

COURT OF APPEAL FOR ONTARIO

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
LAURENTIAN UNIVERSITY OF SUDBURY**

**BOOK OF AUTHORITIES OF THE MONITOR
(Motion for Leave to Appeal Confidentiality Order)**

March 17, 2021

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**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 **LAURENTIAN UNIVERSITY OF
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**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
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INDEX

Tab	Document
1.	<i>Sierra Club of Canada v. Canada (Minister of Finance)</i> , 2002 SCC 41
2.	<i>Nortel Networks Corp., Re</i> , 2016 ONCA 332
3.	<i>Essar Steel Algoma Inc., Re</i> , 2017 ONCA 478
4.	<i>Re Stelco Inc.</i> , 2005 CarswellOnt 6818, 15 C.B.R. (5th) 307 (Ont. C.A.)
5.	9354-9186 <i>Québec inc. v. Callidus Capital Corp.</i> , 2020 SCC 10
6.	<i>Canadian Metropolitan Properties Corp. v Libin Holdings Ltd.</i> , 2009 BCCA 40
7.	<i>Statoil Canada Ltd. (Arrangement relatif à)</i> , 2012 QCCA 665
8.	<i>Fairview Donut Inc. v TDL Group Corp.</i> , 2010 ONSC 789
9.	<i>U.S. Steel Canada Inc., Re</i> , 2016 ONCA 662
10.	<i>Re Ravelston Corp.</i> , 2007 ONCA 268
11.	<i>GasTOPS Ltd. v Forsyth</i> , 2011 ONCA 186
12.	<i>Essar Steel Algoma Inc., Re.</i> , 2015 ONSC 7656
13.	<i>Business Development Bank of Canada v Pine Tree Resorts Inc.</i> , 2013 ONCA 282

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001

Judgment: April 26, 2002

Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

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Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada

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

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a \$1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

(1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) *The General Framework: Herein the Dagenais Principles*

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

A publication ban should only be ordered when:

(a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick, supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick, supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;

(b) the judge must consider whether the order is limited as much as possible; and

(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

A publication ban should only be ordered when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.* [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial

generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter: New Brunswick, supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick, supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under R. 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck, supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields "where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the

parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan, supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck, supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra, supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal, supra, per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination.

In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, "we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive

information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

2016 ONCA 332
Ontario Court of Appeal

Nortel Networks Corp., Re

2016 CarswellOnt 6785, 2016 ONCA 332, 130 O.R. (3d) 481,
265 A.C.W.S. (3d) 834, 348 O.A.C. 131, 36 C.B.R. (6th) 1

**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 Nortel Networks Corporation,
Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks
International Corporation and Nortel Networks Technology Corporation Application
under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Alexandra Hoy A.C.J.O., R.A. Blair, S.E. Pepall J.J.A.

Judgment: May 3, 2016

Docket: CA M45307, M45309, M45310 M45311, M45312, M45313

Proceedings: refusing leave to appeal *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 175, 2015 CarswellOnt 7072, 2015 ONSC 2987, Newbould J. (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 51, 2015 ONSC 4170, 2015 CarswellOnt 10304, Newbould J. (Ont. S.C.J. [Commercial List])

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Andrew Kent, Brett Harrison, Laura Brazil, for Moving party, Bank of New York Mellon as Indenture Trustee
Steven L. Graff, Ian Aversa, Miranda Spence, for Moving party, Nortel Trade Claims Consortium
Michael E. Barrack, D.J. Miller, John L. Finnigan, Michael S. Shakra, Andrea McEwan, for Responding parties, Board of the
Pension Protection Fund and Nortel Networks U.K. Pension Trust Ltd.
Benjamin Zarnett, Jessica Kimmel, Peter Ruby, Peter Kolla, for Responding party, Monitor, Ernst & Young Inc.
Kenneth Kraft, John Salmas, for Responding party, Wilmington Trust, National Association
Derrick Tay, Jennifer Stam, for Responding parties, Canadian Debtors(2)
Kenneth Rosenberg, Lily Harmer, Massimo Starnino, for Responding party, Superintendent of Financial Services as
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Arthur O. Jacques, Paul Steep, Byron Shaw, for Responding party, Canadian Creditors' Committee
Barry E. Wadsworth, for Responding party, CAW-Canada
Matthew P. Gottlieb, Matthew Milne-Smith, for Responding parties, Joint Administrators of the EMEA Debtors(3) other than
Nortel Networks S.A.

Per curiam:

A. Introduction

1 January 14, 2009 was not a good day. At that time, Nortel Networks Corp. ("NNC") and the other Nortel Canadian Debtors filed for insolvency protection under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). That same day, Nortel Networks Inc. ("NNI") and other U.S. Debtors filed voluntary petitions for relief under Chapter 11 of the U.S. *Bankruptcy Code*, 11 U.S.C. §§1101 - 1174, and other Nortel entities incorporated in Europe, the Middle East and Africa ("EMEA") were placed under administration in England by the High Court of England and Wales under the U.K. *Insolvency Act 1986*, c. 45. Shortly afterwards, courts in Canada and the United States approved a cross-border, court-to-court protocol that established procedures for the co-ordination of cross-border proceedings in Canada and the U.S.

2 More than seven years later, many Januarys have come and gone and these insolvency proceedings continue. During that time:

- more than 6,800 Nortel former employees or pensioners have died;
- well in excess of \$1 billion has been incurred in costs; and
- Nortel's assets have been sold and some \$7.3 billion¹ in sale proceeds have been placed in escrow (the "Lockbox Funds").

3 The leave motions now before this court arise from the joint trial dealing with the allocation of the Lockbox Funds. Newbould J. (the "trial judge") of Ontario's Superior Court of Justice (Commercial List) and Judge Gross of the U.S. Bankruptcy Court for the District of Delaware presided over the joint trial.² It was held over the course of six weeks. Each judge rendered separate decisions on May 12, 2015. Each concluded that the Lockbox Funds should be allocated on a *pro rata* basis among the various Nortel debtor estates. Although their analysis differed somewhat, the outcome was the same.

4 Appeal proceedings were initiated in Canada and the U.S. The moving parties were authorized to file their leave materials in the absence of an issued judgment on the basis that counsel would subsequently file the formal judgment. The formal judgment was issued on April 26, 2016 and filed with this court on April 27, 2016.

5 Before this court, the six moving parties, led by the U.S. Debtors, seek leave to appeal the trial judge's judgment pursuant to s. 13 of the *CCAA*. They submit that the trial judge made fundamental errors and that the proposed appeal is of significance to the practice of insolvency and to the parties, and will not delay the completion of the *CCAA* proceedings.

6 The responding parties, led by the Board of the Pension Protection Fund and Nortel Networks UK Pension Trust Limited ("UKPC"), submit that the record supports the trial judge's factual findings, which were integral to his analysis, including his findings that Nortel's assets were jointly created, that the Nortel group of companies operated on a fully-integrated global basis and that Nortel did not operate separate businesses in separate countries. In their submission, the proposed appeal is not *prima facie* meritorious. In addition, the remaining elements of the test for leave to appeal under the *CCAA* have not all been met.

7 After consideration of each of the factums³ and other materials filed on the leave motions, we agree with the responding parties that the test for leave has not been met. For the reasons that follow, we dismiss the moving parties' motions for leave to appeal.

B. Genesis of Dispute

8 NNC was a publicly-traded Canadian corporation at the helm of a global networking solutions and telecommunications business, and the direct or indirect parent of more than 130 subsidiaries located in more than 100 countries. These companies were collectively referred to as the "Nortel Group" or "Nortel".

9 NNC was the successor to a long line of companies, headquartered in Canada, that date back to the founding of the Bell Telephone Company of Canada in 1883. NNC's principal, direct operating subsidiary was Nortel Networks Limited ("NNL"), also a Canadian company. NNL was the direct or indirect parent of operating companies located around the world. It owned 100 percent of the equity of each of the following entities: NNI, Nortel's operating company in the United States; Nortel Networks

UK Ltd. ("NNUK"), Nortel's operating company in the United Kingdom; and, Nortel Networks (Ireland) Ltd. ("NN Ireland"), Nortel's operating company in Ireland. It also owned 91.17 per cent of the equity of Nortel Networks S.A. ("NNSA"), Nortel's operating company in France.

10 Following the insolvency filings, Nortel's initial plan was to downsize and carry on portions of the telecommunications business. However, by June 2009, the decision was made to liquidate Nortel's assets.

11 On June 29, 2009, an Interim Funding and Settlement Agreement ("IFSA") was approved by both the Canadian and American courts. Among other things, it addressed interim funding for NNL and the anticipated sales of Nortel's business lines and residual intellectual property ("IP"). The parties, consisting of the Canadian Debtors, the U.S. Debtors⁴, and the EMEA Debtors⁵, agreed to cooperate with the sales process and also agreed that the proceeds of sale would be held in escrow. The issue of allocation was deferred.

12 Under the IFSA, there would be no distribution out of escrow without "either (i) agreement of all of the Selling Debtors⁶ or (ii) ... determination by the relevant dispute resolver(s) under the terms of the Protocol ... applicable to the Sale Proceeds". The parties were then to negotiate and attempt to reach agreement "on a protocol for resolving disputes concerning the allocation of Sale Proceeds from Sale Transactions (the "Interim Sales Protocol")". Despite numerous attempts at resolution, agreement on both an Interim Sales Protocol and allocation proved to be elusive.

13 Meanwhile, over \$7 billion was generated from various asset sales and other realizations. From mid-2009 until March 2011, proceeds of \$3.285 billion were generated from the sale of Nortel's various business lines, including some patents. Of that amount, \$2.85 billion is available for allocation. In June 2011, proceeds of approximately \$4.5 billion were generated from the sale of Nortel's residual intellectual property, consisting of approximately 7,000 patents and patent applications, to the Rockstar consortium. In total, approximately \$7.3 billion is currently held in escrow.

14 By orders dated January 21, 2010, the Canadian and U.S. courts approved a "Final Canadian Funding and Settlement Agreement". The Agreement addressed a number of issues and allowed NNI a \$2 billion claim against NNL in NNL's *CCAA* proceeding, which claim is not subject to offset or counterclaims.

15 The parties still could not agree on an Interim Sales Protocol or on allocation. In the spring of 2013, the Canadian court and the U.S. bankruptcy court granted orders approving an "Allocation Protocol". The purpose of this Protocol was to set out "binding procedures for determining the allocation of the Sale Proceeds among the Selling Debtors"⁷. It provided for a joint hearing to determine allocation before the Canadian court and the U.S. bankruptcy court.⁸ Any party in interest was at liberty to advance any theory on allocation. Leave to appeal that order was denied by this court on June 20, 2013.

16 The issue of allocation of the Lockbox Funds then proceeded to trial.

C. Trial Judge's Decision

(1) Trial Decision

17 The trial judge's reasons may be summarized. He commenced by reviewing the history of the Nortel Group. He described the operations and the four main product groups or lines of business. Before turning to his analysis of the legal issues, he made a number of important findings about the Nortel Group's structure. He found, and repeatedly reiterated, that the Nortel Group operated as a highly-integrated multinational enterprise. For instance, he stated:

[16] The Nortel Group operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world. Each entity, such as NNL, NNI, NNUK, NN Ireland and NNSA, was integrated into regional and product line management structures to share information and perform research and development ("R&D"), sales and other common functions across geographic boundaries and across legal entities. The matrix structure was designed to enable Nortel to function more efficiently, drawing on employees

from different functional disciplines worldwide, allowing them to work together to develop products and attract and provide service to customers, fulfilling their demands globally.

[17] As a result of Nortel's matrix structure, no single Nortel entity, either NNL or any of the other Canadian debtors in Canada, NNI or any of the other US debtors in the United States or NNUK or any of the other EMEA debtors, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis. While Nortel ensured that all corporate entities complied with local laws regarding corporate governance, no corporate entity carried on business on its own.

18 The trial judge also found that R&D, which was performed at labs around the world, was the primary driver of Nortel's value and profit.

19 After reviewing the necessary background, the trial judge turned to the legal issues before him, starting with the interpretation of the Master Research and Development Agreement ("MRDA"). The MRDA dealt with transfer-pricing arrangements, effective from 2001 onwards, among NNL, NNI, NNUK, NNSA and NN Ireland, who were parties to the agreement.⁹

20 The parties took differing and competing positions on the meaning and application of the MRDA:

- The Monitor (on behalf of the Canadian Debtors), supported by the Canadian Creditors' Committee ("CCC"), took the position that under the MRDA, NNL owned the IP whereas other participants to the MRDA were simply licensees. They argued that the proceeds derived from the sale of the residual IP belonged exclusively to NNL.
- The U.S. Debtors and other U.S. interests, including the Bondholders, argued that NNI and the other licensees held all of the rights and value in the IP in their respective exclusive territories as defined in the MRDA.
- The EMEA Debtors asserted that parties to the MRDA jointly owned all of the IP in proportion to their financial contributions to R&D and that all should share in the sale proceeds attributable to IP in those same proportions. The joint ownership arose independent of, but was recognized in, the MRDA.
- The UKPC took the position that the MRDA should not govern allocation and that a *pro rata* allocation based on a *pari passu* distribution should be used. The CCC also adopted this as its alternative position.

21 The trial judge found that, by its terms, the MRDA was to be construed in accordance with, and governed by, Ontario law. He reviewed the applicable principles of contractual interpretation, including the law on factual matrix (surrounding circumstances), commercial reasonableness, and recitals. In reviewing the law, he considered the recent authority from the Supreme Court of Canada on contractual interpretation, *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), which was released during the course of the trial. He considered in detail the parties' positions, the language of the MRDA and evidence on factual matrix.

22 He concluded that the MRDA was an operating agreement and was not intended to, nor did it, deal with the disposal of all of Nortel's assets in a situation in which no revenue was being earned and no profits or losses were occurring. Rather, he found that the MRDA was developed for, and driven by, transfer-pricing concepts for tax purposes and did not govern allocation after Nortel ceased operations:

[177] I accept that the MRDA was a transfer pricing document created for tax purposes. The licenses were a part of it. The licenses granted under it were never dealt with separately from the MRDA. Their only purpose was to support the intended tax treatment resulting from the MRDA.

.....

[185] I conclude that the circumstances surrounding the creation of the MRDA lead to no other result but that the construct of legal title to the NN Technology being in NNL in return for NNL granting exclusive licenses to the Licensed Participants was only for the purpose of supporting the proposed method to split profits or losses on a tax efficient basis while Nortel

operated as a going concern business. The agreement in its application was intended to apply only to Nortel while it operated and not to deal with rights after Nortel and its subsidiaries stopped operating its businesses.

23 Thus, he rejected the primary positions of the Monitor, the CCC, the U.S. Debtors and other U.S. interests, as well as the EMEA Debtors' joint ownership theory.

24 Having found that the MRDA did not govern allocation on Nortel's insolvency and having rejected the joint ownership theory, the trial judge turned to the metric to be used to allocate the Lockbox Funds. He found that the intangible assets that were sold were not separately located or owned in any one jurisdiction. Rather, they were created by all of the so-called "Residual Profit Entities" or "RPEs" (namely, NNL, NNI, NNUK, NNSA and NN Ireland), which were located in different jurisdictions. In addition, the matrix structure allowed Nortel to draw on employees from different functional disciplines worldwide, regardless of region or country, according to need.

25 He held that NNL was not entitled to the proceeds of sale simply because the patents were in its name:

[197] This was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multi-national enterprise with all RPEs doing R&D that led to patents being granted. It was R&D that drove Nortel's business. R&D and the intellectual property created from it was the primary driver of Nortel's value and profits. All parties agree on that. It would unjustly enrich NNL to deprive all of the other RPEs of the work that they did in creating the IP just because the patents were registered in NNL's name.

26 He determined that he had wide powers under the *CCAA* to do what was just in the circumstances. Section 11 of the *CCAA*, which reflected prior jurisprudence, expressly provides that a court may make any order it considers appropriate in the circumstances, subject to the provisions of the Act. He wrote:

[208] In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation. The costs have well exceeded \$1 billion. A global solution in this unprecedented situation is required and perforce, as this situation has not been faced before, it will by its nature involve innovation. Our courts have such jurisdiction. [Footnote omitted.]

27 He observed that it is a fundamental tenet of insolvency law that all debts be paid *pari passu* and that all unsecured creditors receive equal treatment. In his view, a *pro rata* allocation could be achieved by directing an allocation of the Lockbox Funds to each Debtor Estate based on the percentage that the claims against that Estate bore to the total claims against all of the Debtor Estates.

28 In reaching this conclusion, the trial judge dealt with the argument that a *pro rata* allocation would amount to substantive consolidation. He concluded that a *pro rata* allocation would not constitute substantive consolidation in the unique circumstances of this case. In any event, even if it were substantive consolidation, there was precedent that justified substantive consolidation in this case: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *PSINET Ltd., Re* (2002), 33 C.B.R. (4th) 284 (Ont. Gen. Div. [Commercial List]); *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.).

29 Ultimately, he concluded that the Lockbox Funds were to be allocated on a *pro rata* basis in accordance with certain governing principles, which are outlined below.

30 After his reasons were released, the U.S. Debtors supported by the Official Committee, the Ad Hoc Group of Bondholders and the Law Debenture Trust Company of New York filed motions for clarification, reconsideration or amendment in Canada and the U.S. and a number of points were clarified.

31 In the end result, the judgment that was signed, issued and entered on April 26, 2016 provided that the allocation proceed on a *pro rata* basis in accordance with the following principles:

- (a) Each Debtor Estate ¹⁰ is to be allocated that percentage of the Lockbox Funds that the total allowed pre-filing claims against that Debtor Estate bear to the total allowed pre-filing claims against all Debtor Estates.
- (b) In determining what the claims are against the Debtor Estates, pre-filing claims of the kind provable under the *Companies' Creditors Arrangement Act* that have received court approval and which have been paid may be taken into account to the extent that they have been paid under the settlement.
- (c) In determining what the pre-filing claims are against each Debtor Estate, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once.
- i. Claims on bonds are to be made on the Debtor Estate of the issuer and shall be included in that Debtor Estate's total allowed claims for the purpose of determining its allocation. A claim can be recognized by the Debtor Estate that guaranteed the bond, but those claims will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.
 - ii. If the UK Pension Claimants make a claim for the approximately £2.2 billion deficit in the NNUK pension plan against NNUK and also against other EMEA Debtors or the EMEA Non-Filed Entities, the claim against NNUK will be taken into account in determining claims against the Debtor Estates for allocation purposes but the additional claims against the EMEA Debtors or the EMEA Non-Filed Entities will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.
- (d) Subject to the general proviso in (c), above, in respect of claims that can be made against more than one Debtor Estate, pre-filing intercompany claims against a Debtor Estate shall be included in the determination of the claims against that Debtor Estate for purposes of its allocation.
- (e) The following specific pre-filing claims shall be included in the determination of the allowed claims against NNL for purposes of determining its allocation:
- i. the US\$2.0627 billion claim of NNI against NNL that was approved by this Court and the U.S. Court;
 - ii. the claims of NNUK and Nortel Networks SpA against NNL pursuant to the Agreement Settling EMEA Canadian Claims and Related Claims dated July 9, 2014; and
 - iii. the claim of the UK Pension Claimants against NNL recognized in this Court's judgment of December 9, 2014, as such claim is finally determined.
- (f) Cash on hand in any Debtor Estate will not be taken into account in determining its allocation. Each Debtor Estate with cash on hand will continue to hold that cash and deal with it in accordance with its administration.

D. Analysis

32 Six moving parties now seek leave to appeal from the trial judge's allocation decision: the U.S. Debtors, the Ad Hoc Group of Bondholders, the Conflicts Administrator of Nortel Networks S.A., the Official Committee of Unsecured Creditors of NNI and others, the Bank of New York Mellon as Indenture Trustee, and the Nortel Trade Claims Consortium.

33 We will commence our analysis by discussing the test for leave to appeal under the *CCAA* and then address the moving parties' positions in relation to that test.

(1) Test for Leave to Appeal

34 Section 13 of the *CCAA* provides that any person dissatisfied with an order or a decision made under the Act may appeal from the order or decision with leave. Leave to appeal is granted sparingly in *CCAA* proceedings and only where there

are serious and arguable grounds that are of real and significant interest to the parties. In addressing whether leave should be granted, the court will consider whether:

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

See, for e.g.: *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 24; *Timminco Ltd., Re*, 2012 ONCA 552, 2 C.B.R. (6th) 332 (Ont. C.A.), at para. 2; and *Nortel Networks Corp., Re*, 2013 ONCA 427, 5 C.B.R. (6th) 254 (Ont. C.A.), at para. 3.

(a) Whether Appeal is Prima Facie Meritorious

35 The moving parties take the position that leave should be granted because the appeal is *prima facie* meritorious. In making that argument, they raise three main issues — substantive consolidation, the interpretation of the MRDA, and questions of fairness. We will deal with each issue in turn.

(i) Substantive consolidation

Position of the Moving Parties

36 First, the moving parties submit that the trial judge erred in not recognizing that the allocation ordered departed from "corporate separateness" and was a form of substantive consolidation.

37 Secondly, it is alleged that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation.

38 In its supplementary factum, the Bank of New York Mellon, as Indenture Trustee, makes a related argument. It submits that since the Nortel proceeding no longer involves a restructuring, the *CCAA*'s purpose is spent and the proceeds should thereafter be distributed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), or at least in a manner consistent with the *BIA* scheme. It says the *BIA* does not contemplate consolidation but rather distribution on an entity-by-entity basis.

39 Finally, the Ad Hoc Group of Bondholders makes a related argument. It submits that the allocation decision takes property interests that belong to certain debtor estates and gives them to others. They argue that, even though the authority provided under s. 11 is broad, the *CCAA* does not permit a court to redistribute property in this way.

Analysis

40 The moving parties' arguments on substantive consolidation are not *prima facie* meritorious.

41 Professor Janis Sarra, a leading expert on insolvency law in Canada, describes substantive consolidation in her article "[Corporate Group Insolvencies: Seeing the Forest and the Trees](#)" (2008) 24 B.F.L.R. 63, at pp. 80 - 81:

Substantive consolidation essentially treats member entities of a corporate group as one entity. In the context of liquidation, it creates a common pool of assets to meet creditors' claims. In the context of restructuring, it may create the opportunity for creditors to share in the future upside potential of a restructured entity or entities by centralizing and negotiating an arrangement in respect of their claims. Canadian courts have recognized substantive consolidation under both the *BIA* and the *CCAA* where there is evidence of intertwined assets and liabilities; integrated administrative functioning and operations; a perception by creditors that they are dealing with an integrated entity; common control and governance structures; where it would be impracticable to separate the affairs of related entities; where it is more cost effective and beneficial to creditors

to have the proceedings administered as a single estate; and where it would result in an expeditious and administratively efficient administration of the proceeding.

42 As we have noted, the trial judge concluded that *pro rata* allocation was appropriate, that it did not amount to substantive consolidation, and that even if it could be said that a *pro rata* allocation involved substantive consolidation, it was not precluded by law in the unique circumstances of the case.

43 In reaching those conclusions, he made numerous factual findings, in addition to those already mentioned, including the following:

- "Nortel (a) had fully integrated and interdependent operations; (b) had intercompany guarantees for its primary indebtedness; (c) operated a consolidated treasury system in which generated cash was used throughout the Nortel Group as required; (d) disseminated consolidated financial information throughout its entire history, save for the year before its bankruptcy; and (e) created IP through integrated R&D activities that were global in scope": para. 223.
- "[N]o one entity or region was able to provide the full line of Nortel products and services": para. 202.
- "Nortel's matrix structure also allowed Nortel to draw on employees from different functional disciplines worldwide ... regardless of region or country according to need": para. 203.
- "R&D was organized around a particular project, not particular geographical locations or legal entities, and was managed on a global basis": para. 202.
- "The fact that Nortel ensured that legal entities were properly created and advised in the various countries in which it operated in order to meet local legal requirements [did] not mean that Nortel operated a separate business in each country. It did not": para. 202.
- "The intangible assets that were sold, being by far the largest type of asset sold, were not separately located in any one jurisdiction or owned separately in different jurisdictions": para. 202.
- The assets are "so intertwined that it is difficult to separate them for purposes of dealing with different entities": para. 222.
- There is "no recognized measurable right in any one of the selling Debtor Estates to all or a fixed portion of the proceeds of sale": para. 224.
- "Nortel has had significant difficulty in determining the ownership of its princip[al] assets, namely the \$7.3 billion representing the proceeds of the sales of the lines of business and the residual patent portfolio", which "constitutes more than 80 per cent of the total assets of all Nortel entities": para. 222.

44 In addition to his factual findings supporting the *pro rata* order, the trial judge explained why the allocation in this case did not constitute substantive consolidation, either actual or deemed:

- The Lockbox Funds were largely due to the sale of IP and no one Debtor Estate had any right to the funds. They did not belong in whole or in part to any one Estate or combination of Estates.
- The various entities and the various Estates were not being treated as one entity and the creditors of each entity would not become creditors of a single entity. Each entity remained separate and with its own creditors.
- Each entity would maintain its own cash on hand and would be administered separately.
- The inter-company claims would not be eliminated.

45 Similarly, Judge Gross explained at p. 554 of his reasons that the *pro rata* allocation, which was not a distribution, "both recognizes the integrity of the corporate separateness and the integrated synergistic operations of Nortel." Furthermore,

he noted that a "pro rata allocation does not merge the Nortel Debtors into a single survivor and does not erase intercompany claims": p. 554.

46 In our view, there is no *prima facie* merit to the argument that we should interfere with the trial judge's conclusion that the allocation decision did not amount to substantive consolidation. His conclusion was based on the nature and effect of his allocation decision and his factual findings. He made the findings having heard from 36 witnesses and having received and reviewed thousands of exhibits and dozens of deposition transcripts over the course of a six-week trial. Those factual findings were central to the result. Absent palpable and overriding error, those factual findings are afforded deference by this court: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 10.

47 The moving parties also allege that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation in finding that, even if the allocation did constitute substantive consolidation, it was permissible. They point to *Northland* as the leading authority on substantive consolidation but say that it is time to revisit that decision in Canada.

48 The trial judge correctly observed that while the *CCAA* does not expressly address the issue of substantive consolidation, jurisprudence in Canada has recognized substantive consolidation as being appropriate in certain exceptional circumstances: see, for e.g., *Lehndorff General Partner Ltd.*, *PSINet Ltd.*, and *Northland Properties Ltd.*

49 He also correctly observed that the court has jurisdiction to make any order that it considers appropriate in the circumstances under s. 11 of the *CCAA*. Although that section came into effect after the Nortel filing under the *CCAA*, it reflects past jurisprudence: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 68. Specifically, s. 11 states:

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

50 That said, since there is no *prima facie* merit to the argument that the *pro rata* allocation constitutes substantive consolidation, there is no need to re-visit the jurisprudence governing substantive consolidation in Canada or to consider whether the threshold for substantive consolidation should be changed.

51 Furthermore, we see no merit in the argument raised by the Bank of New York Mellon that the trial judge erred by failing to allocate the Lockbox Funds in a manner consistent with the *BIA* scheme, which contemplates distribution on an entity-by-entity basis. Under the *CCAA* allocation decision, distribution to creditors will be done on an entity-by-entity basis.

52 Finally, the argument raised by the Ad Hoc Group of Bondholders and the Official Committee also lacks merit. It presumes that the various Nortel companies had distinct and separable property rights in Nortel's IP. The trial judge repeatedly rejected that proposition. As we explain in the following sections, we see no merit in the argument that the trial judge erred in failing to recognize such distinct property rights. As such, we see no merit in the argument that he exercised his authority in a way that ignored such rights.

53 This ground of appeal is not *prima facie* meritorious.

(ii) The Interpretation of the MRDA

Position of Moving Parties

54 The moving parties take the position that the trial judge erred in concluding that the MRDA has no application to the allocation of the Lockbox Funds. On their reading, the MRDA provides NNI and other "Integrated Entities" with valuable rights to Nortel's IP in their respective exclusive jurisdictions. They note that the trial judge and Judge Gross diverged on the issue of IP rights under the MRDA.

55 The thrust of their contractual argument is two-fold: (1) the trial judge misinterpreted the MRDA by disregarding the words of the agreement; and (2) he failed to apply the Supreme Court of Canada's decision in *Sattva Capital Corp.* by taking an impermissibly narrow view of the scope of factual matrix evidence. In particular, they submit that the trial judge failed to take into account evidence relating to, and explaining, the tax-driven nature of the MRDA and the purposes the parties were trying to achieve through the agreement.

Analysis

56 We reject the moving parties' submissions on the interpretation of the MRDA.

57 On August 1, 2014, the Supreme Court of Canada released *Sattva Capital Corp.* The essence of that decision is best captured by excerpts from the reasons of the court written by Rothstein J.:

- "Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law": para. 43.
- "[T]he historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": para. 50.
- "[T]his Court in *Housen [v. Nikolaisen]*, 2002 SCC 33, [2002] 2 S.C.R. 235] found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law": para. 52.
- "[I]t may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law Legal errors made in the course of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'": para. 53.
- "However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation": para. 54.
- "The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare": para. 55.

58 Justice Rothstein also discussed the need to consider the surrounding circumstances, or factual matrix of a contract, when interpreting a written agreement. The goal of contractual interpretation is to ascertain the objective intentions of the parties. In doing so, "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": para. 47. Recognizing that words do not have an immutable meaning, the court should consider the contract's commercial purpose, taking into account its genesis, background, context, and the market in which the parties are operating.

59 In this case, the moving parties suggest that the trial judge erred in his interpretation of the MRDA and failed to pay heed to *Sattva Capital Corp.* In our view, the moving parties' arguments are not *prima facie* meritorious.

60 We are not persuaded that there is any reason to interfere with the trial judge's interpretation of the agreement on the basis of palpable and overriding error. Nor, in our view, have the moving parties pointed to any extricable legal error warranting intervention by this court.

61 As mentioned, although *Sattva Capital Corp.* was released during the course of the allocation trial, the trial judge nonetheless considered and applied *Sattva Capital Corp.* in interpreting the MRDA. In over 40 paragraphs, he addressed the relevant law on, and evidence of, factual matrix: see paras. 55 - 57, 117 - 157. He properly rejected evidence of subjective intention as being inadmissible.

62 We would also observe that, as noted by the Monitor and the Canadian Debtors, to be fully successful on their appeal, the U.S. Debtors would have to persuade the court that the trial judge should have: (i) concluded that the MRDA controlled allocation of Nortel's assets in the event of insolvency; (ii) adopted the interpretation of the MRDA advanced by the U.S. Debtors; and (iii) accepted the expert valuation evidence tendered by the U.S. Debtors.

63 The trial judge did none of these things. All of his conclusions to the contrary engage questions of fact or mixed fact and law that are well within his province.

64 For instance, the trial judge rejected the U.S. Debtors' valuation evidence as unreliable and the moving parties' factums are silent on how this finding could be overcome. The acceptance or rejection of the evidence of a witness is squarely within the fact-finding arena of the trial judge. The moving parties have suggested no reason why the trial judge's findings on valuation would be reversed.

65 In conclusion, this ground of appeal does not warrant granting leave to appeal.

(iii) Fairness to the Parties and Related Arguments

Position of Moving Parties

66 Next, the moving parties submit that they were denied procedural fairness in various respects and that the allocation decision is, among other things, arbitrary, and inequitable. In this regard, we do not propose to address every argument in the multitude of factums filed. The principal submissions on fairness and related arguments that merit comment are as follows.

67 The moving parties say they were given no notice or opportunity to make submissions on the remedy granted. Moreover, there was no record before the court on the full spectrum of claims asserted against the Selling Debtors and no one proposed the specific remedy granted.

68 The U.S. Debtors also submit that the remedy did not respond to the question before the court, which they say was the allocation of the Sale Proceeds (i.e. the proceeds from a particular Sale Transaction) among the Selling Debtors (i.e. the Nortel parties to a particular Sale Transaction). In their view, the trial judge did not answer that question but instead allocated the Sale Proceeds to Nortel entities that did not transfer assets in a particular Sale Transaction and were, thus, not entitled to any Sale Proceeds.

69 The Ad Hoc Group of Bondholders similarly submits that the trial judge answered the wrong question. For instance, it says that the only question properly before the court was to determine the relative value of the assets, rights and interests that each Selling Debtor sold or relinquished, which generated the Sale Proceeds. Moreover, they say that the decision disregards their legitimate expectations.

70 The U.S. Debtors further submit that the allocation is arbitrary since there is no logical connection between what will be or will not be counted for allocation purposes. In particular, they point to the fact the allocation excludes \$4 billion in bondholder guarantee claims from the U.S. Debtors' allocation. They say that, as a result, the U.S. Debtors will receive no allocation of funds on account of approximately two-thirds of their claims.

71 Similarly, the Ad Hoc Group of Bondholders submits the allocation is arbitrary as it produces a redistribution of assets among debtors that violates the rule that equity holders get paid after creditors.

72 The Conflicts Administrator of NNSA also takes issue with the fairness of the allocation decision. It says that NNSA is prejudiced by the decision because of the relatively small quantum of its creditors' claims in comparison with those of other debtor estates.

73 Finally, the Official Committee, which represents all general unsecured creditors of the U.S. Debtors, complains that the trial judge exercised his discretion in an unprincipled way and strayed into improper "commercial judicial moralism".

Analysis

74 We are not satisfied that there is *prima facie* merit to the moving parties' submissions.

75 As explained, the trial judge was required to "determine the allocation of the Sale Proceeds among the Selling Debtors" under the Allocation Protocol.

76 Given the trial judge's conclusion that the MRDA did not govern allocation and his rejection of the EMEA Debtors' joint ownership theory, the trial judge had to determine what other metric should be used to allocate the Lockbox Funds among the U.S., Canadian and EMEA Debtor Estates.

77 The Allocation Protocol permitted submissions on "any theory of allocation". At trial, the UKPC and the CCC, in the alternative, sought a *pro rata* distribution of the funds held in escrow and each submitted expert reports that supported a *pro rata* result. Moreover, the U.S. Debtors, the Official Committee and the Ad Hoc Group of Bondholders all made submissions before the trial judge opposing a *pro rata* allocation and had an opportunity to test the evidence. They submitted a motion to strike the *pro rata* allocation evidence, attacked the reliability of the expert reports and cross-examined the experts.

78 Thus, all parties knew that a *pro rata* allocation was in play. The fact that the specifics of the allocation ordered by the trial judge were not identical to those advanced by any of the parties does not, in our view, create unfairness to the parties. This is not a situation where the trial judge addressed an issue that was not before him, failed to grapple with the arguments or evidence, or came up with a new theory of the case.

79 The two judges were not required to determine value but allocation. The IFSA provided for a right to receive an allocation of the Sale Proceeds without restricting the basis upon which that allocation might be determined by the two courts. In particular, we note that the trial judges were given authority to decide the issue of allocation. In addition to the terms of the Allocation Protocol, we note s.10(a) of the IFSA:

[T]his Agreement is not, and shall not be deemed to be, an acknowledgement by any Party of the assumption, ratification, adoption or rejection of the Transfer Pricing Agreements or any other Transfer Pricing methodology employed by the Nortel Group or its individual members for any purpose nor shall it be determinative of, or have any impact whatsoever on, the allocation of proceeds to any Debtor from any sale of assets of the Nortel Group;

[Emphasis added.]

80 We also observe that the trial judge turned his mind to expectations and found that there was no evidence to support the Bondholders' argument that their legitimate expectations would be disregarded by a *pro rata* allocation.

81 Furthermore, we see no basis for the assertion that the allocation framework is arbitrary and unfair since it excludes \$4 billion in Bondholder guarantee claims from the U.S. Debtors' allocation. Under the allocation decision, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once for allocation purposes. This principle is applicable to all claims. The allocation decision also specifies that claims on bonds are to be made on the Debtor Estate of the issuer. Claims on those bonds may also be made on the Debtor Estate of the guarantor but those claims will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

82 On the reconsideration motion, it was argued that the trial judge's decision should be changed to provide that the claims by the bondholders on the guaranteed bonds against the issuer and guarantor Debtor Estates should be included in the claims for allocation purposes. It was contended that, without such a change, there would be a manifest injustice, especially to the creditors of the U.S. Debtors other than the bondholders.

83 The trial judge rejected that argument, noting that the \$2 billion admitted claim against NNL endures. Further, cash on hand in the U.S. Debtors' Estates would be available to their creditors. He also noted that the issue of the treatment of the guaranteed bonds, and whether they should be counted once or twice in a *pro rata* allocation, was a live issue in evidence at trial, which was open to the U.S. Debtors to explore. He found, at para. 16, that "any lack of briefing by the U.S. Debtors and the [Official Committee] was a deliberate tactic taken by them in attacking the *pro rata* allocation method proposed at trial". He concluded that, even if he were to reconsider the double-counting issue, he would not change his mind:

I see no injustice in the result.... There must also be considered other claims that could be made against more than one Debtor Estate, including the pension claim by the UKPC against NNUK that could be made against other EMEA Debtors and claims that could be made on bonds issued by NNL and guaranteed by NNC. The allocation decision precludes the double counting of any such claims for allocation purposes. The U.S. Debtors and [Official Committee] do not suggest that any of these other claims should be permitted to be claimed twice for allocation purposes. I see no basis to treat the guaranteed bonds any differently for allocation purposes. The principles that govern allocation should be applied consistently to each debtor.

84 We are not persuaded that there is *prima facie* merit to the argument that the allocation is arbitrary. The trial judge was clearly alive to the fairness concerns and gave reasons for adopting the approach he did after careful consideration of the evidence and argument at trial.

85 We would also observe that there was no other clear answer to the question of who was entitled to receive the sale proceeds. As Judge Gross noted at p. 500 of his reasons, the parties "submitted widely varying approaches for deciding the issue leaving virtually no middle ground." The U.S. Debtors and Bondholders argued that in excess of \$5 billion belonged to the U.S. Estate and that the Canadian Estate should receive only \$0.77 billion. The Canadian Debtors and the Monitor, in sharp contrast, argued that in excess of \$6 billion belonged to the Canadian Estate and that the U.S. Estate should receive just over \$1 billion. The highly integrated nature of the Nortel business operations and the nature of the assets sold defied either outcome.

86 Judge Gross's comments in his reasons on the allocation trial, at pp. 532-533, accurately sum up the context in which the two courts came to adopt the *pro rata* allocation approach:

The Court is convinced that where, as here, operating entities in an integrated, multi-national enterprise developed assets in common and there is nothing in the law or facts giving any of those entities certain and calculable claims to the proceeds from the liquidation of those assets in an enterprise-wide insolvency, adopting a *pro rata* allocation approach, which recognizes inter-company and settlement related claims and cash in hand, yields the most acceptable result.

There is nothing in the law or facts of this case which weighs in favour of adopting one of the wide ranging approaches of the Debtors. There is no uniform code or international treaty or binding agreement which governs how Nortel is to allocate the Sales Proceeds between the various insolvency estates or subsidiaries spread across the globe.

87 Nor are we satisfied that there is *prima facie* merit to the Official Committee's argument that the trial judge exercised his discretion in an unprincipled way by straying into improper "commercial judicial moralism". To the extent the Official Committee is suggesting that it amounts to judicial moralism when a judge takes into account fairness concerns, we reject that argument. The trial judge considered the evidence before him in considerable detail and worked with the facts presented to him. Based on those facts, he concluded that a *pro rata* order constituted the answer to the allocation issue. The fact that the answer is also fair should not detract from the force of his conclusion.

88 Finally, we are not persuaded that there is any merit to the argument that the allocation violates the rule that equity holders get paid after creditors. The Ad Hoc Group of Bondholders submits that the trial judge's decision results in NNL (NNI's parent company) receiving allocation proceeds from the sale of NNI's assets and rights that ought to have been allocated to the NNI estate for the benefit of NNI's creditors. This argument is premised on NNI having a right to the particular proceeds as a result of the MRDA interpretation advanced by the U.S. Debtors and Bondholders. As we have discussed above, the trial judge rejected that argument.

89 For these reasons, we conclude that none of the fairness and related arguments put forward by the moving parties are *prima facie* meritorious.

(b) Significance of Issues to the Practice

Position of Moving Parties

90 The moving parties submit that the trial judge's decision presents important issues of first impression in the cross-border insolvency context. They submit that, without appellate intervention, there is a risk substantive consolidation will become far more widely available. In addition, they say that it creates significant uncertainty on the separation of subsidiaries within a corporate group and on the consequences of an insolvency proceeding on the rights of stakeholders, including creditors. In their submission, an appeal would permit this court to clarify these issues. Furthermore, the appeal would allow this court to clarify the proper interpretation and effect of *Sattva Capital Corp.* on commercial agreements.

Analysis

91 As discussed above, the moving parties have raised three main issues they say warrant leave — namely, substantive consolidation, the interpretation of the MRDA, and fairness. Of the three issues, the moving parties submit that the first two raise issues of significant interest to the practice.

92 We disagree.

93 The facts of this case are unique and exceptional. As we have already discussed, substantive consolidation is not engaged and so this case would not provide an opportunity for this court to provide guidance on that question. Nor does this case engage any issues that require any clarification on the application of *Sattva Capital Corp.*. In short, granting leave would not provide an opportunity for this court to provide guidance on legal issues of significance to the practice.

(c) Significance of Issues to the Action

Position of Moving Parties

94 The moving parties state that the allocation of the Lockbox Funds is the overriding issue in the *CCAA* proceedings.

Analysis

95 We accept that the allocation of the Lockbox Funds is a significant issue in this *CCAA* proceeding. That said, we are of the view that, standing alone, this factor is insufficient to warrant granting leave to appeal. To perhaps state the obvious, typically parties tend to seek leave to appeal a decision that is of significance to an action.

(d) Progress of Proceedings

Position of Moving Parties

96 The moving parties submit that the proposed appeal will not unduly hinder the progress of Nortel's *CCAA* proceeding. They state that many steps and issues remain before creditor distributions can be made, including the determination of claims. In addition, the allocation decisions of the Canadian court and the U.S. court must both be final orders in their respective

jurisdictions before funds can be released from escrow. It is argued that this court should grant leave to ensure that it maintains the ability to address any issues should Judge Gross's decision be varied or overturned on appeal.

97 The moving parties also make the point that there are no operating businesses that are in the process of restructuring because the Nortel businesses and assets have been liquidated and the joint trial was a "stand-alone component" of the *CCAA* proceeding. Thus, it is argued that the traditional concerns leading courts to "sparingly" grant leave to appeal in *CCAA* proceedings are not applicable here. In fact, the Official Committee submits that where an appeal would have existed as of right under the *BIA*, it is nonsensical to deny leave here simply because Nortel's liquidation proceeded under the *CCAA*.

Analysis

98 This brings us to the final consideration: progress. Repeatedly, the parties have been encouraged to resolve their differences, but without success. For instance, in a 2011 decision, *Nortel Networks Inc., Re*, 669 F.3d 128 (U.S. C.A. 3rd Cir. 2011), the Third Circuit Court of Appeals admonished the parties at p. 143:

We are concerned that the attorneys representing the respective sparring parties may be focusing on some of the technical differences governing bankruptcy in the various jurisdictions without considering that there are real live individuals who will ultimately be affected by the decisions being made in the courtrooms. It appears that the largest claimants are pension funds in the U.K. and the United States, representing pensioners who are undoubtedly dependent, or who will become dependent, on their pensions. They are the Pawns in the moves being made by the Knights and the Rooks.

Mediation, or continuation of whatever mediation is ongoing, by the parties in good faith is needed to resolve the differences. [Footnote omitted.]

99 Former Chief Justice Winkler also encouraged the parties to find a way to resolve this matter. In April 2012, he warned about the "prospect of additional delays and the potential for conflicting decisions" if the parties failed to reach a negotiated settlement.

100 Numerous mediations have been ordered but have failed.

101 In the Annual Review of Insolvency, Kevin P. McElcheran described *Nortel* as a case that has become "an emblem of waste and dysfunction in a system intended to foster consensus based solutions to commercial insolvency", noting that it has "eclipsed all previous Canadian cases in both duration and expense": 2014 Ann. Rev. Insolv. L. 24 at p. 24. And that was in 2014.

102 Consistent allocation decisions have been issued by the Canadian and U.S. courts. A further appeal proceeding in Canada would achieve nothing but more delay, greater expense, and an erosion of creditor recoveries. There are asymmetric appeal routes in Canada and the U.S. However, we do not accept that the separate appeal proceedings in the U.S. somehow diminish the need to bring these proceedings in Canada to a conclusion. In our view, any additional step is a barrier to progress.

103 Furthermore, the fact that this case is a liquidation and not a restructuring does not render delay immaterial, where so many individuals and businesses continue to await a resolution of this proceeding. The potential of an interim distribution, remote or otherwise, does not alter this reality. In addition, the parties acceded to a liquidation under the *CCAA*. They cannot now reject the parameters of that statute, which requires leave to appeal, and where the jurisprudence on the applicable test is settled and long-standing.

E. Standing Issue

104 There is the additional issue of the standing of the Nortel Trade Claims Consortium that needs to be addressed. It represents a group of creditors that collectively holds over \$130 million in unsecured claims against NNI and certain of its U.S. affiliates. It includes institutional investors and former Nortel employees. Unlike other U.S. creditors, the Consortium's sole recourse is against the U.S. Debtors' estates.

105 At trial, the Consortium was represented by the Official Committee. It says that, given the trial decision, its interests may diverge from those of the rest of the Official Committee. It submits that the Consortium should have standing to seek leave to appeal. It relies on the court's jurisdiction to grant leave to appeal, pursuant to s. 13 of the *CCAA*, to "any person dissatisfied with an order or a decision made under [the] Act". It argues that the trial judge exceeded his jurisdiction by deciding matters that are properly for the U.S. court to decide.

106 It is unnecessary to decide the standing issue. Even if the Consortium had standing, we would dismiss its leave motion for the same reasons we have dismissed the other leave motions. In any event, we see no merit in its argument that the trial judge exceeded his jurisdiction.

F. Disposition

107 In conclusion, we are not persuaded that the test for leave to appeal has been met. For these reasons, we dismiss all of the motions for leave to appeal.

Motions dismissed.

Footnotes

- 1 All references to dollars are to U.S. dollars, unless otherwise specified.
- 2 Judge Gross's reasons are reported at 532 B.R. 494 (U.S. Bankr. D. Del. 2015).
- 3 In accordance with the directions of the Court of Appeal case management judge, there was one main factum filed on behalf of the moving parties by the U.S. Debtors and one main factum filed on behalf of the responding parties by the UKPC. Six supplementary factums and one reply factum were also filed.
- 4 With the exception of Nortel Networks (CALA) Inc.
- 5 The Joint Administrators were also party to the IFSA but only for the purposes of Section 17 (No Personal Liability of the Joint Administrators).
- 6 A description of "Selling Debtor" is found in s.12 (a) of the IFSA: "Each Debtor hereby agrees that its execution of definitive documentation with a purchaser (or, in the case of any auction, the successful bidder in any such auction) of, or closing of any sale of, material assets of any of the Debtors to which such Debtor (a "Selling Debtor") is proposed to be a party..."
- 7 Selling Debtors was defined in the Allocation Protocol as the "Canadian Debtors, U.S. Debtors, EMEA Debtors and Nortel Networks Optical Components Ltd., Nortel Networks AS, Nortel Networks AG, Nortel Networks South Africa (Pty) Limited, and Nortel Networks (Northern Ireland) Limited."
- 8 The EMEA Debtors were held to have attorned to the jurisdiction of the Canadian court and the U.S. bankruptcy court.
- 9 Nortel Networks Australia was also a party to the agreement. It ceased being a Residual Profit Entity on December 31, 2007.
- 10 The order defines "Debtor Estate" as "each of the individual legal entities" set out in Schedule B. Schedule B lists the 45 entities, including the Canadian Debtors, the U.S. Debtors, the EMEA Debtors and five "EMEA Non-Filed Entities" who have not commenced insolvency proceedings. See also the similar definition given to Selling Debtors under the Allocation Protocol.

2017 ONCA 478
Ontario Court of Appeal

Essar Steel Algoma Inc. (Re)

2017 CarswellOnt 8668, 2017 ONCA 478, 279 A.C.W.S. (3d) 463, 49 C.B.R. (6th) 259, 65 B.L.R. (5th) 218

**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 ESSAR STEEL
ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA
(ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

E.A. Cronk, R.A. Blair, K. van Rensburg JJ.A.

Heard: June 2, 2017

Judgment: June 8, 2017

Docket: CA M47815/M47846

Proceedings: refusing leave to appeal *Essar Steel Algoma Inc., Re* (2017), 2017 CarswellOnt 6582, 2017 ONSC 2585, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter H. Griffin, Matthew B. Lerner, Kim Nusbaum, Robert Trenker, for Moving Parties, GIP Primus LP and Brightwood Loan Services LLC

Patricia D.S. Jackson, Andrew Gray, Jeremy Opolsky, Alexandra Shelley, for Moving Party, Port of Algoma Inc.

Ashley Taylor, Eliot Kolers, Sanja Sopic, for Applicants / Respondents

Clifton P. Prophet, Nicholas Kluge, Delna Contractor, for Monitor, Ernst & Young Inc.

Motions for leave to appeal from the order of Justice Frank Newbould of the Superior Court of Justice, dated April 28, 2017

Per curiam:

Background

1 GIP Primus LP and Brightwood Loan Services LLC (collectively "GIP") and Port of Algoma Inc. ("Portco") apply for leave to appeal the order of Newbould J. dated April 28, 2017. The order was made in the context of insolvency proceedings under the CCAA¹ involving Essar Steel Algoma Inc. ("Algoma") and related companies. Newbould J. is the supervising CCAA judge in those proceedings.

2 Algoma and its predecessors are no strangers to restructuring proceedings. The first CCAA proceedings were commenced in 1991. A second CCAA restructuring took place in 2001. By 2014 Algoma was in further need of a cash injection and an attempt was made to address the problem through a solvent restructuring under the *Canada Business Corporations Act*.² This resulted in a complex transaction in the course of which GIP advanced \$150 million which was then paid to Algoma as the major portion of the purchase price in what is referred to by the parties as the "Port Transaction". That overall transaction involved four basic components:

- (i) the sale by Algoma to Portco of the port facilities at Sault Ste. Marie, Ontario;
- (ii) a lease of the port lands to Portco for a period of 50 years;

(iii) a Cargo Handling Agreement, whereby Algoma was to pay Portco US\$36 million annually, in monthly instalments, for use of the port and cargo-handling facilities; and

(iv) a Shared Services Agreement that required Portco to pay Algoma US\$11 million annually, in monthly instalments, in exchange for Algoma providing operation and maintenance services at the port.

3 At the end of the day, Algoma received a total purchase price of US\$171.5 million. Of that amount, US\$150 million was advanced by GIP to Portco which, in turn, used it to pay Algoma. Portco paid a small further amount itself and the balance of the purchase price was paid by way of a US\$19.8 million promissory note from Portco to Algoma (the "Note"). Portco's obligation under the Note was subsequently assumed by Essar Global Fund Ltd. ("EGFL"), the indirect parent company of both Portco and Algoma. The structure of the Cargo Handling Agreement and the Shared Services Agreement was designed to provide Portco with a net stream of payments that would enable it to service the GIP loan.

4 Unfortunately, the restructuring was unsuccessful. Algoma filed for protection under the CCAA in November, 2015. DIP lenders provided financing during the proceedings.

5 Under the Initial CCAA Order, Algoma was required to pay post-filing expenses as set out in a cash-flow budget approved by the DIP lenders, and for a period of time after the filing Algoma continued to make regular payments under the Cargo Handling Agreement. These payments stopped in May, 2016, however, when the DIP lenders refused to approve cash-flow budgets providing for those payments so long as the \$19.8 million Note remained outstanding.

6 This triggered proceedings that have ultimately led to these motions for leave to appeal.

The First Motion

7 In June, 2016, Portco brought a motion — supported by GIP — for an order requiring Algoma to resume payments under the Cargo Handling Agreement, relying on the provisions of s. 11.01(a) of the CCAA as the basis for the order. Section 11.01(a) permits a company under CCAA protection to make payment for post-filing goods and services provided to it. Portco argued it was providing post-filing services under the Cargo Handling Agreement.

8 There was also an issue raised by the Monitor and the DIP lenders as to whether there was a right, on the part of Algoma, to set off payments due under the Cargo Handling Agreement against the amount outstanding on the Note.

9 The CCAA Judge dismissed the motion. He held that s. 11.01(a) was not applicable because, in fact, it was Algoma and its employees, and not Portco, who were providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. He concluded that it was premature to deal with the set-off issue. In dismissing the motion, he said that the dismissal was "without prejudice to it being brought back on after the set-off issue [had been] determined".

10 No steps were taken to seek leave to appeal from this decision.

The Second Motion

11 Not to be deterred, however, Portco — again supported by GIP — brought a second motion in October, 2016, seeking the same relief. Again Portco and GIP relied on s. 11.01(a). But this time, they presented a different argument. The Cargo Handling Agreement was in reality a licensing agreement, they submitted, and Algoma was not entitled to enter onto the premises without paying under the license.

12 The CCAA Judge dismissed the motion again. First, he held that the issue of s. 11.01(a)'s applicability had been decided on the previous motion — from which no leave to appeal had been sought — and could not be re-litigated under the guise of a different argument which could have been raised on the First Motion. In holding that the s. 11.01(a) issue had already been finally decided against Portco, and with respect to the "without prejudice" aspect of the first order, he was very clear:³

I must say that when I stated that the first Portco motion was dismissed without prejudice to it being brought back on after the set-off issue was determined, it was not intended to enable Portco to raise anew those issues that had been decided against it. It was intended to permit Portco to come back if it succeeded on the set-off point or the issues raised by the Monitor. Portco however continues to raise issues already decided against it.

13 Secondly, and in any event, the CCAA Judge rejected the licensing argument. He further concluded that even if Portco were free to raise the s. 11.01(a) issue — which it was not free to do — he would not have ordered payment of amounts due under the Cargo Handling Agreement at that stage in the face of related oppression remedy proceedings involving the Port Transaction that were pending before him as well.

14 No steps were taken to seek leave to appeal from this second order.

The Oppression Proceedings

15 In September, 2016, the CCAA Judge had authorized the Monitor to commence oppression remedy proceedings on behalf of Algoma with regard to the Port Transaction. EGFL (the obligor under the Note) asserted a counterclaim in those proceedings, arguing that the amounts owing to Portco under the Cargo Handling Agreement could be set off against the \$19.8 million Note and that that amount had then been exceeded, with the result that payments should resume under the Cargo Handling Agreement.

16 The oppression remedy proceedings were heard by Newbould J. as well, in early 2017. On March 6, 2017, he released his reasons. He found the Port Transaction was oppressive and unfairly disregarded the interests of Algoma's trade creditors, employees, pensioners and retirees, but did not set aside the transaction. Instead, he ordered that the transaction documents be amended in various ways, the particulars of which are not important to the leave to appeal issues. He declined to deal with the set-off issue in those proceedings, however, concluding instead that "the appropriate place to make this claim is in the CCAA proceedings."

The Third Motion

17 Very quickly — in April, 2017 — the s. 11.01(a) issue was brought back again, this time by way of a GIF motion, supported by Portco. In an April 28th endorsement, Newbould J. once again dismissed the motion. This time he said:⁴

This is the third time that this argument has been advanced. It was unsuccessfully argued by Portco on two previous motions requesting orders that the payments under the Cargo Handling Agreement resume. On the first occasion, it was argued that Portco was providing services to Algoma on the Port facilities and that section 11.01(a) required immediate payment. I held that Portco was not providing the services but rather Algoma personnel who were doing all of the work. On the second occasion Portco added the argument that Portco was licensing the Port facilities to Algoma and that the payments under the Cargo Handling Agreement were for that purpose and therefore had to be made. I held that it was not open to Portco to make that new argument but that in any event I did not accept it . . .

Portco adds another argument why the access of Algoma to the Port facilities is a licence. Again, that should have been argued in the first go-around on the point. It says that under the Cargo Handling Agreement, Algoma can enter the property only if it makes payment under that agreement. I do not agree. What the Cargo Handling Agreement provides in section 3.3 is that notwithstanding that Algoma's access to the Port is non-exclusive, Algoma shall have priority access so long as it makes its payments due under the Cargo Handling Agreement. That in no way can be construed to be a licence. That section recognizes Algoma's right to access to the Port facilities as provided for in the Lease.

In short, even if it were permissible for Portco or GIP to again raise section 11.01(a), which it is not, I cannot find that there was a licence relationship between Algoma and Portco regarding the Port assets.

18 It is this order that is the subject of these motions for leave to appeal.

Analysis

19 Leave to appeal is to be granted sparingly in CCAA proceedings. This is because of the "real time" dynamic of CCAA matters and the "generally discretionary character underlying many of the orders made by supervising judges in such proceedings" and the deference to be accorded to those decisions. In considering whether to grant leave, the court will consider whether:

- (i) the proposed appeal is *prima facie* meritorious or frivolous;
- (ii) the point on the proposed appeal is of significance to the practice;
- (iii) the point on the proposed appeal is of significance to the proceeding; and
- (iv) whether the proposed appeal will unduly hinder the progress of the action.

See *Stelco Inc., Re*, [2005] O.J. No. 4883 (Ont. C.A.), at paras. 15-20; *Nortel Networks Corp., Re*, 2016 ONCA 332, 130 O.R. (3d) 481 (Ont. C.A.), at para. 34.

20 In our view, the leave motions fail on the first two of these factors.

The Merits

21 GIP and Portco propose identical questions to be determined on the appeal if leave is granted:

- (i) Did the motion judge err in concluding that [GIP and Portco were] precluded from arguing that Algoma is required by section 11.01(a) of the CCAA to make payments under the Cargo Handling Agreement?
- (ii) Did the motion judge err in his interpretation of section 11.01(a) of the CCAA?

22 The application and interpretation of s. 11.01(a) of the CCAA are precisely the issues that were addressed by the motion judge in the First Motion, and in the Second Motion (in addition to whether those issues were *res judicata*), and in the Third Motion (which led to the order from which leave to appeal is now sought). In spite of the moving parties' attempts on the Second and Third Motions to wrap their arguments in different packaging, the issues remained the same: the interpretation of s. 11.01(a) and its application in the particular circumstances of this CCAA proceeding.

23 Those issues have now been determined adversely against the moving parties three times. No steps were taken to obtain leave to appeal from the motion judge's orders on the First Motion or the Second Motion. We are not persuaded there is *prima facie* merit in the attempt now to seek leave to appeal from a third unsuccessful attempt to invoke s. 11.01(a) of the CCAA.

24 The moving parties argue that the landscape has changed since Newbould J.'s determination of the oppression remedy proceedings.⁵ They submit that, in declining to deal with the set-off issue in those proceedings and determining that "the appropriate place to make [that] claim is in the CCAA proceedings", he opened the door for a re-consideration of the s. 11.01(a) issue. The record does not support that submission.

25 Newbould J. dealt with the set-off counterclaim in one paragraph at the end of his reasons in the oppression remedy proceedings. He said:⁶

Portco has made a counterclaim for a declaration that the \$19.8 million note has been paid in full as a result of set-off and for payments beyond that amount said to be owing under the Cargo Handling Agreement. When and how the set-off occurred is not in the record and whether that could be affected by the stay of proceedings in the CCAA has not been argued. Nor are the amounts said to be owing set out with any precision. In my view the appropriate place to make this claim is in the CCAA proceedings and I do not intend to deal with it in this counterclaim.

26 We see nothing in this disposition to suggest that Newbould J. had somehow signalled that he was re-opening — even if he were entitled to do so — the s. 11.01(a) issues, which he had clearly determined against the moving parties' interests on the First and Second Motions. Nor is there any indication in his reasons provided on the Third Motion — which was heard *after* his decision in the oppression remedy proceedings had been released — that he intended that to be the case. Indeed, as stated in the passage of his reasons on the Third Motion set out above, quite the opposite was the case.

27 The same parties have now joined issue on the same legal questions (the interpretation and application of s. 11.01(a) in the circumstances of the CCAA proceedings) three times. The CCAA Judge, presiding in a court of competent jurisdiction, had finally determined those legal questions twice before the Third Motion was launched, and there were no attempts to appeal. All the relevant factors for the application of issue estoppel are present and the decisions are binding on the moving parties, absent a successful appeal: see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (S.C.C.), at para. 25; *Diamond v. Western Realty Co.*, [1924] S.C.R. 308 (S.C.C.), at para. 35. They deprive the proposed appeal of the merit required for leave to appeal to be granted.

28 The moving parties raise an additional argument, however. They submit that, even if the elements of issue estoppel have been established, the court retains a residual discretion to decline to apply the doctrine, and that the CCAA Judge failed to take that factor into consideration.

29 We disagree. In concluding that payments to Portco under the Cargo Handling Agreement should not resume, the CCAA Judge considered and weighed the interests of all stakeholders involved in the CCAA proceeding — including the fact that to allow the payments to resume would be to permit a breach of the DIP financing then in place, thereby jeopardizing that financing — and concluded that it would not be appropriate in the circumstances to lift the CCAA stay in respect of those payments. In doing so, he was exercising the same discretion that would apply to the estoppel issue. We see no error that would justify granting leave to appeal in the exercise of that discretion.

Significance to the Practice

30 We accept that the s. 11.01(a) issues have considerable significance for this particular CCAA proceeding, but we are not persuaded that they have significance for the practice in the circumstances of this proceeding.

31 Whether s. 11.01(a) is available to benefit the moving parties, thereby giving them an advantage over other stakeholders in terms of the servicing of the GIP loan, depends upon the interpretation and application of the particular agreements that underlie the Port Transaction and upon how they are being carried out in practice. Thus, the proposed appeals arise out of the unique and inter-related agreements that formed the Port Transaction. We see little of assistance to the general practice of insolvency law that would arise in the proposed appeals.

Undue Hindrance of the Proceedings

32 We do not think that granting leave to appeal would unduly hinder the progress of the CCAA proceedings, given that the appeals could be heard together with the pending appeal in the oppression remedy proceedings in August. However, in view of the foregoing conclusions, this does not assist the moving parties in the circumstances.

Disposition

33 For the reasons set out above, the motions for leave to appeal are dismissed.

34 The Monitor and Algoma are each entitled to their costs of the leave motions, fixed in the amount of \$3,000, as against the moving parties, jointly and severally.

Application dismissed.

- 1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
- 2 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.
- 3 [2016 ONSC 6459](#) (Ont. S.C.J. [Commercial List]), at para. 9.
- 4 [2017 ONSC 2585](#) (Ont. S.C.J. [Commercial List]), at paras. 10-12.
- 5 An appeal from that order is scheduled to be heard in this Court in August of this year.
- 6 [*Ernst & Young Inc. v. Essar Global Fund Ltd.*] [2017 ONSC 1366](#) (Ont. S.C.J. [Commercial List]), at para. 147.

2005 CarswellOnt 6818
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 6818, [2005] O.J. No. 4883, 11 B.L.R. (4th) 185, 144 A.C.W.S.
(3d) 15, 15 C.B.R. (5th) 307, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT
WITH RESPECT TO STELCO INC., AND OTHER APPLICANTS LISTED IN SCHEDULE "A"

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

Goudge, Sharpe, Blair J.J.A.

Heard: November 14, 2005
Judgment: November 17, 2005
Docket: CA C44436, M33171

Proceedings: additional reasons at *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 ((Ont. C.A.)); affirmed
Stelco Inc., Re ((2005)), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 ((Ont. S.C.J. [Commercial List]))

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Fred Myers for Her Majesty the Queen in Right of Ontario, Superintendent of Financial Services
Ken Rosenberg for United Steelworkers of America
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Murray Gold for Salaried Retirees
Heath Whitley for CIBC
Steven Bosnick for U.S.W.A. Loc. 5328, 8782

Blair J.A.:

Background

1 This appeal arises out of the reorganization of Stelco Inc., and related companies, pursuant to the *Companies' Creditors Arrangement Act* ("CCAA").¹ Stelco has been in the midst of this fractious process for approximately twenty-one months. Justice Farley has been the supervising judge throughout.

2 Stelco has presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval. The vote was scheduled for Tuesday, November 15, 2005. On Thursday, November 10, a group of creditors known as the Informal Independent Converts' Committee ("the Converts' Committee") sought an order from the supervising judge, amongst other things, classifying the Subordinated Debenture Holders whom they represent as a separate class for voting purposes. Justice Farley dismissed the motion. In the face of the pending vote, the Converts' Committee sought leave to appeal on Thursday afternoon (The courts were

closed on Friday, November 11, for Remembrance Day). Rosenberg J.A. dealt with the matter and directed that the application for leave, and if leave be granted, the appeal, be heard by a panel of this court on Monday, November 14, 2005.

3 This panel heard the application for leave and the appeal on Monday. We concluded that leave should be granted, but that the appeal must be dismissed, and at the conclusion of argument — and in order to clarify matters so that the vote could proceed the following day — we issued a brief endorsement with our decision, but indicating that more detailed reasons would follow.

4 The endorsement read as follows:

In our view, the appellants have not demonstrated a different legal interest from the other unsecured creditors vis à vis the debtor, nor any basis for setting aside the finding of Farley J. that there are no different practical interests such that the appellants deserve a separate class. We see no legal error or error in principle in his exercise of discretion.

Leave to appeal is granted, but the appeal must therefore be dismissed. Because of the importance of the issue for Ontario practice in this area, we propose to expand somewhat on these reasons in due course.

5 These are those expanded reasons.

Facts

6 Stelco's Proposed Plan is made to unsecured creditors only. It is not intended to affect the claims of secured creditors.

7 The Converts' Committee represents unsecured creditors who hold \$90 million of convertible unsecured subordinated debentures issued by Stelco pursuant to a Supplemental Trust Indenture dated January 21, 2002, and due in 2007. With interest, the claims of the Subordinated Debenture Holders now amount to approximately \$110 million. Those claims are subordinated to approximately \$328 million in favour of Senior Debt Holders. In addition, Stelco has unsecured trade debts totalling approximately, \$228 million. In the Proposed Plan, these three groups of unsecured creditors — the Subordinated Debenture Holders (represented by the Converts' Committee), the Senior Debt Holders, and the Trade Creditors — have all been included in the same class for the purposes of voting on the Proposed Plan or any amended version of it.

8 The Converts' Committee takes issue with this, and seeks to have the Subordinated Debenture Holders classified as a separate class of creditors for voting purposes. They argue that their interests are different than those of the Bondholders and that creditors who do not have common interests should not be classified in the same group for voting purposes. They submit, therefore, that the supervising judge erred in law in not granting them a separate classification. In that regard, they rely upon this court's decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.). They also argue that the supervising judge was wrong, on the facts contained in the record, in finding that the Subordinated Debenture Holders and the Bondholders did not have conflicting interests.

9 In making their argument about a different interest, the appellants rely upon their status as subordinated debt holders as shaped particularly by Articles 6.2 and 6.3 of the Supplemental Trust Indenture. In essence those provisions reinforce the subordinated nature of their debt. They stipulate (a) that if the Subordinated Debenture Holders receive any payment from Stelco, or any distribution from the assets of Stelco, before the Senior Debt is fully paid, they are obliged to remit any such payment or distribution to the Senior Debt Holders until the latter have been paid in full (Art. 6.2(3)), but (b) that no such payment or distribution by Stelco shall be deemed to constitute a payment on the Subordinated Debenture Holders' debt (Art. 6.3). The parties refer to these provisions as the "Turnover Payment" provisions.

10 In short, although Stelco is obliged to pay both groups of creditors in full, as between the Subordinated Debenture Holders and the Senior Debt Holders, the latter are entitled to be paid in full before the former receive anything. The Supplemental Trust Indenture makes it clear that the provisions of Article 6 "are intended solely for the purpose of defining the relative rights of [the Subordinated Debenture Holders] and the holders of the Senior Debt" (Art. 6.3).

11 The appellants contend that the Turnover Payment provisions distinguish their interests from those of the Subordinated Debenture Holders when it comes to voting on Stelco's Proposed Plan. They say that the Subordinated Debenture Holders'

interest in maximizing the amounts to be made available to unsecured creditors ends once they have received full recovery, in part as a result of the Turnover Payments that the Subordinated Debenture Holders will be required to make from their portion of the funds. On the other hand, the Subordinated Debenture Holders will have an interest in seeking more because their recovery, for practical purposes, will have only begun once that point is reached.

12 The respondents submit, for their part, that the appellants are seeking a separate classification for a collateral purpose, i.e., so that they will be able to veto the Proposed Plan, or at least threaten to veto it, unless they are granted a benefit to which they are not entitled — the elimination of their subordinated position by virtue of the Turnover Payment provisions.

13 Farley J. rejected the appellants' arguments. The thrust of his decision in this regard is found in paragraphs 13 and 14 of his reasons:

[13] I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/Senior Debt² plus the trade debt vis-à-vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid any unnecessary fragmentation — and in this respect multiplicity of classes does not mean that that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.

[14] Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of the ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis-à-vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible. . . . That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the variation of the consideration obtained.

14 We agree with his conclusion and see no basis to interfere with his findings in that regard.

The Leave Application

15 The principles to be applied by this court in determining whether leave to appeal should be granted to someone dissatisfied with an order made in a CCAA proceeding are not in dispute. Leave is only sparingly granted in such matters because of their "real time" dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings. There must be serious and arguable grounds that are of real and significant interest to the parties. The court has assessed this criterion on the basis of a four-part test, namely,

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

See *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 24; *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) at para. 15; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 7.

16 Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA

proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), this court has not dealt with the issue since its decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)*, *supra*, and the Converts' Committee argues that the Alberta line of authorities is contrary to *Nova Metal Products Inc.*

17 A brief further comment respecting the leave process may be in order.

18 The court recognizes the importance of its ability to react in a responsible and timely fashion to the appellate needs arising in the "real time" dynamics of CCAA restructurings. Often, as in the case of this restructuring, they involve a significant public dimension. For good policy reasons, however, appellate courts in Canada — including this one — have developed relatively stringent parameters for the granting of leave to appeal in CCAA cases. As noted, leave is only sparingly granted. The parameters as set out in the authorities cited above remain good law.

19 Merely because a corporate restructuring is a big one and money is no object to the participants in the process, does not mean that the court will necessarily depart from the normal leave to appeal process that applies to other cases. In granting leave to appeal in these circumstances, we do not wish to be taken as supporting a notion that the fusion of leave applications with the hearing of the appeal in CCAA restructurings — particularly in major ones such as this one involving Stelco — has become the practice. Where there is an urgency that a leave application be expedited in the public interest, the court will do so in this area of the law as it does in other areas. However, where what is involved is essentially an attempt to review a discretionary order made on the facts of the case, in a tightly supervised process with which the judge is intimately familiar, the collapsed process that was made available in this particular situation will not generally be afforded.

20 As these reasons demonstrate, however, the issues raised on this particular appeal, and the timing factor involved, warranted the expedited procedure that was ordered by Justice Rosenberg.

The Appeal

No Error in Law or Principle

21 Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class. Most analyses of this approach start with a reference to *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-94] All E.R. Rep. 246 (Eng. C.A.), which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited:

At pp. 249-250 Lord Esher said:

The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act³ recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.

At p. 251, Bowen L.J. stated:

The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

22 These views have been applied in the CCAA context. But what comprises those "not so dissimilar" rights and what are the components of that "common interest" have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process — a flexibility which is its genius — there can be no fixed rules that must apply in all cases.

23 In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:

In summary, the cases establish the following principles applicable to assessing commonality of interest:

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

24 In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.); *Woodward's Ltd., Re* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.); *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *NsC Diesel Power Inc., Re* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.), (*sub nom. Amoco Acquisition Co. v. Savage*); *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines Corp., Re* decision: *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 27.

25 In the passage from his reasons cited above (paragraphs 13 and 14) the supervising judge in this case applied those principles. In our view he was correct in law in doing so.

26 We do not read the foregoing principles as being inconsistent with the earlier decision of this court in *Nova Metal Products Inc. v. Comiskey (Trustee of)*. There the court applied a common interest test in determining that the two creditors in question ought not to be grouped in the same class of creditors for voting purposes. But the differing interests in question were not different legal interests as between the two creditors; they were different legal interests as between each of the creditors and the debtor company. One creditor (the Bank) held first security over the debtor company's receivables and the other creditor (RoyNat) held second security on those assets; RoyNat, however, held first security over the debtor's building and realty, whereas the Bank was second in priority in relation to those assets. The two creditors had differing commercial interests in how the assets should be dealt with (it was in the interests of the bank, with a smaller claim, to collect and retain the more realizable receivable assets, but in the interests of RoyNat to preserve the cash flow and have the business sold as a going concern). Those differing commercial interests were rooted in differing legal interests as between the individual creditors and the debtor company, arising from the different security held. Because of the size of its claim, RoyNat would dominate any group that it was in, and Finlayson J.A. was of the view that RoyNat, as the holder of second security, should not be able to override the Bank's legal interest as the first

secured creditor with respect to the receivables by virtue of its voting rights. On the basis that there was "no true community of interest" between the secured creditors (p. 259), given their different legal interests, he ordered that the Bank be placed in a separate class for voting purposes.

27 *Nova Metal Products Inc. v. Comiskey (Trustee of)* did not deal with the issue of whether creditors with divergent interests as amongst themselves — as opposed to divergent legal interests vis-à-vis the debtor company — could be forced to vote as members of a common class. Nor did it apply an "identity of interest" test — a test that has been rejected as too narrow and too likely to lead to excessive fragmentation: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, *supra*); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*; *Fairview Industries Ltd., Re*, *supra*; *Woodward's Ltd., Re*, *supra*. In our view, there is nothing in the decision in *Nova Metal Products Inc.* that is inconsistent with the evolutionary set of principles developed in the Alberta jurisprudence and applied by the supervising judge here.

28 In addition to commonality of interest concerns, a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". Examples of the former include *Nova Metal Products Inc. v. Comiskey (Trustee of)* ⁴ and *Wellington Building Corp., Re*, *supra* ⁵. Examples of the latter include *Sklar-Peppler*, *supra* ⁶ and *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.) ⁷.

29 Here, as noted earlier in these reasons, the respondents argue that the appellants are seeking a separate classification in order to extract a benefit to which they are not entitled, namely a concession that the Turnover Payment requirements of their subordinated position be extinguished by the Proposed Plan, thus avoiding their obligation to transfer payments to the Senior Debt Holders until they have been paid in full, and freeing up all of the distribution the appellants will receive from Stelco for payment on account of their own claims. On the other hand, the appellants point to this conflict between the Subordinated Debenture Holders and the Senior Debt Holders as evidence that they do not have a commonality of interest or the ability to consult together with a view to whatever commonality of interest they may have vis-à-vis Stelco.

30 We agree with the line of authorities summarized in *Canadian Airlines Corp., Re* and applied by the supervising judge in this case which stipulate that the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. To the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary — see, for example *NsC Diesel Power Inc., Re*, *supra* — we prefer the Alberta approach.

31 There are good reasons for such an approach.

32 First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C. S.C.) at para. 24 (after referring to the full style of the legislation):

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

33 In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

34 Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

35 Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association — Ontario Continuing Legal Education, 5th April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*, at para. 27; *Northland Properties Ltd., Re*, *supra*; *Sklar-Peppler*, *supra*; *Woodward's Ltd., Re*, *supra*.

36 In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Canadian Airlines Corp., Re*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

Discretion and Fact Finding

37 Having concluded that the supervising judge made no error in law or principle in his approach to the classification issue, we can find no error in his factual findings or in his exercise of discretion in determining that the Subordinate Debenture Holders should remain in the same class as the Senior Debt Holders and Trade Creditors in the circumstances of this case.

38 We agree that there is no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis-à-vis Stelco. Each is entitled to be paid the monies owing under their respective debt contracts. The only difference is that the former creditors are subordinated in interest to the latter and have agreed to pay over to the latter any portion of their recovery received until the Senior Debt has been paid in full. As between the two groups of creditors, this merely reflects the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. For that reason, the supervising judge was also entitled to determine that this was not a case involving any confiscation of legal rights.

39 Finally, the supervising judge's finding that there is no "realistic conflict of interest" between the creditors is supported on the record. Each has the same general interest in relation to Stelco, namely to be paid under their contracts, and to maximize the amount recoverable from the debtor company through the Plan negotiation process. We do not accept the argument that the Senior Debt Holder's efforts will be moderated in some respect because they will be content to make their recovery on the backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders will require the support of the Trade Creditors, whose interest is not affected by the subordination agreement. Thus the Senior Debt Holders will be required to support the maximization approach.

40 We need not deal with whether a realistic and genuine conflict of interest, produced by different legal positions of creditors vis-à-vis each other, could ever warrant separate classes, as we are satisfied that even if it could, this is not such a case.

Disposition

41 Accordingly, we would not interfere with the supervising judge's decision that the appellants had not made out a case for a separate class. The appeal is therefore dismissed.

Goudge J.A.:

I agree.

Sharpe J.A.:

I agree.

Footnotes

- 1 R.S.C. 1985, c. C-36, as amended.
- 2 Farley J. uses the term "ConCom debt" to refer to the debt represented by the Converts' Committee (i.e., that of the Subordinated Debenture Holders), and the term "BondCom debt" to refer to that of the Senior Debt Holders.
- 3 The *Joint Stock Companies Arrangement Act*, 1870.
- 4 A second secured creditor with superior voting power was separated from a first secured creditor for voting purposes, in order prevent the former from utilising its superior voting strength to adversely affect the latter's prior security position.
- 5 The court refused to allow subsequent mortgagees to vote in the same class as a first mortgagee because in the circumstances the subsequent mortgagees would be able to use their voting power to destroy the priority rights and security of the first mortgagee.
- 6 Borins J., as he then was, warned against the dangers of "excessive fragmentation" and of creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power".
- 7 Montgomery J. declined to grant a separate classification to a minority group of creditors who would use that classification to extract benefits to which it was not otherwise entitled.

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10,
1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

**9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and
Callidus Capital Corporation, International Game Technology, Deloitte
LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis
Proulx and François Pelletier (Respondents) and Ernst & Young Inc.,
IMF Bentham Limited (now known as Omni Bridgeway Limited),
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital
(Canada) Limited), Insolvency Institute of Canada and Canadian
Association of Insolvency and Restructuring Professionals (Interveners)**

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020

Judgment: May 8, 2020

Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

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Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.

Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring):

I. Overview

1 These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

2 Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

3 For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

5 In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately \$24 million to Bluberi. This debt was secured in part by a share pledge agreement.

6 Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately \$86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets

7 On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

8 Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

9 Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately \$135.7 million. Callidus would maintain an undischarged secured claim of \$3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").¹ Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over \$200 million in damages.

10 The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

11 Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's \$3 million claim.

B. The Initial Competing Plans of Arrangement

12 On September 11, 2017, Bluberi filed an application seeking the approval of a \$2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

13 However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a \$2.5 million (later increased to \$2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than \$3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

14 The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded \$20 million.

15 On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. Creditors' Vote on Callidus's First Plan

16 On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing \$3,450,882 of debt) voted in favour, and 8 voted against (representing \$2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

17 Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] ... the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. Bluberi's Interim Financing Application and Callidus's New Plan

18 On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a \$20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

19 The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested

funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

20 Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.²

21 On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by \$250,000 (from \$2.63 million to \$2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its \$3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

22 The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. Quebec Superior Court (2018 QCCS 1040 (C.S. Que.)) (Michaud J.)

23 The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

24 With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.

As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

25 The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the CCAA proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], at para. 70).

26 Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

27 With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the \$20 million Litigation Financing Charge should be imposed on Bluberi's assets.

28 The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Crystallex International Corp., Re*, 2012 ONCA 404, 293 O.A.C. 102 (Ont. C.A.), at para. 92 ("*Crystallex*"). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

29 After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2013 ONSC 4974, 117 O.R. (3d) 150 (Ont. S.C.J.), at para. 41, and *Hayes v. Saint John (City)*, 2016 NBQB 125 (N.B. Q.B.), at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the CCAA context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332 (Ont. S.C.J.), at para. 23).

30 Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

31 Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. Quebec Court of Appeal (2019 QCCA 171 (C.A. Que.)) (Dutil and Schrager J.J.A. and Dumas J. (ad hoc))

32 The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII). In particular, the court identified two errors of relevance to these appeals.

33 First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Blackburn Developments Ltd., Re*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199 (B.C. S.C.), at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the CCAA proceedings to be incapable of justifying a finding of improper purpose.

34 Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

35 In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

36 Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

37 These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. Preliminary Considerations

38 Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of *CCAA* Proceedings

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of \$5 million (*CCAA*, s. 3(1)).

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

41 Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarraz, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1 (Ont. C.A.), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarraz, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating *CCAAs*", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 (Ont. C.A.), at para. 70).

43 Liquidating *CCAAs* take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating *CCAAs*: Discretion Gone Awry?", in J. P. Sarraz, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating *CCAAs* are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge*, Re (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), at paras. 15-16, aff'd 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating *CCAAs*. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.³ Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarraz, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing

creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in CCAA Proceedings

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

52 We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp-566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

53 A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426 (Ont. C.A.), at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.), at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338 (B.C. C.A.), at para. 20).

54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Edgewater Casino Inc., Re*, 2009 BCCA 40, 305 D.L.R. (4th) 339 (B.C. C.A.) ("*Re Edgewater Casino Inc.*"), at para. 20, are apt:

... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

55 With the foregoing in mind, we turn to the issues on appeal.

B. Callidus Should Not Be Permitted to Vote on Its New Plan

56 A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

57 Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at N§149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.), at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things,

whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at N§45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

58 Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

59 Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

60 We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

61 While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at N§33, *Red Cross; 1078385 Ontario Ltd., Re* (2004), 206 O.A.C. 17 (Ont. C.A.)). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 59; see also *Third Eye Capital Corporation*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

62 Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

63 Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of *debtor companies* to organize a restructuring plan that confers additional benefits to *related parties*" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

64 Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

65 There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

66 Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

67 Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

68 Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

69 Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

70 Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

71 The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc., Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.). In *Laserworks Computer Services Inc.*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

72 While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

73 First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

74 Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283 (Ont. C.A.), at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks Computer Services Inc.* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

75 We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

76 Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) *The Supervising Judge Did Not Err in Prohibiting Callidus From Voting*

77 In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

78 The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it to do so⁴. The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of \$250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

79 Indeed, as the Monitor observes, "Once a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the *CCAA*, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of \$200,000 (see supervising judge's reasons, at para. 72).

80 We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

81 As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

82 In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

83 Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in

a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. Bluberi's LFA Should Be Approved as Interim Financing

84 In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the CCAA

85 Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), at paras. 7, 9 and 24; *Boutiques San Francisco inc., Re* [2003 CarswellQue 13882 (C.S. Que.)], 2003 CanLII 36955, at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

86 Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

87 The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.⁵ It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

88 The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

89 Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their

assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztein and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

90 Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

Factors to be considered

(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.

(*CCAA*, s. 11.2(4))

91 Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

92 As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

93 Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a

share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364 (Ont. S.C.J.); *Musicians' Pension Fund of Canada (Trustee of)*).

94 Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance.⁶ The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1885), 7 O.R. 644 (Ont. Div. Ct.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

95 Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915 (C.S. Que.), at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321 (Ont. S.C.J.), at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Ont. Div. Ct.); see also *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192 (B.C. S.C.), at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

96 That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

97 We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

98 The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US\$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from *CCAA* protection" (para. 68).

99 A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

100 There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at N§33)

101 The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away ... their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

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.

(*Crystallex International Corp.*, *Re*, 2012 ONSC 2125, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), at para. 50)

102 Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

103 We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

104 None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

105 In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the

principles relevant to approving similar agreements in the class action context (para. 74, citing *Musicians' Pension Fund of Canada (Trustee of)*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of CCAA proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

106 While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's CCAA proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's CCAA proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);
- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));
- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, *the only potential recovery* lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

107 In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

108 To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

109 First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

110 Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

111 We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.)).

112 This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

.....

... While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

113 We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

114 We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

115 Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

116 Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter*

dictum. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

117 For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

- 1 Bluberi does not appear to have filed this claim yet (see [2018 QCCS 1040](#) (C.S. Que.), at para. 10 (CanLII)).
- 2 Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.
- 3 We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.
- 4 It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.
- 5 A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.
- 6 The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Pole Lite ltée c. Banque Nationale du Canada*, [2006 QCCA 557](#), [\[2006\] R.J.Q. 1009](#) (C.A. Que.); G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

2009 BCCA 40
British Columbia Court of Appeal

Edgewater Casino Inc., Re

2009 CarswellBC 213, 2009 BCCA 40, [2009] B.C.W.L.D. 1577, 175 A.C.W.S. (3d)
43, 265 B.C.A.C. 274, 308 D.L.R. (4th) 339, 446 W.A.C. 274, 51 C.B.R. (5th) 1

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

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

In the Matter of Edgewater Casino Inc. and Edgewater Management Inc.

Canadian Metropolitan Properties Corp. (Appellant / Applicant) and Libin Holdings Ltd.,
Gary Jackson Holdings Ltd. and Phoebe Holdings Ltd. (Respondents / Respondents)

Levine, Tysoe, D. Smith J.J.A.

Heard: January 7, 2009

Judgment: February 6, 2009

Docket: Vancouver CA035922, CA035924

Counsel: J.J.L. Hunter, Q.C., J.A. Henshall for Appellant

J.R. Sandrelli, A. Folino for Respondents

Tysoe J.A.:

Introduction

1 This application raises the question of the nature and application of the test to be utilized when leave is sought to appeal from an order made in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

2 On August 29, 2008, the chambers judge refused Canadian Metropolitan Properties Corp. (the "Landlord") leave to appeal from two orders pronounced on March 5, 2008 and December 18, 2008, by the judge supervising the *CCAA* proceedings (the "*CCAA* judge") concerning Edgewater Casino Inc. and Edgewater Management Inc. ("Edgewater"). The Landlord applies under section 9(6) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, to vary or discharge the order of the chambers judge so that it is given leave to appeal from the two orders. The respondents, being the original shareholders of Edgewater, oppose the application.

Background

3 The Landlord and Edgewater entered into a lease agreement dated for reference November 8, 2004 (the "Lease") under which the Landlord leased part of the Plaza of Nations site in downtown Vancouver for the operation of a casino by Edgewater. Edgewater took possession of the leased property on May 4, 2004 and, prior to commencing operation of the casino on February 5, 2005, spent approximately \$15 million renovating the main building covered by the Lease. These renovations indirectly led to two disputes between the parties. The first dispute related to the extent, if any, to which Edgewater was responsible to reimburse the Landlord for increases in property taxes attributable to improvements made by Edgewater. A related issue was whether Edgewater was responsible to pay a portion of the consulting fees incurred by the Landlord in appealing property tax assessments. The second dispute related to Edgewater's responsibility to pay for the cost of utilities supplied to the leased

property prior to the commencement of the operation of the casino while Edgewater was in possession and renovating the building.

4 Edgewater commenced the *CCAA* proceedings on May 2, 2006, and the *CCAA* judge supervised the proceedings. Edgewater proposed a plan of arrangement by which sufficient funds would be paid into a law firm's trust account in an amount to fully pay all claims of creditors accepted by Edgewater and the asserted amounts of creditor claims disputed by Edgewater. I gather that the plan of arrangement was predicated on a sale of the shares in Edgewater by the respondents to a new owner and that it was agreed that the respondents would be the benefactors of any monies recovered from the Landlord and any monies left in trust following the resolution of the property tax and utilities disputes.

5 On August 11, 2006, the *CCAA* judge pronounced a "Claims Processing Order" establishing a process for claims to be made by Edgewater's creditors and to be either accepted by Edgewater or adjudicated upon in a summary manner in the *CCAA* proceedings. On August 29, 2006, the *CCAA* judge pronounced a "Closing Order" pursuant to which the plan of arrangement was implemented and sufficient funds were paid into trust to satisfy the accepted and disputed claims of Edgewater's creditors.

6 The Landlord filed a proof of claim asserting that Edgewater was indebted to it in the amount by which the property taxes for the leased property had increased since 2004. Edgewater disallowed the proof of claim. Edgewater subsequently claimed a right of setoff against the Landlord in respect of the utilities that it alleged had been improperly charged by the Landlord and had been paid by mistake.

7 By a case management order dated March 29, 2007, the *CCAA* judge directed that, among other things, the property tax and utilities disputes were to be determined summarily, with the parties exchanging pleadings and having representatives cross-examined on affidavits or examined for discovery. Hearings took place before the *CCAA* judge in August and September, 2007.

8 In his reasons for judgment dealing with the property tax dispute, indexed as [2008 BCSC 280](#) (B.C. S.C. [In Chambers]), the *CCAA* judge held that: (i) clause 3.05 of the Lease, which dealt with Edgewater's responsibility for increases in the property taxes, was sufficiently clear to be enforceable; (ii) the Landlord had not made negligent misrepresentations to Edgewater on matters relevant to the property tax increase; (iii) Edgewater was only responsible for increases in the assessment of the "Lands" (defined as the lands and improvement thereon) solely attributable to the improvements made by it, with the result that Edgewater was only obliged to pay the Landlord the increased taxes based on the increase in the assessed value of the buildings; and (iv) Edgewater was not liable, either in contract, *quantum meruit* or unjust enrichment, to reimburse the Landlord for any consulting fees incurred by it in appealing the property tax assessments in question.

9 In his reasons for judgment dealing with the utilities dispute, indexed as [2007 BCSC 1829](#) (B.C. S.C. [In Chambers]), the *CCAA* judge held that: (i) clause 4.01 of the Lease, which was clear on its face, restricted the amount of rent and additional rent during the period preceding the commencement of operation of the casino to the sum specified in the clause, and Edgewater was not responsible to pay for any additional sum in respect of utilities; (ii) the Landlord did not meet the test in order to have the Lease rectified in respect of the payment for utilities during the period of possession preceding the commencement of operation of the casino; and (iii) Edgewater was entitled to the return of the payments for utilities during the period of possession preceding the commencement of the casino made by it as a result of a mistake.

Decision of the Chambers Judge

10 In dismissing the applications for leave to appeal the two orders, the chambers judge commented that the *CCAA* judge had held the language of clauses 3.05 and 4.01 of the Lease to be clear and unambiguous. Relying on *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), and *Pine Valley Mining Corp., Re*, 2008 BCCA 263, 43 C.B.R. (5th) 203 (B.C. C.A. [In Chambers]), the chambers judge stated that leave to appeal in proceedings under the *CCAA* is granted sparingly. He commented that there were none of the time pressures that often attend *CCAA* proceedings.

11 The chambers judge noted that the *CCAA* judge had applied settled principles of contractual interpretation and expressed the view that there were very limited prospects of success on appeal. He observed that the issues had been decided in the context of summary proceedings under the *CCAA* and stated that the decision of the chambers judge was entitled to substantial deference.

Discussion

12 The parties are agreed that the test to be applied by a reviewing court on an application to review an order of a chambers judge is to determine whether the judge was wrong in law or principle or misconceived the facts: see *Haldorson v. Coquitlam (City)*, 2000 BCCA 672, 3 C.P.C. (5th) 225 (B.C. C.A.).

13 The parties made their submissions on the basis that there is a special test or standard for the granting of leave to appeal from an order made in CCAA proceedings. The genesis of this perception is the following passage from the decision of Mr. Justice Macfarlane in *Pacific National Lease*:

[30] Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this court on discreet questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

[31] A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

[32] Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

Numerous subsequent decisions have referred to these comments. These decisions include *Westar Mining Ltd., Re* (1993), 75 B.C.L.R. (2d) 16, 17 C.B.R. (3d) 202 (B.C. C.A.) at para. 57; *Woodward's Ltd., Re* (1993), 105 D.L.R. (4th) 517, 22 C.B.R. (3d) 25 (B.C. C.A.) at para. 34; *Repap British Columbia Inc., Re* (1998), 9 C.B.R. (4th) 82 (B.C. C.A. [In Chambers]) at para. 8; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 175 D.L.R. (4th) 703 (Alta. C.A.) at para. 62; *Blue Range Resource Corp., Re*, 1999 ABCA 255, 12 C.B.R. (4th) 186 (Alta. C.A.) at para. 3; *Canadian Airlines Corp., Re*, 2000 ABCA 149, 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 42; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.) at para. 52; *Fantom Technologies Inc., Re* (2003), 41 C.B.R. (4th) 55 (Ont. C.A. [In Chambers]) at para. 17; and *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, [2005] 8 W.W.R. 224 (B.C. C.A.) at para. 20.

14 The Landlord accepts the general proposition that leave to appeal from CCAA orders should be granted sparingly, but says that there should be an exception where, as here, the time constraints present in typical CCAA situations do not exist. In this regard, the Landlord relies on the views expressed by Chief Justice McEachern in *Westar Mining*. After quoting the above passage from *Pacific National Lease Holding Corp., Re*, McEachern C.J.B.C. said the following:

[58] I respectfully agree with what Macfarlane J.A. has said, but in this case the situation of the Company has stabilized as its principal assets have been sold. The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities, and the proper distribution of the trust fund which was established with the approval of the Court primarily for the protection of the Directors.

Although McEachern C.J.B.C. was speaking in dissent when making these comments, an appeal to the Supreme Court of Canada was allowed, [1993] 2 S.C.R. 448 (S.C.C.), and the Court agreed generally with his dissenting reasons.

15 The respondents submit that there should be the same test for leave to appeal from all orders made in CCAA proceedings. The respondents maintain that the test has been consistently applied throughout Canada and that a different test in some

circumstances would lead to the result that there would be many more leave applications to appeal orders made in *CCAA* proceedings and appellate courts would be required to analyze the underlying *CCAA* proceeding in every leave application.

16 The requirement for leave to appeal from an order made in *CCAA* proceedings is found in the *CCAA* itself (section 13), as opposed to the provincial or territorial statutes governing the appellate courts in Canada. This suggests that Parliament recognized that appeals as of right from orders made in *CCAA* proceedings could have an adverse effect on the efforts of debtor companies to reorganize their financial affairs pursuant to the Act and that appeals in *CCAA* proceedings should be limited: see *Algoma Steel Inc., Re* (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 (Ont. C.A.) at para. 8.

17 However, it does not follow from the fact that the statute itself is the source of the requirement for leave that the test or standard applicable to applications for leave to appeal orders made in *CCAA* proceedings is different from the test or standard for other leave applications. It is my view that the same test applicable to all other leave applications should be utilized when considering an application for leave to appeal from a *CCAA* order. In British Columbia, the test involves a consideration of the following factors:

- (a) whether the point on appeal is of significance to the practice;
- (b) whether the point raised is of significance to the action itself;
- (c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- (d) whether the appeal will unduly hinder the progress of the action.

The authority most frequently cited in British Columbia in this regard is *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.).

18 This is not to suggest that I disagree with the above comments of Macfarlane J.A. in *Pacific National Lease*. To the contrary, I agree with his comments, but I do not believe that he established a special test for *CCAA* orders. Rather, his comments are a product of the application of the usual standard used on leave applications to orders that are typically made in *CCAA* proceedings and a recognition of the special position of the supervising judge in *CCAA* proceedings. In particular, a consideration of the third and fourth of the above factors will result in leave to appeal from typical *CCAA* orders being given sparingly.

19 The third of the above factors involves a consideration of the merits of the appeal. In non-*CCAA* proceedings, a justice will be reluctant to grant leave where the order constitutes an exercise of discretion by the judge because the grounds for interfering with an exercise of discretion are limited: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog.*, [1998] B.C.J. No. 2298 (B.C. C.A. [In Chambers]). Most orders made in *CCAA* proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons alluded to in the comments of Macfarlane J.A.

20 First, one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests. Secondly, *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. These considerations are reflected in the comment made by Madam Justice Newbury in *New Skeena Forest Products* that "[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in *CCAA* matters and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).

21 The fourth of the above factors relates to the detrimental effect of an appeal on the underlying action. In most non-*CCAA* cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. *CCAA* proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing — some refer to *CCAA* proceedings as "real-time" litigation.

22 The fundamental purpose of *CCAA* proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.

23 Similar views were expressed by Mr. Justice O'Brien in *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266, 35 C.B.R. (5th) 27 (Alta. C.A. [In Chambers]):

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

- (1) Whether the point on appeal is of significance to the practice;
- (2) Whether the point raised is of significance to the action itself;
- (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- (4) Whether the appeal will unduly hinder the progress of the action.

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

Other decisions on leave applications where the usual factors were expressly considered include *Blue Range Resource Corp., Re*, *Canadian Airlines Corp., Re* and *Fantom Technologies Inc., Re*, each of which quoted the above comments of Macfarlane J.A. in *Pacific National Lease*.

24 As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing *CCAA* proceeding. However, not all of the above considerations will be applicable to some orders made in *CCAA* proceedings. Thus, in *Westar Mining*, McEachern C.J.B.C., while generally agreeing with the comments made in *Pacific National Lease*, believed that the considerations mentioned by Macfarlane J.A. were not applicable in that case because the *CCAA* proceeding had effectively come to an end with the sale of the principal assets of the debtor company. Madam Justice Newbury made a similar point in *New Skeena Forest Products* at para. 25 (which was a hearing of an appeal, not a leave application), although she found it unnecessary to decide the appeal on the point.

25 The chambers judge did give consideration to the usual factors in the present case, but none of the considerations I have mentioned were applicable to the two orders. The *CCAA* judge was deciding questions of law in each case and was not exercising his discretion. The knowledge gained by the *CCAA* judge during the reorganization process was not relevant to his decisions, which involved events that occurred prior to the commencement of the *CCAA* proceeding. The plan of arrangement made by Edgewater has been implemented, and appeals from the two orders will not delay or otherwise jeopardize the reorganization process. There is no prospect that the outcome of the appeals will affect the continuing viability of Edgewater; indeed, although the disputes involve Edgewater in name, the parties with a monetary interest in the disputes are the Landlord and the respondents, who are the former shareholders of Edgewater. In the circumstances, there was no reason to give substantial deference to the *CCAA* judge.

26 I am not saying that the considerations I have mentioned will never apply to a determination of claims pursuant to a claims process in a *CCAA* proceeding. For example, a plan of arrangement may only be successful if the total amount of claims

against the debtor company is less than a specified sum. An appeal from an order quantifying a claim of a creditor would delay the *CCAA* proceeding and could jeopardize the company's reorganization.

27 I have no doubt that there will be other circumstances in which the claims process will have an impact on the reorganization process. Even if the claims process will not jeopardize the reorganization process, some of the other considerations I have mentioned may apply to the determination of the claims. For example, the outcome of an appeal may affect the amounts received by other creditors and may delay the full implementation of the plan of arrangement. The fact that section 12 of the *CCAA* mandates the determination of claims to be by way of a summary application to the court illustrates that Parliament recognized that the claims process will often be sensitive to time constraints.

28 There is one other point about the order relating to the utilities dispute that differentiates it from the typical *CCAA* order. The dispute did not involve a claim against Edgewater but, rather, it was a claim by Edgewater to have the Landlord refund utilities payments made by it. Such a claim would normally be pursued in a normal lawsuit and, if it was determined on a summary application (i.e., a Rule 18A application), there would have been an appeal as of right, and leave would not have been required. It was only because the claim was raised as a setoff to the Landlord's property tax claim that it came to be determined in the *CCAA* proceeding.

29 I now turn to a consideration of the usual factors in relation to the order dealing with the property tax dispute:

1. As stated by the chambers judge, the point in issue is of no significance to the practice.
2. As conceded by the respondents on the application before the chambers judge, the point in issue is of significance to the action itself (in the sense that it finally determines the Landlord's claim).
3. The order did not involve an exercise of discretion by the *CCAA* judge. The chambers judge was mistaken in his belief that the *CCAA* judge held that clause 3.05 was clear and unambiguous; the first issue considered by the *CCAA* judge was whether the clause was sufficiently clear as to make it enforceable. In my opinion, the appeal is not frivolous.
4. The appeal will not unduly hinder the progress of the action because Edgewater's plan of arrangement has been implemented and the *CCAA* proceeding has come to a conclusion.

On a consideration of all of the factors, it is my view that leave to appeal the order dealing with the property tax dispute should be given.

30 A consideration of the usual factors in relation to the order dealing with the utilities dispute leads to the same observations with one exception. As conceded by the Landlord on this application, the prospects of success of an appeal do not appear to be as high as the prospects in an appeal from the other order. However, I am not persuaded that the appeal has so little merit that it amounts to a frivolous appeal. If the dispute had not become intertwined with the property tax dispute as a result of Edgewater's claim of a right of setoff, the dispute would not have been determined in the *CCAA* proceeding, and the Landlord would have had an appeal as of right. In all the circumstances, it is my view that leave to appeal from the order dealing with the utilities dispute should also be given.

Conclusion

31 I would discharge the order made by the chambers judge dismissing the leave application, and I would grant the Landlord leave to appeal from both of the orders.

Levine J.A.:

I agree.

D. Smith J.A.:

I agree.

Order discharged; leave to appeal granted.

2012 QCCA 665
Cour d'appel du Québec

Homburg Invest Inc., Re

2012 CarswellQue 3445, 2012 QCCA 665, 230 A.C.W.S. (3d) 357, J.E. 2012-824, EYB 2012-205048

In the matter of the plan of compromise or arrangement of: Statoil Canada Ltd., Petitioner-Impleaded party, and Homburg invest inc., Respondent-debtor-petitioner, v. The Cadillac Fairview Corporation Limited, Bos Solutions Ltd., Canadian Tubular Services Inc., Keywest Projects Ltd., Mhi Fund Management Inc., SPT Group Canada Ltd. formerly Neotechnology Consultants Ltd., Premier Petroleum Corp., Tucker Wireline Services Canada Inc., Surge Energy Inc., Moe Hannah Mcneil LLP, Logan Completion Systems Inc. and CE Franklin Ltd., Impleaded third parties-Impleaded third parties, and Samson Belair/Deloitte & Touche, Impleaded party-Monitor

Hilton J.C.A.

Heard: 1 march 2012

Judgment: 12 april 2012

Docket: C.A. Qué. Montréal 500-09-022267-116

Counsel: *Me Gerald N. Apostolatos, Me Stefan Chripounoff*, for Petitioner
Me Éric Préfontaine, Me Martin Desrosier, Me Alexandre Fallon, for Respondent
Me Mark Meland, for Cadillac Fairview Corporation Limited
Me Mathieu Lévesque, for Canadian Tubular services inc.; Premier Petroleum Corp.; Moe Hannah McNeil LLP
Me Louis Dumont, for Tucker Wireline Services Canada Inc.
Me Michael John Hanlon, for Surge Energy Inc.
Me Jocelyn Perreault, for Samson Belair/Deloitte & Touche

Allan R. Hilton, J.A.:

1 The Debtor Homburg Invest Inc. applied for relief under the *Companies' Creditors Arrangement Act*,¹ and an initial order was issued on September 9, 2011. The supervising judge, the Honourable Mr. Justice Louis J. Gouin, rendered judgment on December 5, 2011 granting Homburg's application for an order confirming the re-assignment and assignment of certain agreements relating to its position as a debtor with respect to commercial real estate premises in Alberta, and Homburg's release from obligations it had contracted thereunder. The effect of the order was to immediately enforce the obligations of Statoil Canada Ltd. under those agreements with respect to the landlord and subtenants of the premises. Statoil now seeks leave to appeal that judgment pursuant to sections 13 and 14 of the *CCAA*.

2 Statoil urges a barrage of reasons why leave should be granted,² which are conveniently summarized in paragraph 52 of its motion:

- a) Did the motions judge have the power and jurisdiction to grant the orders sought in the Motion?
- b) Did Homburg have the legal standing and interest to seek the conclusions of the Motion?
- c) Could the motions judge exercise his powers so as to interfere with the contractual rights of third parties (Statoil, Cadillac Fairview and subtenants) in the manner that he did in the judgment?

3 A threshold issue is the criteria to be considered upon such an application for leave. Based on the judgment of Wittman, J.A., as he then was, in *Resurgence Asset Management LLC v. Canadian Airlines Corp.*,³ there are four such criteria:

whether the point on appeal is of significance to the practice;

whether the point raised is of significance to the action itself;

whether the appeal is prima facie meritorious, or, on the other hand, whether it is frivolous, and;

whether the appeal will unduly hinder the progress of the action.

4 Judges of this Court to whom such applications have been addressed have held unanimously that the four criteria are cumulative; with the result that an applicant's failure to establish any one of them will result in the dismissal of the application.⁴ In addition, it is also generally understood that an applicant carries a heavy burden in order to obtain leave, and that appellate courts will only grant such applications sparingly.

5 Without disputing the applicability of these four criteria, Statoil urges me to consider that they need not be cumulative, but weighed together, even if one or more of them are not established. In this respect, it points to the reasons of Yamauchi, J., of the Alberta Court of Queen's Bench in *Royal Bank of Canada v. Cow Harbour Construction Ltd.*,⁵ who was hearing a CCAA leave application of the type before me. In doing so, Yamauchi, J. referred to reasons given in Alberta that advocate a different approach than the one that has been unanimously followed by judges of this Court. Here is what he said:

For DLL to obtain leave to appeal under the CCAA, it must meet the test set out by the Alberta Court of Appeal in *Fairmont Resort Properties Ltd. (Re)*, 2009 ABCA 360 at para. 10, where the court said:

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

Before this Court considers the factors involved in the « test for leave, » it is worthwhile to outline the applicable standard of review that the Court of Appeal will apply if leave were to be granted. In *Canadian Airlines Corp. (Re)*, 2000 ABCA 149 at paras. 28-29, the court held that:

28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the CCAA. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p. 95:

.... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

In *Smoky River Coal Ltd. (Re)* (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the CCAA's history and purpose, and observed at p. 341:

The fact that an appeal lies only with leave of an appellate court (s. 13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

The standard of review of this Court, in reviewing the CCAA decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

[. . .]

29 *Fairmont Resort* provides us with the « test for leave. » The test is but one test, in which « there must be serious and arguable grounds that are of real and significant interest to the parties. » To determine whether DLL has met its onus, we must consider the four factors that *Fairmont Resort* outlines. The question then becomes whether DLL must satisfy all the factors. In other words, if it fails on one (or more), does fail to meet the test? The answer to this question lies in the decision of O'Brien J.A. in *Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)*, 2005 CarswellAlta 1527, 15 C.B.R. (5th) 235 (C.A.). In that case, Justice O'Brien went through and applied the four factors to the facts with which he was dealing. The applicant in that case had met some of the factors, but not others. Justice O'Brien at para. 15, made his decision not to grant leave after « weighing all the factors. » In other words, success or failure to prove one or more of the factors does not guarantee that the applicant has met the « test for leave. » The court must weigh all the factors.

[Emphasis added.]

6 In analyzing whether I should follow what was suggested in the foregoing extract or the judicial history that has prevailed in this province, I am mindful that the Supreme Court of Canada granted leave to appeal⁶ the judgment of my colleague Chamberland, J.A. in *Newfoundland and Labrador v. AbitibiBowater*⁷ in which he dismissed an application for leave to appeal. I can only assume the Court decided to hear the appeal to look at the merits of the Superior Court judgment of Gascon, J., as he then was,⁸ rather than to decide whether Chamberland, J.A. had erred by refusing leave. Only time will tell once the Court's judgment on the merits is released.⁹

7 That being said, unless and until the Supreme Court determines a different test to apply by an appellate judge hearing a CCAA leave application, or until a panel of this Court holds that the test articulated in the extract I have quoted in paragraph [5] above is the one that should be followed, I believe that the better course for me is to apply the principles that have been repeatedly stated by judges of this Court. Counsel in Quebec are entitled to stability in knowing what test they will need to satisfy in bringing a CCAA leave application. The parameters of that test should not depend on who, as a matter of chance, happens to be the judge in chambers on the day they present their motion. I will therefore consider Statoil's application on the basis that the four recognized criteria are cumulative.

8 I turn now to the three grounds of appeal mentioned in paragraph [2] above.

9 With respect to the jurisdictional issue, Statoil argues that the motions judge overstepped the limits to which he was subject in a CCAA application of the type with which he was seized because the orders issued were not « necessary »¹⁰ to facilitate Homburg's reorganization and to achieve the CCAA objectives. Instead, it says that he adopted what it characterizes as a « broad and result-driven » approach that is reflected in paragraph [114] of the judgment to the effect that granting the orders sought in Homburg's motion is a « fair, equitable, practical and efficient solution to HII's¹¹ default under the Head Lease ».

10 To this argument, Homburg replies that Statoil misstates the law, and notes that section 11 CCAA refers not to necessity but to the power of a supervising judge « to make any order that it considers appropriate in the circumstances ». It adds that by releasing Homburg from financial obligations under the agreements, the judgment promotes the remedial purpose of the CCAA by enhancing the possibility of a successful restructuring.

11 Next is the issue of standing.

12 Statoil argues that Homburg had no legal standing, with the exception of one conclusion that it does not contest, to seek declarations that relating to the enforcement of its obligations to Cadillac Fairview under the Head Lease between it and Statoil,

the effect of which is to remove Homburg from the line of fire. Statoil contends that only Cadillac Fairview had the required standing, and that Gouin, J. misconstrued the identity of the proper party before him.

13 As for Homburg, it says that it is at the centre of the various agreements whereby Statoil undertook to step into its shoes in the event of its default under the agreements, which has now happened. All that it sought by the conclusions of the motion, therefore, is a declaration that Statoil live up to the obligations it had contractually undertaken, and acknowledged subsequently in writing.

14 Finally, there is the issue of the interference with the contractual rights of third parties by the effect of the orders, in this case not only Statoil, but also Cadillac Fairview and the subtenants of the premises. All of them are third party non-debtors, and Statoil says that Gouin, J. simply lacked the authority to interfere with the exercise of their respective contractual rights between themselves. Statoil acknowledges what it describes as a « certain jurisprudential controversy on this issue », but says the controlling case is that of the Ontario Court of Appeal in *Stelco Inc. (Re)*.¹² Blair, J.A., for the Court, remarked that the *CCAA* contains « no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves », ¹³ and that the trial judge had been « very careful to say that nothing in his reasons should be taken to determine or affect the relationship between (categories of debenture holders). » ¹⁴

15 I note immediately that the issue in *Re Stelco* arose in a very different context, namely, the classification of categories of debenture holders for voting purposes on a proposed plan of arrangement or compromise of a debtor company. The proposed classification was dismissed at trial and confirmed on appeal by the same panel that granted leave. The ratio of the judgment does not appear to be of much significance to the resolution of the issues that were before Gouin, J.

16 In a nutshell, while at the same time disputing Statoil's interpretation of the contractual agreements, Homburg argues that the issue is not, in and of itself, of any relevance to the ongoing *CCAA* proceedings, nor likely to be of any precedential value to insolvency practice in Canada.

17 In my view, whether individually or collectively, I do not consider that Statoil has satisfied the test incumbent upon it to be granted leave.

18 Any appeal would have to proceed based on the trial judge's findings of fact. Whatever may be said of them, Statoil's motion does not satisfy me that they could be found to be manifestly unfounded with the necessary determinative effect if the Court were to intervene. Moreover, the great latitude given *CCAA* supervising judges would weigh heavily against any appeal succeeding given the apparent novelty of some of the questions raised. In addition, although some of the legal issues appear interesting from an objective standpoint, they fall short of being significant to the action in the overall scheme of things, nor do they appear to be *prima facie* meritorious, although I would hesitate to characterize them as frivolous.

19 One final point, which is in and of itself dispositive, leads to the motion failing.

20 The judgment of Gouin, J. granted the relief claimed with provisional effect notwithstanding appeal, and no attempt was made to suspend provisional execution of the judgment. To the extent the terms of the judgment may already have been implemented, it would be akin to unscrambling scrambled eggs to put matters back where they were before the orders were implemented, not to mention the uncertainty that would be created by the mere fact of leave being granted.

21 Statoil's motion is accordingly dismissed with costs.

Footnotes

1 R.S.C. c.-36.

2 I omit from consideration any grounds that essentially argue questions of interpretation of fact, which, even in the context of complicated commercial real estate transactions, would be highly unlikely to persuade a judge in chambers to grant leave. I also take no account of its argument that it was more or less bulldozed into a hearing that occurred 13 days after the service of the proceeding,

thus, it says, preventing it from adequately conducting pre-trial discovery, since it seeks no relief, such as a new trial, that is directly related to the expedited process about which it complains.

3 [2000] A.J. No. 610, 2000 ABCA 149, at paras. 6 and 7.

4 See, for example, 4370422 *Canada inc. (Davie Yards inc.) (Arrangement relatif à)*, J.E. 2012-159, 2011 QCCA 2442, at paras. 11 and 12 per Pelletier, J.A.; *Newfoundland and Labrador v. AbitibiBowater inc.*, , 68 C.B.R. (5th) 57, 2010 QCCA 965, at paras. 25-29 per Chamberland, J.A.; *Papiers Gaspésia inc. (Arrangement relative à)*, 9 C.B.R. (5th) 103, per Bich, J.A. at para. 5; *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, J.E. 2010-568, 2010 QCCA 403, per Bich, J.A., at para 9; and, *Imprimerie Mirabel inc. v. Ernst & Young inc.*, J.E. 2010-1256, 2010 QCCA 1244, per Dufresne, J.A., at para. 5.

5 72 C.B.R. (5th) 261, 2010 ABQB 637.

6 Supreme Court of Canada file 33797.

7 *Supra* note 3.

8 2010 QCCS 1061.

9 The appeal was heard by the full bench on November 16, 2011, after which judgment was reserved.

10 Relying on *Century Services Inc. v. Canada (A.G.)*, [2010] 3 S.C.R. 379, 2010 SCC 60.

11 For ease of understanding, I am using the first name of the company, Homburg, rather than its initials, HII, to identify the respondent.

12 261 D.L.R. (4th) 368; [2005] O.J. No. 4883.

13 *Ibid.*, para. 32.

14 *Ibid.*, para. 33.

2010 ONSC 789
Ontario Superior Court of Justice

Fairview Donut Inc. v. TDL Group Corp.

2010 CarswellOnt 677, 2010 ONSC 789, [2010] O.J. No. 502, 100 O.R. (3d) 510, 185 A.C.W.S. (3d) 610

**Fairview Donut Inc. and Brule Foods Ltd. (Plaintiffs / Respondents) and
The TDL Group Corp. and Tim Hortons Inc. (Defendants / Moving Parties)**

G.R. Strathy J.

Heard: December 22, 2009
Judgment: February 8, 2010
Docket: CV-08-00356806-CP00

Counsel: Peter Howard, Samaneh Hosseini for Defendants / Moving Parties
Jerome Morse, Agapé Lim for Plaintiffs / Respondents

G.R. Strathy J.:

1 The defendants ("Tim Hortons") in this proposed class action move for a "confidentiality order" or sealing order, restricting public access to certain documents, or portions of certain documents, in their motion record on certification and summary judgment. Tim Hortons seeks this order on the ground that these documents are said to contain highly sensitive and competitive financial information, the disclosure of which would cause serious harm to their commercial interests. They propose a mechanism that would allow the plaintiff, members of the proposed class and other advisors to have access to the information while preserving its confidentiality. They also propose an ongoing process for dealing with confidential information in this case, under which parties will be allowed to designate information as confidential, subject to a ruling by the court. The motion engages the test for confidentiality orders in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42 (S.C.C.) ("*Sierra Club*").

The Proposed Class Action - Certification and Summary Judgment Motions

2 The two putative class representatives are franchisees of the well-known Tim Hortons organization. Their action asserts two basic complaints. The first relates to a franchise-wide conversion in 2002 from a full-baking system, whereby donuts and most other baked goods were baked on-site in each store, to a method called "Always Fresh" or "par baking," where donuts and "timbits" and later sandwich buns and pastries, were baked at a central facility, frozen and shipped to the retail stores, where they were prepared in a special convection oven. The plaintiffs claim that this conversion resulted in increased costs, increased capital expenses and was a breach of their individual license agreements.

3 The second complaint relates to the obligation of all franchisees to provide a lunch menu- a requirement that the plaintiffs say was imposed on franchisees, and has caused them to lose money. They say that Tim Hortons breached their license agreements by requiring them to sell lunch menu items at unreasonably low margins.

4 The plaintiffs assert claims in breach of contract, unjust enrichment, breach of the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 and misrepresentation.

5 Tim Hortons has delivered its responding motion record on the certification motion and in support of a motion for summary judgment, to be brought at the same time as the certification motion. The materials are voluminous and include fifteen affidavits of factual witnesses and an affidavit of one expert witness and numerous exhibits, including extensive financial information.

6 Certain material has been redacted in the motion record, or has not been included in the record, but a complete and unredacted copy has been delivered to the plaintiffs' lawyers on their undertaking to keep the material confidential pending the outcome of this motion. I have been provided with a copy of the unredacted materials. The plaintiffs have acknowledged that a confidentiality order is warranted for some of the documents and information, but not for other documents.

7 Tim Hortons' position on the summary judgment motion is that the plaintiffs' claims are entirely without merit. It says that while the conversion to "Always Fresh" baking had the predicted result of increasing the franchisees' food costs, it has also had the expected result of reducing their labour costs, because they no longer have to hire expensive professional bakers to produce baked goods "from scratch." The result, says Tim Hortons, is that franchisees' profits have generally increased and the program has been a resounding success. Tim Hortons says that lunch items have been part of its business plan since 1986 and that every franchisee is expected to provide a lunch menu.

8 Much of the evidence in Tim Hortons' certification and summary judgment motion record, including some of the financial information at issue on this motion, is intended to refute the plaintiffs' assertion that the conversion to par baking, and the lunch menu, resulted in increased costs and lower margins for franchisees. Tim Hortons will argue that the putative plaintiffs were inefficient operators and that their experiences are not reflective of the positive and profitable experiences of the great majority of competent franchisees. It also says that the plaintiffs' financial information and margin analysis are fundamentally flawed.

The Information at issue

9 A list of the documents at issue, prepared by counsel for the defendants, is attached as a schedule to this endorsement. I will describe it in more detail shortly.

10 In his affidavit filed in support of the summary judgment motion and in response to the certification motion, Mr. David Clanachan, the Chief Operating Officer of Tim Hortons, describes the information at issue as "sensitive commercial information that is not public and would be of considerable interest and use to the competitors of Tim Hortons and its store owners." Mr. Jeff O'Rourke, Director Financial Analysis Franchise Operations, who has also filed an affidavit in support of the summary judgment motion, describes the information as "commercially sensitive information."

11 Mr. O'Rourke elaborates on his concerns in two affidavits filed in support of the motion for a confidentiality order. As well, a supporting affidavit has been sworn by Drew McLennan, a Tim Hortons franchisee, and a member of the Tim Hortons Advisory Board of franchisees. I will briefly summarize their evidence.

12 Mr. O'Rourke describes the information sought to be protected as including "highly confidential and competitively sensitive financial and business data such as profit margins and sales information of Tim Hortons franchisees from 2001 to 2009."

13 Mr. O'Rourke says that public disclosure of this information would give competitors useful information about Tim Hortons' costs, sales and margins that would allow them to increase their market penetration. He says information concerning the "Always Fresh" conversion would facilitate the entry of competitors into the par baking market. He claims that competitors could target geographic areas with lower than average margins and could identify regions where there is untapped demand or lower costs; suppliers and landlords could gain useful information about margins that would lead them to increase franchisees' costs.

14 Mr. O'Rourke says that Tim Hortons is careful to secure the confidentiality of this information through confidentiality provisions in its licence agreements with its franchisees and through express notices on some of its documents.

15 While Mr. O'Rourke acknowledges that as a public company Tim Hortons makes disclosure of consolidated business and financial information, confidentiality is not claimed for information in the public domain. He says, however, that it is the "level of granularity and detail" in the documents at issue that would make them valuable to competitors and their disclosure would cause damage to Tim Hortons and its franchisees.

16 Mr. McLennan, a franchisee and member of the Advisory Board, agrees with Mr. O'Rourke that the information at issue is provided to or by franchisees on a confidential basis. He also says:

I also agree with [Mr. O'Rourke] that the material he describes is competitively sensitive and if it were made public could be used by our competitors and other third parties with whom we deal to the real disadvantage of the franchisees. [Mr. O'Rourke] has detailed some of the ways that this information could be used to the detriment of the franchisees and I believe that those are all valid and additionally that there are likely other negative consequences for franchisees from potential adverse publicity likely attendant upon that publication.

17 Mr. McLennan says that the disclosure of sales and margin information would result in "real harm" to franchisees.

18 The defendants say that the information redacted or deleted falls into four general categories:

(a) Personal information of Tim Hortons' franchisees

19 The information redacted includes names, addresses and phone numbers of franchisees, which Tim Hortons claims was "collected from franchisees in the expectation that it would not be widely disseminated." The personal information is contained in Exhibits 7, 16 and 40 of Mr. Clanachan's affidavit. Exhibit 7 is a 2001 disclosure document, provided to prospective franchisees. It contains a "Confidentiality Notice" on its face. Names and addresses of franchisees have been redacted. Exhibit 16 is a franchise agreement that has been attached as an example. The name of the franchisee and other personal information about the franchisee have been redacted. The amount of the licence fee and other financial information pertaining to charges to the franchisee, as well as hours of operation, have been redacted. Exhibit 40 is a powerpoint presentation made at Tim Hortons' Ontario Regional Meeting in 2003. It contains some information about the financial experience of identified franchisees.

(b) Financial information of franchisees

20 This information is described as financial information used to track operating margins, including sales and profit and loss information. This information is collected from franchisees by Tim Hortons on the basis that it is confidential.

21 Exhibit 35 is part of a presentation made to franchisees in 2002 concerning the "roll-out" of the "Always Fresh" system. It contains breakdowns of food and labour costs at various franchise locations. Exhibit 38 is entitled "Always Fresh Financial Update" and was prepared in 2003. The information redacted includes profit and loss results and operating margins prior to and after the "Always Fresh" conversion. Exhibits 39, 40 and 41 contain similar information. Exhibit 43 was prepared for the 2004 meetings with franchisees and contains information about food unit costs, sales revenue and comparisons of gross margins before and after the "Always Fresh" conversion. Exhibit 2 to Mr. O'Rourke's affidavit shows historical operating margins for Ontario for the period from 2002 to 2008. It is tendered in evidence to support Tim Hortons' position that historical margins have increased as a result of the introduction of the "Always Fresh" baking method.

22 Exhibit 3 to Mr. O'Rourke's affidavit is financial information provided by Mr. Jollymore, the operator of one of the putative class representatives, and appears to be introduced to support the assertion that the experiences of the plaintiffs are due to their own inefficiencies and that their financial performance is not representative of those of other franchisees. Exhibit 4 to Mr. O'Rourke's affidavit contains profit margin information for all regions in Canada in the period from 2002 to 2008. It appears to be introduced to support the assertion that the "Always Fresh" conversion has not had a negative effect.

(c) Competitively sensitive commercial data

23 This category includes earnings, projections, profitability and productivity information, historical costs of food, paper and labour, pricing information, operating margins and gross margins, profit and loss results, costs versus pricing per region, and break-downs of sales by time of day.

24 Many of the documents in this category are presentations made at the time of the "Always Fresh" conversion in 2002-2003. They consist of analyses of food and labour costs, sales, profits and margins to demonstrate historic results and to project anticipated results of the conversion. Exhibits 28, 33, 35, 37-40 and 43-45 of Mr. Clanachan's affidavit fall within this description. Several of the documents contain more current information of the same kind: exhibit 46 (historic costs vs. price of donuts and timbits 2003-2009); exhibit 2 to Mr. O'Rourke's affidavit (historic operating margins for Ontario Region

2002-2008, including costs of food, paper, labour, rent, royalty, advertising fees, operating expenses and operating margins); exhibit 4 (historical operating margins 2002-2008, including costs and sales volumes; exhibit 5 (retail price change history); and exhibit 6 (costs versus price of donuts and timbits, 2003-'09) to Mr. O'Rourke's affidavit.

25 Exhibit 3 to Mr. O'Rourke's affidavit, referred to above, contains financial information comparing the performance of the proposed representative plaintiffs to average performance figures.

26 Paragraph 8 of Mr. Clanachan's affidavit contains information pertaining to the labour costs of Ontario store owners in contrast with Mr. Jollymore's - this information has been redacted. Also redacted is paragraph 20 and portions of one of the exhibits that shows information concerning the percentage of sales made at various times of the day, including during lunch times. This is introduced to respond to complaints that the introduction of the lunch menu was unreasonable and to support the argument that the plaintiffs' evidence is flawed.

(d) "Trade secrets"

27 This information is generally described as "confidential product preparation methods and procedures," relating to the preparation of Tim Hortons' products. Tim Hortons claims disclosure of this information would allow competitors to make use of its experience to gain an unfair competitive advantage.

28 The documents that Tim Hortons wishes to redact or seal on this basis include exhibit 29, a 2003 "Production Manual" that includes instructions and procedures for "Always Fresh." It is essentially a "how to" manual for the baking system. The parties agree that it should be excluded and sealed.

29 Exhibit 34 is an extract from a meeting of the Advisory Board in 2002 that contains information about the "Always Fresh" roll-out and some very basic information about the par baking system. It describes various products and contains simple baking information such as "Muffins ... bake at × [degrees] for y minutes". The plaintiff does not contest the claim for confidentiality of this document. Exhibit 35 contains similar information.

Redaction for Relevance

30 In addition to these documents, certain documents have been partially redacted on the basis that the redacted portions are not relevant to the issues before the court on certification or summary judgment.

The Sierra Club Test

31 The general principle, expressed in s. 135 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, is that "all court hearings shall be open to the public." Sub-section 135(2) permits the court to exclude the public from a hearing "where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings shall be open to the public."

32 The principle is also expressed in s. 486 of the *Criminal Code*, R.S.C. 1986, c. C-46, as amended, which permits exclusion of the public only where "the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security." The "proper administration of justice" includes ensuring that witnesses under the age of eighteen are safeguarded and that participants in the justice system are protected. Specific provision is made in s. 486.4 to prevent publication of the names of victims of sexual offences.

33 The importance of the open court principle has been repeatedly affirmed by the Supreme Court of Canada in a line of cases interpreting s. 2(b) of the *Canadian Charter of Rights and Freedoms*: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104 (S.C.C.); *R. v. Mentuck*, [2001] 3 S.C.R. 442, [2001] S.C.J. No. 73 (S.C.C.); *Vancouver Sun, Re*, [2004] 2 S.C.R. 332, [2004] S.C.J. No. 41 (S.C.C.); and *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, [2005] S.C.J. No. 41 (S.C.C.). In the civil context, the principle has been most recently and definitively stated by the Supreme Court in *Sierra Club*.

34 The open court principle also governs applications, such as this, to seal portions of a court file. There is no doubt that the court has inherent jurisdiction, and jurisdiction under s. 137(2) of the *Courts of Justice Act*, to seal a portion of the court file:

A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

35 Even before *Sierra Club*, it was clearly established that a sealing order is an exceptional measure that violates the open court principle, a principle that should be curtailed only "where there is present the need to protect social values of superordinate importance": *MacIntyre v. Nova Scotia (Attorney General)*, 132 D.L.R. (3d) 385, [1982] 1 S.C.R. 175 (S.C.C.).

36 In *Sierra Club*, at para. 53, the Supreme Court of Canada held that a sealing order will be granted where:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; [the necessity stage of the test] and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings [the proportionality stage of the test].

37 In that case, Justice Iacobucci stated, at para. 53, that three important elements are subsumed under the first branch of this test. First, the risk in question must be *real and substantial*, in that the risk is *well-grounded in evidence* and poses a serious threat to the *commercial interest* in question. As this case involves interests that are primarily commercial in nature, the words I have italicized bear emphasis - the risk must be real, substantial, and well-grounded in evidence, and disclosure must pose a serious threat to the interest in question.

38 Second, Justice Iacobucci made it clear that a "commercial" interest must be an interest that goes beyond harm to the private commercial interests of a person or a business. In order to qualify as an "important commercial interest," the interest must be one that can be expressed in terms of a public interest in confidentiality. Justice Iacobucci stated, at para. 55:

In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", *the interest in question cannot merely be specific to the party requesting the order*; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)* [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness"

[emphasis added].

39 Third, the phrase "reasonable alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

40 In *Sierra Club*, the Supreme Court granted a confidentiality order over technical information concerning an environmental assessment of a site, in China, for the construction of two CANDU nuclear reactors. The documents were the property of the Chinese authority and had been provided to Atomic Energy of Canada Limited ("AECL") on condition that they be protected by a confidentiality order. The Supreme Court found that the test had been met. Under the necessity branch of the test, there was a commercial interest in preserving contractual obligations of confidentiality. The information had been treated as confidential,

had been accumulated with a reasonable expectation that it would be kept confidential and proprietary commercial and scientific interests would be harmed by its disclosure. There was a serious risk of harm to an important commercial interest of AECL if there was disclosure. No alternative measures were available.

41 On the application of the proportionality branch of the test, the salutary effect of the order was to promote a fair trial, which would otherwise have been impaired if AECL could not disclose the documents. Limiting disclosure of the documents to the parties, under the protection of a confidentiality order, would promote, rather than harm, the search for the truth. Finally, the technical nature of the information, pertaining as it did to a nuclear facility, gave rise to a public security interest in the confidentiality order.

42 The deleterious effect of the order was, in general, to impair the open court principle. In these circumstances, the Supreme Court held that the salutary effects of the confidentiality order outweighed its deleterious effects.

Application of the Sierra Club test in various contexts

43 The *Sierra Club* case signals an important development of the open court principle and it has been applied in a number of cases. To illustrate the types of cases, and the interests they engage, they can be grouped as follows:

Trade Secret and Intellectual Property Cases

44 Cases of true trade secrets and patents are likely to involve important public and private interests and sealing orders have frequently been granted in such cases: see *Eli Lilly & Co. v. Apotex Inc.*, 2008 FC 892, [2008] F.C.J. No. 1593 (F.C.); *Laboratoires Servier v. Apotex Inc.*, 2006 FC 1405, [2006] F.C.J. No. 1764 (F.C.); *Camoplast Inc. c. Soucy International Inc.*, 2003 FC 1401, [2003] F.C.J. No. 1791 (F.C.); *Merck & Co. v. Apotex Inc.*, 2004 FC 567, [2004] F.C.J. No. 684 (F.C.); *AB Hassle v. Canada (Minister of National Health & Welfare)*, 5 C.P.R. (4th) 149, [2000] F.C.J. No. 283 (Fed. C.A.). They have been granted prior to *Sierra Club* - see, for example, *Dupont Canada Inc. v. Russel Metals Inc.*, [2000] O.J. No. 2043 (Ont. Master); *CPC International Inc. v. Seaforth Creamery Inc.*, [1996] O.J. No. 2059, 70 C.P.R. (3d) 434 (Ont. Gen. Div.). In *Abbott Laboratories v. Canada (Minister of Health)*, 2005 FC 1368, [2005] F.C.J. No. 1669 (F.C.), Prothonotary Milczynski of the Federal Court refused to make a confidentiality order in a patent case, although she noted that such orders were common in patent cases. She found that, on the evidence, the *Sierra Club* test had not been met. See also *Hyundai Auto Canada v. Cross Canada Auto Body Supply (West) Ltd.*, 2006 FC 1127, [2006] F.C.J. No. 1402 (F.C.). Orders were refused in *Osmose-Pentox Inc. c. Société Laurentide Inc.*, 2005 FC 1689, [2005] F.C.J. No. 2093 (F.C.); and in *Novopharm Ltd. v. Company X*, 2008 FC 840, [2008] F.C.J. No. 1062 (F.C.).

Ccaa Cases

45 Sealing orders have been granted in several Ontario cases under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 where the release of commercial information would have undermined the efficacy of the proceedings or prejudiced the position of stakeholders: *Nortel Networks Corp., Re*, [2009] O.J. No. 4487, 56 C.B.R. (5th) 224 (Ont. S.C.J. [Commercial List]); *Stelco Inc., Re*, [2006] O.J. No. 275, 17 C.B.R. (5th) 76 (Ont. S.C.J. [Commercial List]); *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]), 2009 CanLII 55114. It makes sense in such "real time" litigation that confidential information should be protected where its release would jeopardize the very purpose of the proceeding.

Cases involving minors or persons under a disability

46 Cases involving children frequently engage public interests that transcend the interests of the parties: *J.B. Trust (Trustee of) v. B. (J.) (Litigation Guardian of)*, [2009] O.J. No. 2693, 50 E.T.R. (3d) 50 (Ont. S.C.J.). So too may cases involving persons under a disability. In *Phelan, Re*, 29 E.T.R. (2d) 82, [1999] O.J. No. 2465 (Ont. S.C.J.), a case prior to *Sierra Club*, Kitley J. granted a partial sealing order in a proceeding under the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30.

Commercial Cases

47 The application of *Sierra Club* in the commercial context requires the court to distinguish between an interest that is specific to the party requesting the order and a general interest that goes beyond the interest of the party. In *Publow v. Wilson*, 36 C.P.C. (3d) 33, [1994] O.J. No. 3036 (Ont. Gen. Div.) which pre-dated *Sierra Club*, Spence J. refused to grant a sealing order in spite of the argument that the disclosure of a company's insolvency to its suppliers and customers might cause them to cease dealing with the company, leading to its demise and possible unemployment for hundreds of employees. Relying on the then leading case of *MacIntyre v. Nova Scotia (Attorney General)*, above, Spence J. stated, at para. 18:

The disclosure of internal corporate information in the course of legal proceedings may almost always have the potential for harm to the company concerned and perhaps to others as well. This consequence of the resort to the courts is not limited to corporate parties in commercial matters; individuals may suffer from the public disclosure which ordinarily accompanies litigation. If the prospect of harm were a sufficient basis for preventing disclosure, a great many litigants might justifiably seek to have their proceedings shielded from public view, whether through a sealing order, an order for in camera proceedings or otherwise. Widespread granting of such orders could tend to diminish public confidence in the administration of justice. These considerations suggest that such orders should be available only in exceptional cases.

48 The observations of Spence J. in *Publow v. Wilson* were referred to by Nordheimer J. in *Lederer v. 372116 Ontario Ltd.*, 50 O.R. (3d) 282, [2000] O.J. No. 3000 (Ont. S.C.J. [Commercial List]), another pre-*Sierra Club* case, in which the moving party sought to seal a court file containing allegedly confidential and potentially damaging information. Nordheimer J. refused to seal the file. He observed, at paras. 26 and 27, that litigation frequently involves disclosure of sensitive, embarrassing and sometimes prejudicial information, but the principle of open justice admits of limited exceptions:

There are, of course, many instances where matters that parties would prefer to keep private become public because the parties become embroiled in litigation. This applies not only to corporations, both public and private, but also to individuals. Many private matters are forced into the public view as a result of the fact that litigation ensues. That is a necessary consequence of maintaining an open and public judicial system.

As Madam Justice Swinton observed [in *Ethyl Canada Inc. v. Canada (Attorney General)*, [1998] O.J. No. 315 (Gen. Div.) at para. 9], over the years courts have made exceptions to the general principle that all matters before the court must be part of the public record. Matters involving minors are one example. Matters involving trade secrets or secret processes are other examples. Customer lists and pricing information may constitute even other examples. Also, in cases where victims might be precluded, as a result of trauma and embarrassment, from pursuing a claim or giving evidence then orders restricting the openness of the proceedings may be justified. In all of these situations, though, the court must be satisfied that there is a need to protect "societal values of superordinate importance" before such restrictions on public access to the proceedings of the courts can be justified - see *MacIntyre v. Nova Scotia (Attorney General)*, supra per Dickson J. at p. 186.

49 Subsequent to *Sierra Club*, requests for confidentiality orders or sealing orders have been considered and rejected in *SRM Global Master Fund Ltd. Partnership v. HudBay Minerals Inc.*, [2009] O.J. No. 797 (Ont. S.C.J.); *Rieger Printing Ink Co., Re*, 94 O.R. (3d) 440, [2009] O.J. No. 755 (Ont. S.C.J. [Commercial List]); *Ontario Council of Hospital Unions v. Ontario (Minister of Health & Long-Term Care)*, 85 O.R. (3d) 55, [2007] O.J. No. 411 (Ont. Div. Ct.); and *John Deere Ltd. v. Long Tractor Inc.*, 2003 SKQB 24, [2003] S.J. No. 57 (Sask. Q.B.).

Class action cases

50 Class actions, such as this one, give rise to particular concerns in dealing with requests for confidentiality. They frequently attract public attention due to their relative novelty, the public interest in the issues involved, the size of the proposed class, and the large sums at issue. Apart from the public, members of the putative class have a substantial and direct interest in the proceedings, prior to certification, and they have a particular interest in observing and understanding the proceedings. While the defendant in this action is prepared to release the information at issue to members of the putative class who undertake to be bound by the confidentiality order, such undertakings are difficult to monitor and enforce.

51 A class action engages broader interests than in an ordinary civil action. With its goals of access to justice, efficient use of judicial resources and behaviour modification, a class action serves public purposes that go beyond the immediate interests of the parties, including members of the putative class. It is particularly important, therefore, that the open court principle should be observed in such proceedings and a request for a sealing order in a class action should be approached with particular caution.

52 A sealing order was granted by Master MacLeod in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*, [2003] O.J. No. 1016, 121 A.C.W.S. (3d) 426 (Ont. Master), a proposed class action in which franchisees alleged that the defendant franchisor had failed to pass on or account for discounts that had been provided by a supplier. The parties had reached an agreement that the confidential information would be sealed and made available only to the proposed class representatives and their counsel. Members of the proposed class would have access to summaries of the information, provided they signed a confidentiality agreement. The Master was satisfied that the proposed order struck an appropriate balance and was prepared to sign it. However, some of the suppliers (whose discounts were at issue) attended court, having been put on notice that their rights might be affected. They claimed an interest as their sensitive, and allegedly proprietary, information was at issue. They were concerned that the release of summaries of information to class members who were not named parties could potentially enable third parties to calculate their prices, costs and contractual arrangements with the defendant.

53 It is obvious from the Master's reasons, at para. 6, that he considered the information to be highly confidential and that the release would have "devastating" effects for the suppliers:

An affidavit was filed on behalf of Parmalat [one of the suppliers]. Other suppliers appeared but only Canada Bread and Hostess Frito-Lay made submissions. Parmalat and Canada Bread appear to be in the most vulnerable position. They are exclusive suppliers of certain products and as a result of their special relationship with the defendant, they have disclosed detailed information about pricing and profit margins. This is a complex and highly competitive business in which the interests of the parties and the suppliers may be congruent for some purposes and adverse for others. I am advised that an example of this sensitivity would be an agreement to supply certain lines at close to cost while entering into an agreement with the defendant to promote other lines which have a higher profit margin. This information could be used to devastating effect by other suppliers who might bid against the current supplier in dealing with A&P, by other grocery stores with whom they will be negotiating and by other suppliers who might bid with other customers.

54 The Master granted the suppliers standing and provided that they were entitled to enforce the order if the defendant failed to do so. They were entitled to be informed of the release of information to members of the class. It is noteworthy that in this case the information sought to be protected was, like the information in *Sierra Club*, confidential to persons who were not parties to the litigation.

55 Hoy J. in an unreported endorsement dated November 16, 2007 in *Peter v. Medtronic Inc.* [2007 CarswellOnt 7975 (Ont. S.C.J.)] (05-CV-295910-PD2), granted a sealing order at the conclusion of a certification motion, at the defendant's request and without opposition from the plaintiff. She found that the documents contained commercially sensitive market information and there was evidence that one of the defendant's competitors had taken an interest in the proceeding. She found that there was a public interest in not granting an unfair advantage to competitors of the defendant, since the public financed the class of medical devices at issue. The information subject to the sealing order was "minimal" and had not even been referred to at the hearing. In that case, the order agreed upon by counsel and approved by Hoy J. permitted the court to refer to any facts in the sealed materials in its reasons. The order was amended by Hoy J. to provide that it would expire in seven years.

56 In *Prendiville v. 407 International Inc.*, [2002] O.J. No. 2549, 24 C.P.C. (5th) 184 (Ont. S.C.J.), leave to appeal refused, [2002] O.J. No. 3913 (Ont. S.C.J.), a decision subsequent to *Sierra Club*, Nordheimer J. declined to grant a sealing order in a proposed class action against the operators of Highway 407, a toll highway. The defendants, supported by the province, sought to seal the court file, which contained agreements between the defendants and the province. The defendants claimed that the disclosure of this information would put them at a competitive disadvantage in future highway privatizations because it would disclose their costs and pricing structures to their competitors. They argued that disclosure of this information would give third parties access to information about their business and their projections as well as historical financial information that could be

used in the bid process. Nordheimer J. concluded, at paras. 14 and 15, that the commercial interest of the defendants did not meet the *Sierra Club* test:

In any event where the 407 defendants fail in their request for a sealing order is in their inability to establish that there is an important public interest in the confidentiality that is sought. As I set out in the quotation from Mr. Justice Iacobucci above, the important commercial interest which has to be established to justify such an order cannot be specific to the party requesting the order. Mr. Justice Iacobucci mentioned expressly that "a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests" and yet that is essentially what the argument of the 407 defendants boils down to here. For example, at para. 16 of their factum, the 407 defendants state:

"... the disclosure of the Share Purchase Agreement and the 407 Agreements will put the 407 defendants at a competitive disadvantage vis-à-vis their cost and pricing structure in future competitive bidding processes concerning highway development and privatization."

While no doubt arguments could be made as to the actual degree of commercial sensitivity which attaches to such information given that the prospect of future private highway acquisitions is very much speculative both in its occurrence and its timing, it would seem almost by definition to be very specific to the party whose information is involved. While it may well be that the 407 defendants will indeed be put at a commercial disadvantage if their pricing and other information is publicly revealed, that result would appear to fall squarely within the category of commercial information which Mr. Justice Iacobucci said does not constitute the type of important commercial interest justifying a confidentiality or sealing order. In fact, it would appear to more properly fall within the type of information of which Mr. Justice Spence spoke in *Publow v. Wilson* (1994), 36 C.P.C. (3d) 33 (Ont. Gen. Div.) at p. 39 [quoted above] ...

57 Confidentiality orders or sealing orders have also been granted in class actions to limit or prevent disclosure of:

(a) private medical information: *Logan v. Harper*, 72 O.R. (3d) 706, [2004] O.J. No. 4132 (Ont. Master);

(b) names of victims of sexual assault: see *G. (M.) v. Assoc. Selwyn House*, [2008] Q.J. No. 772 (C.S. Que.); *White v. Canada (Attorney General)*, [2006] B.C.J. No. 760 (B.C. S.C.);

(c) financial information concerning the defendant and the names of investors and shareholders, on the settlement of the class action where other proceedings were pending in another jurisdiction: *Mortillaro v. Cash Money Cheque Cashing Inc.*, 73 C.P.C. (6th) 369, [2009] O.J. No. 2904 (Ont. S.C.J.); and

(d) information concerning young offenders: *Richard v. British Columbia*, [2008] B.C.J. No. 1794 (B.C. S.C.).

58 The use of pseudonyms has also been permitted where private medical information is being disclosed: *Jane Doe I v. Manitoba*, 66 C.P.C. (6th) 125, [2008] M.J. No. 292 (Man. Q.B.).

59 It is my understanding that confidentiality orders have been made in the case management of some class actions, to protect the names of victims of mass torts and in other cases on a consent basis, where it was in the interests of both parties to keep information confidential.

Redaction based on Relevance

60 There is no general authority to redact documents appended to affidavits, or portions thereof, on the grounds that they are irrelevant: see *Albrecht v. Northwest Protection Services Ltd.*, [2005] O.J. No. 2149 (Ont. S.C.J.); *Guelph (City) v. Super Blue Box Recycling Corp.*, 2 C.P.C. (6th) 276, [2004] O.J. No. 4468 (Ont. S.C.J.).

61 Requests for redaction frequently come up at the discovery stage and are often resolved on consent. Although the practice of redacting has in some cases been sanctioned by the court, the cases in which it has been permitted are usually ones in which other important interests are affected: see, for example, *Kimberly-Clark Corp. v. Procter & Gamble Inc.*, 31 C.P.R.

(3d) 207, [1990] F.C.J. No. 451 (Fed. T.D.) (patent action); *Janhevich v. Thomas*, 15 O.R. (2d) 765, [1977] O.J. No. 2227 (Ont. H.C.) (personal tax returns); *United States Surgical Corp. v. Downs Surgical Canada Ltd.*, [1982] 1 F.C. 733, [1981] F.C.J. No. 164 (Fed. T.D.) (patent action); *Collins v. Beach*, 24 C.P.C. (2d) 228, [1988] O.J. No. 43 (Ont. H.C.) (personal tax returns); *Manufacturers Life Insurance Co. v. Dofasco Inc.*, 38 C.P.C. (2d) 47, [1989] O.J. No. 1456 (Ont. H.C.) (confidential and sensitive market information); *John Labatt Ltd. v. Molson Breweries, A Partnership*, [1994] 1 F.C. 801, [1993] F.C.J. No. 1343 (Fed. T.D.) (confidential and sensitive commercial information); *North American Trust Co. v. Mercer International Inc.*, 71 B.C.L.R. (3d) 72, [1999] B.C.J. No. 2107 (B.C. S.C.) at paras. 11, 13-16 (commercially sensitive information).

Application of Sierra Club Test

62 As Spence J. observed in *Publow v. Wilson*, above, at para. 18, court proceedings frequently require parties and even witnesses who have no stake in the outcome, to disclose information that they would much rather keep to themselves. The information can be embarrassing and sometimes prejudicial, both personally and financially. Yet the principle of open courts has generally prevailed except in the limited circumstances now permitted by the *Sierra Club* test. In spite of this, requests for sealing orders remain commonplace. It is appropriate to observe that sealing orders impose an additional layer of complexity on an already complicated and expensive litigation process. They require that separate court files be kept, one open to the public and one not. They may require bifurcation of discovery and trial transcripts to exclude references to information in sealed documents. They may require *in camera* hearings where reference is made to documents that are subject to a sealing order. This can give rise to confusion by witnesses, counsel and the court as to what is and what is not sealed. They may restrict the ability of the court to give clear and comprehensible reasons where reference to sealed documents is necessary.

63 The request for a sealing order itself raises questions about whether notice must be given to the media and the public to give them an opportunity to contest the order and to speak in favour of the open court principle. On a practical level, this may give the proceeding more notoriety than would otherwise be the case - or than either party might wish.

64 Applying the *Sierra Club* test to the facts of this case, I am not satisfied that the interests affected extend beyond the private commercial interests of Tim Hortons and its franchisees or that these interests can be expressed in terms of the broader commercial interest in the preservation of confidential information or the promotion of fair competition. I accept that much of the information has been treated by Tim Hortons and its franchisees as confidential -obviously in the ordinary course of their businesses they would have absolutely no reason to disclose it to third parties or to make it public. This is true in almost every business relationship, however, and in almost every such relationship it would be possible to characterize the "interest" in terms of a broader public interest in the preservation of confidential information.

65 That is not, however, the real interest at stake in this motion. Tim Horton puts the case on the basis that it and its franchisees will suffer commercial harm if the information is disclosed to competitors. While the promotion of fair competition is an important societal interest, I am not satisfied that the risk of harm in this case is real and substantial or well-grounded in the evidence. Tim Hortons' evidence of harm is speculative, general and lacking in specifics. The par baking system was introduced at very substantial costs in 2002, some eight years ago. The system itself is not unique. The notion that information on the successful implementation of the system, even at a "granular" level, would give competitors an unfair advantage is simply speculative. So is the notion that competitors, landlords and suppliers could take advantage of information on costs, sales, profit margins and other financial information, to the detriment of Tim Hortons and its franchisees. The information sought to be disclosed is not dissimilar to the information in *Prendiville v. 407 International Inc.*, above, and it is the kind of private commercial interest that Iacobucci J. in *Sierra Club* expressly excluded from the scope of protection.

66 The information described as "trade secrets" is of the most general nature and at the very lowest level of "secrecy." In order to take advantage of the information it would be necessary to create a substantial par baking infrastructure. There is no evidence that any competitor of Tim Hortons has done so or is in a position to do so. Any competitor with the resources to do so would not likely need to know that you must bake a frozen lump of ingredients for a particular length of time at a particular temperature in order to make a muffin.

67 As I have noted earlier, sealing orders have been routinely and appropriately granted in cases involving true trade secrets, but this case does not involve that kind of information.

68 In light of my conclusion that the information in this case does not meet the necessity test, I need not move to the second stage of the test in *Sierra Club*. However, if I had found that an important commercial interest was engaged in this case, I would not have found that the salutary effects of the order outweighed its deleterious effects. First, a sealing order is not required in this case to ensure a fair trial. In *Sierra Club*, AECL would have been prevented from disclosing the evidence without a sealing order. The absence of a sealing order would have impaired its right to a fair trial. There is no evidence that this is the case here. Nor is there any evidence that the request for disclosure is abusive or being used for the purpose of an unfair tactical advantage - for example, to force the defendant to settle to avoid disclosure of potentially damaging information.

69 Second, a sealing order in this case could have significant adverse effects on public confidence in the administration of justice. The defendants' case on the motion for summary judgment depends to a large degree on the proposition that the putative plaintiffs are inefficient operators, whose experience is not representative of the class. To make out this case, the devil will be in the details and I expect that a careful analysis of the defendants' and the franchises' financial information will be required. There is a real risk that the proceedings will not be comprehensible to the public without reference to the information sought to be sealed. If a detailed examination of the sealed information is required at the hearing, the proceeding may have to be held *in camera*. Any analysis of this issue in reasons may require reference to the confidential information so as to be intelligible. As I said earlier, as a putative class proceeding openness is a particularly important consideration in this case.

70 While the consent of the parties does not absolve the court of its responsibility to ensure that court proceedings are open and transparent, I would be reluctant to compel the parties to disclose information that neither of them wishes to produce, *provided* that such material forms no part of the court record. If the parties can agree to any of the redactions proposed by Tim Hortons, and can undertake that the redacted information is not material to the motions and will not be relied upon by either party, the redacted information does not need to form part of the court record. The open court principle will not be infringed by excising irrelevant confidential material as long as the public has access to the same record as the parties and the motion judge.

71 Although procedural orders have been granted in some cases to protect documents pending a determination of confidentiality, no purpose would be served by such an order in this case.

72 For these reasons, the defendants' motion is dismissed, with costs. If counsel are unable to agree on costs, written submissions may be addressed to me in accordance with a timetable agreed upon by counsel.

SCHEDULE

Confidential Information Put in Issue by Plaintiffs

Reference	Confidential Information	Basis for Claim of Confidentiality
Ex. 7	Excerpts from TDL's Ontario 2001 Disclosure Document containing references to: initial license fees, royalty fees, total initial licensee investment, advertising levies, disclosure of administrative proceedings and civil litigation and liabilities, projected store earnings at varying sales levels, names and addresses of franchisees and Ontario store list. Certain portions redacted for relevance.	Personal Information— Competitively Sensitive Commercial Data
Ex. 12	This document has not been redacted. The only reference in the Clanachan Affidavit is to the Acknowledgement of Receipt of Ontario Disclosure Document.	Not Applicable
Ex. 16	Personal information on sample of agreements has been redacted.	Personal Information
Ex. 17	This document has not been redacted on the basis of confidentiality. The Affidavit refers to only the relevant portion of the Tim Hortons Production Manual.	Not applicable

Ex. 28	Always Fresh Financial Forecast (entire document redacted). Contains references to single store costs, sales, margins and profitability pre-Always Fresh and the projections post-Always Fresh.	Competitively Sensitive Commercial Data
Ex. 29	Always Fresh Baking Production Manual (entire document redacted).	Trade Secrets
Ex. 33	August 2002 Always Fresh Financial Forecast (entire document redacted). Contains references to single store costs, sales, margins and profitability pre-Always Fresh and the projections post-Always Fresh.	Competitively Sensitive Commercial Data
Ex. 34	Excerpt from Advisory Board minutes referring to production methods and procedures.	Trade Secrets
Reference	Confidential Information	Basis for Claim of Confidentiality
Ex. 35	Excerpts from November 2002 Always Fresh Presentations relating to product preparation methods, food costs, labour costs and projections, costs model, sales and costs information from specific franchisees	Trade Secrets— Franchisee Financial Information— Competitively Sensitive Commercial Data
Para. 130 of Clanachan Affidavit and Ex. 37	Excerpts from 2003 Always Fresh Baking Presentation containing current and projected single store costs models and the results to date under Always Fresh.	Competitively Sensitive Commercial Data
Ex. 38	Excerpt from September 2003 Always Fresh Financial Update referring to Ontario and Alberta P&L results, operating margin comparisons, operating margins by month for Always Fresh stores, Ontario and Alberta store sales.	Franchisee Financial Information — Competitively Sensitive Commercial Data
Para 132 of Clanachan Affidavit and Ex. 39	Excerpts from Advisory Board minutes containing references to Ontario P&L results and pre and post Always Fresh conversion.	Franchisee Financial Information — Competitively Sensitive Commercial Data
Ex. 40	Excerpts from the Ontario 2003 Regional Meeting Presentation containing profit and loss analysis, price changes, operating margins, productivity data and financial experiences of franchisees.	Personal Information— Franchisee Financial Information— Competitively Sensitive Commercial Data
Ex. 41	Excerpts from the Atlantic Canada 2003 Regional Meeting Presentation containing single store operating margins, food cost impact, operating margin comparisons, and Always Fresh financial results.	Franchisee Financial Information — Competitively Sensitive Commercial Data
Reference	Confidential Information	Basis for Claim of Confidentiality
Ex. 42	Excerpt from Advisory Board meeting minutes of February 4 and 5, 2004 referring to product improvements	[Not listed in schedule prepared by counsel]
Ex. 43	Excerpts of Spring 2004 Regional Meeting Presentation slides referring to food unit costs, sales revenue and comparison of pre and post Always Fresh gross margins at the store level.	Franchisee Financial Information — Competitively Sensitive Commercial Data
Ex. 44	2002 Ontario Product Cost Summary (entire document redacted).	Competitively Sensitive Commercial Data
Ex. 45	Toronto Order Guide, November 2003 (entire document redacted).	Competitively Sensitive Commercial Data
Ex. 46	2003-2009 Costs vs. Prices Report (entire document redacted).	Competitively Sensitive Commercial Data
Para. 8	Reference to labour costs in specific years redacted.	Competitively Sensitive Commercial Data
Para. 20	Percentage of sales by time of day has been redacted.	Competitively Sensitive Commercial Data
Ex. 2	Ontario Historical Operating Margins based on P&Ls reported for 2002-2008 (entire document redacted).	Franchisee Financial Information — Competitively Sensitive Commercial Data

Ex. 3	Jollymore reported P&L data (entire document redacted).	Franchisee Financial Information — Competitively Sensitive Commercial Data
Ex. 4	Historical Operating Margins for all Canadian regions for 2002-2008 (entire document redacted).	Franchisee Financial Information — Competitively Sensitive Commercial Data
Reference	Confidential Information	Basis for Claim of Confidentiality
Ex. 5	Price Change History for Ontario for 2002-2009 (entire document redacted).	Competitively Sensitive Commercial Data
Ex. 6	Costs vs. Prices - Donuts and Timbits 2003-2009 (entire document redacted).	Competitively Sensitive Commercial Data
Ex. 7	2003- 2009 report showing volume and percentage of sale for each part of the day and for each region.	Competitively Sensitive Commercial Data

Motion dismissed.

2016 ONCA 662
Ontario Court of Appeal

U.S. Steel Canada Inc., Re

2016 CarswellOnt 14104, 2016 ONCA 662, 270 A.C.W.S. (3d)
471, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450, 61 B.L.R. (5th) 1

**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 U.S. Steel Canada Inc.

George R. Strathy C.J.O., P. Lauwers, M.L. Benotto JJ.A.

Heard: March 17, 2016
Judgment: September 9, 2016
Docket: CA C61331

Counsel: Gordon Capern, Kristian Borg-Olivier, Denise Cooney for Appellant, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
Andrew Hatnay, Barbara Walancik for SSPO and non-union retirees and active employees of U.S. Steel Canada Inc.
Tamryn Jacobson for Her Majesty the Queen in Right of Ontario and Superintendent of Financial Services (Ontario)
Michael E. Barrack, Jeff Galway, John Mather for Respondent, United States Steel Corporation
Sharon Kour for U.S. Steel Canada Inc.

George R. Strathy C.J.O.:

1 U.S. Steel Canada Inc. ("USSC") is in *CCAA*¹ protection. Its former employees claim that its American parent, United States Steel Corporation ("USS"), ran the company into insolvency to further its own interests. An issue arose in the court below as to whether the *CCAA* judge could apply an American legal doctrine called "equitable subordination" to subordinate USS's claims to the appellant's claims.

2 The *CCAA* judge held he had no jurisdiction to do so. For reasons different than the ones he gave, I agree, and would dismiss the appeal.

FACTUAL BACKGROUND

3 USS is one of the largest steel producers in North America. In 2007, it acquired Stelco, which was in *CCAA* protection at the time, and changed its name to USSC.

4 Seven years later, on September 16, 2014, USSC was again granted *CCAA* protection by order of the Superior Court of Justice (Commercial List).

5 The *CCAA* judge made a Claims Process Order on November 13, 2014, establishing a procedure for filing, reviewing and resolving creditors' claims against USSC.

6 The order set out a separate procedure for resolving claims of approximately \$2.2 billion by USS against USSC. Most of the claims arose from USS's acquisition and reorganization of Stelco and from advances of working capital. Those claims were to be determined by the court, rather than by the Monitor.

7 USS filed its proofs of claims. The Monitor recommended they be approved and USS moved for court approval of the claims.

8 Notices of Objection were filed by four parties: (a) the Province of Ontario and the Superintendent of Financial Services in his capacity as administrator of the Pension Benefits Guarantee Fund; (b) the United Steelworkers, Locals 8782 and 1005; (c) Representative Counsel to the Non-USW Active Salaried Employees and Non-USW Salaried Retirees; and (d) Robert Milbourne, a former president of Stelco, and his wife, Sharon Milbourne, both of whom are beneficiaries of a pension agreement with USSC.

9 These objections overlapped to some extent. The *CCAA* judge had to develop a procedure to address the objections. He had to decide whether they should be dealt with within the *CCAA* process, outside it, or not at all.

10 The Province made two allegations. The first was that loans by USS to USSC should be characterized as shareholders' equity, because of the circumstances in which they were made. They should therefore be subordinated to all other claims pursuant to s. 6(8) of the *CCAA*² (the "Debt/Equity Objection"). Second, the Province argued that the security for the loans should be invalidated pursuant to provincial and federal fraudulent assignment and fraudulent preference legislation (the "Security Objection"). USS disputed both allegations, but was content to have the issues determined under the Claims Process Order.

11 The Union made objections similar to the Province's, but it added a third based on oppression and breach of fiduciary duty arising out of USS's conduct in relation to the Canadian plants, pensioners, pension plan members and beneficiaries (the "Conduct Objections").

12 The *CCAA* judge described the Conduct Objections as allegations that USS caused USSC to underperform, thereby requiring it to incur significant debt and to be unable to meet its pension obligations. The Union sought, among other things, an order subordinating the USS claims in whole or in part to its claims.

13 The Milbournes' objections were based on USS's alleged conduct and relied primarily on the doctrine of equitable subordination. They asked that the USS claims be dismissed entirely or subordinated to the claims of the other unsecured creditors.

14 The *CCAA* judge scheduled a motion to establish a litigation plan for USS's motion for approval of its claims against USSC. The parties agreed that the Security Objection and the Debt/Equity Objection could be determined pursuant to the Claims Process Order and within the *CCAA* proceedings.³

15 The primary disagreement concerned the procedure and timing for the determination of the other objections. The Union argued that the Conduct Objections should be resolved as part of the Claims Process Order and that an evidentiary record was required to do so. USS and USSC took the position that the Conduct Objections should be litigated outside the *CCAA* claims process.

16 The *CCAA* judge found that some of the claims of the Union and the Milbournes could be approached as third party claims against USS for oppression for the purpose of s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and for breach of fiduciary duty. He found that neither the Claims Process Order nor the *CCAA* contemplated that such claims would be addressed by or would be relevant to a plan of arrangement or compromise under the *CCAA*. The third party claims fell outside the claims process unless specifically incorporated into the restructuring plan as approved by the parties or otherwise ordered.

17 The *CCAA*, he said at para. 65, "is directed towards the creation, approval and implementation of a plan of arrangement or compromise proposed between a debtor company and its secured and unsecured creditors". It did not contemplate incorporation of inter-creditor claims into any plan of arrangement or compromise or into the voting process in respect of any proposed plan.

18 He concluded, at para. 84, that under s. 11 the court had authority to order the remaining claims of the Union and the Milbournes, except the claim for equitable subordination, to be "determined by a process within the *CCAA* proceedings, other than the process contemplated by the Claims Process Order, if the Court is of the opinion that, on balance, such action is likely

to further the remedial purpose of the *CCAA*." He held that those claims could be determined within the *CCAA* proceedings, rather than in a separate action in the Superior Court, but not under the Claims Process Order. He noted that the court retained jurisdiction to order that the claims be continued outside the *CCAA* if it was determined that pursuing them within the process would no longer further the remedial process of the *CCAA*.

19 He held, however, that he had no jurisdiction under the *CCAA* to apply the doctrine of equitable subordination. Before turning to his reasons, I will explain the doctrine of equitable subordination.

EQUITABLE SUBORDINATION

20 Equitable subordination was developed as an equitable remedy in American insolvency law to subordinate a creditor's claim based on its inequitable conduct. The principles were articulated in *Mobile Steel Co., Re*, 563 F.2d 692 (U.S. C.A. 5th Cir. 1977), which set out a three-part test:

- a. the claimant must have engaged in some type of inequitable conduct;
- b. the misconduct must have resulted in injury to creditors of the bankrupt or conferred an unfair advantage on the claimant; and
- c. equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

21 Paragraph 105(a) of the U.S. *Bankruptcy Code* authorizes bankruptcy courts to use equitable principles to alter the provisions of Title 11 or to prevent an abuse of process. One year after *Mobile Steel*, the *Code* was amended to give legislative effect to equitable subordination: *Bankruptcy Reform Act*, 11 U.S.C. §510(c)(1).

22 The Supreme Court of Canada considered the doctrine on two occasions. In both, the court found it unnecessary to determine whether equitable subordination should be applied, because the underlying facts did not meet the test: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 (S.C.C.), at p. 609; and *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 77. This court also found it unnecessary to decide the issue in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 14 O.R. (3d) 1 (Ont. C.A.).

23 The availability of the doctrine has been considered in various Canadian superior courts at the trial level, in various contexts and with inconclusive results: see *General Chemical Canada Ltd., Re*, [2006] O.J. No. 3087 (Ont. S.C.J. [Commercial List]), (in the context of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3); *Christian Brothers of Ireland in Canada, Re* (2004), 69 O.R. (3d) 507 (Ont. S.C.J. [Commercial List]), (in the context of the *Winding-up and Restructuring Act*, R.S.C. 1985, C. W-11, as amended).

24 In *AEVO Co. v. D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Ont. Bkcty.), Chadwick J. rejected the application of equitable subordination in Canadian law, observing, at p. 372, that to introduce the doctrine would create chaos and would lead to challenges to security agreements based on the conduct of the secured creditor. In *I. Waxman & Sons Ltd., Re* (2008), 89 O.R. (3d) 427 (Ont. S.C.J. [Commercial List]), Pepall J. queried, at para. 33, whether statutory priorities should be upset by a doctrine "divorced from its legal home". This observation was followed, however, with the comment that "a vibrant legal system must be responsive to new developments in the law and the need for reform. Jurisprudence from other jurisdictions often provides the impetus or basis for much needed legal developments."

25 On the other hand, the Newfoundland and Labrador Supreme Court (Trial Division) applied the doctrine in a bankruptcy case in *Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd.*, 2009 NLTD 148, 291 Nfld. & P.E.I.R. 149 (N.L. T.D.).

26 The Supreme Court of Canada's silence on the issue of equitable subordination in *CDIC* and *Indalex* cannot be taken, as the *CCAA* judge appears to have thought, as an outright rejection of the doctrine. In my view, the Supreme Court simply left the issue for another day.

27 It is unnecessary to decide that issue in order to resolve this appeal. The only issue is whether the *CCAA* judge was right in deciding that he had no jurisdiction to grant equitable subordination under the *CCAA*, assuming the remedy is available in Canadian law.

SUBMISSIONS AND ANALYSIS

A. PROCEDURAL OBJECTION

28 The appellant's first submission is procedural. It claims that it was unnecessary for the *CCAA* judge to determine whether he had jurisdiction to grant equitable subordination. The Union essentially says it was blindsided. It says it made no submissions on the doctrine of equitable subordination and the *CCAA* judge did not indicate that he was going to address the issue in the context of the scheduling motion. It was inappropriate and unnecessary for the court to shut the door on a novel and controversial remedy without a full factual record.

29 The respondent acknowledges that equitable subordination was not a central issue in the oral submissions before the *CCAA* judge, but points out that it was raised in some of the factums and memoranda filed before and after the hearing. The *CCAA* judge was required to determine what conduct-based inter-creditor claims would be litigated, either under the Claims Process Order or under the *CCAA*. He was entitled to determine whether he had jurisdiction to grant equitable subordination within the *CCAA*.

30 I do not accept the appellant's submission. The issue of equitable subordination was plainly before the *CCAA* judge in submissions made before and after the hearing. The Milbournes' factum made extensive submissions on equitable subordination and argued that it, along with fiduciary duty and oppression, were "live issues which should be the subject matter of a robust evidentiary record and subject to a fair and thorough due process in this court". The Union's factum suggested that some of USS's unsecured claim could be subordinated to the claims of other creditors "on account of a breach of fiduciary duty, a finding of oppression, *or otherwise*." USSC's factum argued that the Union's claim for equitable subordination should be rejected and that suitable remedies were available outside the Claims Process. In supplementary written submissions, the Union argued, in response to USSC's submissions, that the determination of the issue of equitable subordination should await an evidentiary record.

31 Moreover, the issue before the *CCAA* judge was not simply scheduling. The motion sought directions on the extent and nature of production and discovery with respect to the various objections. The Union argued that the objections had to be resolved before there could be approval of a plan of restructuring, a sale process or a distribution to creditors. The allegations that USS's claims should be re-characterized, invalidated, disallowed or subordinated had to be resolved and the *CCAA* judge had to determine a process for their resolution. Some might be dealt with under the Claims Process Order and some might be dealt with outside that Order but nevertheless in the *CCAA* proceedings. Some might not be dealt with under the *CCAA* at all.

32 The *CCAA* judge was plainly aware that a determination of the inter-creditor claims could have implications for the approval of any subsequent reorganization, sale of the business or credit bid. It was appropriate for him to consider whether the court had jurisdiction to address those claims and, if so, how and when.

33 An evidentiary record was unnecessary. The *CCAA* judge was not deciding whether equitable subordination applied on the facts of this case. The issue was whether he had jurisdiction to grant equitable subordination under the *CCAA*.

34 I turn now to the question whether the *CCAA* judge correctly held that he had no jurisdiction under the *CCAA* to order equitable subordination of USS's claims.

B. JURISDICTION TO ORDER EQUITABLE SUBORDINATION

35 I will begin by summarizing the *CCAA* judge's reasons on this issue. I will then set out the submissions of the parties, identify the standard of review, describe the methodology I will use and apply that methodology to the legislation.

(1) The CCAA judge's reasons

36 The *CCAA* judge noted that although the *CCAA* gives authority to re-characterize debt as equity and to invalidate a preference or assignment, there is no express provision conferring jurisdiction to grant equitable subordination. He was of the view that any jurisdiction to do so would have to be found in s. 11, which provides that "the court ... may, subject to the restrictions set out in this Act ... make any order that it considers appropriate in the circumstances."

37 He observed that there is no Canadian case law supporting that authority and, when given the occasion to confirm the existence of equitable subordination on two occasions, the Supreme Court of Canada had declined to do so: *Canada Deposit Insurance Corp.*; and *Indalex*. He suggested that one might infer from this that the Supreme Court had rejected the principle of equitable subordination.

38 He found, however, that to the extent the issue remained open, the *CCAA* evidenced an intention to exclude equitable subordination. When Parliament amended the legislation in 2009, it gave authority under s. 6(8) to subordinate debt as being in substance equity, but it did not enact any provision to subordinate a claim based on the conduct of the creditor. Nor had it drafted s. 36.1, which permitted the court to invalidate preferences and assignments, broadly enough to permit the court to make an order for equitable subordination. These provisions, he said, were "restrictions set out in this Act", limiting the court's broad discretion under s. 11. Parliament's failure to include equitable subordination in the remedies introduced in 2009 must be taken as indicative of an intention to exclude the operation of the doctrine under the *CCAA*. This, he said, was a policy decision the court must respect.

(2) The submissions of the parties

39 The appellant submits the *CCAA* judge had jurisdiction to grant equitable subordination pursuant to s. 11 of the *CCAA* in the absence of express "restrictions" on that jurisdiction. He erred in implying restrictions based on Parliament's failure to amend the legislation.

40 The respondent submits that Canadian courts have all the tools they need to assess, review and, where necessary, subordinate or invalidate creditors' claims in a manner consistent with the underlying legislation, without the need for equitable subordination. Some of these tools are the result of the 2009 amendments to the *BIA* and the *CCAA*. Parliament might have expanded those amendments to incorporate equitable subordination or some other conduct-based remedy, but declined to do so. The court should not invoke a controversial doctrine that Parliament declined to adopt when it had the opportunity to do so.

(3) The standard of review

41 The parties agree that the applicable standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.), at para. 8; and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 40.

(4) Framework for analysis

42 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], at paras. 65ff., the Supreme Court of Canada gave guidance on the approach to the scope of statutory remedies under the *CCAA*, and, if need be, under related sources of judicial authority. The court adopted the analysis proposed by Justice Georgina R. Jackson of the Court of Appeal for Saskatchewan and Professor Janis Sarra in an article entitled, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law*, 2007 (Toronto: Thomson Carswell, 2007), at p. 41. Blair J.A. also approved of this approach in *Metcalfe & Mansfield*, at paras. 48-49.

43 Jackson and Sarra note that the *CCAA* is skeletal legislation and advocate a transparent and consistent methodology as judges define the scope of their jurisdiction under the statute. They propose that the courts should take a hierarchical view of the powers at their disposal, adopting a broad, liberal and purposive interpretation of the statute and applying the principles of statutory interpretation before turning to other tools such as the common law or the exercise of inherent jurisdiction.

44 At para. 66 of *Century Services*, the Supreme Court held that in most cases, the search for jurisdiction under the *CCAA* should be an exercise in statutory interpretation. The starting point is the "big picture" principles of statutory interpretation.

45 Driedger's modern principle is the crucial tool for construing skeletal legislation such as the *CCAA*. A court must go beyond an examination of the wording of the statute and consider the scheme of the Act, its object or the intention of the legislature and the context of the words in issue:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: Jackson and Sarra, at p. 47; Elmer A. Driedger, *The Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at p. 87, cited in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26. See also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at paras. 23, 40.

46 With this in mind, I will apply the framework in *Century Services* to the search for jurisdiction. I turn first to a consideration of the purpose and scheme of the *CCAA*, before considering the language of the statute.

(5) Application of the framework

(i) The purpose of the CCAA

47 There is no dispute about the purpose of the *CCAA*. It describes itself as "An Act to facilitate compromises and arrangements between companies and their creditors". Its purpose is to avoid the devastating social and economic effects of commercial bankruptcies. It permits the debtor to continue to carry on business and allows the court to preserve the status quo while "attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all": *Century Services*, at para. 77.

48 The *CCAA* has proven to be a flexible and successful tool to enable businesses to avoid bankruptcy. As Professor Sarra notes, "[i]t has been the statute of choice for debtor corporations in every major Canadian restructuring in the past quarter century, including national airlines, major steel and forestry companies, telecommunications companies, major retail chains, real estate and development groups, and the national blood delivery system": Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2d ed. (Toronto: Carswell, 2013), at p. 1.

49 The *CCAA* achieves its goals through a summary procedure for the compromise or arrangement of creditors' claims against the company. It was described in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 36, as:

a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders.

50 The process has been effective because it is summary, it is practical, it is supervised by an independent expert monitor and it is managed in real time by an experienced commercial judge.

51 *Century Services* is a good example of how the purpose of the *CCAA* informs the exercise of the court's authority. At issue in that case were the reconciliation of another federal statute with the *CCAA* and the scope of a *CCAA* judge's discretion. At para. 70, the orders of the *CCAA* judge were considered squarely within the context of the purpose of the Act:

The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully

further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[emphasis added]

52 The Supreme Court concluded, at para. 75, that the order advanced the underlying purpose of the CCAA.

(ii) The scheme of the CCAA

53 The CCAA has been described as "skeletal" or "under-inclusive" legislation, (Jackson and Sarra at p. 48) which grants broad powers to the courts in general terms.

54 The Act has five parts. Part I, entitled "Compromises and Arrangements" permits the court to sanction a compromise or arrangement between a company and its secured or unsecured creditors, or both.

55 The powers of the court are found in Part II, entitled "Jurisdiction of Courts". The statute gives the court jurisdiction to receive applications, order stays, approve debtor-in-possession financing and appoint a monitor, among other things. Proceedings are commenced by an application to the Superior Court. The court generally grants an initial stay, appoints a monitor with authority to repudiate leases and other agreements and authorizes debtor in possession financing. A process is established for the identification and review of creditors' claims by the monitor and to deal with disputed claims, with the ultimate purpose of establishing classes of creditors who will vote, by class, on the compromise or arrangement.

56 One possible outcome is the preparation of a plan of arrangement. Creditors vote by class on the plan at a meeting called for that purpose. A majority by number of creditors in each class, together with two-thirds of the creditors in that class by dollar value, must approve the plan. If a class of creditors approves the plan, it is binding on all creditors within the class, subject to the court's approval of the plan. If all classes of creditors approve the plan, the court must then approve the plan as a final step.

57 Part III, entitled "General", deals with such issues as the determination of the amount of creditors' claims, classes of creditors, the duties of monitors, the disclaimer of agreements between the company and third parties and preferences and transfers at undervalue.

58 Section 19 identifies "claims" that may be dealt with in a compromise or arrangement. Those are claims provable in bankruptcy that relate to debts or liabilities, present or future, to which the *debtor company* is subject or may become subject before the compromise or arrangement is sanctioned.⁴

59 The significance of this definition is that the focus of the plan of arrangement is claims against the *debtor company* that are provable in bankruptcy. The CCAA judge identified this significance at para. 59 of his reasons, where he noted that s. 19(1) of the CCAA provides, effectively, "that a plan of compromise or arrangement may only deal with claims that relate to debts or liabilities to which a debtor company is subject at the time of commencement of proceedings under the CCAA". At para. 61, he noted that neither the Claims Process Order nor the CCAA contemplated that inter-creditor claims would be addressed by or be relevant to a plan of arrangement.

60 Section 20 sets out the method for determining the amount of the claim of any secured or unsecured creditors. In most cases, it will be the amount "determined by the court on summary application by the company or by the creditor".

61 Section 22 provides for the establishment of classes of creditors for the purpose of voting on a compromise or arrangement, based on, among other things, the nature of their claims, the nature of the security in respect of their claims and the remedies available to them in relation to their claims. Creditors may be included in the same class "if their interests or rights are sufficiently similar to give them a commonality of interest".

62 Part IV deals with Cross-Border Insolvencies. Its stated purposes are to give mechanisms to provide for the fair and efficient administration of such insolvencies, to promote cooperation with courts of other jurisdictions, to promote "the rescue of financially troubled businesses to protect investment and preserve employment" and to protect the interests of creditors, of other interested persons and of the debtor company. Part V deals with Administration.

63 The *CCAA* was amended in 2009. The amendments were the product of extensive discussion of the *BIA* and the *CCAA* in the Standing Senate Committee on Banking, Trade and Commerce. The Committee recommended amendments to the legislation, including an expanded power to review, invalidate or subordinate creditors' claims under the *CCAA*.

64 These recommendations were reflected in the 2009 amendments in two respects. First, s. 6(8) provides that a compromise or arrangement will not be approved unless it provides that all other claims are to be paid in full before an equity claim is paid.

65 This provision, coupled with the definition of "equity interest"⁵ and "equity claim"⁶ in s. 2(1), permits the court to determine whether a creditor's claim is in substance a share, warrant or option. This is the underpinning of the Debt/Equity Objection, an objection based on a disagreement as to the proper characterization of the disputed claims.

66 Section 22.1, also added in 2009, provides that all creditors with equity claims are to be in the same class unless the court otherwise orders, and may not, as members of that class, vote at any meeting unless the court otherwise orders.

67 Second, the 2009 amendments harmonized the rules of reviewable transactions under the *BIA* and the *CCAA*. Creditors in a *CCAA* proceeding are now entitled to invoke the provisions of the *BIA* to invalidate security granted by a debtor corporation to a creditor where a fraudulent preference or transfer at undervalue is established. Section 36.1 of the *CCAA* provides that ss. 38 and 95 to 101 of the *BIA* apply, with any required modifications, in respect of a compromise or arrangement, unless the compromise or arrangement provides otherwise.

68 USS says that the 2009 amendments reflected Parliament's decision concerning the extent of the court's jurisdiction over "reviewable transactions" in *CCAA* proceedings and the extent to which a creditor's claim can be subordinated to other claims as a result of its conduct. It says Parliament might have included jurisdiction to rearrange priorities between creditors, for example through equitable subordination, but it declined to do so.

69 The scheme of the *CCAA* focuses on the determination of the validity of claims of creditors against the company and the determination of classes of claims for the purpose of voting on a compromise or arrangement. Except as contemplated by ss. 2(1), 6(8), 22.1 and 36.1, the statute does not address either conflicts between creditors or the order of priorities of creditors. Priorities are, however, part of the background against which the plan of compromise or arrangement is negotiated.

70 There is nothing in the record before us to indicate that the issue of equitable subordination was given serious consideration at the time of the 2009 amendments or that those amendments were intended to import other remedies.

(iii) Interpreting the particular provisions before the court

71 I now turn to the words of the statute itself, considered in context and having regard to the scheme of the *CCAA*, the object of the act and the intentions of Parliament.

72 As Blair J.A. put it when deciding whether the *CCAA* granted the court the power to sanction the disputed order in *Metcalfe & Mansfield*, at para. 58, "[w]here in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases?" The question before us is "where (if at all) in the words of the statute is the court (implicitly or explicitly) clothed with authority to make an order for equitable subordination of the USS claims?"

(a) Section 11: "The engine that drives the statutory scheme"

73 The parties focussed their arguments on whether the powers granted by s. 11 include the power to grant the remedy of equitable subordination. In order to inform the scope of s. 11, they urge us to consider the treatment of "equity" claims in s. 6(8) of the *CCAA* and the remedies available under s. 36.1.

74 In *Stelco*, at para. 36, Blair J.A. described s. 11 as "the engine that drives this broad and flexible statutory scheme". Section 11 states, in full:

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[Emphasis added.]

75 Prior to amendment in 2005 (S.C. 2005, c. 47, s. 128), the underlined portion above had read "subject to this Act". In *Century Services*, the Supreme Court, at paras. 67-68, interpreted this amendment as being an endorsement of the broad reading of *CCAA* jurisdiction that had been developed in the jurisprudence.

76 The jurisdiction under s. 11 has two express limitations. First, the court must find that the order is "appropriate in the circumstances". Second, even if the court considers the order appropriate in the circumstances, it must consider whether there are "restrictions set out in" the *CCAA* that preclude it.

77 As I have noted, the *CCAA* judge held that s. 11 did not confer jurisdiction to apply the doctrine of equitable subordination. The statute could have provided the authority to subordinate claims on this basis, as it did with equity claims, but it did not. He also held that the definition of "equity claim" and the option to bring proceedings under s. 36.1 were "restrictions" within the meaning of s. 11.

78 In my view, the interpretative process should start with the scope of s. 11 before the restrictions are considered in the analysis. The broad powers exercised by *CCAA* judges evolved in the jurisprudence before the concept of "restrictions" was legislated.

79 Moreover, it is inconsistent with the anatomy and history of the *CCAA* to maintain that if Parliament had intended that a *CCAA* judge would have the authority to make a certain type of order, it would have said so. The Supreme Court has made it clear that "[t]he general language of the *CCAA* should not be read as being restricted by the availability of more specific orders": *Century Services*, at para. 70.

80 What is apparent from the many creative orders that have been made, before and since the 2009 amendments, is that such orders are made squarely in furtherance of the legislature's objectives. In *Century Services*, at para. 59, the Supreme Court observed that "[j]udicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes", to avoid the devastating social and economic effects of bankruptcy while an attempt is made to organize the affairs of the debtor under court supervision.

81 The words "may ... make any order it considers appropriate in the circumstances" in s. 11 must, in my view, be read as "may ... *in furtherance of the purposes of this act*, make any order it considers appropriate in the circumstances."

82 There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

83 I turn to the second limit on the court's jurisdiction under s. 11, the "restrictions set out in this Act". The first question is whether such restrictions must be express or can be implied.

84 It bears noting that there are numerous express restrictions on the court's jurisdiction contained within the *CCAA* itself. Some are contained in Part II (Jurisdiction of Courts) and some are actually preceded by the heading "Restriction". In *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 426, 81 B.C.L.R. (5th) 102 (B.C. C.A.), at para. 34, the British Columbia Court of Appeal observed that "where other provisions of the statute are intended to restrict the powers under ss. 11 and 11.02 of the statute, they do so in unequivocal terms."

85 The *CCAA* judge found that there were "restrictions set out" in the *CCAA* that prevented the court from applying equitable subordination, namely the definition of "equity claim" in s. 2(1) and the provisions of s. 36.1. Essentially, he found that Parliament could have introduced equitable subordination into the *CCAA* when it amended the legislation in 2009, but declined to do so. "The court must respect that policy decision", he said at para. 53. The respondent supports this interpretation.

86 I agree with the appellant that "equity claim" is not a restriction at all, but a definition. Together with s. 6(8), it codifies what was essentially the law before the 2009 amendments. The purpose of this involvement in the priority of claims is to remove shareholders from the process of arriving at a compromise or arrangement, absent permission of the court. It has nothing to do with any wrongdoing by the person with the equity interest. The only "restriction", if any, would be the lack of flexibility to reverse this statutory subordination, as Pepall J. pointed out in *Nelson Financial Group Ltd., Re*, 2010 ONSC 6229, 75 B.L.R. (4th) 302 (Ont. S.C.J. [Commercial List]), at para. 34. However, this has to do only with subordination flowing from the characterization of a claim and not equitable subordination.

87 I also agree that the plain meaning of the words "subject to the restrictions *set out* in this Act" refers to express restrictions, of which there are a number.

(b) Subsection 6(8): Subordination of "equity claims"

88 In the court below, and in the appellant's submissions in this court, there was a blurring of the distinction between the separate concepts of "equity claim" and the doctrine of "equitable subordination". The *CCAA* judge's reasons referred at times to the "subordination claims" of the Union and the Milbournes as including the equitable subordination claims and the claims for oppression and breach of fiduciary duty.

89 As explained earlier, s. 6(8) of the *CCAA* effectively subordinates "equity claims", as defined, to the claims of all other creditors. No compromise or arrangement can be approved unless it provides for other claims to be paid, in full, before equity claims are paid.

90 With the exception of environmental claims, ss. 6(8) and 22.1 are the only provisions of the *CCAA* to deal expressly with priorities between creditors.⁷ There is a clear rationale for these provisions. In E. Patrick Shea, *BIA, CCAA & WEPPA: A Guide to the New Bankruptcy & Insolvency Regime* (Markham: LexisNexis Group, 2009), at p. 89, the author explains that "[t]he intention of these amendments is to remove the shareholder/creditor from the reorganization process, unless the court orders that they have a seat at the table."

91 "Equitable subordination", on the other hand, refers to the doctrine at issue here: a form of equitable relief to subordinate the claim of a creditor who has engaged in inequitable conduct. Such a claim is not an "equity claim", as defined. If it were, it would be subordinated without the need for intervention by the court.

92 Pepall J. dealt with these different principles and distinguished them clearly in *I. Waxman & Sons Ltd.*, a Commercial List decision that predated the 2009 amendments. There, a trustee in bankruptcy brought a motion for advice and directions as to whether a judgment creditor's claim should be allowed. Other creditors argued that his claim was rooted in equity and was not a debt claim. In the alternative, they argued that even if it was a debt claim, it should be subordinated to their claims pursuant to the doctrine of equitable subordination.

93 Pepall J. addressed the argument that the judgment creditor's claim was an equity claim under the heading "Characterization" (paras. 18-26), because the issue was whether his claim was properly characterized as one of equity or debt,

with the attendant priority consequences. Next she considered whether, even though she had found that the claim was a debt claim, it should be subordinated pursuant to the doctrine of equitable subordination (paras. 27-35). She noted, at para. 27, that "[a]s its name suggests, the basis for development of the doctrine is the equitable jurisdiction of the court". She held that even if it applied in Canada, which was not established, there was no evidence on which to apply it in that case.

94 By contrast, the *CCAA* judge in this case disposed of these issues under one heading, "The Authority of the Court to Adjudicate Claims for Debt Re-Characterization and for Equitable Subordination", at paras. 38-53. He found, at para. 51, that the absence of any provision in the *CCAA* that would permit the application of equitable subordination was indicative of an intention to exclude the operation of the doctrine.

95 The *CCAA* judge appears to have treated equitable subordination as akin to equity claims as defined in s. 2(1), the subordination of equity claims in s. 6(8) and the remedies under s. 36.1. He found that because equitable subordination is not mentioned in the context of these remedies, Parliament must have intended to exclude it.

96 The distinction between these terms undermines the argument that equitable subordination does not exist because it was not included as part of the definition of (or together with the subordination of) equity claims. Equity claims are subordinated in order to keep shareholders away from the table while the claims of other creditors are being sorted out. Even prior to being explicitly subordinated by statute in 2009, they generally ranked lower than general creditors: *Sino-Forest Corp., Re*, 2012 ONCA 816, 114 O.R. (3d) 304 (Ont. C.A.), at para. 30. The purpose of the 2009 amendments appears to have been to confirm and clarify the law: see The Report of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa, November 2003), at p. 158-59.

(c) Section 36.1: Preferences and Assignments

97 Section 36.1, which was part of the 2009 amendments, incorporates by reference provisions of the *BIA* permitting the court to invalidate prior fraudulent preferences or fraudulent assignments.

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

98 The respondent argues that the inclusion of these express provisions implies that no other form of equitable remedy was contemplated. Its argument is that, had Parliament wished to invalidate or subordinate claims of creditors who had engaged in inequitable conduct in relation to other creditors, it could have expressly included that remedy.

99 I would not read anything into s. 36.1, one way or the other. Nor would I regard it as a "restriction" set out in the Act within the meaning of s. 11.

(6) Summary

100 The appellant requested "a declaration that the *CCAA* contains no restrictions within the meaning of s. 11 on the court's ability to apply the doctrine of equitable subordination." In my view, this is the wrong inquiry and this is why I reach the same result as the *CCAA* judge, but for different reasons.

101 I would not grant the relief sought because, applying the principles of statutory interpretation, nowhere in the words of the *CCAA* is there authority, express or implied, to apply the doctrine of equitable subordination. Nor does it fall within the scheme of the statute, which focuses on the implementation of a plan of arrangement or compromise. The *CCAA* does not legislate a scheme of priorities or distribution, because these are to be worked out in each plan of compromise or arrangement. The subordination of "equity claims" is directed towards a specific group, shareholders, or those with similar claims. It also has a specific function, consistent with the purpose of the *CCAA*: to facilitate the arrangement or compromise without shareholders' involvement.

102 The success of the *CCAA* in fulfilling its statutory purpose has been in large measure due to the ability of judges to fashion creative solutions, for which there is no express authority, through the exercise of their jurisdiction under s. 11. As Blair J.A. noted in *Metcalfe and Mansfield*, however, the court's powers are not limitless. They are shaped by the purpose and scheme of the *CCAA*. The appellant has not identified how equitable subordination would further the remedial purpose of the *CCAA*.

103 At this stage of the analysis, I am mindful of the Supreme Court's observation in *Century Services* that in most cases the court's jurisdiction in *CCAA* matters will be found through statutory interpretation. I am also mindful of its observation in *Indalex*, at para. 82, that courts should not use an equitable remedy to do what they wish Parliament had done through legislation. In my view, there is no "gap" in the legislative scheme to be filled by equitable subordination through the exercise of discretion, the common law, the court's inherent jurisdiction or by equitable principles.

104 There is no provision in the *CCAA* equivalent to s. 183 of the *BIA* or §105(a) of the U.S. *Bankruptcy Code*. Section 183 invests the bankruptcy court with "such jurisdiction at law and in equity" as will enable it to exercise its bankruptcy jurisdiction. This is significant, because if equitable subordination is to become a part of Canadian law, it would appear that the *BIA* gives the bankruptcy court explicit jurisdiction as a court of equity to ground such a remedy and a legislative purpose that is more relevant to the potential reordering of priorities.

CONCLUSION

105 For these reasons, I would dismiss the appeal. I would order that counsel may make written submissions as to costs, not to exceed five pages in length, excluding costs outlines. I would assume counsel can agree on a timetable for delivery of all costs submissions within 30 days of the release of these reasons.

P. Lauwers J.A.:

I agree

M.L. Benotto J.A.:

I agree

Appeal dismissed.

Footnotes

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

2 6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

3 In a subsequent ruling, *U.S. Steel Canada Inc., Re*, 2016 ONSC 569 (Ont. S.C.J.), the *CCAA* judge dismissed the Debt/Equity objection, finding that approximately \$2 billion of USSC's unsecured claims and \$73 million in secured claims were properly characterized as debt rather than equity. He also dismissed the objection that approximately \$118 million in secured claims should be invalidated due to lack of consideration or as a fraudulent preference.

4 *CCAA*, s. 2(1): "*claim* means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*." Section 121 of the *BIA* states that claims provable in bankruptcy are those to which the bankrupt is subject: "121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act."

5 "*Equity interest* means (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and (b) in the case of

an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt."

- 6 "Equity claim means a claim that is in respect of an equity interest, including a claim for, among others, (a) a dividend or similar payment, (b) a return of capital, (c) a redemption or retraction obligation, (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)."
- 7 Subsection 11.8(8) gives the federal and provincial Crowns priorities for environmental claims against the debtor.

2007 ONCA 268
Ontario Court of Appeal [In Chambers]

Ravelston Corp., Re

2007 CarswellOnt 2114, 2007 ONCA 268, [2007] O.J. No. 1389, 156 A.C.W.S. (3d) 824, 31 C.B.R. (5th) 233

**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 THE
RAVELSTON CORPORATION LIMITED AND RAVELSTON MANAGEMENT INC.

AND IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.O. 1985, c. B-3,
AS AMENDED, AND THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

Borins J.A.

Heard: March 22, 2007
Judgment: April 13, 2007
Docket: CA M34868, C46730

Proceedings: refusing leave to appeal *Ravelston Corp., Re* (2007), 2007 CarswellOnt 755, 29 C.B.R. (5th) 34 (Ont. S.C.J. [Commercial List])

Counsel: George S. Glezos, Bryce Rudyk for Applicant, Conrad Black
Alex L. MacFarlane, Tushara Weerasooriya for Respondent, RSM Richter Inc., Interim Receiver for Ravelston Corporation Limited, Ravelston Management Inc.
Matthew P. Gottlieb, Davit D. Akman for Respondent, Hollinger Inc.
Robyn M. Ryan Bell for Respondent, Sun-Times Media Group Inc.

Borins J.A.:

I

1 Pursuant to the orders of Farley J. of April 20, 2005 and May 18, 2005, RSM Richter Inc. ("Richter") was appointed receiver and manager and interim receiver of the property, assets and undertaking of what is referred to in these proceedings as the Ravelston Companies, including the Ravelston Corporation Limited ("RCL"), Ravelston Management Inc. ("RMI") and Argus Corporation Limited ("Argus"). On April 20, 2005 the court also issued an order granting RCL and RMI protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and appointing Richter as the monitor.

2 Initially, Farley J. was the supervisory judge in this complex and long-term insolvency. The current supervisory judge is Cumming J. From the outset of its appointment as receiver, Richter has regularly filed reports with the court detailing the steps that it has taken in fulfilling its mandate, asking that the court approve each report and the recommendations contained in it and, frequently, asking the court's approval to take a particular step or to follow a particular course of action.

3 The motion before Cumming J., giving rise to this motion for leave to appeal, emanated from Richter's Nineteenth Report recommending the preparation of a report (the "Payments Report") setting out a factual account of the monies received by, and the distributions made by, RCL, RMI and Angus during the respective periods January 3, 1997 to April 20, 2005, July 3, 2002 to April 20, 2005, and January 1, 1999 to April 30, 2005. Pursuant to Richter's motion for authorization to complete and file the Payments Report with the Superior Court of Justice, on January 12, 2007 Cumming J. ordered Richter to complete the Payments

Report, provided that it would not be filed or disseminated to any party until further order of the Superior Court. Pursuant to a further motion brought by Richter, on February 15, 2007, Cumming J. ordered Richter to file the Payments Report with the Superior Court. The Payments Report contains data as to payments made by RCL, RMI and Argus to corporate officers of these companies, including Conrad Black, who is a defendant in ongoing criminal proceedings in the United States District Court in Chicago. Before Cumming J., only Lord Black opposed the filing of the Payments Report.

4 Lord Black subsequently moved under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") for leave to appeal Cumming J.'s order of February 15, 2007 to the Court of Appeal. On March 22, 2007 I dismissed Black's motion with reasons to follow. These are my reasons.

II

5 In its Nineteenth Report, Richter indicated that on December 14, 2006 the United States Attorney's Office ("USAO") asked it to prepare and provide a schedule of payments, including salaries, bonuses and dividends, made by the Ravelston Companies to Lord Black and others between January, 1998 and January, 2004. The USAO is a stakeholder in the Ravelston estate, as is Lord Black. A number of other stakeholders have also requested similar information from Richter. Before Cumming J., and before this court, Lord Black contended that because on its filing the Payments Report would become a public document and available to all stakeholders, including the USAO, the information contained in the Report may assist the prosecution in the ongoing criminal proceedings. He contended that there may be unfairness in the use of the information revealed by the Payments Report. Lord Black, therefore, submitted that the Report should not be filed until the conclusion of the criminal proceedings against him.

6 In his reasons, reported at [2007] O.J. No. 536 (Ont. S.C.J. [Commercial List]), Cumming J. pointed out at para. 26 that in the normal course of events the Payments Report would be filed with the court by the receiver when it is completed, to be used by the receiver in administering the estate, and to be used by all stakeholders in assessing their positions and in making representations to the receiver. At para. 27, Cumming J. stated that Lord Black had not provided any evidence that the filing of the Payments Report would be to his prejudice as a financial stakeholder having an economic interest in the Ravelston estate. To this I would add that Lord Black has also failed to provide any evidence that the filing of the Payments Report would prejudice the fairness of his criminal trial. As Cumming J. correctly observed, the possible use by the prosecution of any information contained in the Report as evidence against Black is a consideration for the United States District Court in Chicago.

7 In rejecting Black's attempt to seal the Report, at para. 33 Cumming J. stated:

It is the personal interest of Lord Black at stake in the criminal proceedings which results in his request to delay the release of the Payments Report. The Receiver submits that such a personal interest, as opposed to an economic interest, is beyond the Receiver's area of proper consideration in the administration of the estate. The Receiver is not obliged to protect the interests of stakeholders which are unrelated to the administration of a debtor's estate, such as the interest of a stakeholder to avoid alleged prejudice in criminal proceedings. The Receiver's role is to make business decisions in the best interests of the estate after a careful cost/benefit analysis and the weighing of competing interests. *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)

8 In the opinion of Cumming J., the receiver's decision to provide the Payments Report and to file it with the court as relevant information for the benefit of the stakeholders was "within the bounds of reasonableness". At para. 47, he added:

[A]n Order sealing the Payment Report until the close of Lord Black's criminal trial would be inappropriate. There is not any social value established on evidence by Lord Black which is of superordinate importance to the rights of the public to open access to court records and the interest of the estate's stakeholders to proceed unimpeded with the receivership. There is a strong presumption against any order that restricts public access to court proceedings or records that must be met by an applicant before a sealing order may properly issue. *R. v. Toronto Star Newspapers Ltd.*, [2005] 2 S.C.R. 188.

III

9 In his motion for leave to appeal, Lord Black submits that Cumming J. committed two errors: (1) he erred in his duty to supervise the receiver to ensure that it met its fiduciary duty to all stakeholders to act in an even-handed manner; and (2) he erred in his understanding of the principle of comity and failed to consider the prejudice to Lord Black, a Canadian resident, arising from the use of the Payments Report in the American criminal proceedings against Lord Black.

10 Lord Black contends that his proposed appeal raises issues significant to bankruptcy practice for which there is no guidance, including the extent and nature of the court's role in supervising the work of a court-appointed receiver whose interests, which are adverse to a major stakeholder, conflict with his duties to act in an even-handed manner, and the appropriate conduct of the receiver where it has consequences to stakeholders beyond the Canadian border. Lord Black also contends that granting leave to appeal will not hinder the administration of the receivership as the receiver conceded in submissions before Cumming J. that there is no need to file the Payments Report now for any reason relating to the administration of the receivership.

IV

11 As Armstrong J.A. noted, at para. 15 of *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]) there appears to be a "measure of confusion" in respect to the test for leave to appeal under s. 193(e) of the BIA. However, the caselaw is clear that one factor that is considered in all cases is whether the appeal is *prima facie* meritorious, a factor that Armstrong J.A. relied on in *SVCM*. See, e.g., *R.J. Nicol Homes Ltd. (Trustee of) v. Nicol* (1995), 30 C.B.R. (3d) 90 (Ont. C.A.); *Baker, Re* (1995), 22 O.R. (3d) 376 (Ont. C.A. [In Chambers]); *GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.*, [2003] O.J. No. 5761 (Ont. C.A. [In Chambers]); *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.). Similarly, this factor is also considered by the court in applications seeking leave to appeal under s. 193(e) from orders made under the CCAA: *Stelco Inc., Re* (2005), 78 O.R. (3d) 254 (Ont. C.A.).

12 *Ravelston*, supra, is a helpful example of the need for a *prima facie* meritorious appeal as the starting point in the application of the test under s. 193(e). If the proposed appeal is found to be *prima facie* meritorious, the court must then consider whether the other elements of the test have been met. At paras. 27-32 of *Ravelston*, Doherty J.A. provided this helpful guidance:

As indicated above, s. 193(e) permits leave to appeal from any order on any issue that the court determines warrants leave to appeal. There are no statutory criteria governing the granting of leave. Appellate courts, using different formulations, have identified various factors that should be addressed when deciding whether to grant leave under s. 193(e) of the BIA. The cases recognize, however, that the granting of leave to appeal is an exercise in judicial discretion that must be case-specific, and cannot be completely captured in any single formulation of the relevant criteria: [Citations omitted.]

The inquiry into whether leave to appeal should be granted must, however, begin with some consideration of the merits of the proposed appeal. If the appeal cannot possibly succeed, there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal.

A leave to appeal application is not the time to assess, much less decide, the ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal. Granting leave to appeal if the merits fall short of even that relatively low bar would be a waste of court resources and would needlessly delay and complicate insolvency proceedings.

In *Re Canadian Airlines Corp.* (2000), 261 A.R. 120 at para. 35 (C.A.), Wittmann J.A. (in chambers) was faced with an application for leave under the CCAA. He referred to earlier cases which had listed four criteria for the granting of leave, one of which was that "the appeal is *prima facie* meritorious." He described the necessary merits inquiry in this way:

... There must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "*prima facie*" meritorious.

I think the same level of merits inquiry is warranted on an application for leave to appeal under the BIA. I would describe an appeal which raises an apparent error in law or apparent palpable and overriding factual error as an appeal that has a realistic possibility of success.

The court need address the other matters relevant to the exercise of its discretion on a leave to appeal application only if the applicant demonstrates that the appeal has *prima facie* merit. I do not reach those other considerations on this motion.

V

13 As I have indicated, Lord Black's proposed appeal focuses on two aspects of the reasons of Cumming J. He submitted that Cumming J. failed to act fairly and even-handedly in preferring the interests of the other stakeholder, USAO to his interests, thereby possibly prejudicing his right to a fair trial in the American criminal proceedings. Second, he contends that Cumming J. erred in his understanding of the principles of comity. In my view, neither of the proposed grounds of appeal is *prima facie* meritorious.

14 There are two important principles that this court has endorsed in considering whether leave to appeal should be granted in bankruptcy and CCAA proceedings. In *Ravelston Corp., Re*, [2007] O.J. No. 749 (Ont. C.A.) at para. 3, the court stated: "It is well established that an appellate court owes substantial deference to the discretion of a commercial court judge charged with the responsibility of supervising insolvency and restructuring proceedings and that absent demonstrable error, it will not interfere." In *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.) at para. 4, Doherty J.A. stated: "If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all the stakeholders, the court will support the receiver's decision." These principles, necessarily, inform the determination of whether the proposed appeal is *prima facie* meritorious.

15 Turning to the first proposed ground of appeal, as Cumming J. said, the Payments Report is a necessary and normative analysis and part of the receiver's fiduciary duties in determining the financial situation of the bankrupt's estate. It will permit the stakeholders to learn and better understand the historical transactions of the insolvent business. Moreover, the motion judge found that the receiver had considered all relevant interests relating to the administration of the Ravelston estate in its decision to complete the Payments Report and to file it with the court. The interests that are relevant are those that are economic in nature, involving the debtor's assets, property and undertaking.

16 Lord Black has raised no competing economic interest to delay the filing of the Payments Report on its completion. Therefore, Cumming J. was correct in finding that his interest in avoiding possible prejudice in the American criminal proceedings was not a relevant interest to be weighed by the receiver in fulfilling its mandate to make business decisions in the best interests of the estate. Lord Black's alleged interest is not related to the administration of, or his economic interest in, the Ravelston estate. His sole interest in seeking to prevent the disclosure of the Payments Report is in his capacity as defendant in the American criminal proceedings.

17 It is noteworthy that Lord Black presented no evidence that the filing of the Payments Report would prejudice him in his capacity as a stakeholder having an economic interest in the Ravelston estate. Nor did he adduce any evidence that the filing of the Report would prejudice his right to a fair trial in the criminal proceeding. In my view, this is not surprising as it is difficult to understand how any relevant information in the Payments Report introduced in evidence by the United States Attorney could prejudice Lord Black's right to a fair trial. There is nothing unfair in the prosecution's introduction of relevant and admissible evidence against a defendant in a criminal trial.

18 I see no viable argument that Cumming J. erred in principle in the exercise of his discretion in approving the filing of the Payments Report. The proposed appeal has no realistic possibility of success if leave to appeal were granted as it raises no apparent error in law or palpable and overriding factual error. In other words, Cumming J. made no apparent error in law or apparent palpable and overriding error of fact in his supervision of the receiver.

19 As for the second proposed ground of appeal, Lord Black contends that Cumming J.'s misapprehension of the principle of comity caused him to refuse to consider the prejudice to him from the use of the Payments Report by the USAO. In my view, this contention is also untenable.

20 The motion judge's comments in respect to comity were general in nature. He stated that comity requires that each society, and its courts, must recognize and respect the legal processes of the courts of other societies, and that, accordingly, it would be for the United States District Court to determine the admissibility of any information contained in the Payments Report that the prosecution may seek to introduce against Lord Black in his criminal trial. Cumming J. was never asked to rule on any foreign law or procedure, nor was evidence of a foreign law or procedure introduced. He made it clear at para. 25 that "[t]he issue as to whether the Payments Report is to be filed in this Court is, of course, a matter for this Court alone". He properly recognized that there was nothing improper in the receiver voluntarily providing the information in the Payments Report to the USAO, especially where the information may be relevant to the administration of justice.

21 I see no viable argument that Cumming J. erred in principle in his comments on the principle of comity. The proposed appeal has no realistic chance of success if leave to appeal were granted as it raises no apparent error in law or palpable and overriding factual error.

VI

22 I would confirm the order that I made at the close of argument on March 22, 2007 refusing Lord Black's motion for leave to appeal the order of Cumming J. to this court. The parties have agreed that the successful responding parties should have their costs, and have agreed on the amount of costs as follows: RSM Richter Inc. — \$5,000; Hollinger Inc. — \$2,500; Sun-Times Media Group, Inc. — \$1,500. All costs include disbursements and GST.

Application dismissed.

2011 ONCA 186
Ontario Court of Appeal [In Chambers]

GasTOPS Ltd. v. Forsyth

2011 CarswellOnt 1328, 2011 ONCA 186, [2011] O.J. No. 979,
12 C.P.C. (7th) 116, 200 A.C.W.S. (3d) 1019, 280 O.A.C. 141

**GasTOPS Ltd., Plaintiff (Respondent) and Bradley Forsyth, Douglas
Brouse Jeffrey Cass, Robert Vandenberg and MXI Technologies
Ltd. a.k.a. 1197543 Ontario Ltd., Defendants (Appellants)**

R.G. Juriansz J.A.

Heard: January 27, 2011
Judgment: March 8, 2011
Docket: CA M39614, C51170

Counsel: David Elliot, for Appellants
James Shields, for Respondent

R.G. Juriansz J.A.:

1 This motion relates to the confidentiality of part of the court record in this appeal. After the hearing of the motion on January 27, 2011, I ordered that Trial Exhibits 17C, 33C, 42C and 764C are to be kept confidential and that the court registry is not to make them available to the public. I indicated that I would provide written reasons later.

2 I am case managing this appeal. In the action the respondent, a software company, claimed the individual defendants, who are former employees of the respondent, used its proprietary trade secrets and confidential business information to misappropriate corporate opportunities. The respondent was successful at trial. The trial judge awarded it damages in the amount of \$11,401,571. At the trial, which lasted 290 days, 2893 exhibits totalling some 70,000 pages were filed. Some 150 exhibits were designated confidential pursuant to a broad sweeping Confidentiality and Nondisclosure Order made by the trial judge. I highlight a few of the features of that order.

3 The order provides that Designated Information may be revealed only to Designated Persons. Designated Persons are listed in the order. They include the trial judge, counsel for the parties, court staff and the parties themselves. Other Designated Persons, such as expert witnesses, have to execute Confidentiality Undertakings in a prescribed form before being granted access to the Designated Information. The Confidentiality Undertakings, themselves, are ordered to be kept confidential. The order provides that the court may name other Designated Persons "from time to time on motion by either party".

4 The question of whether, and to what extent, the order applied to the Court of Appeal proceeding arose early in the case management process. The order that Designated Information be kept confidential is not time-limited. The order contains several references to the appeal process. For example, para. 6 of the order provides "that upon final disposition of all court proceedings, including appeals, all Designated Information will be destroyed." On the other hand, the order can be read as reserving to the trial judge a continuing role to supervise access to the information during and after the appeal proceedings. If taken literally, the order would require that the Court of Appeal registry and even the Court of Appeal judges be named as Designated Persons by the trial judge so that the Designated Information may be revealed to them. The first notice of motion filed by the respondent regarding the confidentiality issue sought an order of this court supplementing the confidentiality orders to include judges of the Court of Appeal and appeal court staff as Designated Persons. As well, if the appeal is considered a "related hearing", para. 5 of the order would control who may be present in the courtroom at the hearing of the appeal when Designated Information is discussed.

5 A final concern was that there is no indication that the requirements of the Supreme Court's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), were satisfied prior to the making of the order. In fact, the order seems on its face to delegate to the parties the responsibility for determining what material would be kept confidential. Paragraph 1 of the order provides:

THIS COURT ORDERS that at any time during the within trial, or any related hearing, either party may designate any particular exhibit (hereinafter "Designated Information") as being subject to the confidentiality provisions of this order.

6 In light of all of these concerns, I instructed counsel that a motion be scheduled in open court on notice to the media to address whether the trial judge's Confidentiality and Nondisclosure Order applied to the appeal proceeding and to deal with any requests that the record on appeal, or parts of it, be kept confidential.

7 Ultimately, the respondent sought to have only four exhibits kept confidential. The appellants made no request that any material be kept confidential. The motion proceeded on January 27, 2011, after notice was given to the media through the court's website. No representative of the media attended.

Discussion

8 In my view, the trial judge's Confidentiality and Nondisclosure Order was not intended to interfere with this court's authority to deal with its own process. A careful reading of the order leads me to conclude that the trial judge did not intend that the parties should seek a variation of his order to identify Court of Appeal judges as Designated Persons or to permit the filing of the appeal record. As I read it, the order applies only to the trial record and the proceedings at trial. The order's isolated references to "appeals" simply indicate when certain steps may be taken in regard to the trial record. For example, para. 2(e)(v) provides that copies of the Confidentiality Undertakings filed with the trial court may be obtained on application to the trial court upon the completion of "the trial, and any appeals". Paragraph 6 provides that the Designated Information will be destroyed "upon the final disposition of all court proceedings, including appeals". I understand para. 6 to refer to destruction of the Designated Information in the registry of the trial court, and not in the registry of this court.

9 I conclude that the order does not apply to this court or the record filed with this court. No variation of the trial judge's order is necessary to have any portion of the appeal record available to the public. Rather, the starting point in this court is that all material filed with this court's registry is available to the public, and any party seeking to have material kept confidential must obtain an order to that effect.

10 The Supreme Court in *Sierra Club* at para. 53 stated the test that must be met. A confidentiality order should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

11 Under the first branch of this test:

- the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question;
- the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, and the public interest in confidentiality must outweigh the public interest in openness of the courts; and

- consideration of reasonably alternative measures does not require the adoption of the absolutely least restrictive option, but does require the courts to restrict an order as much as is reasonably possible while preserving the commercial interest in question.

12 In the second branch of the test, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which in turn is connected to the principle of open and accessible court proceedings. The balancing of these considerations will determine whether the confidentiality order ought to be granted.

13 I now turn to consideration of the four exhibits the respondent seeks to keep confidential in the appeal.

Exhibits 17C, 33C, and 42C

14 These three exhibits relate to the relationship of GasTOPS with the government of Canada. Exhibit 17C is a Proposal to Develop ECMS Intellectual Property Rights. Each page of the proposal is marked "GasTOPS Ltd. Proprietary Information". Exhibit 33C is a Department of National Defence (DND) grant of license to GasTOPS. It contains a confidentiality clause prohibiting GasTOPS from disclosing the licensed intellectual property, except as authorized by the agreement or with the prior consent of the licensor. Exhibit 42C is a contract between GasTOPS and the government of Canada. Large and bold type on its face indicates that it contains a security requirement. The contract specifies that GasTOPS "hold a valid Facility Security Clearance with approved document safeguarding at the level of SECRET, issued by the Industrial Security Division (ISD) of the Department of Supply and Services (DSS)."

Exhibit 764C

15 Exhibit 764C is GasTOPS' Business Plan for Fiscal Year 1997-1998. It contains marketing strategies, revenue information and the cost structure of GasTOPS. The age of the document raises the question whether disclosure of the information that it contains, which was clearly commercially sensitive at the time it was written, would continue to constitute a serious risk to GasTOPS' commercial interest.

16 Counsel for GasTOPS stresses that this particular business plan was prepared after GasTOPS had lost the defendants as employees as well as a large part of its business. This business plan, he said, was prepared for the Board of Directors to decide how to recover, or even whether an attempt to recover was feasible. The document was introduced at trial to show the effect of the defendants' actions on GasTOPS as an operating company. The document contains a lot of material not relevant to this action, relating to other products and other contracts that are still ongoing. That is because the projects in this particular industry, by their nature and complexity, are long-lived. The time from conception of a project and the making of a proposal to the formation of a contract and its execution can easily span more than a decade. The document describes projects both with DND, the U.S. Navy and other military and commercial interests that are still ongoing. It also describes the processes and methodology of GasTOPS in carrying out its projects.

Conclusion

17 I am satisfied that disclosure of these documents would pose a serious risk to GasTOPS' commercial interests, and that the risk is real and substantial. I am also satisfied that there is a public interest in not disclosing these documents. These documents contain intellectual property, information connected to national defence, and subject matter over which third parties have required secrecy in their commercial dealings with GasTOPS. These public interests in this case outweigh the public interest in openness of the courts. Also, these documents would scarcely be of any interest to anyone other than potential competitors in the same business.

18 With respect to all four documents, I am satisfied that redaction is not a reasonable alternative. Redaction is possible with Exhibit 764C, but would result in a document that conveyed little meaning. I see no other reasonable alternative to protect the interests involved than by keeping these documents confidential.

19 I was advised that argument at trial related to these documents took place in open court, and that it was anticipated that keeping them confidential would not require that any portion of the appeal hearing be conducted in camera.

20 I have also considered that GasTOPS introduced these exhibits at trial with the security provided by the trial judge's order that they would be kept confidential.

21 Having weighed the salutary effects of the confidentiality order requested in this motion against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which includes the public interest in open and accessible court proceedings, I am satisfied that the interests in keeping these four exhibits confidential outweighs the public interest in their disclosure.

22 I order that trial exhibits 17C, 33C, 42C and 764C shall remain confidential. As the record in this case is electronic, electronic versions of these exhibits are to be filed on a separate disk that will not be available to the public. The copies of the exhibits filed in support of this motion will also not be available to the public. There will be no restriction on the remainder of the appeal file, subject to any further order.

Order accordingly.

2015 ONSC 7656
Ontario Superior Court of Justice [Commercial List]

Essar Steel Algoma Inc., Re

2015 CarswellOnt 18694, 2015 ONSC 7656, 261 A.C.W.S. (3d) 265, 31 C.B.R. (6th) 116

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

In the Matter of a Plan of Compromise or Arrangement of Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA, Applicants

Newbould J.

Heard: December 3, 2015
Judgment: December 7, 2015
Docket: CV-15-11169-00CL

Counsel: Ashley Taylor, for Applicants
Derrick Tay, Clifton P. Prophet, for Monitor Ernst & Young, Inc.
Marc Wasserman, Andrea Lockhart, for Deutsche Bank
Massimo Starnino, Debra McKenna, for USW and Local 2724
Lou Brzezinski, for USW Local 2251
Karen Ensslen, for Applicants' retirees
L. Joseph Latham, for Ad Hoc Committee of Essar Algoma Noteholders
Shayne Kukulowicz, Ryan C. Jacobs, for Ad Hoc Committee of Junior Secured Noteholders
Sara-Ann Van Allen, John J. Salmas, for Wilmington Trust, National Association

Newbould J.:

1 The applicants were granted protection under the CCAA in an Initial Order on November 9, 2015. On November 16, 2015 a DIP loan was approved, with the order settled on November 19, 2015, which provided tight timelines for the entire process, including strict timelines for a SISP process.

2 The applicants have now moved for the approval of a key employee retention plan ("KERP") offered to certain management employees of Essar Steel Algoma Inc. ("Algoma") said to be deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the applicants to secure the obligations under the KERP. The KERP is supported by all those who appeared at the hearing save for the unions who opposed it.

The KERP

3 The KERP covers 23 management personnel. The maximum aggregate amount which may become payable under the KERP is \$3,468,027. This includes a \$250,000 reserve for additional cash retention payments in the discretion of the board of directors, subject to approval of the Monitor.

4 Under the KERP, a cash retention payment will be paid to the KERP participants upon the earliest of the following events: (a) implementation of a plan of compromise or arrangement sanctioned by the Court; (b) completion of a sale (or liquidation) of all or substantially all of the assets and operations of Algoma approved by the Court; (c) termination of a KERP participant's employment by Algoma without cause; and (d) December 31, 2016.

5 In order to receive payments under the KERP, a KERP participant cannot have resigned, been terminated with cause or failed to perform his or her duties and responsibilities diligently, faithfully and honestly in the opinion of his or her direct supervisor and the special committee of the board of directors.

6 The cash retention payment will be an amount equal to a percentage of the KERP participant's annual salary. The KERP participants are categorized in four tiers, with the retention payment corresponding to 100%, 75%, 50% or 25% of annual salary respectively for each of the four tiers.

7 The list of KERP participants and the amounts of the cash retention payments offered to them were formulated by Algoma's management with the assistance of the applicants' legal counsel and other professional advisors, and with the assistance of a report prepared by a third party human resources firm, and in consultation with the Monitor. The KERP has been recommended by the special committee of the board of directors and approved by the board of directors of Algoma.

Analysis

8 At the outset, the unions appearing requested an adjournment of the motion to further consider the requested relief. I declined the adjournment. The motion was served on November 26, 2015 and the confidential information regarding the persons and the amounts to be promised to them under the KERP was provided to counsel for the unions on November 30 after a confidentiality agreement was signed. That information is straightforward and easily understood.

9 I understand the anxiety in Sault Ste. Marie caused by the difficulties being experienced by Algoma and the importance to the employees of the survival of Algoma. It would be preferable to have the luxury of considering all of the many issues in this CCAA proceeding in a relaxed atmosphere without time pressures. However that is not possible. The difficulty in this case is that the timelines are tight and the risk of senior management leaving the applicants, which I will discuss further, requires a quick decision on the KERP. Notice that the KERP would be sought was disclosed at the outset but deferred, and to delay this matter any further increases the risks that the KERP is intended to address. Moreover, taking into account the process that was followed by the applicants, it is questionable whether more that is relevant could be said on behalf of the unions than has been said on their behalf in their affidavit and factum filed at the hearing of the motion.

10 There is no express statutory jurisdiction in the CCAA for a court to approve a KERP. However, the courts have routinely held that the general power under section 11 of the CCAA gives jurisdiction to authorize a KERP and grant a charge to secure the applicants' obligations under the KERP. In *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]), I considered the factors to be considered in determining whether a KERP should be approved. These were summarized by Morawetz J. (as he then was) in *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]) at para. 91 as follows:

91....The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

- a. whether the Monitor supports the KERP agreement and charge;
- b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
- c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- d. the employees' history with and knowledge of the debtor;
- e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

11 In my view, the KERP should be approved for the following reasons:

(i) The evidence is that the KERP participants are critical to a successful restructuring of the applicants. Their institutional knowledge and experience would be very difficult, if not impossible, to be replaced during the relative short time in which the restructuring is contemplated. Without the KERP and the security provided by the KERP charge, there is concern that the KERP participants are likely to consider other employment options prior to the completion of the applicants' restructuring proceedings.

(ii) The unions contend that there is no evidence that any of the KERP participants have been approached by any other potential employers. Regardless of whether that is the case, it is no reason not to approve a KERP. The issue is whether there is a sufficient risk that persons may leave their employ, not whether there has been an approach by some other employer. See *Grant, supra*, at para. 14.

(iii) In this case, many of the management covered by the KERP are not from Sault Ste. Marie. They are obviously mobile and understandably would be concerned about their future in that city with a steel company that is under CCAA protection and not for the first time. The risk of their leaving for some other more certain future cannot be ignored, and it would be in no one's interest for them to leave Algoma at this critical time in which efforts are being made to restructure the business.

(iv) Management of Algoma took into account the difficulty of replacing the KERP participants during the stay period, taking into account the remoteness of Sault Ste. Marie. Algoma has been trying to recruit for some of these positions for the past year without success.

(v) The process to establish the KERP and those who should be covered by it was a thorough process. Outside HR personnel were consulted, legal counsel provided advice and the special committee of the board of directors as well as the board itself considered and approved the KERP. The Monitor provided input to Algoma in formulating the KERP and was invited to the meetings of the special committee and the board when the KERP was considered in detail, including whether the entitlements of certain participants should be changed from what management had proposed.

(vi) The business acumen of the board of directors, including the special committee of the board, should not be ignored unless there is good reason in the record to disregard it. See *Grant, supra*, at para. 18.

(vii) The KERP is not opposed by the various classes of noteholders, who will become junior to the KERP charge. They have worked with the applicants and have agreed to certain terms that will give them protection from their main concerns. While their concerns have not been completely answered, they are satisfied that it is in the best interests of Algoma that the KERP be approved.

(viii) The KERP is not opposed by the DIP lenders who are satisfied with the settled terms.

(ix) The Monitor supports the KERP.

12 Counsel for the USW contends that the terms of the individual contracts of employment of each of the KERP participants should be disclosed to them as there may be non-competition provisions that would prevent the executives from leaving Algoma. Disclosure of all of the terms of employment is not required to deal with this issue. Of the 23 employees covered by the KERP, only eight have an employment agreement. The template for this agreement has been provided in confidence. There is a non-competition clause but it is questionable whether it would be enforceable and it clearly does not prevent all possible jobs that

might be available elsewhere. Six of the eight employees in question are not from Sault Ste. Marie. To run the risk that the eight management employees in question would not leave Algoma because of this clause and to ignore the business judgment of the board and the special committee to the board because of this clause would be foolhardy.

13 It is also said that the terms of the employment agreements should be reviewed to determine whether these employees would be entitled in any event to the amounts provided for in the KERP. This is completely answered by the terms to be agreed by the KERP participants that any amounts paid under the KERP will result in a corresponding reduction in any non-KERP claim that the participants may be entitled to.

14 It is contended by the USW that the KERP was planned and approved without any input from the unions. I would not on that basis refuse to approve the KERP. Whether a particular person in a management role is important enough to be covered by a KERP agreement in an insolvency, or what the size of the KERP payment should be, is something that is the purview of management and the board of directors of a company. What useful input could be provided by the unionized employees is not apparent on the record, and no case provided to me suggested that the unionized employees should be consulted on such a decision.

15 It was contended on behalf of local 2251 that the collective agreement provides for a steering committee on which the union has an important role and that the steering committee will work with the President and CEO and senior management towards achievement of the company's business goals and in particular how they relate to the facilities, manning objectives including attrition and other matters which impact the company's employees. It is contended that this is broad enough to require the steering committee to have been involved in the implementation of the KERP for the senior executives of the company.

16 I doubt that this provision of the collective agreement goes so far as contended to require union input into the terms of employment of the company's executives, which is what the contention of the union amounts to. However, if it is thought that the collective agreement was breached by the process leading to the KERP, a grievance could presumably be taken under the collective agreement. That is independent of the considerations to be given by a CCAA court in deciding whether to approve a KERP. A CCAA proceeding is not the place for grievances under collective agreements.

17 It was also contended by the USW that the total amount of the KERP, being \$3.4 million was excessive, taking into account the amount of the special pension shortfall payments that were deferred for the month of November. Counsel declined to say what a reasonable amount would be, saying it was a matter of discretion for the Court. In my view, the tying together these two separate issues is not appropriate. Whether the special pension payments should be deferred is a different issue and one that will be dealt with at a future date. The judgment of the board of directors and the special committee of the board should not be disregarded because of this issue.

18 It was contended on behalf of the retirees that the terms of the KERP provide for payment when there has been a completion of a sale or liquidation of the assets of Algoma and that the KERP should not pay out in the event of a liquidation as it is in the interests of all stakeholders that the company or its business be reorganized rather than liquidated. I would not change this provision. The management to be protected by the KERP are being incentivized to stay in Sault Ste. Marie to assist in the SISP and it would only be after that process that a liquidation might take place if a SISP were not successful. It is in the interests of the KERP participants, along with all stakeholders, that Algoma survive and not be liquidated, and to deny them their KERP payment after they stayed to attempt to save Algoma from liquidation would not be appropriate.

19 In accordance with terms worked out by the applicant with the secured lenders, the applicants will not make or distribute any payments in respect of any claim of a KERP participant against the applicants (including any claims for termination, severance and change of control entitlements, but not including claims for payment pursuant to the KERP, claims for wages and vacation pay, or claims in respect of pension plans administered by the applicants) without first obtaining court approval of such payments on notice to the Service List. The KERP letters will have complimentary provisions worked out by the parties.

Sealing order requested.

20 The applicants requested that the list of KERP participants and the information regarding their income and amounts of their proposed KERP payments be sealed. This information was contained in a confidential supplement to the third report of the Monitor. This request is supported by the Monitor. The unions oppose the request.

21 In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), Justice Iacobucci adopted the following test to determine when a sealing order should be made

A confidentiality order ... should only be granted when:

(a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

22 Sealing orders are routinely granted in KERP cases, and found to meet the *Sierra Club* tests. In *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) stated the following, which is entirely apt to this case of Algoma:

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

23 See also *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]).

24 In this case, it is contended by the union that under Ontario law, disclosure is made of salary information for public servants who make in excess of \$100,000 per annum. Thus as this is a very public restructuring process and there is significant public interest in the outcome of these proceedings, the salary information for individual KERP participants should be disclosed. I do not agree. Persons who choose to work as public servants understand the rules of disclosure relating to their employment. Persons who work in the private sector take employment with the expectation that their income is private information. There are exceptions under securities legislation requiring disclosure of the income of the top earning executives of companies whose shares are publicly traded. I would not extend these statutory requirements to the KERP participants.

25 The union also contends that they may wish to test the necessity of including individuals in the list of KERP participants and need the particular financial information of each for that purpose. I agree with the Monitor that it would not be appropriate to consider each individual person. The process of selecting the participants and the amounts to be paid to them as incentives to stay and assist the restructuring was a robust process as discussed, and it is not in these circumstances helpful for public discussion about whether any particular person should be included. The impact of such disclosure in the workplace would not be helpful. I agree with Justice Pepall in *Canwest* that individual personal information adds nothing when the aggregate is disclosed.

26 The sealing order requested by the applicants is granted.

Motion granted.

2013 ONCA 282
Ontario Court of Appeal [In Chambers]

Business Development Bank of Canada v. Pine Tree Resorts Inc.

2013 CarswellOnt 5026, 2013 ONCA 282, [2013] O.J. No. 1918, 100
C.B.R. (5th) 91, 115 O.R. (3d) 617, 227 A.C.W.S. (3d) 611, 307 O.A.C. 1

Business Development Bank of Canada Applicant (Respondent) and Pine Tree Resorts Inc. and 1212360 Ontario Limited Respondents (Appellants)

R.A. Blair J.A., In Chambers

Heard: April 22, 2013
Judgment: April 29, 2013
Docket: CA M42401, M42383, M42395 (C56856)

Proceedings: refused leave to appeal *Business Development Bank of Canada v. Pine Tree Resorts Inc.* (2013), 2013 CarswellOnt 12749 ((Ont. S.C.J. [Commercial List]))

Counsel: Milton A. Davis for Appellants, Pine Tree Resorts Inc., 1212360 Ontario Limited
David Preger for Appellant, Romspen Investment Corporation
Harvey Chaiton for Respondent, Business Development Bank of Canada

R.A. Blair J.A., In Chambers:

Overview

1 On April 2, 2013, Justice Mesbur granted the application of Business Development Bank of Canada ("BDC") for the appointment of a receiver over the assets of the respondents, Pine Tree Resorts Inc. and 1212360 Ontario Limited (together, "Pine Tree"). Pine Tree owns and operates the Delawana Inn in Honey Harbour, Ontario.

2 Pine Tree and the second mortgagee, Romspen Investment Corporation ("Romspen"), seek to appeal from Mesbur J.'s order. At the heart of this motion is whether the order should be stayed pending the appeal if there is an appeal. Collateral issues include whether the appeal is as of right under s. 193 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3 ("BIA"). If the answer to that question is yes, should the automatic stay be lifted? If leave to appeal is required, should it be granted and, if so, should the order be stayed pending the disposition of the appeal?

3 For the reasons that follow, I conclude that the appeal is not as of right, that leave to appeal is required and that in the circumstances here leave ought not to be granted. It is therefore unnecessary to deal with the specific question of whether a stay should be ordered pending appeal.

Background and Facts

4 BDC is owed approximately \$2.6 million by Pine Tree and holds first security for that indebtedness by way of a mortgage on the Delawana Inn lands and, additionally, by way of general security agreements covering both land and chattels. Romspen is the second mortgagee. Its mortgage, too, is in default. Romspen is owed approximately \$4.3 million.

5 The Inn has been in financial difficulties for several years and finally, after a number of negotiated extensions and forbearances, BDC demanded payment under both the mortgage and the general security agreements.

6 Under its security documents, BDC is contractually entitled to the appointment of a receiver. Instead of appointing a private receiver, however, BDC chose to apply for a court-appointed receiver. Romspen chose to initiate power of sale proceedings but, at the time the order was made, was not in a position to proceed with the sale because three days remained under the period prescribed in the Notice of Power of Sale for redemption.

7 Pine Tree and Romspen opposed BDC's application. That said, all parties agree the property must be sold immediately. Pine Tree does not have the financial ability to keep the Inn operating. In essence, the dispute is over which secured creditor will have control over the sale of the property and which plan for sale will be implemented.

8 Pine Tree supports Romspen's plan because it involves re-opening the Inn for the upcoming summer season and attempting to sell the property on a going concern basis. BDC rejects this option as unrealistic because it views the Inn's operations as being an irretrievably losing proposition.

9 Romspen argued before the application judge — and argues here as well — that it was entitled to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act*, R.S.O. 1990, c. M.40, to put BDC's mortgage in good standing and take over the sale of the property. It proposes to put the mortgage in good standing by paying all arrears of principal and interest, together with all of BDC's costs, expenses, and outstanding realty taxes. However, it does not propose to repay approximately \$250,000 in HST arrears. Those arrears constitute a default under the BDC security documents.

10 In seeking to appeal the order, Romspen and Pine Tree assert a number of grounds relating to the exercise of the application judge's discretion in granting the receivership order, but the centre piece of their legal argument on appeal concerns the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*. They submit that the arrears of HST do not jeopardize BDC's security in any way because they are a subsequent encumbrance, and therefore it is not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22. Whether that view is correct is the question of law they wish to have determined on appeal.

11 On behalf of BDC, Mr. Chaiton submits that there is nothing in s. 22 that permits a subsequent mortgagee to exercise its s. 22 rights unless it brings the prior mortgage into good standing, which involves both paying the amount due under the mortgage and — where there are unperformed covenants — performing those covenants as well.

Is Leave to Appeal Necessary?

12 In my view, there is no automatic right to appeal from an order appointing a receiver: see *Century Services Inc. v. Brooklin Concrete Products Inc.* (11 March 2005), Court File No. M32275 (Ont. C.A., in Chambers), Catzman J.A.; *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)* (1997), 206 A.R. 295 (Alta. C.A. [In Chambers]).

13 The portions of s. 193 of the BIA relied upon by Romspen and Pine Tree are the following:

Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

...

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

...

(e) in any other case by leave of a judge of the Court of Appeal.

14 Neither (a) nor (c) applies in these circumstances, in my view. I will address whether leave to appeal should be granted later in these reasons.

15 "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future: see *Ravelston Corp., Re*, [2005] O.J. No. 5351 (Ont. C.A.), at para. 17. See also *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co., Re* (1965), 52 D.L.R. (2d) 79 (Man. C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]).

16 Here, Romspen's legal rights are its right to exercise its power of sale remedy and its right to put the first mortgage in good standing under s. 22 of the *Mortgages Act*. The first crystallized on the default under the Romspen mortgage, the second on the default under the BDC mortgage. Both rights were therefore triggered before the order of Mesbur J. They were at best rights presently existing but exercisable in the future.

17 Nor do I accept the argument that the property in the appeal exceeds in value \$10,000 for purposes of s. 193(c). As noted by the Manitoba Court of Appeal in *Dominion Foundry Co., Re*, at para. 7, to allow an appeal as of right in these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.

18 In my view, leave to appeal is required in the circumstances of this case.

Should Leave to Appeal Be Granted?

The Test

19 In *Fiber Connections Inc.*, Armstrong J.A. (in Chambers) reviewed extensively the jurisprudence surrounding the test to be applied for granting leave to appeal under s. 193(e). As he noted at para. 15, there is some confusion as to what that test is. Two articulations of the test have emerged, and each has its support in the case law.

20 One formulation is that set out by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.). It asks the following questions:

- (i) Is the point appealed of significance to the practice as a whole?
- (ii) Is the point raised of significance in the action itself?
- (iii) Is the appeal *prima facie* meritorious?
- (iv) Will the appeal unduly hinder the progress of the action?

21 These are the criteria generally applied when considering whether to grant leave to appeal from orders made in restructuring proceedings under the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36 ("CCAA"), although their application has not been confined to those types of cases.

22 A second approach to the test was adopted by Goodman J.A. in *R.J. Nicol Homes Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48 (Ont. C.A.), at para. 6. Through this lens, the court is to determine whether the decision from which leave to appeal is sought (a) appears to be contrary to law; (b) amounts to an abuse of judicial power; or (c) involves an obvious error, causing prejudice for which there is no remedy.

23 Ontario decisions have traditionally leaned toward the *R.J. Nicol* factors when determining whether to grant leave to appeal under s. 193(e) of the BIA: see, in addition to *R.J. Nicol Homes Ltd. (Trustee of)*, for example, *Leard, Re* (1994), 114 D.L.R. (4th) 135 (Ont. C.A.); and *Century Services Inc.*

24 This view has evolved in recent years, however, and three decisions in particular have added nuances to the *R.J. Nicol Homes Ltd. (Trustee of)* approach by considering such factors as whether there is an arguable case for appeal and whether the issues sought to be raised are significant to the bankruptcy practice in general and ought to be addressed by this Court: see *Fiber Connections Inc.*, at paras. 16-20; *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (Ont. C.A. [In Chambers]); and *Baker, Re* (1995), 22 O.R. (3d) 376 (Ont. C.A. [In Chambers]). These factors echo the criteria set out in *Power Consolidated (China) Pulp Inc.*.

25 In *Baker, Re*, Osborne J.A. acknowledged the two alternative approaches to determining whether leave to appeal should be granted. He concluded at p. 381 that the *R.J. Nicol Homes Ltd. (Trustee of)* criteria were "generally relevant" but observed that all factors need not be given equal weight in every case. For that particular case, he emphasized the factor that the issue sought to be appealed was "a matter of considerable general importance in bankruptcy practice". In *TCT Logistics Inc.*, at para. 9, Feldman J.A. listed all of the *R.J. Nicol Homes Ltd. (Trustee of)* and the *Power Consolidated (China) Pulp Inc.* criteria — without apparently distinguishing between them — as matters to be taken into account. She granted leave holding that the issues in that case were significant to the commercial practice regulating bankruptcy and receivership and ought to be considered by this court.

26 Finally, in *Fiber Connections Inc.*, Armstrong J.A. reviewed all of the foregoing authorities and, at para. 20, granted leave to appeal because he was satisfied in that case that there were arguable grounds of appeal (although it was not necessary for him to determine whether the appeal would succeed) and because the issues raised were significant to bankruptcy practice and ought to be considered by this Court.

27 I take from this brief review of the jurisprudence that, while judges of this Court have tended to favour the *R.J. Nicol Homes Ltd. (Trustee of)* test in the past, there has been a movement towards a more expansive and flexible approach more recently — one that incorporates the *Power Consolidated (China) Pulp Inc.* notions of overall importance to the practice area in question or the administration of justice as well as some consideration of the merits.

28 That being the case, it is perhaps time to attempt to clarify the "confusion" that arises from the co-existence of the two streams of criteria in the jurisprudence. I would adopt the following approach.

29 Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;

b) is *prima facie* meritorious, and

c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

30 It is apparent these considerations bear close resemblance to the *Power Consolidated (China) Pulp Inc.* factors. One is missing: the question whether the point raised is of significance to the action itself. I would not rule out the application of that consideration altogether. It may be, for example, that in some circumstances the parties will need to have an issue determined on appeal as a step toward dealing with other aspects of the bankruptcy/insolvency proceeding. However, it seems to me that this particular consideration is likely to be of lesser assistance in the leave to appeal context because most proposed appeals to this Court raise issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case.

31 I have not referred specifically to the three *R.J. Nicol Homes Ltd. (Trustee of)* criteria in the factors mentioned above. That is because those factors are caught by the "*prima facie* meritorious" criterion in one way or another. A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power, or

(c) involves an obvious error causing prejudice for which there is no remedy, will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated (China) Pulp Inc.* "prima facie meritorious" criterion is different than the "arguable point" notion referred to by Osborne J.A. in *Baker, Re* and by Armstrong J.A. in *Fiber Connections Inc.*. In my view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol Homes Ltd. (Trustee of)* factors into the test.

32 As I have explained above, however, the jurisprudence has evolved to a point where the test for leave to appeal is not simply merit-based. It requires a consideration of all of the factors outlined above.

33 The *Power Consolidated (China) Pulp Inc.* criteria are the criteria applied by this Court in determining whether leave to appeal should be granted in restructuring cases under the CCAA: see *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377 (Ont. C.A. [In Chambers]), Feldman J.A., at para 15; and *Blue Range Resource Corp., Re* (1999), 244 A.R. 103 (Alta. C.A.). The criteria I propose are quite similar. There is something to be said for having similar tests for leave to appeal in both CCAA and BIA insolvency proceedings. Proposed appeals in each area often arise from discretionary decisions made by judges attuned to the particular dynamics of the proceeding. Those decisions are entitled to considerable deference. In addition, both types of appeal often involve circumstances where delays inherent in appellate review can have an adverse effect on those proceedings.

Application of the Test in the Circumstances

34 I am not prepared to grant leave to appeal on the basis of the foregoing criteria in the circumstances of this case.

35 First, Romspen and Pine Tree raise a number of grounds relating to the exercise of the application judge's discretion. These include her consideration and treatment of: the relative expenses involved in BDC's and Romspen's plans for the sale of the property; the impact of shutting down the Inn on employees and others and upon the potential sale prospects of the property; and her concern for "the usual unsecured creditors". These discretionary considerations are all entitled to great deference and, in any event, are purely factual and case specific, and do not give rise to any matters of general significance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

36 I would not grant leave to appeal on those grounds.

37 The legal issue raised by Romspen is this: did the application judge err by relying on a covenant default that could not prejudice BDC or erode its first-ranking security as the basis for her conclusion that Romspen had not complied with the requirements for the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*? The basis for that submission is the argument that the outstanding HST arrears — although a default in the observance of a covenant under the BDC mortgage — could not in any circumstances constitute a claim that would have priority over BDC's security, and therefore Romspen, as a subsequent mortgagee, is not required to cure the default by performing that covenant in order to be able to exercise its s. 22 rights.

38 I have serious reservations about the likelihood of success of this submission on appeal.

39 Romspen relies upon the jurisprudence of this Court establishing that a mortgagor — and therefore, a subsequent mortgagee — is entitled as of right, upon tendering the arrears or performing the covenant in default, to be relieved of the consequence of default: see *Theodore Daniels Ltd. v. Income Trust Co.* (1982), 37 O.R. (2d) 316 (Ont. C.A.). The problem is that Romspen has not offered to put the BDC mortgage in good standing, but has only offered to do so partially. It proposes to leave unperformed a \$250,000 covenant — payment of the outstanding HST arrears.

40 For Romspen to succeed on appeal would require a very creative interpretation of s. 22 of the *Mortgages Act*¹, and one that would potentially create an undesirable element of uncertainty in the field of mortgage enforcement, because no one would know which covenants could be left unperformed and which could not, without litigating the issue in each case.

41 I am not persuaded that the s. 22 point crosses the *prima facie* meritorious threshold. In any event, given my serious reservations about the merits, that factor together with the need for a timely sale process leads me to conclude that leave to appeal ought not to be granted.

42 Interfering with the timeliness of that process could potentially impact on the success of the sale. All parties agree the property must be sold. They only differ over who will conduct the sale and how it will be done. The application judge considered the alternative plans at length, and her decision to accept the BDC plan was not dependent on her rejection of Romspen's s. 22 argument.

43 There is some need for the sale to proceed expeditiously. The experienced application judge chose between BDC's and Romspen's two proposals and favoured that of BDC. Any further delay resulting from an appeal could well impact the potential sale, since the Inn is a seasonal business that only operates in the warm months of the year and those warm months are fast approaching.

44 For the foregoing reasons, I decline to grant leave to appeal.

Disposition

45 There is no appeal as of right from the receivership order granted by Mesbur J. under s. 193 of the BIA. Leave to appeal is required, but Romspen and Pine Tree have not met the test for leave to be granted in these circumstances. The motions of Romspen and Pine Tree are therefore dismissed. It follows that the receivership order is not stayed and that BDC's motion, to the extent it is necessary to deal with it, is successful.

46 No order as to costs is required, since I am advised that BDC is entitled to add the costs of this proceeding to its debt under the mortgage.

Motion dismissed.

Footnotes

1 Section 22(1) provides:

Despite any agreement to the contrary, *where default has occurred* in making any payment of principal or interest due under a mortgage or *in the observance of any covenant in a mortgage* and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

(a) at any time before sale under the mortgage: or

(b) before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,

the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.

[Emphasis added]

It is not disputed that a subsequent mortgagee is a "mortgagor" for purposes of this provision.

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 LAURENTIAN UNIVERSITY OF SUDBURY

Court of Appeal File No. M52287
Court File No. CV-21-656040-00CL

COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

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