions to writing and put them in his reply to the collective statements of defence.

34 Leaving aside any other defects this suit may have, I think that the question of a limitation period generally ought not be the subject of an application under Rule 19(24). That is particularly so when the parties disagree on the facts on which a limitation period may be determined: (*Canadian Pacific Ltd. v. British Columbia Hydro & Power Authority* (1979), 10 B.C.L.R. P-6 (B.C. S.C.)). There may well be merit in the defendant's position on the limitation issue, but that argument should best be made in the context of some application other than under Rule 19(24).

Disclose Reasonable Cause of Action

35 To assess whether the statement of claim discloses a reasonable cause of action the court will assume that the facts plead can be established: (*McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (B.C. C.A.)). The statement of claim asserts that:

1. Between 1985 and 1988 Mr. Roeder owned an interest in Spiral Engineering Ltd. which was publicly traded on the Vancouver Stock Exchange.

2. Between 1985 and 1988 Mr. Roeder shared confidences with his lawyer Mr. Bence concerning Spiral.

3. Some of those confidences had to do with the mechanism by which Mr. Roeder transferred his controlling interest in Spiral.

4. In 1991 Mr. Bence joined the firm Lang Michener Lawrence & Shaw.

5. In 1992 Mr. Roeder owned a controlling interest in Keywest which was publicly traded on the Vancouver Stock Exchange.

6. In 1993 Mr. Nesmith joined Lang Michener Lawrence & Shaw.

7. At material times before July 1994 Mr. Flemming was an associate at Lang Michener Lawrence & Shaw; after that he was a sole practitioner.

8. In July 1993 the Securities Commission retained Mr. Nesmith and Mr. Fleming to advise it with respect to irregularities it suspected in Mr. Roeder's dealings with his interest in Keywest.

9. Mr. Bence shared confidences concerning Mr. Roeder with Messers. Nesmith and Fleming, and those confidences influenced the advice the latter gave to the Commission concerning the investigation of Mr. Roeder's dealings with Keywest.

10. There were material similarities in the mechanism Mr. Roeder used to transfer his ownership of Spiral and Keywest.

11. The confidential information concerning Mr. Roeder and Spiral given by Mr. Bence to Messers. Nesmith and Fleming assisted the Commission's investigation of Mr. Roeder on the Keywest affair.

12. The sharing of confidential information placed Messers. Nesmith and Fleming in a conflict of interest *vis-à-vis* their retainer by the Commission on the Roeder and Keywest matter.

13. The Commission and its investigator Ms. Murray were aware that Messers. Nesmith and Fleming were in a conflict of interest.

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14. In 1994 Mr. Roeder became aware of Mr. Bence's association with Mr. Nesmith and asked that Mr. Nesmith resign from the Commission's retainer. Mr. Nesmith said that he would comply, but secretly did not resign, and Mr. Nesmith continued to advise the Commission with respect to the Roeder and Keywest matter.

15. The Commission's investigator Ms. Murray and Messers. Nesmith and Fleming misrepresented to Mr. Roeder that Mr. Nesmith was no longer advising the Commission. Mr. Roeder relied on that misrepresentation by taking no steps to obtain an order excluding Mr. Nesmith from the process.

16. Ms. Murray and Messers. Nesmith and Fleming conspired to conceal the fact that they were making use of confidential information against Mr. Roeder. That conspiracy was outside the scope of their employment or retainer as the case may be.

17. The Commission actively participated in concealing Mr. Nesmith's continued involvement in the Roeder and Keywest matter.

18. At the hearing of the Keywest matter Mr. Fleming prosecuted the Commission's case against Mr. Roeder. Mr. Fleming cross-examined Mr. Roeder concerning his sale of Spiral and with respect to his dealings with Keywest. Mr. Fleming argued that Mr. Roeder had a history of creating publicly traded "shell" companies by divesting them of their assets so as to facilitate his sale of a controlling interest in those companies. Mr. Roeder denied that he intended to do such a thing with Keywest.

19. The Commission Panel did not accept Mr. Roeder's assertion that he did not intend to divest Keywest of assets thereby turning it into a "shell". The Commission Panel held that Mr. Roeder deliberately divested Keywest of its assets in order to facilitate the sale of his controlling interest.

20. As a consequence of that finding the Commission sanctioned Mr. Roeder by barring him from trading in securities and from acting as a director of a publicly traded company for 17 years.

21. The Commission delayed in its response to Mr. Roeder's request in the year 2000 for documents relating to his complaint concerning Mr. Nesmith's involvement in 1994-5, the Commission declined to give Mr. Roeder a right of discovery in the context of his s. 171 application, and the Commission dismissed Mr. Roeder's application due to his delay before it considered the merits of his complaint.

22. As a result of these facts Mr. Roeder has suffered

(i) loss of reputation;

(ii) loss of income arising from trading ban;

(iii) emotional distress and anxiety; and

(iv) general damages flowing from Mr. Nesmith's continued retainer, Mr. Bence's breach of confidentiality, and Mr. Roeder's loss of his right to a hearing before the Commission Panel that was untainted by impropriety.

23. As a result the new plaintiff Keywest has suffered

(i) the cost of retaining counsel for the 1994-5 hearing, the s. 171 application, and the effort to obtain discovery in the s. 171 matter.

36 Before I turn to Mr. Roeder's various complaints I will spend a moment to deal with Mr. Roeder's assertions throughout the statement of claim that the defendants owed duties of care to the public or to each other (for example, paragraph 39 where Mr. Roeder alleges: "The Defendant, Bence was under a fiduciary and professional duty to Mr. Roeder, the Commission, and the public...". Obviously Mr. Roeder has no standing to sue for a breach of duty owed to any entity other than him, and any reference to duties owed to other entities is superfluous. Whatever fate may befall his pleadings generally, it is certain that

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the specific references to duties owed by the defendants to anyone other than the plaintiff must be struck from Mr. Roeder's statement of claim.

37 Mr. Roeder's statement of claim advances eight separate causes of action. They are:

1. Breach of Professional Duty

38 Mr. Roeder alleges that Messers. Bence, Nesmith, and Fleming, and Lang Michener Lawrence & Shaw owed a "professional" duty to him and that they breached that duty by failing to avoid a conflict of interest. These allegations are set out in paragraphs 39, 40 41, 42, 43, 45, 48, 50, 51, 52, 53, 56, and 57.

39 The lawyers and the law firm had no contractual relationship with Mr. Roeder. They did not, therefore, owe him a duty of care. Mr. Roeder has no cause of action against them: (*Jensen v. MacGregor*, [1992] B.C.J. No. 467 (B.C. S.C.)). Furthermore, a lawyer does not owe an actionable duty to act ethically to anyone other than his client: (*Lawrence v. Baynham*, [2003] B.C.J. No. 343 (B.C. S.C.)).

40 Paragraphs 39, 40 41, 42, 43, 45, 48, 50, 51, 52, 53, 56, and 57 of the statement of claim do not disclose a cause of action and must be struck.

2. Breach of Duty to Disclose

41 At paragraphs 44, 46, 48, and 50 Mr. Roeder alleges that Messers. Nesmith and Fleming, the law firm, and the Commission breached a professional and fiduciary duty of disclosure to the plaintiff.

42 For the same reasons that the claim for breach of professional duty must be struck, so must this claim. It is not a duty of care known to law and cannot underwrite an actionable tort.

3. Breach of Fiduciary Duty

43 Breach of a fiduciary duty can, of course, underwrite a claim in tort for damages. The tort requires that the plaintiff be a person to whom a fiduciary duty is owed, that the defendant be a person who owes the duty, that the duty was in some way not satisfied, and that the plaintiff suffered some loss as a consequence. Many relationships can give rise to a fiduciary duty. I say nothing new when I observe that the relationship between a solicitor and his client is capable of impressing upon one a fiduciary duty to the other. Mr. Roeder's statement of claim adequately describes a set of facts upon which one could, if one assumes that those facts to be true, conclude that Mr. Bence owed a fiduciary duty to Mr. Roeder, and further that Mr. Bence breached his fiduciary duty to maintain solicitor-client confidentiality. The statement of claim connects that breach to some kind of loss Mr. Roeder suffered. I am, therefore, satisfied that the statement of claim adequately describes a cause of action against Mr. Bence for breach of fiduciary duty.

44 The statement of claim asserts no facts upon which a person could conclude that Mr. Nesmith and Mr. Fleming or the law firm were fiduciaries to Mr. Roeder. Those portions of the statement of claim that allege breach of fiduciary duty against Messers. Nesmith and Fleming, and Lang Michener Lawrence & Shaw must be struck.

45 Likewise, Mr. Roeder's statement of claim does not assert that the Commission and Ms. Murray were in the kind of relationship with him that could impress upon them a fiduciary responsibility. Accordingly, those portions of the statement of claim that assert that the Commission and Ms. Murray are responsible for damage Mr. Roeder suffered as a result of a breach of fiduciary duty must also be struck.

4. False Representation

46 The statement of claim alleges that Messers. Nesmith and Fleming and Ms. Murray misrepresented to Mr. Roeder that Mr. Nesmith was no longer acting on the case, that Mr. Roeder relied on that representation to his detriment (by not pursuing his complaint through to an order formally excluding Mr. Nesmith), and that Mr. Roeder suffered loss as a result. Those allegations

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describe the tort of misrepresentation. Whether Mr. Roeder can prove any of it is beside the point at this juncture; the only question here is whether the pleadings disclose a reasonable cause of action. In the case of misrepresentation, they do.

5. Abuse of Process

47 Abuse of process can amount to an actionable tort. Its essential elements are:

1. the defendants have been subjected to a legal process by the plaintiffs;

2. this has been done predominantly to further some indirect, collateral and improper purpose outside the ambit of the litigation;

3. some definite act or threat has been made in furtherance of that process;

4. some measure of actual damage has resulted.

(*Home Equity Development Inc. v. Crow*, 2002 BCSC 1747 (B.C. S.C.)).

48 The operative portions of the statement of claim concerning this tort are paragraphs 66 to 68. At paragraph 66 Mr. Roeder alleges that:

> ...By shrouding Nesmith's continued legal services to the Commission...in secrecy after Mr. Roeder repeatedly complained that Nesmith was acting in conflict of interest and after Nesmith had represented that he had withdrawn and in failing to disclose Fleming's prior relationship with Bence and in failing to disclose private communications with and submissions to Commission Panel members on Mr. Roeder's conflict of interest complaint, the Commission exercised its powers either for the illegal purpose of injuring Mr. Roeder or with reckless indifference to the probability of injury to Mr. Roeder and thereby breached this duty...

49 This and the paragraphs that follow are awkwardly worded. As best as I can make out, the gist of the allegation is that the Commission was intent on injuring Mr. Roeder and initiated the proceeding against him for an improper purpose. Presumably the improper purpose necessary for the tort of abuse of process is the "illegal purpose of injuring Mr. Roeder". I do not read the statement of claim to say that concealing Mr. Nesmith's involvement was the improper purpose, but rather that the concealment comprises circumstantial evidence that the Commission was motivated to hurt Mr. Roeder. I think the statement of claim poses the rhetorical question: Why would the Commission hide Mr. Nesmith if its proceeding against Mr. Roeder was for legitimate reasons?

50 The statement of claim does set out the elements of the tort. It alleges that Mr. Roeder was the subject of a legal process, that the process was initiated for the improper purpose of harming Mr. Roeder, that the Commission committed the concrete act of concealing Mr. Nesmith's involvement in furtherance of that process, and that Mr. Roeder was harmed. Leaving aside the question of whether Mr. Roeder could ever prove that allegation, the statement of claim does describe the cause of action of abuse of process.

6. Abuse of Public Office

51 At paragraph 68 Mr. Roeder alleges that the Commission committed the tort of abuse of public office. That tort has these as its essential elements:

1. deliberate unlawful conduct by the defendant in the exercise of a public function;

2. awareness that the conduct was unlawful and was likely to injure the plaintiff.

(*Odhavji Estate v. Woodhouse*, 2003 SCC 69 (S.C.C.)).

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52 Paragraph 68 is concerned with the Commission's response to Mr. Roeder's s. 171 application, and in particular with the Commission's deliberations on whether he was entitled to have discovery of documents and of the players involved in the 1995 hearing and decision. The paragraph is also concerned with the order in which the Commission made decisions, specifically the fact that it decided that the application should be dismissed due to Mr. Roeder's delay before it put its mind to whether Mr. Roeder was entitled to discovery.

53 Nowhere in paragraph 68, or anyplace else, does Mr. Roeder allege that the decision making arm of the Commission engaged in deliberate unlawful conduct cognizant that the conduct was unlawful and was likely to injure him.

54 This pleading is, in any event, vexatious. The Court of Appeal has specifically endorsed the the Commission's decision to rule on delay before discovery. It cannot be correct in law to assert that the Commission erred, much less that it acted illegally. Paragraph 68 must be struck from the statement of claim.

7. Conspiracy

55 Mr. Roeder has alleged that Messers. Nesmith and Fleming, and Ms. Murray conspired to injure him. The conspiracy comprised their plan to conceal from Mr. Roeder Mr. Nesmith's continuing involvement in the Keywest matter. That allegation is contained in paragraph 60 of the statement of claim.

56 An essential element of the civil tort of conspiracy is that the defendants have agreed to do an unlawful act. As I pointed out earlier these defendants did not have a duty to tell Mr. Roeder anything about Mr. Nesmith's involvement in the file. Their failure to do so cannot be counted an unlawful act, and Mr. Roeder's pleading of conspiracy against them is fatally flawed.

57 Paragraph 60 must therefore be struck from the pleadings.

Conclusion

58 The action itself must be stuck as an abuse of process.

59 If I am wrong, then the portions of the statement of claim noted above must be struck out.

60 The defendants are entitled to their costs against the plaintiffs on Scale 3 throughout.

Application granted.

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Supreme Court of Canada, Laskin C.J.C.

R. v. Wilson

1983 CarswellMan 154, 1983 CarswellMan 189, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 37 C.R. (3d) 97, 4 D.L.R. (4th) 577, 51 N.R. 321, 9 C.C.C. (3d) 97, J.E. 84-70

James Stephen Wilson, Appellant and Her Majesty the Queen, Respondent

Dickson, Estey, McIntyre and Chouinard JJ.

Heard: March 14, 1983
Judgment: December 15, 1983

Proceedings: Affirmed, 65 C.C.C. (2d) 507, 13 Man. R. (2d) 155, 1982 CarswellMan 69, [1982] 2 W.W.R. 91 (Man. C.A.)

Counsel: *R.L. Pollack*, for appellant
J.D. Montgomery, Q.C., for respondent

Subject: Criminal

Headnote

Criminal Law --- Invasion of privacy — Interception of private communications — Admissibility — Authorization

Authorization reviewable only upon prompt application to court originally granting it.

At trial, wiretap evidence was ruled inadmissible on the basis that the authorization granted by the Court of Queen's Bench was unlawful. This determination was made without opening the sealed packet containing the documents relating to the authorization after cross-examination of the police officer indicated that there was no evidence to support the statement in the authorization that other investigative procedures had been tried and failed, that other investigative procedures were unlikely to succeed, and that the matter was urgent. Upon the Crown's appeal from the accused's acquittal, a new trial was ordered on the basis that an authorization could not be challenged collaterally in Provincial Court. The accused appealed.

Held:

Appeal dismissed.

Per McIntyre J. (Laskin C.J.C. and Estey J. concurring)

A trial judge has no authority to collaterally attack a wiretap authorization; he is limited to a consideration of defects and irregularities apparent on the face of the authorization and may not go behind it. In his capacity as trial judge, there is no authority to direct the opening of the sealed packet. Having no access to the materials necessary to review the granting of the authorization, a collateral attack is not possible. Any application to review an authorization must be made as soon as possible to the court which originally granted it, preferably before the authorizing judge. If the trial judge happens to be of the same court that made the authorization order, an application may be made to him directly for review to avoid delay, but such a review would be done in his capacity as a judge of the authorizing court, not in his capacity as trial judge. The trial judge effectively went behind the authorizations, even though he did not open the sealed packet, and thus exceeded his jurisdiction and was in error in refusing to admit the Crown's evidence.

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Per Dickson J. (concurring in result) (Chouinard J. concurring)

Section 178.16(1)(*a*) and 3(*b*) of the Criminal Code require a trial judge to consider the validity of an authorization and give him authority in doing so to go behind an apparently valid wiretap authorization to determine whether there are defects or irregularities in either the giving of the authorization or in the application for it. Such a determination cannot properly be made without opening the sealed packet. A superior court judge has authority to do so. A trial before an inferior court judge should be adjourned to allow counsel to apply for an order permitting its opening. The trial judge erred in deciding that the pre-conditions of s. 178.13(1)(*b*) had not been met without examining the contents of the sealed packet.

Table of Authorities

Cases considered:

Statutes considered:

Criminal Code, R.S.C. 1970, c. C-34, Pt. IV.1 [en. 1973-74, c. 50, s. 2], ss. 2 "superior court of criminal jurisdiction" [am. 1974-75-76, c. 19, s. 1

1978-79, c. 11, s. 10(1)], 178.12(1)(*g*) [en. 1973-74, c. 50, s. 2], 178.13 [en. 1973-74, c. 50, s. 2

am. 1976-77, c. 53, s. 9], 178.14 [en. 1973-74, c. 50, s. 2], 178.16 [en. 1973-74, c. 50, s. 2

am. 1976-77, c. 53, s. 10], 482 "judge" [am. 1974-75-76, c. 48, s. 25(1)

c. 93, s. 61

78-79, c. 11, s. 10(1)], 613(1)(*b*)(iii).

Authorities considered:

Bellemare, "Larevisiond'une authorisation en écoute electronique" (1979), 39 Revue du Barreau 496.

Cohen, Invasion of Privacy: Police and Electronic Surveillance in Canada (1983), p. 155.

Manning, Protection of Privacy Act (1974), pp. 135-37.

Appeal from decision of Manitoba Court of Appeal, [1982] 2 W.W.R. 91, 65 C.C.C. (2d) 507, 13 Man. R. (2d) 155, allowing appeal and ordering new trial on basis trial judge had no authority to exclude wiretap evidence on basis of collateral attack on wiretap authorization.

Considered by majority:

Bador Bee v. Habib Merican Noordin, [1909] A.C. 615 (P.C.) — *referred to*

Bidder v. Bridges (1884), 26 Ch. D. 1 (C.A.) — *referred to*

Boyle v. Sacker (1888), 39 Ch. D. 249 (C.A.) — *referred to*

Can. Tpt. (U.K.) Ltd. v. Alsbury, 7 W.W.R. (N.S.) 49, 105 C.C.C. 20, [1953] 1 D.L.R. 385 , affirmed (sub nom. *Poje v. A.G.B.C.)* [1953] 1 S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311, [1953] 2 D.L.R. 785 — *applied*

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Charette v. R., [1980] 1 S.C.R. 785, 14 C.R. (3d) 191, 51 C.C.C. (2d) 350, 110 D.L.R. (3d) 71, 33 N.R. 158 , affirming (sub nom. *R. v. Parsons)* 17 O.R. (2d) 465, 40 C.R.N.S. 202, 37 C.C.C. (2d) 497, 80 D.L.R. (3d) 430, 33 N.R. 161 — *considered*

Clarke v. Phinney, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 — *referred to*

Dickie v. Woodworth (1883), 8 S.C.R. 192 — *applied*

Gibson v. Le Temps Publishing Co. (1903), 6 O.L.R. 690 — *applied*

Goldman v. R., [1980] 1 S.C.R. 976, 13 C.R. (3d) 228, 51 C.C.C. (2d) 1, 108 D.L.R. (3d) 17, 30 N.R. 453 — *referred to*

Gulf Islands Navigation Ltd. v. Seafarers' Int. Union (1959), 28 W.W.R. 517, 18 D.L.R. (2d) 625 (B.C.C.A.) — *applied*

Maynard v. Maynard, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 — *referred to*

Miller and Thomas, Re (1975), 28 C.C.C. (2d) 128 (B.C. Co. Ct.) — *referred to*

Pashko v. Can. Accept. Corp. Ltd. (1957), 12 D.L.R. (2d) 380 (B.C.C.A.) — *referred to*

R. v. Blacquiere (1980), 57 C.C.C. (2d) 330, 28 Nfld. & P.E.I.R. 336, 79 A.P.R. 336 (P.E.I.S.C.) — *considered*

R. v. Bradley, [1980] C.S. 1051, 19 C.R. (3d) 336 (Que. S.C.) — *referred to*

R. v. Cardoza (1981), 61 C.C.C. (2d) 412 (Ont. C.A.) — *referred to*

R. v. Crease (1980), 53 C.C.C. (2d) 378 (Ont. C.A.) — *referred to*

R. v. Dass, [1979] 4 W.W.R. 97, 8 C.R. (3d) 224, 47 C.C.C. (2d) 194 , leave to appeal to S.C.C. refused 30 N.R. 609n — *considered*

R. v. Donnelly, [1976] W.W.D. 100, 29 C.C.C. (2d) 58 (Alta. T.D.) — *considered*

R. v. Gabourie (1976), 31 C.C.C. (2d) 471 (Ont. Prov. Ct.) — *referred to*

R. v. Gill (1980), 56 C.C.C. (2d) 169 (B.C.C.A.) — *considered*

R. v. Hancock, [1976] 5 W.W.R. 609, 36 C.R.N.S. 102, 30 C.C.C. (2d) 544 (B.C.C.A.) — *referred to*

R. v. Haslam (1977), 36 C.C.C. (2d) 250 (Nfld. T.D.) — *referred to*

R. v. Ho (1976), 32 C.C.C. (2d) 339 (B.C. Co. Ct.) — *referred to*

R. v. Hollyoake (1975), 27 C.C.C. (2d) 63 (Ont. Prov. Ct.) — *referred to*

R. v. Johnny (1981), 62 C.C.C. (2d) 33 (B.C.S.C.) — *referred to*

R. v. Kalo (1975), 28 C.C.C. (2d) 1 (Ont. Co. Ct.) — *referred to*

R. v. Miller, [1976] 1 W.W.R. 97, 32 C.R.N.S. 192, (sub nom. *Re Miller and Thomas)* 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679 (B.C.S.C.) — *referred to*

R. v. Newall (1982), 67 C.C.C. (2d) 431, 136 D.L.R. (3d) 734 (B.C.S.C.) *referred to*

R. v. Robinson, [1977] 4 W.W.R. 697, 39 C.R.N.S. 158 (B.C. Co. Ct.) — *referred to*

R. v. Turangan, [1976] 4 W.W.R. 107, 32 C.C.C. (2d) 249 , affirmed 32 C.C.C. (2d) 254n (B.C.C.A.) — *referred to*

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R. v. Welsh (1977), 15 O.R. (2d) 1, 32 C.C.C. (2d) 363, 74 D.L.R. (3d) 748 (C.A.) — *applied*

R. v. Wong (1976), 33 C.C.C. (2d) 506 (B.C.S.C.) — *considered*

R. and Collos, Re, [1977] 5 W.W.R. 284, 37 C.C.C. (2d) 405 , reversing [1977] 2 W.W.R. 693, 34 C.C.C. (2d) 313 (B.C.C.A.) — *referred to*

R. and Kozak, Re (1976), 32 C.C.C. (2d) 235 (B.C.S.C.) — *referred to*

Royal Comm. Inquiry into Royal Amer. Shows Inc. (1978), 40 C.C.C. (2d) 212 (Alta. T.D.) — *referred to*

Royal Trust Co. v. Jones, [1962] S.C.R. 132, 37 W.W.R. 1, 31 D.L.R. (2d) 292 — *applied*

Stewart and R., Re (1975), 8 O.R. (2d) 588, 23 C.C.C. (2d) 306, 58 D.L.R. (3d) 644 , affirmed 13 O.R. (2d) 260, 30 C.C.C. (2d) 391, 70 D.L.R. (3d) 592 (H.C.) — *referred to*

Stewart v. Braun, [1924] 2 W.W.R. 1103, [1924] 3 D.L.R. 941 (Man K.B.) — *applied*

Zaduk and R., Re (1977), 37 C.C.C. (2d) 1 (Ont. H.C.) — *referred to*

***McIntyre J.*:**

1 The appellant was charged with nine counts relating to betting. He was tried before Dubienski, Provincial Court Judge in the Manitoba Provincial Court. The Crown's case depended on evidence obtained by wiretap for which it had procured four authorizations under the provision of Part IV. 1 of the *Criminal Code* from judges of the Court of Queen's Bench of Manitoba. Each authorization contained the following words:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Chemiak;
>
> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

2 At trial, on cross-examination of the police officer Cherniak who is referred to in the authorizations, evidence was given that Cherniak had had the sole direction of the investigation and that he had made the applications for the authorizations. He said that the interceptions were made under the authorizations, that they were the sole investigations made and that no other investigation was done or ordered by him after the first authorization. He was unaware of any other investigating steps. It is evident that counsel for the appellant by this line of cross-examination was attempting to ascertain whether or not the above-quoted words from the authorization were true and whether the prescriptions of s. 178.13(1)(b) of the *Code* had been satisfied. That section reads:

> 178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied.
>
> [...]
>
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

3 No objection was taken by the Crown to this line of examination.

4 On the basis of the cross-examination of the police officer, the trial judge made the following finding:

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> No other investigative procedures had been tried and failed, that there was no evidence that investigative procedures were likely to succeed, nor that there was any urgency.

5 As a result, the trial judge held that the interceptions of the private communications of the appellant had not been lawfully made as required by s. 178.16 of the *Criminal Code* and he ruled the evidence obtained by the wiretaps inadmissible. The case for the Crown collapsed and the appellant was acquitted on all counts.

6 On appeal to the Manitoba Court of Appeal, the Crown argued that the provincial court judge was without jurisdiction to go behind the authorizations and thereby make a collateral attack upon the order of a superior court. The appeal was allowed and a new trial was ordered. Monnin J.A. (as he then was), with whom Matas J.A. concurred, held that an authorization granted by a superior court judge could not be collaterally attacked in a provincial court. O'Sullivan J.A., concurring in the result, went further and said that: "In my opinion, where there is an authorization granted by a superior court of record, it cannot be collaterally attacked in any court and it cannot be attacked at all in an inferior court." A further argument was advanced by the appellant Wilson that there was no evidence of proper notice of intention to adduce wiretap evidence as required under s. 178.16(4) of the *Code*. This argument was rejected in the Court of Appeal and, on an acknowledgment that there was some five months' notice given, it was rejected in this Court as well. The only remaining issue then is whether or not the trial judge erred in law in refusing to admit the wiretap evidence.

7 In the Manitoba Court of Appeal, Monnin J.A. said:

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

8 I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally-and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

9 Authority for these propositions is to be found in many cases. A particularly clear statement of the law, together with reference to many of the authorities, is to be found in *Can. Tpt. (U.K.) Ltd. v. Alsbury*, 7 W.W.R. (N.S.) 49, 105 C.C.C. 20, [1953] 1 D.L.R. 385, affirmed *(sub nom. Poje v. A.G. B.C.)* [1953] 1 S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311, [1953] 2 D.L.R. 785, a judgment of the British Columbia Court of Appeal. In that case striking employees picketed the wharf where a vessel was waiting to take on cargo. The shipowner secured an ex *parte* injunction in the Supreme Court restraining the defendant and others from picketing. The injunction was disobeyed and contempt proceedings were commenced against the defendant. At first instance before the Chief Justice of the Supreme Court of British Columbia the defendants contended that an attachment for contempt should not issue for the reason that the injunction order, made by a judge of the Supreme Court, was a nullity and could not therefore form the basis for a contempt order. This collateral attack was rejected by the Chief Justice, attachment issued, and penalties for contempt including fines and imprisonment were imposed. In the Court of Appeal the appeal was dismissed with one dissent and, at p. 406, Sidney Smith J.A. said:

> First it was said that the injunction order of Clyne J. was a nullity that could be ignored with impunity, and could form no basis for contempt proceedings. Many objections were levelled at this learned Judge's order, chief among them being: (1) that it was based on improper and inadmissible evidence; (2) that the injunction was in conflict with the *Trade-unions Act* [R.S.B.C. 1948, c. 342] and the *Laws Declaratory Act*[R.S.B.C. 1948, c. 179]; (3) that the injunction was in permanent form and no Court could grant a permanent injunction *ex parte*.
>
> To this the general answer is made that the order of a Superior Court is *never* a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. This seems to be established by

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> the authorities cited by counsel for the Attorney-General, *viz., Scott v. Bennett* (1871), L.R. 5 Hi. 234 at p. 245; *viz., Scott v. Bennett* (1871), L.R. 5 H.L. 234 at p. 245; *Revell v. Blake* (1873), L.R. 8 C.P. 533 at p. 544 (Ex. Ch.); *Scotia Const. Co. v. Halifax*, [1935] S.C.R. 124, [1935] 1 D.L.R. 316; and to these I might add *Re Padstow Total Loss & Collision Assur. Assn.* (1882), 20 Ch.D. 137 at p. 145 (C.A.), and *Hughes v. Northern Elec. & Mfg. Co.* (1915), 50 S.C.R. 626 at pp. 652-3, 21 D.L.R. 358. To these general authorities may be added the more specific line of cases holding that an injunction, however wrong, must be obeyed until it is set aside, as shown by the authorities cited in Kerr on Injunctions, 6th éd., p. 668, and 7 Hals., p. 32, which include the authoritative decision in *Eastern Trust Co. v. MacKenzie, Mann & Co.*, [1915] A.C. 750 at p. 761, 31 W.L.R. 248, 22 D.L.R. 410, where a party was held to be rightly committed for disobeying an injunction, later set aside. Other authorities for holding that an injunction, though wrong, must be obeyed till set aside, are *Leberry v. Braden* (1900), 7 B.C.R. 403, and *Bassel's Lunch Ltd. v. Kick*, [1936] O.R. 445 at p. 456, 67 Can. C.C. 131 at p. 135.
>
> [1936] 4 D.L.R. 106 at p. 110 (C.A.)

10 Bird J.A., who wrote a separate concurring judgment, made the following comments, at p. 418:

> The order under review is that of a Superior Court of Record, and is binding and conclusive on all the world until it is set aside, or varied on appeal. No such order may be treated as a nullity.

and later, at pp. 418-19:

> In *Eastern Trust Co. v. MacKenzie, Mann & Co.*, 22 D.L.R. at p. 418, [1915] A.C. at p. 760, Sir George Farwell, speaking for their Lordships of the Judicial Committee, said: "(The injunction) was, or course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged."
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> Duff C.J.C., approved the same principle in *Scotia Const. Co. v. Halifax*, [1935], 1 D.L.R. 316, S.C.R. 124, and expressed the principle in these terms (p. 317 D.L.R., p. 128 S.C.R.) "In any case, no appeal was attempted, and whether appealable or not, it was a judgment of a Court of general jurisdiction, possessing ... authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction."
>
> In my opinion these submissions must be rejected.

11 On appeal to this Court, *Poje v. A.G. B.C.*, [1953] 1 S.C.R. 516, the appeal was dismissed. The question of a collateral attack upon a court order was not specifically dealt with. Kerwin J. expressed no opinion on the matter, but Estey J. in a short concurring judgment said at p. 528:

> I agree the appeal should be dismissed. The learned Chief Justice, in my opinion, upon this record had jurisdiction to hear the motion. I am in respectful agreement with the conclusions of the majority of the learned judges in the Court of Appeal, both with respect to the objections taken to the order as made by Mr. Justice Clyne and the findings of the learned Chief Justice. In view of the foregoing it is unnecessary to determine the nature and character of the contempt.

12 The case was referred to in *Pashko v. Can. Accept. Corp. Ltd.* (1957), 12 D.L.R. (2d) 380, in the British Columbia Court of Appeal.

13 In addition to these authorities and those referred to in judgments of the majority in the *Canadian Transport* case, reference may be made as well to the words of Osier J.A. in *Gibson v. Le Temps Publishing Co.* (1903), 6 O.L.R. 690 (Ont. H.C. [In Chambers]) at 694-95, where a judgment was attacked on the basis of a deficiency in service during the earlier proceedings which gave rise to the judgment. Osier J.A. said:

> If the judgment in the Quebec action is to be regarded as a judgment against a corporation or body corporate, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that is an objection which should have been taken on the motion to enter summary judgment, and it appears not to have been then taken. This was the substantial ground of defence to the action, and, so far as I can see, it was not brought to the attention of the Court at the proper stage and has never been decided. A similar difficulty attends the objection as to the service of the writ on

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> the manager. On the motion for judgment it might have been shewn (unless the defendants had done something to waive the objection) that the requirements of Rule 224 had not been complied with, and therefore that there had never been an effective service of the writ upon the firm, the person served not being, in fact, a partner, and not having been informed by the prescribed notice that he was served as manager: Snow's Annual Practice, *1902, p. 655;* Yearly Practice, *1904*, p. *504*. Or the firm might have moved to set aside the faulty service on the manager: *Nelson v. Pastorino & Co.* (1883), 49 L.T. 564 . Neither of these courses was taken and there is now a judgment against a partnership firm, which stands unimpeached, and which cannot be attacked in a collateral proceeding. While it stands, the plaintiff has the right to enforce it by any means open to him under Rule *228*.

14 Further authority in support of the rule against collateral attack may be found in *Clarke v. Phinney* (1895), 25 S.C.R. 633; *Maynard v. Maynard*, [1951] S.C.R. 346, [1951] 1 D.L.R. 241; *Bador Bee v. Habib Merican Noordin*, [1909] A.C. 615 (P.C.) and particularly in *Royal Trust Co. v. Jones*, [1962] S.C.R. 132, 37 W.W.R. 1, 31 D.L.R. (2d) 292. In that case the validity of a codicil to a will was upheld in proceedings in the Supreme Court of British Columbia. The trial judgment was affirmed in the Court of Appeal. The unsuccessful party brought a new action to set aside this judgment which succeeded notwithstanding the confirmation on appeal of the earlier judgment. No appeal was taken and the trustee proceeded for a period of fifteen years to administer the estate on the basis that the codicil was invalid. On an application for directions on a matter which did not directly involve the validity of the codicil and which involved parties not in the first proceeding, the Court of Appeal on its own motion declared that the trial judge, Manson J., who had declared the codicil invalid and set aside the earlier judgment, was without jurisdiction to do so and reversed his judgment. On appeal to this Court the appeal was allowed. Cartwright J. (as he then was) said, at p. 145:

> An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal.

15 The first judgment had therefore been properly challenged by a direct action. The second judgment, not having been appealed or directly challenged, was binding. Cartwright J. said, at p. 146:

> It follows that Manson J. had jurisdiction to entertain the action which was brought before him and his judgment in that action, not having been appealed from or otherwise impeached, *is* a valid judgment of the Court binding upon all those who were parties to it.

16 The cases cited above and the authorities referred to therein confirm the well-established and fundamentally important rule, relied on in the case at bar in the Manitoba Court of Appeal, that an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms.

17 The authorizations in question here are all orders of a superior court. Unless Parliament has altered or varied the rule above-described, it would apply in this case. It would then follow that in this action to determine the guilt or innocence of the accused the trial judge was in error in entertaining a collateral attack on the validity of the authorizations and, in effect, going behind them. Support for this view, with some qualifications for cases where there has been a defect on the face of the authorization or fraud, is to be found in *R. v. Welsh* (1977), 15 O.R. (2d) 1, 32 C.C.C. (2d) 363 at 371-72, 74 D.L.R. (3d) 748 (C.A.), where Zuber J.A., at pp. 371-72, said:

> Ordinarily the trial Court is obliged to simply accept the authorization at face value. Cases in which a trial Court could decline to accept the authorization would be rare indeed and, without attempting to set out an exhaustive list, would include cases in which the authorization was defective on its face, or was vitiated by reason of having been obtained by a fraud. However, even an authorization that was said to be defective on its face may attract the curative provisions of s. 178.16(2)(b) *[now s.* 178.16(3)(b)].

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18 In the case at bar, the trial judge preferred to follow the reasoning of Meredith J., of the British Columbia Supreme Court, in *R. v. Wong* (1976), 33 C.C.C. (2d) 506, where he asserted a broader power in the trial judge to go behind the authorization.

19 The question then is: has Parliament by the enactment of Part IV. 1 of the *Criminal Code* altered the rule which would render the authorizations immune from collateral attack? In my opinion, the answer must be no.

20 Section 178.16(1) deals with the admissibility of evidence obtained under the authority of the authorization. Subsection (3) gives the trial judge a discretion to admit evidence that is inadmissible under subs. (1) "by reason only of a defect of form or an irregularity in procedure not being a substantive defect or irregularity, in the application for or the giving of the authorization". The trial judge may be required to determine whether he will admit under subs. (3) evidence otherwise inadmissible under the provisions of Part IV.1 of the *Code*. This step, it would seem, would require some examination of the procedures followed in obtaining the authorization in order to determine whether evidence has been rendered inadmissible only by a defect or an irregularity of a nonsubstantive nature.

21 It is my opinion that the trial judge in reaching a conclusion on this subject is limited to a consideration of defects and irregularities which are apparent on the face of the authorization and he may not go behind it. Such a step would involve a collateral attack upon the authorization. It would require, in my opinion, much clearer statutory language than that employed in subs. (3) of s. 178.16 to permit such a step in the face of the clearly established rule. I find additional support for this view in the fact that once an authorization is granted s. 178.14 provides that all documents connected with it, save the authorization itself, be sealed in a packet and kept in the custody of the court, to be opened only for the purposes of a renewal or by an order of a judge of a superior court of criminal jurisdiction or a judge defined in s. 482 of the *Code*. Many trial judges will not fall into either of those categories and accordingly will not have authority to direct the opening of the sealed packet. It follows that a trial judge *qua* trial judge has not, and was not intended to have, access to the materials necessary to review the granting *of* the authorization. This makes any collateral attack on the authorization a virtual impossibility.

22 It should be observed as well that subs. (3) of s. 178.16 gives no power to go behind the authorization and no power to vary or question it. It merely provides that if in the performance *of his* task of determining the admissibility of evidence the trial judge forms the opinion that a relevant, private communication is inadmissible because of subs. (1) of s. 178.16 he may, if the admissibility results only because of a defect in form or an irregularity in procedure which is not substantive in the giving of the authorization, admit the evidence notwithstanding subs. (1). This subsection gives a power to the trial judge in appropriate circumstances to admit evidence despite its inadmissibility under the authorization, but it includes no power to attack the authorization itself. I have not overlooked the fact that this Court in *Charette v. R.*, [1980] 1 S.C.R. 785, 14 C.R. (3d) 191, 51 C.C.C. (2d) 350, 110 D.L.R. (3d) 71, 33 N.R. 158, affirming *(sub nom. R. v. Parsons)* 17 O.R. (2d) 465, 40 C.R.N.S. 202, 37 C.C.C. (2d) 497, 80 D.L.R. (3d) 430, 33 N.R. 161, approved the judgment of Dubin J.A. in the Ontario Court of Appeal in *R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont. C.A.), and that Dubin J.A. said in that case, at pp. 501-02:

> *A voir dire* is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to the admissibility of the tendered evidence immediately arise. In order to render evidence of intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, i.e., that the interceptions were lawfully made, and that the statutory notice was given. In a case where the Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any of the parties to the communication, and, as I have said, that the statutory notice has been complied with.

23 In my view, these words do not support the notion that the trial judge may go behind the authorization. They indicate that consideration of the validity of the authorization on the part of the trial judge is limited to matters appearing on its face, and it is my opinion that Dubin J.A. did not in that case assert a power in the trial judge to do more.

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24 Since no right of appeal is given from the granting of an authorization and since prerogative relief by *certiorari* would not appear to be applicable (there being no question of jurisdiction), any application for review of an authorization must, in my opinion, be made to the court that made it. There is authority for adopting this procedure. An authorization is granted on the basis of an *ex parte* application. In civil matters, there is a body of jurisprudence which deals with the review of *ex parte* orders. There is a widely recognized rule that an *ex parte* order may be reviewed by the judge who made it. In *Dickie v. Woodworth* (1883), 8 S.C.R. 192 at 195, Ritchie C.J.C. said, at p. 195:

> The judge having in the first instance made an *ex parte* order, it was quite competent for him to rescind that order, on its being shown to him that it ought not to have been granted, and when rescinded it was as if it had never been granted ... .

25 This view is reflected in the words of Mathers C.J.K.B. in the case of *Stewart v. Braun*, [1924] 2 W.W.R. 1103, [1924] 3 D.L.R. 941 at 945 (Man. K.B.), at p. 945:

> But it frequently happens that Judges and judicial officers are called upon to make orders *ex parte*, where only one side is represented and where the order granted *is* not the result of a deliberate judicial decision after a hearing and argument. An application to rescind or vary an *ex parte* order is neither an appeal nor an application in the nature of an appeal and therefore the Judge or officer by whom such an order has been made, has since the Judicature Act, as he had before, the right to rescind or vary it... .

26 Such power of review has been asserted and exercised in respect of authorizations to intercept private communications in *Re Stewart and R.* (1975), 8 O.R. (2d) 588, 23 C.C.C. (2d) 306, 58 D.L.R. (3d) 644 (Ontario County Court, Ottawa-Carleton Judicial District), application for *certiorari* dismissed, 13 O.R. (2d) 260, 30 C.C.C. (2d) 391, 70 D.L.R. (3d) 592 (H.C.) (1976); *R. v. Turangan*, [1976] 4 W.W.R. 107, 32 C.C.C. (2d) 249 (B.C.S.C), appeal dismissed for lack of jurisdiction, affirmed 32 C.C.C. (2d) 254n (B.C. C.A.)

27 The exigencies of court administration, as well as death or illness of the authorizing judge, do not always make it practical or possible to apply for a review to the same judge who made the order. There is support for the proposition that another judge of the same court can review an *ex parte* order. See, for example, *Bidder v. Bridges* (1884), 26 Ch.D. 1 (C.A.), and *Boyle v. Sacker* (1888), 39 Ch.D. 249 (C.A.). In the case of *Gulf Islands Navigation Ltd. v. Seafarers' Int. Union* (1959), 28 W.W.R. 517, 18 D.L.R. (2d) 625 at 626-27 (B.C. C.A.) Smith J.A. said, at pp. 626-27:

> After considering the cases, which are neither as conclusive nor as consistent as they might be, I am of opinion that the weight of authority supports the following propositions as to one Judge's dealings with another Judge's *ex parte* order: (1) He has power to discharge the order or dissolve the injunction; (2) he ought not to exercise this power, but ought to refer the motion to the first Judge, except in special circumstances, e.g., where he acts by consent or by leave of the first Judge, or where the first Judge is not available to hear the motion; (3) if the second Judge hears the motion, he should hear it *de novo* as to both the law and facts involved.

28 I would accept these words in the case of review of a wiretap authorization with one reservation. The reviewing judge must not substitute his discretion for that of the authorizing judge. Only if the facts upon which the authorization was granted are found to be different from the facts proved on the *ex parte* review should the authorization be disturbed. It is my opinion that, in view of the silence on this subject in the *Criminal Code* and the confusion thereby created, the practice above-described should be adopted.

29 An application to challenge an authorization should be brought as soon as possible. In most cases, because of the requirement for reasonable notice of intention to adduce wiretap evidence, it may be that the application can be made before trial. Otherwise, defence counsel wishing to challenge an authorization may, in accordance with the suggestion made by O'Sullivan J.A. in the case at bar, have to apply for an adjournment for this purpose.

30 It may be argued that where a trial judge happens to be of the same court that made the authorization order (as was the case in *Wong (No. 1), supra)* an application to review the authorization could be made to him directly, rather than incurring

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extra expense and needless delay by instituting completely separate proceedings. There may be some merit to this argument but, if such a review were undertaken, it would be done by the judge in his capacity as a judge of the court that made the original order and not in his capacity as trial judge.

31 In the case at bar, the trial judge held the wiretap evidence to be inadmissible and at the same time he stated that he did not need to go behind the authorizations. In my opinion, he did go behind the authorizations even though he did not consider it necessary to open the sealed packets. In so doing, for the reasons discussed above, he exceeded his jurisdiction. I am in substantial agreement with the Manitoba Court of Appeal that the trial judge was in error in refusing to admit the evidence which was tendered by the Crown. I would therefore dismiss the appeal and confirm the order for a new trial.

***Dickson J.*:**

32 The issue is whether a trial judge, who is a provincial court judge, can look behind an apparently valid wiretap authorization given by a superior court judge and rule intercepted private communications inadmissible in evidence.

I The Facts and Judicial History

33 The appellant, James Stephen Wilson, was tried before Dubienski Prov. Ct. J. of the Manitoba Provincial Court (Criminal Division) on nine counts, all related to betting. The Crown sought to adduce wiretap evidence. Dubienski Prov. Ct. J. ruled the evidence inadmissible as having been illegally obtained. The Crown's case collapsed and Wilson was acquitted on all nine counts. The issue on appeal is whether Dubienski Prov. Ct. J. exceeded his jurisdiction in refusing to admit the intercepted communications in evidence.

34 The tapes were made pursuant to four authorizations, obtained from judges of the Manitoba Court of Queen's Bench, concerning the accused Wilson and authorizing interceptions at named addresses. In each of the authorizations the following words appear:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Cherniak;
>
> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

35 Counsel for Wilson concedes all four authorizations are valid on their face. Police Inspector Anton Cherniak testified as to the manner in which the authorizations had been obtained. Cherniak said, in respect of the first authorization:

> ... while in company with Mr. John Guy [a Crown counsel and designated agent] we attended in judges chambers before Mr. Justice Hunt. Mr. Justice Hunt was supplied with an application. He appeared to read it. He was supplied with an affidavit. He appeared to read it. He was then supplied with an authorization. He appeared to read it and he then applied his signature, in my presence, to the authorization.

36 Testimony with respect to the other authorizations was virtually the same. On cross-examination, Inspector Cherniak added that he might have been asked a number of questions. Wilson's counsel spent considerable time cross-examining Cherniak about the matters referred to in ss. 178.12(1)(g) and 178.13(1)(b) of the *Criminal Code:*

>> 178.12 (1) An application for an authorization shall be made *ex parte* and in writing ...
>>
>> and shall be accompanied by an affidavit which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters, namely:
>>
>> [...]

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(g) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied

(a) that it would be in the best interests of the administration of justice to do so; and

(b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

37 The questions related to the actual state of facts at the time the authorizations were applied for and not to the contents of the affidavits. The Crown made no objection to this line of questioning. On the basis of Cherniak's testimony at trial, Dubienski Prov. Ct. J. decided none of the three alternative pre-conditions of s. 178.13(1)(h) had been met at the time the authorizations were given: (i) no other investigative procedures had been tried and failed, (ii) there was no evidence other investigative procedures were unlikely to succeed, (iii) there was no urgency. The judge concluded that the improper granting of the authorizations was not due to any error on the part of the authorizing judges, but due to the fault of the police.

My whole problem was that the evidence that was before me, as presented by the police, was quite different from the evidence that would appear to have been given and upon which the authorizations were based.

38 He further commented:

I am inclined to say the police have developed a pattern of application based on routine.

39 It would be carrying it too far to say Dubienski Prov. Ct. J. concluded the authorizations had been obtained by fraud, but, at least, he assumed there had been insufficient or false information in the affidavits. This determination was reached without examination of the affidavits. They remain in sealed packets, pursuant to s. 178.14 of the *Code*, and Dubienski Prov. Ct. J., as a provincial court judge, had no authority to order the opening of the packets. The judge decided the interceptions of private communications had not been lawfully made and to admit the evidence would bring the administration of justice into disrepute. He therefore excluded the evidence.

40 The Crown appealed the acquittals to the Manitoba Court of Appeal, which unanimously allowed the appeal and ordered a new trial. Monnin J.A., as he then was, and Matas J.A. concurring, concluded that an authorization issued by a superior court could not be collaterally challenged in a provincial court. In separate reasons, O'Sullivan J.A. said that an authorization granted in a superior court could not be collaterally attacked in any court and could not be attacked at all in an inferior court.

41 In the Manitoba Court of Appeal and in this Court counsel for Wilson argued, as an additional point, that the requirement under s. 178.16(4) to give notice of intention to adduce wiretap evidence had not been proven at trial. The Manitoba Court of Appeal rejected this argument. In this Court we gave our opinion on the day of hearing that notice had been sufficiently proven. Thus, the only outstanding issue is the trial judge's treatment of the authorizations.

II The Reviewability of Authorizations

42 An authorization to intercept a private communication is an *ex parte* order which may be made by a judge of a superior court of criminal jurisdiction, as defined in s. 2 of the *Criminal Code*, or a judge, as defined in s. 482. That means that in Manitoba authorizations may be obtained from judges of the Court of Appeal, the Court of Queen's Bench, or a County Court. The designations in other provinces are slightly different; I will use the Manitoba references in the following discussion.

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43 To what extent, if any, and in what manner are authorizations reviewable? The Manitoba Court of Appeal identified two problems in the present case: (i) an inferior court had refused to accept the validity of superior court authorizations, and (ii) collateral attack. I will deal with the latter point first.

(A) Collateral Attack

44 In dealing with the issue of collateral attack I will, for the moment, put to one side the question of a trial judge assessing an authorization given by a higher court. I will assume that the trial judge is of the same court, or a higher court, than the judge who gave the authorization.

45 The collateral attack issue is this: in the absence of an actual application to set aside the authorization, can a trial judge, *qua* trial judge, consider the validity of an authorization in order to determine the admissibility of evidence? O'Sullivan J.A., as I indicated, expressed the view that a superior court authorization could not be collaterally attacked in any court. That was perhaps implicit in the judgment of Monnin J.A. In the earlier case of *R. v. Dass* (1979), [1979] 4 W.W.R. 97, 8 C.R. (3d) 224, 47 C.C.C. (2d) 194 (Man. C.A.), leave to appeal to S.C.C. refused 30 N.R. 609n, Huband J.A., speaking for a five judge Court, said this, at p. 214:

> A question arose as to whether objection could be taken in this Court, to evidence flowing from an interception which had been authorized by a Court order made by a Justice of the Manitoba Court of Queen's Bench .... There *is* a well-recognized rule that the orders of a superior Court cannot be made the subject of a collateral attack: see *Re Sproule* (1886), 12 S.C.R. 140 at 193. In this instance, however, defence counsel does not complain that an application to intercept communications was made. He does not complain that an order was granted. He does not complain as to the terms or the wording of the order, except for the substitution of one location for another as previously discussed. The complaint is not as to the order itself, but rather as to the means by which the order was implemented. The issue raised is therefore not an attack on the order itself, and consequently it is an appropriate subject-matter for the consideration of this Court on appeal. [Emphasis added.]

46 The exception was, however, a broad qualification. There had been a renewal of the authorization in which a new location had been added; the Court of Appeal concluded that was improper; to that extent the renewal was invalid, and any communications intercepted at the new location should not have been admitted in evidence. (Nonetheless, s. 613(1)(b)(iii) was applied.) Despite its asseveration to the contrary, it *is* hard to conclude that the Manitoba Court of Appeal did not, in effect, collaterally attack the authorization in *Dass*.

47 I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs. This general rule is, however, subject to modification by statute. In my view, Parliament has indeed modified the rule in the enactment of two provisions of Part IV.1 of the *Criminal Code, ss.* 178.16(1) and 178.16(3)(b):

> 178.16 (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;
>
> but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.
>
> (3) Where the judge or magistrate presiding at any proceedings is of the opinion that a private communication that, by virtue of subsection (1), is inadmissible as evidence in the proceedings

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(a) is relevant to a matter at issue in the proceedings, and

(b) is inadmissible as evidence therein by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted,

he may, notwithstanding subsection (1), admit such private communication as evidence in the proceedings.

48 The present s. 178.16(3) was formerly, with slightly different wording, s. 178.16(2).

(i) Invalidity on the Face of the Authorization

49 On what basis can a trial judge assess the validity? This Court has been receptive to the view that a trial judge can collaterally attack an authorization. In *Charette v. R.*, [1980] 1 S.C.R. 785, 14 C.R. (3d) 191, 51 C.C.C. (2d) 350, 110 D.L.R. (3d) 71, 33 N.R. 158, affirming, sub nom. *R. v. Parsons*), 17 O.R. (2d) 465, 40 C.R.N.S. 202, 37 C.C.C. (2d) 497, 80 D.L.R. (3d) 430, 33 N.R. 161 (Ont. C.A.), the trial judge had concluded the superior court authorization was invalid on its face and refused to admit the evidence obtained pursuant to it. The Ontario Court of Appeal disagreed, holding the authorization was valid on its face, but the Court accepted the submission that the trial judge had jurisdiction to consider the validity of the authorization. In Charette this Court adopted the reasons of Dubin J.A., which included the following passage at pp. 501-02:

> A *voir dire* is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to admissibility of the tendered evidence immediately arise. In order to render evidence of intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, i.e., that the interceptions were lawfully made, and that the statutory notice was given. In a case where the Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any of the parties to the communication, and, as I have said, that the statutory notice has been complied with.
>
> The determination of whether the statutory conditions precedent have been fulfilled rests exclusively with the trial Judge and are properly determined in a voir dire. [Emphasis added.]

50 The trial judge has the responsibility of deciding upon the admissibility of evidence. Section 178.16(1) says that, absent consent, evidence of a private communication can only be introduced if the interception was lawful. Absent consent, an interception is only lawful if made pursuant to an authorization given in accordance with Part IV. I of the *Criminal Code*. The fact that an authorization purports to be made under Part IV. I is insufficient. Section 178.16(3)(6) gives the trial judge discretion to admit unlawfully obtained evidence if there is a *non-substantive* defect in form or irregularity in procedure in the giving of the authorization. The corollary would seem to be that if the defect or irregularity is *substantive*, there is no such discretion and the evidence is inadmissible. If a court order authorizing the interception were conclusive, even if it did not comply with Part IV.I, there would be no need for the curative provisions of s.178.16(3)(b). The combination of ss. 178.16(1) (a) and 178.16(3)(b) requires the trial judge to consider whether the authorization was valid. The fact that it amounts to what might be called a collateral attack is no bar.

(ii) Going Behind an Apparently Valid Authorization

51 Does the same rationale apply when the question is one of going behind an apparently valid authorization? In the present case Dubienski, Prov. Ct. J. claimed he was not going behind the authorizations. In my view that position is untenable. When a trial judge rules evidence inadmissible because the authorization, although valid on its face, was not lawfully obtained, it can scarcely be said that he is not going behind the authorization. He is not necessarily declaring the authorization invalid for all

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purposes; he is not actually setting it aside; but he is, for the purpose of determining the admissibility of evidence, going behind the authorization. Is there jurisdiction to do so?

52 I am of the view that ss. 178.16(1)(a) and 178.16(3)(b) apply to give the trial judge authority to go behind an apparently valid authorization. There is nothing in the language of the sections justifying a distinction between that which appears on the face of the record and that which is dehors the record. There is nothing limiting the trial judge to an examination only of what appears on the face of the authorization. To impose such a restriction as a matter of statutory interpretation would unnecessarily fetter his ability to determine whether the wiretap evidence is admissible. In many cases wiretap evidence may be the only evidence against the accused. It must be noted that not only does s. 178.16(3)(b) refer to defects or irregularities in the *giving of* the authorization, but also in the *application for* the authorization. Once again, since s. 178.16(3)(b), in effect, gives a discretion to cure for *non-substantive* defects or irregularities it would seem to follow as a necessary inference that *substantive* defects or irregularities *in the application for* the authorization will result in the evidence being inadmissible. In *R. v. Gill* (1980), 56 C.C.C. (2d) 169 at 176 (B.C.C.A.), Lambert J.A. expressed this view at p. 176:

> Subsection (2)(b) [now 178.16(3)(b)] of that section contemplates that any defect or irregularity in the application for or the giving of the authorization may make a private communication inadmissible, and that if it is inadmissible and if the defect or irregularity is a substantive one, then there is no discretion in the trial Judge to admit the private communication.
>
> I think that s. 178.16 defines its own concepts and that if, in the application for the authorization, or in the giving of the authorization, there is a substantive defect or irregularity, then the interception cannot be regarded as being lawfully made within the meaning of s. 178.16(1)(a). A private communication intercepted under such an authorization would be inadmissible. In reaching that conclusion, I disagree on this narrow point with the reasons of Anderson J. of the Supreme Court of British Columbia in *R. v. Miller*, [1976] 1 W.W.R. 97, 32 C.R.N.S. 192, (sub nom. *Miller and Thomas)* 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679, and with the reasons of McDonald J. of the Alberta Supreme Court, Trial Division, in *R. v. Donnelly*, [1976] W.W.D. 100, 29 C.C.C. (2d) 58.

53 A view similar to that of Lambert J.A. was expressed by Meredith J. in *R. v. Wong* (1976), 33 C.C.C. (2d) 506 at 509-510 (B.C.S.C.), a case relied upon by Dubienski Prov. Ct. J. *Wong* involved, as does the present case, a question of compliance with s. 178.13(1)(6).

54 Notwithstanding what has been said by D.C. McDonald, J., in the case cited above [*R. v. Donnelly*, supra], it seems to me to follow by necessary inference that a substantive defect of form or irregularity in procedure in an application for or the giving of the authorization may render the evidence of the communication intercepted as a result, inadmissible as unlawful. Thus, it seems to me that as I am the Judge who must rule on the admissibility of evidence in this case, I must consider whether there has been a substantive defect of form or irregularity in procedures as might render the evidence inadmissible. I do not think that such an examination requires that the ex parte order by which the authorization was granted be reviewed or set aside. [At pp. 509-10].

55 *R. v. Ho* (1976), 32 C.C.C. (2d) 339 (B.C. Co. Ct.) is to the same effect. See Krever J. in *Re Stewart and R.* (1976), 30 C.C.C. (2d) 391 at 400 (Ont. H.C.). See also Manning, *The Protection of Privacy Act*, (1974) at pp. 135-37; Bellemare, *La révision d'une autorisation en écoute électronique* (1979), 39 Revue du Barreau 496.

56 As noted in the above-quoted passages, there is a contrary view, expressed most strongly by McDonald J. in *R. v. Donnelly*, supra, and by Anderson J. in *R. v. Miller*, supra. I will refer specifically to the arguments raised by McDonald J. in considerably influenced by the wording of s. 178.14:

> 178.14 (1) All documents relating to an application made pursuant to section 178.12 or subsection 178.13(3) are confidential and, with the exception of the authorization, shall be placed in a packet and sealed by the judge to whom the application is made immediately upon determination of such application, and such packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be
>
> > (a) opened or the contents thereof removed except

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(i) for the purpose of dealing with an application for renewal of the authorization, or

(ii) pursuant to an order of a judge of a superior court of criminal jurisdiction or a judge as defined in section 482; and

(b) destroyed except pursuant to an order of a judge referred to in subparagraph (a)(ii).

(2) An order under subsection (1) may only be made after the Attorney General or the Solicitor General by whom or on whose authority the application was made for the authorization to which the order relates has been given an opportunity to be heard.

57 McDonald J. started with the assumption that, but for s. 178.16(2)(b) (now 3(b)), he would have thought "lawfully made" in s. 178.16(1)(a) meant in accordance with an apparently valid authorization. He conceded that s. 178.16(2)(6) appeared to imply that the evidence was inadmissible if there were a substantive defect in form or irregularity in procedure in the application for the authorization. He declined, however, to draw this inference, at the same time acknowledging that this relegated portions of s. 178.16(2)(b) to mere surplusage. He sought to avoid three consequences he asserted would flow if s. 178.16(2)(6) were interpreted to enable a trial judge to go behind an apparently valid authorization.

(1) That which was on its face lawfully done, pursuant to an order (i.e., the authorization) of a Judge of a superior or district Court, would be held to have been unlawful. The trial Judge would retrospectively render unlawful that which had appeared to be lawful. I should think that a statute which is said to give a trial Judge such a power should be scrutinized very carefully to determine whether such a power has in fact been given by Parliament.

(2) The contents of the affidavit would be disclosed to public view even though it might reveal investigations not only which led to the prosecution of the accused but also those which might relate to continuing or concluded investigations of other persons not yet charged or tried. I should think that a statute which is said to enable a trial Judge to do an act with such a consequence should be held to do so only if that power is given expressly or by necessary inference.

(3) The *Protection of Privacy Act*, 1973-74 [Can.], c. 50, amended both the *Criminal Code* and the *Crown Liability Act*, R.S.C. 1970, c. C-38 [s. 7.2(1), (2) [en. 1973-74, c. 50, s. 4].

7.2(1) Subject to subsection (2), where a servant of the Crown, by means of an electromagnetic, acoustic, mechanical or other device, intentionally intercepts a private communication, in the course of his employment, the Crown is liable for all loss or damage caused by or attributable to such interception, and for punitive damages in an amount not exceeding $5,000 to each person who incurred such loss or damage.

(2) The Crown is not liable under subsection (1) for loss or damage or punitive damages referred to therein where the interception complained of

(a) was lawfully made;

(b) was made with the consent, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it; or

(c) was made by an officer or servant of the Crown in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.

Whatever interpretation is placed upon the words "lawfully made" in s. 178.16(1)(a) of the *Criminal Code* must surely be given also to s. 7.2(2)(a) of the *Crown Liability Act*, both those provisions having been created by the same statute. It would follow as well that where the issue arises not as one of the admissibility of an intercepted communication (or derivative evidence at a trial but as one of liability under the *Crown Liability Act*, the contention of the defence

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> would entail that liability would flow from an act of interception which when done by a servant of the Crown had been done pursuant to an authorization which on its face made the interception lawful. [At pp. 64 and 65.]

58 With respect, I do not find these three arguments to be wholly persuasive. As to the third consequence, a majority of this Court was not convinced by an argument along the same line in *Goldman v. R.*, [1980] 1 S.C.R. 976 at 998-99, 13 C.R. (3d) 228, 51 C.C.C. (2d) 1, 108 D.L.R. (3d) 17, 30 N.R. 453. Mr. Justice McDonald's first and third consequences are related. It does not necessarily follow that a determination of "not lawfully made" for the purposes of admissibility makes an interception unlawful for all purposes under Part IV.I. The evidence may be inadmissible yet there might be a defence to a criminal or civil proceeding arising from the interception. That question does not arise in this case and need not be decided here. The second consequence predicted by McDonald J. tends to overstatement. The affidavit would not need to be made public in order to rule evidence inadmissible; selected aspects only could be made public. As Stanley A. Cohen suggests in his work *Invasion of Privacy: Police and Electronic Surveillance in Canada* (1983), the integrity of the packet might be preserved "through initial judicial screening, and, if necessary, judicial editing" (p. 155). Due regard to the confidentiality provisions of s. 178.14 is not inconsistent with ruling evidence inadmissible under s. 178.16.

59 I therefore conclude that s. 178.16(1)(a) and 178.16(3)(b) do enable a trial judge to go behind an apparently valid authorization.

(iii) Examining the Contents of the Sealed Packet

60 In most cases it will be necessary to examine the contents of the sealed packet in order to determine whether there was a defect or irregularity in the application for the authorization.

61 In the present case Dubienski Prov. Ct. J. ruled that the requirements of s. 178.13(1)(b) had not been met, without examining the contents of the sealed packet. In this respect he followed Meredith J. in *Wong*, supra, and in my view fell into error. It is important to note that s. 178.13 does not require that the authorization contain a list of the reasons which prompted the judge to give the authorization. In order finally to determine whether other investigative procedures had been tried and failed, other investigative procedures were unlikely to succeed, or that there was urgency, it would be necessary to examine the affidavits. This would enable the trial judge to say whether the apparent conflict between the evidence at trial and what can be assumed to have been said in the affidavits is actual. It may be that the comparison will give rise to clarification, showing that one of the three pre-conditions had been met. For example, in the present case little was said in the testimony at trial as to whether other investigative procedures were unlikely to succeed. If one were to examine the affidavits, there might be an explanation that would satisfy the requirements of s. 178.12(1)(g) and 178.13(1)(b) and hence make the authorizations valid. I therefore conclude Dubienski Pray. Ct. J. could not properly decide the interceptions were not lawfully made without examining the contents of the sealed packets.

62 If this case had been before a superior court trial judge would it have been proper for the judge to order the opening of the sealed packet under s.178.14? Most of the cases have assumed that only rarely is this proper; there appears to be a reticence to go behind an apparently valid authorization; *R. v. Gill*, supra; *Re Stewart and R.*, supra; *Re Miller and Thomas* (1975), 28 C.C.C. (2d) 128 (B.C. Co. Ct.); *R. v. Newall* (1982), 67 C.C.C. (2d) 431, 136 D.L.R. (3d) 734 (B.C.S.C.); *R. v. Johnny* (1981), 62 C.C.C. (2d) 33 (B.C.S.C.); *R. v. Bradley* (1980), 19 C.R. (3d) 336 (C.S. Que.); *Re Royal Comm. Inquiry into Royal Amer. Shows Inc.* (1978), 40 C.C.C. (2d) 212 (Alta. T.D.); *Re Zaduk and R.* (1977), 37 C.C.C. (2d) 1 (Ont. H.C.); *R. v. Haslam* (1977), 36 C.C.C. (2d) 250 (Nfld. D.C.); *Re R. and Kozak* (1976), 32 C.C.C. (2d) 235 (B.C.S.C.); contra: *R. v. Kalo* (1975), 28 C.C.C. (2d) 1 (Ont. Co. Ct.). It is not necessary to decide whether this restricted view of s. 178.14 is correct. There is a broad consensus that prima fade evidence of fraud or non-disclosure is a valid reason for opening the packet. Misleading disclosure would be in the same category. The present case is one in which the trial judge made a prima facie finding of either misleading disclosure or nondisclosure.

63 Opening the sealed packet, and holding an authorization to be invalid, on the basis of fraud, non-disclosure, or misleading disclosure, is, in a sense, a less serious interference with the authorizing judge's decision than a finding of invalidity on the face of the authorization. The latter conclusion connotes that the authorizing judge did something wrong — he signed an order not

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in accordance with the Criminal Code. On the other hand, a finding of invalidity based on fraud, non-disclosure, or misleading disclosure means that the authorizing judge acted properly on the basis of evidence before him — the invalidity arose because the evidence was false or incomplete — the fault of others.

64 Once a foundation is laid for the opening of the packet, I would say that the trial judge, assuming him to be a judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, can open the packet and make a full review for compliance with Part IV.I. He cannot, of course, decide whether, in the exercise of his discretion, he would have granted the authorization. He can only decide whether it was lawfully obtained. He can also apply the curative provisions of s. 178.16(3)(b) to non-substantive defects or irregularities. A failure to comply with a mandatory provision such as 178.12(1)(g) or 178.13(1)(b) would, in my view, amount to a substantive and non-curable defect.

65 Although I conclude that Dubienski Prov. Ct. J. was in error in holding the authorizations to have been unlawfully made without examining the contents of the sealed packet, I also conclude, contrary to the Manitoba Court of Appeal, that a collateral attack by a trial judge, either in respect of invalidity on the face of the authorization or going behind an apparently valid authorization, is contemplated by Part IV.I of the *Criminal Code*.

(iv) Cross-examination of the Deponent

66 Cross-examination was conducted in the present case in order to determine whether any of the preconditions of s. 178.13(1)(6) had been met. The Crown made no objection, but in other cases objections have been made, and in some instances successfully. Such cross-examination of the deponent to the affidavit was ruled improper in *R. v. Blacquiere* (1980), 57 C.C.C. (2d) 330, 28 Nfld. & P.E.I.R. 336, 79 A.P.R. 336 (P.E.I.S.C.); *R. v. Collos*, [1977] 5 W.W.R. 284, 37 C.C.C. (2d) 405, reversing on other grounds [1977] 2 W.W.R. 693, 34 C.C.C. (2d) 313 (B.C.C.A.); *R. v. Haslam*, supra; and *R. v. Robinson*, [1977] 4 W.W.R. 697, 39 C.R.N.S. 158 (B.C. Co. Ct.) . The rationale was that permitting such cross-examination would, by implication at least, reveal the contents of the sealed packet declared to be confidential by s. 178.14. On the other hand, cross-examination has been permitted in *R. v. Johnny*, supra, and in *R. v. Hollyoake* (1975), 27 C.C.C. (2d) 63 (Ont. prov. Ct.). I prefer the latter view. These authorizations are made *ex parte and in camera*. If it is admitted that there is a right of the trial judge to go behind an apparently valid authorization, it must be possible to ask questions on cross-examination to find out if there is any basis upon which to argue invalidity. It is of little avail to defence counsel to have a statement of law that an authorization can be held to be invalid if obtained, for example, by material non-disclosure and then preclude counsel from asking questions tending to show there has in fact been non-disclosure. The questioning can be such as to enable defence counsel to get some indication of whether the authorization was properly obtained, without the disclosure of information which, in the opinion of the judge, ought to be kept confidential. Examples of such confidential information would be the identity of undercover agents and informers or specific information which would jeopardize a continuing police investigation. The interest in confidentiality expressed in s. 178.14 and defence counsel's interest in testing the validity of the authorization need not lead to conflict.

v) Review by a Judge Other than the Trial Judge

67 I have said that in my view Part IV.I contemplates that the trial judge is the proper person to review the validity of the authorization whether on its face or otherwise. The Manitoba Court of Appeal, as I have indicated, thought otherwise. O'Sullivan J.A. said that Part IV.I contemplated a different form of review of authorizations; he suggested the trial could be adjourned and the review of the validity of the authorization would be conducted in the court that gave the authorization. At the hearing before this Court, Crown counsel adopted this position, adding that it was preferable that the actual judge who gave the authorization be the one to review it. Absent the statutory scheme of interception of private communications, and, in particular, s. 178.16, I would agree with this view. The law recognizes a general right of review of an ex parte order by the court which made the order and preferably by the judge who made the order. The statutory provisions, however, override the common law rules. As I read s. 178.16 Parliament mandated that the trial judge conduct such a review.

68 The language of s. 178.16 does not suggest review by anyone other than the trial judge. The only other provision that seems to say anything about review is s. 178.14, concerning the opening of the sealed packet. This would normally be used where an attempt was being made to go behind an apparently valid authorization. As a matter of statutory construction s. 178.14

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seems to contemplate that the packet may be opened by any judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, and is not confined to either the court or the judge who granted the authorization. The policy consideration underlying this broader approach may lie in a desire to avoid any suggestion that the judge who granted the authorization might be inclined simply to reaffirm his previous order without serious consideration.

69 I do find statutory support for the proposition that the trial judge shall review an authorization, and I find no statutory support for the proposition that only the judge or court that made the order can review an authorization.

70 There is a further point. Any decision of the trial judge regarding admissibility of evidence, therefore including questions as to the validity of authorizations, will be subject to appeal on a question of law in the ordinary way. In contrast if only the court that made the order can review an authorization, there is no right of appeal from this review because the Criminal Code does not grant an appeal.

71 The suggestion of O'Sullivan J.A. that the trial be adjourned for review of the authorization by the court granting the authorization would result in needless delays and be costly in terms of trial economy.

(B) Trial Judges Dealing with Authorizations Given By Judges of Higher Courts

72 One issue identified by the Manitoba Court of Appeal remains to be addressed. Does the situation which I have been describing change when, as here, a provincial court judge is dealing with an authorization given by a superior court judge? There are examples in the cases of inferior courts purporting to review superior court authorizations, particularly for invalidity on the face of the authorization. In none of these cases, however, was the question of a trial judge in an inferior court assessing the validity of a superior court authorization mentioned as a problem or an issue.

73 As earlier noted, in *Charette v. R.*, this Court approved the statement [found at (1977), 37 C.C.C. (2d) 497, at pp. 501-02]:

> ... it is for the trial Judge to pass upon such matters as the validity of the authorization ....
>
> The determination of whether the statutory conditions precedent have been fulfilled rests exclusively with the trial Judge ....

74 The appeal case in Charette discloses that the trial judge was a county court judge and the authorization had been given by a superior court judge.

75 Other examples of an inferior trial court assessing the validity of a superior court authorization are: *R. v. Welsh* (1977), 15 O.R. (2d) 1, 32 C.C.C. (2d) 363, 74 D.L.R. (3d) 748 (C.A.); *R. v. Crease* (1980), 53 C.C.C. (2d) 378 (Ont. C.A.); *R. v. Cardoza* (1981), 61 C.C.C. (2d) 412 (Ont. Co. Ct.); *R. v. Gabourie* (1976), 31 C.C.C. (2d) 471 (Ont. Prov. Ct.); and *R. v. Hancock*, [1976] 5 W.W.R. 609, 36 C.R.N.S. 102, 30 C.C.C. (2d) 544 (B.C.C.A.).

76 None of the above cases is persuasive in view of the fact that the inferior court/superior court problem was not addressed, but it is curious that it was not identified as a problem.

77 In my opinion the implicit assumption that an inferior court can attack a superior court authorization is correct. At first glance, this may sound heretical, but I think the justification lies in the statutory language. As discussed earlier, I conclude that ss. 176.16(1)(a) and (3)(b) give the trial judge, qua trial judge, the authority to decide the validity of an authorization. There is nothing in the wording of s. 178.16 which suggests that certain trial judges are in a different position than other trial judges. I would not be prepared to read in such a distinction.

78 If an inferior court trial judge can determine the validity of a superior court authorization for the purpose of deciding admissibility of evidence, what happens when, as in the present case, the trial judge is not authorized to order the opening of the sealed packet? The answer must be, in obedience to the statutory language, that the trial be adjourned to allow counsel to apply under s. 178.14 for an order permitting the opening of the packet. The judge acting under s. 178.14 would not examine the contents of the packet or decide the validity of the authorization (see Bellemare, supra). That is the responsibility of the trial judge. This does not mean that the judge acting under s. 178.14 is performing a mere formality. He has a discretion whether

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to order opening of the packet. He may refuse, and if so the provincial court judge will have to abide by that decision: see *Re R. and Kozak*, supra.

III Bringing the Administration of Justice into Disrepute

79 After concluding that the interceptions were not lawfully made, Dubienski Prov. Ct. J. went on to hold that to admit the evidence would bring the administration of justice into disrepute. In the circumstances, this was an irrelevant consideration. Section 178.16(2) contains the only reference to bringing the administration of justice into disrepute:

> 178.16 (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> > (a) the interception was lawfully made; or
> >
> > (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;
> >
> > but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.
>
> (2) Notwithstanding subsection (1), the judge or magistrate presiding at any proceedings may refuse to admit evidence obtained directly or indirectly as a result of information acquired by interception of a private communication that is itself inadmissible as evidence where he is of the opinion that the admission thereof would bring the administration of justice into disrepute.

80 Section 178.16(2) deals with derivative evidence only, i.e. evidence discovered as a result of intercepting the private communication. It does not relate to primary evidence, i.e. evidence of the private communication itself-the wiretap. That was what was under consideration in this case. Once the interception is held to have been unlawful (and absent consent) it is inadmissible unless the curative provisions of s. 178.16(3)(b) are applied.

IV Conclusion

81 I conclude that Dubienski Prov. Ct. J. erred in deciding, without examining the contents of the sealed packet, that none of the three alternate preconditions of s. 178.13(1)(6) had been met.

82 I would dismiss the appeal and confirm the order of the Manitoba Court of Appeal directing a new trial on all counts.

83 *Appeal dismissed.*

Appeal dismissed.

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2008 CarswellOnt 7933
Ontario Superior Court of Justice

Marsh Engineering Ltd. v. Deloitte & Touche Inc.

2008 CarswellOnt 7933, [2008] O.J. No. 5277, 173 A.C.W.S. (3d) 774, 49 C.B.R. (5th) 286

Marsh Engineering Limited, Daniel Russell, and 603126 Ontario Limited (Plaintiff) and Deloitte & Touche Inc. and Bank of Nova Scotia (Defendants)

Cumming J.

Heard: November 27, 2008
Judgment: December 3, 2008*
Docket: 07-CV-337638PD3

Proceedings: additional reasons at *Marsh Engineering Ltd. v. Deloitte & Touche Inc.* (2009), 2009 CarswellOnt 62 (Ont. S.C.J.)

Counsel: Kristine G. Holder for Plaintiff
Martin Sclisizzi, Brendan Y. B. Wong for Defendant, Bank
Harvey Chaiton for Defendant, Deloitte & Touche Inc.

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

Headnote

Civil practice and procedure --- Summary judgment — General principles

DR was controlling shareholder of 603 Ltd — 603 Ltd was holding company in respect of M Ltd and other related companies known as M Group — M Group experienced severe financial difficulties — Bank demanded payment of M Group's indebtedness and had D appointed as interim receiver — Bank was first ranking secured creditor — Plaintiffs brought action against bank on grounds that bank was allegedly overpaid by receiver or that alleged debts claimed by bank were not owing by M Group — Bank brought motion for summary judgment — Motion granted — Action was barred under s. 45(1)(g) of Limitations Act against bank because statement of claim was issued more than six years after any conceivable cause of action against bank arose — Payments to bank were approved by order of court — DR participated in receivership proceedings and did not contest approval of payments to bank — Action was abuse of process as it was collateral attack on orders of court approving actions of receiver — Doctrine of issue estoppel also applied.

Bankruptcy and insolvency --- Administration of estate — Trustees — Legal proceedings against trustee — Leave to proceed

DR was controlling shareholder of 603 Ltd — 603 Ltd was holding company in respect of M Ltd and other related companies known as M Group of which DR was principal — M Group experienced severe financial difficulties — Bank demanded payment of M Group's indebtedness and had D appointed as interim receiver — D was also accounting firm for DR's parents — Assets and property of M Group were sold with court approval — Plaintiffs alleged conflict of interest on part of D in acting as receiver and acting for his parents as accountants — Plaintiffs brought motion for leave under s. 215 of Bankruptcy and Insolvency Act ("BIA") to commence claim against D — Motion dismissed — Leave was refused on grounds that plaintiffs failed to satisfy test for leave, action was statute barred by Limitations Act and

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allegations and claims were res judicata by reason of court orders during bankruptcy — Plaintiffs did not allude to any actual, specific impropriety on part of D — Evidentiary record established that DR and directing mind of M Group were aware at all times that D was acting as receiver under appointment initiated by bank and that D was acting as accountant to DR's family — DR had notice of motion for appointment of D and would have been aware of any alleged conflict, real or perceived — DR was fully apprised of activities of receiver — Plaintiffs failed to provide any evidence that demonstrated prima facie case to ensure requisite factual finding for case at hand as required by test for leave under s. 215 of BIA.

Table of Authorities

Cases considered by *Cumming J.*:

Central & Eastern Trust Co. v. Rafuse (1986), 37 C.C.L.T. 117, (sub nom. *Central Trust Co. v. Rafuse)* 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, (sub nom. *Central Trust Co. c. Cordon)* [1986] R.R.A. 527 (headnote only), (sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, (sub nom. *Central Trust Co. v. Rafuse)* 31 D.L.R. (4th) 481, (sub nom. *Central Trust Co. v. Rafuse)* 69 N.R. 321, (sub nom. *Central Trust Co. v. Rafuse)* 75 N.S.R. (2d) 109 (S.C.C.) — referred to

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — referred to

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, [2006] 2 S.C.R. 123, 215 O.A.C. 313, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, 2006 SCC 35, 351 N.R. 326, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193 (S.C.C.) — followed

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — referred to

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2006), 19 C.B.R. (5th) 165, 2006 CarswellOnt 2835 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 37 — referred to

s. 215 — pursuant to

Real Property Limitations Act, R.S.O. 1990, c. L.15
s. 45(1)(g) — considered

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Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20 — referred to

MOTION by plaintiffs for leave under s. 215 of *Bankruptcy and Insolvency Act*; CROSS MOTION by bank for summary judgment.

***Cumming J.*:**

1 There are two motions before the Court.

2 First, the plaintiffs move for leave, *nunc pro tunc*, under s. 215 of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3, as am. (”*BIA”*) to commence a claim against Deloitte & Touche Inc.(”Deloitte Inc.”), the former Interim Receiver and Trustee in Bankruptcy for Marsh Engineering Limited (”Marsh Engineering”) and 603126 Ontario Limited (”603”).

3 Second, the defendant, the Bank of Nova Scotia (the “Bank”), the first-ranking secured creditor of Marsh Engineering, seeks by cross motion an order dismissing the plaintiffs’ action as against the Bank. I characterize this motion as a Rule 20 summary judgment motion.

The Evidence

4 The plaintiff Daniel Russell is the controlling shareholder of 603, a holding company in respect of Marsh Engineering and other related companies (being Marsh Instrumentation (Holdings) Inc. and Marsh Industrial Equipment Repair Corporation) within what can be called the “Marsh Group.” Daniel Russell is the principal of the Marsh Group. His company, Babbitt Bearings, Ltd. was also a major secured creditor of the Marsh Group. Working Ventures Capital Fund Inc. (”WVC”) was also a secured creditor of the Marsh Group.

5 Deloitte & Touche LLP. (acting through John Bylhouwer, a partner of that firm, in St. Catherines, “Ontario) (”Deloitte LLP”) was the accounting firm for the plaintiff Daniel Russell’s parents, being Joan and Ian Russell, and Russell Family Holdings Inc. historically and it seems until, at least, 2002.

6 The affiant of the Bank, Neil Stride, Assistant General Manager, Special Accounts Management, sets forth the complex history of this matter.

7 The record establishes that by March, 2000, the Marsh Group was experiencing considerable financial difficulties. The Marsh Group provided projected cash flow statements to the Bank on February 29, 2000 which estimated that for March

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2000 disbursements would exceed receipts by some $649, 000. Marsh Engineering's Vice-President of Operations advised the Bank March 11, 2000 that the Marsh Group was insolvent and unable to repay the Bank and its creditors, with an estimated shortfall in the value of its assets of $4.4 million to $7 million.

8 Deloitte LLP, as accountant for the Marsh Group, advised the parents of Daniel Russell not to invest further in the Marsh Group because of its financial situation.

9 The Bank demanded payment of the Marsh Group's indebtedness. Given its security agreement, the default of the loan agreement and the apparent insolvency of the Marsh Group on March 15, 2000 the defendant Bank had Deloitte & Touche Inc. ("Deloitte Inc.") (acting through Robert Paul of the firm) appointed by Court Order of that date as Interim Receiver of the Marsh Group. The record establishes that the Bank had a valid security.

10 Deloitte Inc. apparently concluded it did not have any conflict of interest in acting as a Receiver/Trustee.

11 On April 7, 2000 a further Court Order was made approving a sale process for the assets of the Marsh Group, including Marsh Engineering. In all, some 13 Reports and two supplementary reports were made by the Receiver to July 23, 2004 and some 15 Orders of this Court were made for approval of the Receiver's actions, including the distribution of proceeds. The plaintiff Daniel Russell had notice of all Reports and Court proceedings and Orders.

12 On May 2, 2000, on a motion with notice to Daniel Russell, Mr. Justice Farley of this Court approved the Receiver's Second Report, including the recommendations to wind down the Port Colborne operations of the Marsh Group. A public auction of the assets ensued in June, 2000. Daniel Russell had access to a list of all the assets and prices and attended the auction. He purchased some of the assets of the Marsh Group. On a motion brought by the Receiver on notice to all interested parties, including Daniel Russell, Justice Lederman approved the conduct of the auction by an Order dated August 15, 2000.

13 The real property formerly occupied by the Port Colborne operations was sold to a company controlled by Daniel Russell and another corporation. The sales of property were approved by Justice Farley June 18, 2000 and by Justice Cameron September 14, 2000.

14 The Dartmouth operation and the accounts receivable were advertised and sold to a corporation controlled by Daniel Russell. Again, the Court approved these transactions. The Burlington operations and its accounts receivable were advertised and sold to an unrelated third party. Again, on motion by the Receiver, with notice to all interested parties, including Daniel Russell, the Court gave Approval Orders May 2, 2000 and May 12, 2000.

15 Distributions to the Bank were made on May 8 and July 4, 2000 and approved July 11, 2000 by the Order of Justice Lamek of this Court.

16 On May 8, 2002 an Order was made distributing $2,348,599 to the Marsh Group's second secured creditor, Canadian Babbitt Bearings, the principal of which is Daniel Russell. All of the debts owed to the secured lenders were ultimately

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satisfied.

17 By December 2000 all the assets of the Marsh Group had been disposed of. Marsh Engineering and Marsh Instrumentation (Holdings) Inc were assigned into bankruptcy December 6, 2000. Daniel Russell reportedly was in favour of the Receiver making the assignment to facilitate the timely and cost-effective distribution of the companies' estates.

18 On July 23, 2004 on a motion brought by the Receiver on notice to all interested parties, including Daniel Russell, Justice Swinton granted an Order discharging the Receiver. On May 15, 2005 Deloitte Inc. was discharged as trustee in bankruptcy of the estates of Marsh Engineering and Marsh Instrumentation.

19 On December 30, 2005 Daniel Russell successfully caused Marsh Engineering to apply for an annulment of the bankruptcy. The moving party plaintiffs in the action at hand commenced a court action the same day against Deloitte Inc. and the Bank but did not serve the statement of claim and this action was dismissed February 27, 2008 as abandoned.

20 On August 1, 2007 the plaintiffs commenced the action at hand which appears to be identical to the abandoned 2005 action.

The Claims against the Defendant Inc.

21 The plaintiffs now raise a claimed conflict of interest on the part of Deloitte Inc. in acting as Receiver and Deloitte LLP in acting for the Russells as accountants. They claim this conflict gives rise to a cause of action. They say that Deloitte LLP counselled Daniel Russell that the receivership route was advantageous given the financial situation of the Marsh Group and that he would be able to repurchase the assets of the Marsh Group, including Marsh Engineering, at a discounted price. They claim also that there was no accounting by the Trustee in respect of the realization of assets in the bankruptcy, that here was no effort to collect some $3 million in receivables and that the assets were sold under value.

22 The plaintiffs do not allude to any actual, specific impropriety on the part of the Receiver/Trustee. They do not adduce any evidence to support the bare allegation that Deloitte Inc. had a duty to advise about the option of making a proposal under the *BIA*, as to the risks of a receivership, or about the anticipated fees and costs of the receivership. They have not adduced any evidence of any advice provided by Deloitte LLP or by Deloitte Inc. to Daniel Russell or to the Marsh Group for the period prior to the receivership. They did not challenge the sales of the assets or the distribution of the proceeds as the receivership/bankruptcy progressed. They did not object to or contest any of the Approval Orders made by the Court. They were represented throughout by their own independent legal counsel. They did not appeal under s. 37 of the *BIA* to the Court in respect of any of the decisions and actions of the Trustee as the bankruptcy proceeded. They do not suggest that the Trustee has not acted in accordance with the provisions of the *BIA*.

23 Daniel Russell makes a bald accusation in his affidavit that workers of the Marsh Group went on a rampage such that there were extensive damages and losses and that the Receiver was negligent in this regard. There is no evidence to substantiate this bare allegation. Indeed, the evidence of the Receiver discloses that the Receiver engaged personnel to secure the premises 24 hours a day.

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24 The moving parties do not have a listing of the equipment and inventory allegedly sold under value. Daniel Russell does not identify any accounts receivable the Receiver allegedly failed to realize upon.

25 The evidentiary record establishes that the plaintiff Daniel Russell and the directing mind of Marsh Group were aware at all times that Deloitte Inc. was acting as Receiver under the appointment initiated by the Bank as a secured lender, and that Deloitte LLP was acting as accountant to the Russell family.

26 Daniel Russell had notice of the motion for the appointment of Deloitte Inc. and he would have been aware of any alleged conflict, real or perceived. Daniel Russell did not oppose the appointment. Rather, the evidence indicates he approved the appointment.

27 The record establishes that the Russells were quite content that the affiliated receivership firm of their accounting firm would take on the receivership. Daniel Russell was fully apprised of the activities of the Receiver throughout the receivership. It seems that the intent of Daniel Russell was to bid to buy the assets of the Marsh Group when they were sold through the receivership. He reportedly made bids through a new entity in respect of many sales and was successful to some extent. The inference is that Daniel Russell hoped to resurrect the business of the Marsh Group yet shed its creditors through purchasing the assets of the Marsh Group through the receivership.

28 Throughout and after the receivership, Daniel Russell had the benefit of representation by independent legal counsel. Daniel Russell never objected to the Receiver/Trustee's actions nor did he ever challenge any of the several motions seeking approval of such actions. The entirety of the evidence indicates he gave, at the least, passive acquiescence to the Receiver's actions.

29 The plaintiffs ignore the fact that as Receiver/Trustee Deloitte Inc. is an officer of the Court with concomitant duties and obligations. Deloitte Inc. did not owe a duty to provide advice to Daniel Russell in respect of the matters complained of.

30 The test for leave under s. 215 of the *BIA* is referred to in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (S.C.C.) at paras.58-59.

31 A party seeking leave to commence an action against a receiver or trustee must demonstrate a *prima facie* case by sufficient affidavit evidence to ensure the claim's proper factual foundation. Therefore, leave is not to be given if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. As well, the evidence in support of the motion must supply facts to support the claim asserted. The leave requirement is designed to protect receivers and trustees from frivolous or vexatious actions and from actions which have no basis in fact.

32 In my view, and I so find, the plaintiffs have failed to provide any evidence that demonstrates a *prima facie* case to ensure the requisite factual foundation for the action at hand.

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33 As well, in my view, the allegations of negligence by the Receiver in administering the receivership are *res judicata* because the activities of the Receiver were reported to the Court and approved in all respects. Moreover, the asserted action amounts to a collateral attack upon the Court's several Approval Orders. Hence, the action at hand amounts to an abuse of process.

34 Finally, all of the asserted causes of action by the plaintiffs against the Receiver constitute actions upon the case. The statement of Claim was issued August 1, 2007, more than six years after any conceivable cause of action against the Receiver arose. A cause of action arises when the material facts upon which it is based have been discovered or ought to have been discovered by the plaintiff through the exercise of reasonable diligence. *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.) at 224. Section 45 (1)(g) of the *Limitations Act*, R.S.O. 1990, c. L 15 provides for a six year limitation period in respect of an action "upon the case." See *Bulloch-MacIntosh v. Browne*, [2003] O.J. No. 3176 (S.C.J.).

35 In my view, leave to commence this action against the Receiver is properly to be refused in the instant situation for three reasons: the moving parties have failed to satisfy the test for leave; the action is statute-barred and the allegations and claims are *res judicata* by reason of the several Court Orders, including the Approval Orders and Discharge Order. *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]).

The Claims against the Bank

36 Paragraphs 32 and 33 of the plaintiffs' claim allege that the Bank was overpaid by the Receiver or that the alleged debts claimed by the Bank were not owing by Marsh Engineering.

37 The distributions to the Bank in satisfaction of the secured debt owing to the Bank were made in 2000. The statement of claim was issued August 1, 2007, more than six years after any conceivable cause of action against the Bank arose. Section 45 (1)(g) of the *Limitations Act* provides for a six year limitation period in respect of an action founded upon any lending or contract or action upon the case.The action is therefore barred as against the Bank.

38 As well, all of the payments to the Bank were approved by Order of the Court. The individual plaintiff participated in the receivership proceedings and did not contest the approval of the payments to the Bank. The plaintiffs' allegations amount to a collateral attack upon the several Court Orders approving the actions of the Receiver. In particular, the plaintiffs' allegations against the Bank in the action at hand amount to a collateral attack upon the Court's Approval Order of July 11, 2000. The litigation at hand is in essence an attempt by the plaintiffs to re-litigate a claim which the Court has already implicitly determined through the Approval Orders. *Toronto (City) v. C.U.P.E., Local 79* (2003), 232 D.L.R. (4th) 385 (S.C.C.). The action at hand constitutes an abuse of process.

39 In my view, the doctrine of issue estoppel also applies: *Danyluk v. Ainsworth Technologies Inc.* (2001), 201 D.L.R. (4th) 193 (S.C.C.) at paras. 18-19. There is a public interest in the finality of litigation. The question of the propriety of the payments to the Bank, and the merit of the Bank's underlying claim to such payment, is the same question in essence raised in the claim of the plaintiffs at hand; the Approval Order of July 11, 2000 was final; and the parties to that Order were the parties in the present proceeding. There are not any special circumstances in the case at hand which would justify the Court exercising its discretion against applying issue estoppel and in favour of allowing the plaintiffs to upset the prior determination made in the receivership proceedings by the Approval Order.

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Disposition

40 For the reasons given, the plaintiffs' motion against Deloitte Inc. is dismissed. The Bank's cross-motion is granted and the claim against the Bank is dismissed.

41 The defendants may make any submissions as to costs within seven days; the plaintiffs have seven days thereafter for any responding submissions; and the defendants have three days thereafter for any reply.

Motion dismissed; cross motion allowed.

Footnotes

* Additional reasons at *Marsh Engineering Ltd. v. Deloitte & Touche Inc.* (2009), 2009 CarswellOnt 62 (Ont. S.C.J.).

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2013 ONSC 5667
Ontario Superior Court of Justice

Wyszatko v. Wyszatko Estate

2013 CarswellOnt 12527, 2013 ONSC 5667, 232 A.C.W.S. (3d) 674, 92 E.T.R. (3d) 316

Teddy Wyszatko, Plaintiff and The Estate of Nadia Wyszatko, Irene Winter, Albert's Marina, Richard Wyszatko, and Edmund James, Defendants

M.L. Edwards J.

Heard: August 7, 2013
Judgment: September 9, 2013
Docket: CV-10-101277

Counsel: Darryl T. Mann, for Plaintiff
David Shiller, for Defendants, Estate of Nadia Wyszatko and Irene Winter
Fred A. Platt, for Defendant, Richard Wyszatko
Peter Auvinen, for SF Partners Inc.

Subject: Estates and Trusts; Civil Practice and Procedure

Headnote

Estates and trusts --- Estates — Powers and duties of personal representatives — Supervision of personal representatives by court — Miscellaneous

Approval of receiver's interim fees and reports — W died, and her family members became involved in litigation regarding family marina business (marina) — Order was issued appointing receiver of marina (original order) — Over following eight months, receiver produced interim reports and incurred interim fees of $72,807.50, and receiver's counsel incurred interim fees of $27,273.58 — Receiver brought motion for orders to approve interim reports and interim fees, and to provide charge over marina — Motion granted in part — Interim reports and interim fees were approved, but requested charge was not granted — To extent that interim reports referred to unauthorized interference in business of marina or conduct that might suggest favouritism on part of receiver, those instances were too few to prove favouritism — Interim reports made clear various responsibilities that had been assumed by receiver and that had been acted upon throughout course of receivership — While it might have been preferable for receiver to document its discussions with parties, it could not be inferred that receiver had not gone about its duties in manner consistent its responsibilities — Court had jurisdiction to order payment of interim fees despite fact that original order contemplated payment of fees from proceeds of sale of marina, which had not occurred — Original order gave court jurisdiction to vary order given significant and material change of circumstances arising out of opposition by defendants to sale of marina — Interim fees should not be left until after trial — Judge on motion at bar was case management judge who had full appreciation of dynamic taking place between W's family members in their fight over marina — Interim fees were reasonable given history of legal proceedings at bar.

Estates and trusts --- Estates — Personal representatives — Administrator — Miscellaneous

Receiver ordered to release funds to estate upon formal appointment of estate trustee or administrator.

Table of Authorities

Cases considered by *M.L. Edwards J.*:

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Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 164 O.A.C. 84, 36 C.B.R. (4th) 200, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — considered

EnerNorth Industries Inc., Re (2007), 38 C.B.R. (5th) 291, 2007 CarswellOnt 7322 (Ont. S.C.J. [Commercial List]) — followed

York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc. (2009), 2009 CarswellOnt 4236, 55 C.B.R. (5th) 181 (Ont. S.C.J. [Commercial List]) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 9 — considered

MOTION by receiver for orders to approve interim reports and interim fees, and to provide charge over estate property; MOTION by estate for release of funds by receiver.

***M.L. Edwards J.*:**

Overview

1 When this matter last came before me some three or four months ago as the case management judge, I took time to speak directly to the parties who were all assembled in court to hear argument on a motion to strike parts or all of the Statement of Claim. I suggested to the parties that if they did not seriously consider their respective positions in an effort to reach an out of court settlement, that by the time this matter was ultimately concluded at trial and likely disposed of on appeal, that the family marina business that is at the root of the litigation would be worthless once all legal fees and receiver's fees had been accounted for.

2 This matter has been the subject matter of a contested motion before Eberhard J. where the successful party sought costs in excess of $100,000. As it turned out, Eberhard J. awarded $30,000 in costs.

3 A few months after Eberhard J. dealt with the motion before her, the parties assembled in court before me to deal with the question of whether a receiver should be appointed to deal with the marina business that has been a family-run business sustaining the Wyszatko family for many years in the past. A consent order ultimately was agreed upon appointing SF Partners Inc. as the receiver of Albert's Marina (the "Marina").

4 Anyone who has been remotely involved in litigation where a receiver has been appointed will quickly appreciate that a receivership adds tremendous costs and expense to the litigation. The parties involved in this litigation to this point do not seem to have appreciated just how expensive the litigation they are involved in has been and will continue to be if they do not take stock of their respective positions in an effort to reach an out of court settlement.

5 The motion before this court at the present time is a further procedural motion. The receiver seeks an order approving the receiver's interim reports, interim receiver's fees, and interim receiver's legal fees. The motion, not surprisingly given the history of this matter, is opposed. As well, there is a motion by the estate requesting an order that the receiver be required to release $17,000 to The Estate of Nadia Wyszatko (the "Estate").

The Receiver's Motion for Approval of its Interim Reports

6 The receiver's motion seeking approval of its interim reports is vigorously opposed by the defendants. Mr. Platt, counsel for Richard Wyszatko ("Richard"), who took the lead in argument with respect to this issue, argues that the receiver has been favouring the position of the plaintiff, Teddy Wyszatko ("Teddy") and that this is reflected in the body of the various interim

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reports that are before this court for approval. It is argued by Mr. Platt that there is no need at this point to approve the receiver's reports and that the receiver's motion, both with respect to the approval of the interim reports and the receiver's motion for fees, should be left to a point in time after the trial in this matter has taken place. The trial is scheduled to proceed in November of this year.

7 Dealing with the question of whether or not the receiver's interim reports demonstrate favouritism on the part of the receiver, Mr. Platt directed me to various references in the reports concerning unauthorized interference in the business of the Marina. A careful reading, however, of the various interim reports submitted to this court, for the most part, makes clear that where allegations of improper conduct is levelled by the receiver against one or other of the various defendants, that the receiver has either independently verified the conduct, or has made clear in its report those situations where the receiver was not able to independently verify improper conduct. To the extent that any of the reports do refer to unauthorized interference or improper conduct that might suggest favouritism on the part of the receiver, I am satisfied that those instances are few in number and not sufficient to cause this court to come to the conclusion that the receiver has favoured one party over the other. The receiver, based on my review of the evidence, has not demonstrated conduct that in any way approaches conduct by a receiver that should call into question the independence of the receiver.

8 Mr. Platt also argues that the receiver cannot justify its conduct and what it has done throughout the course of its receivership since being appointed by this court. Mr. Platt argues that the receiver did not fully respond to a lengthy series of questions that were posed by him to the receiver and that his cross-examination of the receiver makes clear that the receiver has not properly documented any discussions that it might have had with Teddy. Mr. Platt argues that the receiver has not demonstrated that it has put in place controls to deal with the Marina's business, specifically, no controls with respect to supplies, equipment and labour nor anything with respect to repairs that would be required by the Marina. Essentially, Mr. Platt argues that a review of the receiver's interim reports; the answers the receiver gave to questions posed by Mr. Platt; and the cross-examination of the receiver leaves one with the sense that the defendants do not know what responsibilities have been assumed and acted upon by the receiver and what the results have been.

9 While it may very well be that the receiver did not document every discussion or, for that matter, any discussion that it might have had with Teddy, the fact remains that the receiver's interim report does make clear to this court the various responsibilities that have been assumed by the receiver and that have been acted upon throughout the course of the receivership since my order of October 5, 2012. While the luxury of preparing memoranda to file documenting various discussions might, in the best possible world, be the preferable course of action for a receiver in circumstances similar to this case I am not prepared to infer from my review of the evidence that the receiver has not gone about its duties in a manner consistent with the responsibilities of a receiver appointed by this court. I am, therefore, approving the interim reports of the receiver.

Receiver's Fees and Legal Fees Incurred by Counsel for the Receiver

10 The receiver seeks payment of the interim fees that have been incurred by the receiver up to June 3, 2013 in the amount of $72,807.50. In support of its motion the receiver has provided a breakdown of the hours incurred by the various individuals involved in the receivership.

11 Counsel for the receiver seeks approval of the legal fees that have been incurred on behalf of the receiver totalling $27,273.58 covering the time period November 12, 2012 through April 26, 2013. Counsel for the receiver has provided a breakdown of the hours and hourly rates in connection with the request for payment of its legal fees.

12 The defendants oppose the payment of the receiver's costs and counsel's legal fees largely on the basis that my order of October 5, 2012 only contemplated payment of the receiver's fees from the proceeds of sale of the Marina. As the Marina has not been sold it follows that there is no jurisdiction to order interim payment of fees from some other source.

13 Mr. Platt argues that the receiver knew full well when it undertook its responsibilities as the receiver in this matter that the only source for payment of its fees would be the proceeds of sale of the Marina. It is argued that the receiver had the opportunity to review a draft of the order that ultimately became my order of October 5, 2012 and that the receiver should not

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now be entitled to effectively seek a change in the order. Finally, it is argued that there is no jurisdiction to change my order and that what is described as the "comeback" portion of my order at paragraph 13, does not allow the receiver to come back and change material portions of the order. In that regard, Mr. Platt relies on the decision of Morawetz J. in *York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc.*, 2009 CarswellOnt 4236 (Ont. S.C.J. [Commercial List]), where, at paragraph 22, Morawetz J. stated:

> I agree with the submission of the Region that this is language of appeal — not a comeback motion. Further, a motion to vary is not a substitute for an appeal. See: *Textron Financial Canada Ltd. v. Beta Brands Limited*; [2007] O.J. No. 2998 and *Canadian Commercial Bank v. Pilum Investments Ltd.*, [1987] O.J. No. 29. I also agree with the submission of counsel to the receiver to the effect that the jurisdiction to vary an order must be exercised sparingly and comeback provisions are intended to apply in situations where parties impacted by an order are not provided with notice of the hearing giving rise to the order.

14 Mr. Shiller, on behalf of the Estate, joins in the submissions made by Mr. Platt and suggests that when the receiver took on its responsibility as the receiver pursuant to the terms of my order that it did so on the basis of a contingency, i.e., that the receiver would only get paid out of the proceeds of sale of the Marina. It is argued that the lands on which the Marina is located is the matter of a legal dispute between the parties that has yet to be resolved. The fact that the lands were the subject matter of that legal dispute was well known to the receiver prior to accepting its responsibility as a receiver pursuant to my order and as such the receiver assumed the risk, again, that it might not get paid.

15 Mr. Shiller notes that the receiver, in its motion seeking a change to the receivership order, not only is seeking an order that would allow for the receiver to be paid now on an interim basis, but also would provide for a charge over the property of the Marina. It is again argued that because the receiver knew from the beginning that the land on which the Marina is located was the subject matter of a legal dispute between the parties, there is no basis to grant the amendments now sought. Finally, it is argued that from a policy perspective it would be inappropriate to allow a receiver in the middle of a receivership, where it was fully aware of all of the facts, to seek a material change to the receivership order.

16 The receiver argues, contrary to the position advanced by counsel for the defendants, that, in fact, my order does give this court the jurisdiction to allow for the approval and payment of the receiver's interim fees and legal fees as well as to amend the order to provide the receiver with security over the Marina property. The defendants are now opposed to the sale of the Marina and as such it is argued that in so doing the receiver is entitled to come before this court on the basis of a material change in circumstances since the making of my order. I agree.

17 While I agree with the comments of Morawetz J. that the general comeback terms of a receivership order should be sparingly resorted to on a motion to vary a receivership order, I accept that paragraphs 13 and 14 of my order give this court jurisdiction to vary the order given the significant and material change of circumstances arising out of the opposition by the defendants to the sale of the Marina.

18 As to the quantum of the receiver's fees and the legal fees of its counsel I have taken into account the comments of the Court of Appeal in *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (Ont. C.A.), where, at paragraph 37, Borins J.A. stated:

> ...the accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered...the accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts), so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discreet aspects of the receivership.

19 I have also considered and agree with the following comments of Lax J. in *EnerNorth Industries Inc., Re*, [2007] O.J. No. 4391 (Ont. S.C.J. [Commercial List]) where, at paragraph 13, Lax J. stated:

> The general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and disbursements in carrying out the receivership are fair and reasonable...

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20 I also agree with the comments of Lax J. in *EnerNorth Industries Inc., Re* at paragraph 15 where she stated:

> While the court determines the reasonableness of fees, courts are ill-equipped and should be reluctant to second-guess the considered business decisions made by the receiver, whose conduct is to be reviewed in the light of the specific mandate given to the receiver by the court...

21 It was suggested in argument by counsel by the defendants that the question of the receiver's fees and legal fees should be left to a point in time after the trial scheduled for later this year. I disagree. I am the case management judge and I have a full appreciation of the dynamics that are taking place between the various Wyszatko family members in their fight over the family Marina business. I am satisfied based on my review of the breakdown of the receiver's fees as well as the legal fees of the receiver's counsel that this court is in as good a position as anyone else in arriving at the conclusion that given the history of these legal proceedings that the amounts incurred by the receiver and its counsel are reasonable. The receiver's fees and legal expenses are also, to a large extent, a reflection of the apparent intransigence of all of the Wyszatko family members. In my view it was not within the contemplation of any of the parties or their counsel that the receiver would be put in a position that it would have to wait until after a trial of this matter, and possibly even an appeal, before it would be paid for its services in a situation where anyone looking at the history of this matter would have realized that this would be anything other than a difficult receivership given the intransigence of the parties. I am, therefore, approving without amendment the claim by the receiver for its interim fees as well as the interim fees of its counsel.

22 I do not, however, view it appropriate to provide the receiver with a first charge as requested in its motion. Paragraph 1 of my order states that the receiver was appointed "without security". While there has been undoubtedly a material change in circumstance that has allowed this court to provide for the approval of an interim payment of the receiver's legal fees and receiver's fees I am not satisfied that it would be appropriate to go so far as to provide for security in a situation where my original order made it quite clear that no such security was being granted. That portion of the receiver's motion is, therefore, dismissed.

23 As for the motion by the Estate for an order compelling SF Partners Inc. to release the sum of $17,000, I am prepared to make that order once there has been compliance with Rule 9 of the *Rules of Civil Procedure* which requires the formal appointment of an estate trustee or administrator. With such compliance, the receiver shall then release the $17,000 which it has in its possession to the estate trustee or administrator.

24 As to the question of costs, given the positions advanced by counsel at the completion of argument I am making no order as to costs of this motion.

Order accordingly.

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1985 CarswellNS 200
Supreme Court, Appeal Division

Bayhold Financial Corp. v. Clarkson Co.

1985 CarswellNS 200, 166 A.P.R. 70, 70 N.S.R. (2d) 70

The Clarkson Company Limited and Daniel Scouler, Appellants v. Bayhold Financial Corp. Limited, Respondent

Hart, Jones, Matthews, J.J.A.

Judgment: June 13, 1985
Docket: Doc. 01433

Counsel: *Thomas P. Donovan Robert G. MacKeigan*, for the appellants.
Joel E. Fichaud for the respondent.

Subject: Corporate and Commercial; Civil Practice and Procedure

Headnote

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

Mortgagee commencing action against court-appointed receiver -- Application for order dismissing action refused -- Appeal by defendants allowed in part -- Not all matters in issue yet determined between parties -- Court always reluctant to deprive litigant of right to trial -- However, negligence claim requiring application for leave -- Leave granted -- Action to be joined with receivership proceeding for determination of all issues outstanding.

The reasons for judgment of the Court were delivered orally by: *Hart, A/C.J.N.S.*:

1 This is an application for leave to appeal an interlocutory order of Mr. Justice Nathanson dated March 19, 1985, by which he refused to strike out the statement of claim in an action commenced by a mortgagee against the receiver appointed by the court upon the application of a creditor of the mortgagor.

2 The application alleged that the issues raised in the action were *res judicata* in that all matters relating to the realization of the plaintiff's security by foreclosure proceeding had been determined.

3 A review of the statement of claim reveals that the present action alleges negligence on the part of the receiver which caused the diminution of the value of the plaintiff's security.

4 We cannot say that this issue has as yet been determined between the parties. A court should always be reluctant to deprive a litigant of his right to a trial, particularly where the allegation is one of *res judicata* which can only be properly canvassed after evidence has been taken.

5 We would therefore confirm the finding of the trial judge on this issue.

6 At the time of the application, although it was not referred to in the notice of application, the issue of whether the leave of the court should be obtained before such an action could proceed was raised. The trial judge felt it was unnecessary because the action was brought by a secured creditor who was exempted from the terms of the receivership order. We are of opinion, however, that a negligence claim was not so exempted and would hold that such an application for leave should have been made.

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7 Under all of the circumstances, we would, however, do what the trial judge could have done and treat the matter as if leave had been applied for.

8 We would grant such leave and direct that the action be joined with the receivership proceeding for the determination of all issues outstanding between the parties. The costs of this appeal should be costs in the cause.

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2012 ONCA 681
Ontario Court of Appeal

SA Capital Growth Corp. v. Mander Estate

2012 CarswellOnt 12445, 2012 ONCA 681, 117 O.R. (3d) 16,
220 A.C.W.S. (3d) 504, 298 O.A.C. 85, 354 D.L.R. (4th) 748

SA Capital Growth Corp. Applicant and Christine Brooks as Executor of the Estate of Robert Mander, deceased and E.M.B. Asset Group Inc. Respondents and Peter Sbaraglia Moving Party (Appellant, Respondent by way of cross-appeal) and RSM Richter Inc. and Ontario Securities Commission Responding Parties (Respondent, Appellant by way of cross-appeal)

Robert J. Sharpe, E.E. Gillese, David Watt JJ.A.

Heard: October 2, 2012

Judgment: October 10, 2012 *
Docket: CA C55588

Proceedings: reversing in part *SA Capital Growth Corp. v. Mander Estate* (2012), 110 O.R. (3d) 765, 2012 CarswellOnt 6330, 2012 ONSC 2800, 90 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]); & additional reasons at *SA Capital Growth Corp. v. Mander Estate* (2012), 2012 ONCA 768, 2012 CarswellOnt 13972 (Ont. C.A.)

Counsel: Kevin D. Toyne for Appellant, Peter Sbaraglia
Matthew Gottlieb, Shannon Beddoe for Respondent, RSM Richter Inc. (now Duff & Phelps Canada Restructuring Inc.)
Evan Cobb for Applicant, SA Capital Growth Corp.
Jennifer Lynch for Respondent, Ontario Securities Commission
Frank Lamie for Tonin & Co. LLP, Peter Tonin

Subject: Corporate and Commercial; Securities; Constitutional; Criminal; Insolvency

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties

Disclosure — Debtors allegedly carried on ponzi scheme and misappropriated funds — Receiver appointed — Receiver compelled production of documents from certain parties with knowledge of debtors' affairs — Court issued order authorizing receiver to investigate affairs of S, wife, and their companies (C group) — Securities Commission successfully applied for appointment of receiver over C group's assets — Commission alleged that S breached Securities Act by committing fraud and misleading Commission's staff — S brought motion for disclosure of documents obtained by receiver pursuant to court ordered investigation during debtors' receivership, resulting in order that receiver to have transcript made of its interviews with lawyers who acted for S and debtor, for review by court, and other relief — Receiver to prepare for review documents provided by lawyer and accountant for debtors' companies and C group, pursuant to court order concerning C group only, along with deleted emails — Transcript and documents to be reviewed by court to determine what production should be ordered — Trial judge found principles in SCC jurisprudence concerning production in such circumstances are of general application to records held by all third parties — Trial judge found protections granted to court-appointed receiver in receivership to not have to generally provide information regarding receivership to others beyond what is contained in its reports cannot defeat accused's right to production to make full answer and defence — Trial judge found court-appointed receiver is not prevented from having to produce its records to enable accused to make full answer and defence where such documents are likely relevant and balancing of competing interests at stake favours disclosure —

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Debtors appealed, receiver cross-appealed — Appeal dismissed, cross-appeal allowed — Trial judge correctly found that court-appointed receiver cannot be compelled to produce documents obtained in exercise of its mandate in receivership to be used in separate proceeding, and to order disclosure could cause serious mischief — Securities proceedings were clearly distinct from receivership — Inappropriate for trial judge to make what amounted to interlocutory procedural order in relation to proceeding pending before Securities Commission, and third party disclosure issues should be determined by tribunal itself — Rule 20.10 of Rules of Court did not provide jurisdiction to make freestanding production orders regarding Securities Commission.

Securities --- Commissions and exchanges — Hearings and appeals — Right to fair hearing

Disclosure — Debtors allegedly carried on ponzi scheme and misappropriated funds — Receiver appointed — Receiver compelled production of documents from certain parties with knowledge of debtors' affairs — Court issued order authorizing receiver to investigate affairs of S, wife, and their companies (C group) — Securities Commission successfully applied for appointment of receiver over C group's assets — Commission alleged that S breached Securities Act by committing fraud and misleading Commission's staff — S brought motion for disclosure of documents obtained by receiver pursuant to court ordered investigation during debtors' receivership, resulting in order that receiver to have transcript made of its interviews with lawyers who acted for S and debtor, for review by court, and other relief — Receiver to prepare for review documents provided by lawyer and accountant for debtors' companies and C group, pursuant to court order concerning C group only, along with deleted emails — Transcript and documents to be reviewed by court to determine what production should be ordered — Trial judge found principles in SCC jurisprudence concerning production in such circumstances are of general application to records held by all third parties — Trial judge found protections granted to court-appointed receiver in receivership to not have to generally provide information regarding receivership to others beyond what is contained in its reports cannot defeat accused's right to production to make full answer and defence — Trial judge found court-appointed receiver is not prevented from having to produce its records to enable accused to make full answer and defence where such documents are likely relevant and balancing of competing interests at stake favours disclosure — Debtors appealed, receiver cross-appealed — Appeal dismissed, cross-appeal allowed — Trial judge correctly found that court-appointed receiver cannot be compelled to produce documents obtained in exercise of its mandate in receivership to be used in separate proceeding, and to order disclosure could cause serious mischief — Securities proceedings were clearly distinct from receivership — Inappropriate for trial judge to make what amounted to interlocutory procedural order in relation to proceeding pending before Securities Commission, and third party disclosure issues should be determined by tribunal itself — Rule 20.10 of Rules of Court did not provide jurisdiction to make freestanding production orders regarding Securities Commission.

Table of Authorities

Cases considered:

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R. v. O'Connor (1995), [1996] 2 W.W.R. 153, 1995 CarswellBC 1098, 1995 CarswellBC 1151, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1 (S.C.C.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 30.10 — considered

Authorities considered:

Bennett, Frank, *Bennett on Receiverships*, 3rd ed. (Toronto: Carswell, 2011)

APPEAL by debtor and CROSS-APPEAL by receiver from judgment reported at *SA Capital Growth Corp. v. Mander Estate* (2012), 110 O.R. (3d) 765, 2012 CarswellOnt 6330, 2012 ONSC 2800, 90 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]), regarding disclosure.

***Per curiam*:**

1 The appellant faces allegations before the Ontario Securities Commission ("OSC") related to an alleged Ponzi scheme. In an unrelated proceeding and at the suit of the respondent SA Capital Corp., a court-appointed receiver conducted an investigation of the appellant, his wife, and companies they controlled in relation to the alleged Ponzi scheme. The appellant sought and obtained from the Superior Court a third-party production order requiring the respondent, RSM Richter Inc. ("the receiver"), to produce materials the appellant claims he needs in order to make full answer and defence in the OSC proceedings.

2 The appellant appeals that order, arguing that the Superior Court judge erred by failing to order further production. The receiver cross-appeals arguing that no production should have been ordered.

3 For the following reasons, we conclude that the appeal should be dismissed, the cross-appeal allowed, and the order requiring the receiver to produce materials set aside.

Analysis

4 The appellant submits that the third-party production order was justified on two grounds:

1. the appellant is an "interested person" in the receivership and is thereby entitled to production; and

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2. the Superior Court has the authority to order third-party production to protect the appellant's right to make full answer and defence before the OSC.

5 We are unable to accept either of these propositions.

1. "Interested person"

6 In our view the application judge correctly found that a court-appointed receiver cannot be compelled to produce documents obtained in the exercise of its mandate in the receivership to be used in a separate proceeding.

7 The application judge recognized that in some circumstances, a party involved in a receivership can insist upon the production of documents and materials that have been obtained by the receiver. Reference was made to *Bennett on Receiverships*, 3rd ed. (Toronto: Thomson Reuters, 2011) at p. 232:

> As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons including prospective purchasers. The receiver is obliged to respond to requests for information consistent with the position of the person making the request. The receiver must produce all documents in its possession which are relevant to the issues in the receivership.

8 The reach of the phrase "interested person" was discussed and applied by Greer J. in *Battery Plus Inc., Re* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]), where "interested person" was held to include parties who have a direct interest in the subject matter of the receivership itself but to exclude parties who seek production of documents that do not "relate to a specific purpose" concerning the receivership itself. This approach is in line with the case law that states that receivers are not subject to cross-examination on their reports except in exceptional or unusual circumstances: see *Bell Canada International Inc., Re* (2003), 126 A.C.W.S. (3d) 790 (Ont. S.C.J. [Commercial List]) [2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List])]; *Impact Tool & Mould Inc., Re* (2007), 41 C.B.R. (5th) 112 (Ont. S.C.J.), affirmed (2008), 41 C.B.R. (5th) 1 (Ont. C.A.), leave to appeal refused, [2008] S.C.C.A. No. 220 (S.C.C.); and *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]). It is also consistent with bankruptcy case law that establishes that a court officer (trustee in bankruptcy) will not be compelled to produce documents created and obtained as part of its duties in one proceeding for a collateral purpose: see, for example, *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of)* (2006), 79 O.R. (3d) 241 (Ont. C.A.); *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2002), 37 C.B.R. (4th) 267 (Ont. S.C.J. [Commercial List]).

9 The OSC proceedings are clearly separate and distinct from the receivership. The appellant does not seek production for the purpose of advancing any legal claim or interest in the receivership but rather for a purpose collateral to the receivership, namely, his defence before the OSC. Accordingly, in our view, the appellant is not an interested person as his request was made for a purpose collateral to the receivership proceeding.

10 We agree with the receiver's submission that to recognize a right to require the receiver to produce material for purposes collateral to the receivership could lead to serious mischief. A court-appointed receiver is an officer of the court, not a regular litigant. Officers of the court should be left to perform their functions and duties without the distraction, added cost and potential chilling effect on their investigations that could result from permitting open-ended access to the fruits of their investigation.

2. Full answer and defence

11 The application judge made the third-party production order on the basis that the appellant was entitled to the material he ordered produced to make full answer and defence to the allegations he faces before the OSC. The application judge applied, by way of analogy, the procedure contemplated by *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.) in criminal proceedings.

12 In our view, the application judge erred. However, in fairness, we observe that the basis upon which we reach that conclusion does not appear to have been clearly articulated before the application judge.

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13 It was inappropriate for the Superior Court to make what amounted to an interlocutory procedural order in relation to a proceeding pending before the OSC.

14 Matters such as disclosure, third-party production, and other pre-hearing orders required to ensure fair process are quintessentially matters to be dealt with by the tribunal that will decide the case. Requests for third-party production give rise to issues of relevance, cost, delay and fairness, and it has long been recognized that the judge or tribunal charged with final decision-making authority is best placed to resolve such issues. In this case, it is for the OSC to determine what procedural rights should be accorded to the appellant and it is for the OSC to ensure that the appellant is accorded a level of procedural fairness commensurate with the allegations he faces. If, at the end of the day, the appellant is not accorded appropriate fairness in the OSC proceeding, the law provides him with appropriate remedies.

15 Further, resort to the courts on an interlocutory basis disrupts orderly decision-making by the tribunal. There is a long-established principle that ordinarily, neither appeals nor judicial review should be entertained until after the tribunal proceedings have come to a final conclusion. Although this application did not take the form of an appeal or application for judicial review, it was inconsistent with that basic principle.

16 In view of the conclusion we have reached, we make no comment on the merits of the appellant's assertion that he has a procedural right in the OSC proceeding to a third-party production order or on whether the documents he seeks are relevant.

17 We are aware of the fact that before the appellant brought his application before the Superior Court, a time when he was acting in person, he brought a motion before the OSC requesting third-party production from the receiver. The receiver was not served with that motion. The motion was heard by a single commissioner who ruled that the OSC "does not have the authority to order productions from the Receiver, who is an independent officer of the Court" and observed that, as Staff counsel had submitted, the respondent was not left without a remedy. The commissioner did not specify what remedy he had in mind, but we were informed during oral argument that the OSC Staff had pointed out that the appellant could seek a summons including an order for production of the material he seeks in the OSC proceeding or he could go to the Superior Court and ask for an order for third-party production pursuant to rule 30.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

18 The appellant did not challenge that ruling but instead commenced this Superior Court application for third-party production.

19 We agree with the receiver that rule 30.10 could have no application to the appellant's request. That rule provides orders for third-party production "on motion by a party" for a document that is "relevant to a material issue in the action". The rule plainly does not confer jurisdiction on the Superior Court to make freestanding production orders for production of documents sought in relation to proceedings before agencies or tribunals such as the OSC.

20 We make no comment on whether the commissioner was right or wrong in his ruling. We observe, however, that the dismissal of the appellant's motion for third party production does not preclude the appellant from seeking an alternative remedy before the OSC. In any event, the refusal to order production within the OSC proceedings cannot confer authority on the Superior Court to make such an order if, as we find, there is no basis in law for the Superior Court to exercise that authority.

Conclusion

21 For these reasons, the appeal is dismissed, the cross-appeal is allowed, and the order of the Superior Court is set aside. We have received the receiver's bill of costs for the application before the Superior Court and for this appeal. We will entertain brief written submissions in support of that request, to be submitted within 7 days from the release of these reasons and responding submissions from the appellant within 7 days thereafter.

Appeal dismissed; cross-appeal allowed.

Footnotes

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* Additional reasons at *Canadian Imperial Bank of Commerce v. Deloitte & Touche* (2013), 2013 ONSC 917, 2013 CarswellOnt 1264 (Ont. S.C.J.).

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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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

BOOK OF AUTHORITIES

(RE MOTION RETURNABLE JULY 30, 2015)

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Jay Carfagnini LSUC#: 22293T
jcarfagnini@goodmans.ca

Alan Mark LSUC#: 21772U
amark@goodmans.ca

Graham Smith LSUC#: 26377D
gsmith@goodmans.ca

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Monitor