

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 RESPONDING PARTY,
LAURENTIAN UNIVERSITY OF SUDBURY
(Motion for Leave to Appeal Confidentiality Order)**

March 17, 2021

THORNTON GROUT FINNIGAN LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200|
Toronto, Ontario M5K 1K7
Fax: (416) 304-1313

D.J. Miller (LSO# 34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Scott McGrath (LSO #59346K)
Tel: (416) 304-1592
Email: smcgrath@tgf.ca

Derek Harland (LSO #79504N)
Tel: (416) 304-1127
Email: dkharland@tgf.ca

Lawyers for the Responding Party,
Laurentian University of Sudbury

TO: KOSKIE MINSKY LLP

20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Murray Gold (LSO# 26196P)

Tel: 416-595-2085

Email: mgold@kmlaw.ca

James Harnum (LSO# 60459F)

Tel: 416-542-6285

Email: jharnum@kmlaw.ca

Lawyers for the Moving Party,
Ontario Confederation of University Faculty Associations

AND TO: GOLDBLATT PARTNERS LLP

Barristers & Solicitors
20 Dundas St. West, Suite 1039
Toronto, ON M5G 2C2

Charles Sinclair (LSO #43178A)

Tel: 416-979-4234

Fax: 416-591-7333

Email: csinclair@goldblattpartners.com

Lawyers for the Moving Party,
the Laurentian University Faculty Association

AND TO: Miriam Martin (LSO#: 67555T)

1378 Triole St
Ottawa, Ontario K1B 3M4
Tel: 613-237-0115
Fax: 613-237-7936
Email: mmartin@cupe.ca

Lawyers for the Moving Party,
Canadian Union of Public Employees

AND TO: THE SERVICE LIST

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 RESPONDING PARTY,
LAURENTIAN UNIVERSITY OF SUDBURY**

INDEX

TAB NO. (Hyperlink to Tab)	CASE
1.	<i>Sierra Club of Canada v. Canada (Minister of Finance)</i>, 2002 SCC 41.
2.	<i>Hurricane Hydrocarbons Ltd. v. Komarnicki</i>, 2007 ABCA 361.
3.	<i>Essar Steel Algoma Inc., Re</i>, 2016 ONCA 138
4.	<i>Algoma Steel Inc., Re</i>, 2001 CanLII 5433 (Ont. C.A.).
5.	<i>Newfoundland and Labrador c. AbitibiBowater</i>, 2010 QCCA 965
6.	<i>New Skeena Forest Products Inc., Re</i>, 2005 BCCA 192
7.	<i>Essar Steel Algoma Inc., Re</i>, 2017 ONCA 478
8.	<i>Nortel Networks Corp. Re</i>, 2016 ONCA 332
9.	<i>Calpine Canada Energy Ltd., Re</i>, 2007 ABCA 266
10.	<i>Canadian Broadcasting Corporation v. Ferrier</i>, 2019 ONCA 1025
11.	<i>Hollinger Inc., Re</i> , 2011 ONSC 1205
12.	<i>Hollinger Inc., Re</i>, 2011 ONCA 579
13.	<i>Crystallex International Corp., Re</i> , 2019 ONSC 408
14.	<i>Middelkamp v Fraser Valley Real Estate Board</i>, 1992 CarswellBC 267 (C.A.)

TAB 1

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Canada \(Procureur général\) c. Contrevenant No. 10](#) | 2015 CAF 155, 2015 FCA 155, 2015 CarswellNat 2920, 2015 CarswellNat 4847, 476 N.R. 142, 123 W.C.B. (2d) 413, 256 A.C.W.S. (3d) 759, [2015] A.C.F. No. 873 | (F.C.A., Jun 30, 2015)

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.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant

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

Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Related Abridgment Classifications

Civil practice and procedure

[XII](#) Discovery

[XII.2](#) Discovery of documents

[XII.2.h](#) Privileged document

[XII.2.h.xiii](#) Miscellaneous

Civil practice and procedure

[XII](#) Discovery

[XII.4](#) Examination for discovery

[XII.4.h](#) Range of examination

[XII.4.h.ix](#) Privilege

[XII.4.h.ix.F](#) Miscellaneous

Evidence

[XIV](#) Privilege

[XIV.8 Public interest immunity](#)

[XIV.8.a Crown privilege](#)

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)(b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)(b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses

effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a \$1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed 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 when 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 includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer 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. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires

de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

Table of Authorities

Cases considered by *Iacobucci J.*:

AB Hassle v. Canada (Minister of National Health & Welfare), 1998 CarswellNat 2520, 83 C.P.R. (3d) 428, 161 F.T.R. 15 (Fed. T.D.) — considered

AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to
Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered
Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Québec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

M. (A.) v. Ryan, 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205 D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

R. v. Mentuck, 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409 (S.C.C.) — followed

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (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) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (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) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1^{re} inst.)), qui avait accueilli en partie la demande.

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

35

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) Salutory 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.

TAB 2

2007 ABCA 361
Alberta Court of Appeal

Hurricane Hydrocarbons Ltd. v. Komarnicki

2007 CarswellAlta 1521, 2007 ABCA 361, [2008] A.W.L.D. 1, 162
A.C.W.S. (3d) 880, 37 C.B.R. (5th) 1, 418 W.A.C. 182, 425 A.R. 182

Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC (Applicants / Respondents / Plaintiffs) and John J. Komarnicki (Respondent / Appellant / Defendant)

Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC (Applicants / Respondents / Plaintiffs) and John J. Komarnicki (Respondent / Appellant / Defendant)

John J. Komarnicki (Respondent / Appellant / Defendant) and Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC (Applicants / Respondents / Plaintiffs)

E. McFadyen, C. Hunt, P. Rowbotham JJ.A.

Heard: November 15, 2007
Judgment: November 19, 2007
Docket: Calgary Appeal 0701-0086-AC

Counsel: R.F. Steele for Applicants
L.W. Scott, Q.C. for Respondent

Subject: Insolvency; Employment; Public

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.d Effect of arrangement](#)

[XIX.3.d.ii Stay](#)

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Debtor corporations obtained protection under Companies' Creditors Arrangement Act — Employee filed claim for notice of wrongful dismissal against two corporations — Arrangement provided for date at which claims against debtor corporations would be extinguished — Arrangement approved — Employee brought action for wrongful dismissal — Two debtor corporations began action for costs of defence and related issues — Date for resolution of claims passed — Employee's application to proceed with wrongful dismissal actions and debtor corporations' actions was dismissed — Wrongful dismissal action dismissed, employee not entitled to file counterclaim in one proceeding and counterclaim struck in another proceeding — Employee appealed — Debtor corporations brought motion to strike appeal — Motion granted — Employee did not have leave to bring appeal — Finality of affairs is important objective of Act — Debtors' actions were within ambit of Act as they affected claims made in proceedings under Act — Employee was attempting to improperly litigate wrongful dismissal proceeding in debtors' actions as counterclaim.

Table of Authorities

Cases considered:

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Smoky River Coal Ltd., Re (1999), 1999 CarswellAlta 128, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.*) 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.*) 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — referred to

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

Statutes considered:

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

Generally — referred to

s. 13 — considered

MOTION by debtors to strike appeal of employee from judgment dismissing action for wrongful dismissal.

Per curiam:

1 The applicants, Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC (collectively, the Hurricane companies), apply to strike the appeal of the respondent, Komarnicki, on the basis that he failed to obtain leave pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA). The application is granted and the appeal is struck.

Factual background

2 The applicants, Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc., received creditor protection under the CCAA on May 14, 1999. The respondent submitted a notice of claim in the CCAA proceedings alleging wrongful dismissal from employment with Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc., which they disputed.

3 No determination was made on the merits of the disputed claim prior to February 28, 2000 when the Plan of Compromise and Arrangement (Plan) received court approval. The Plan provided that any disputed claim not resolved by March 31, 2005 was deemed to be forever extinguished, terminated and cancelled.

4 In October 2000, the respondent commenced a claim in the Court of Queen's Bench seeking damages for wrongful dismissal from Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc.

5 On February 28, 2001, the Hurricane companies commenced an action in the Court of Queen's Bench seeking indemnity from the respondent for costs or damages resulting from the Hurricane companies' defence of various claims (Hurricane #1 action). Because counsel for the Hurricane companies did not immediately receive a filed copy of the statement of claim, out of an abundance of caution to avoid expiry of a limitation period, a second identical statement of claim was filed on March 1, 2001 (Hurricane #2 action). The Hurricane #1 action was served in January 2002 and the Hurricane #2 action was never served. The Hurricane #1 and #2 actions were not claims within the CCAA proceedings.

6 On August 9, 2002, Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc. filed a statement of defence to the respondent's wrongful dismissal action. On August 14, 2002, the respondent filed a statement of defence to the Hurricane #1 action.

7 The March 31, 2005 drop dead date passed without resolution of the respondent's wrongful dismissal claim.

8 On March 22, 2006, almost one year past the drop dead date, the respondent filed a statement of defence and counterclaim in the Hurricane #2 action. The counterclaim is virtually identical to the wrongful dismissal action. On October 13, 2006, the

respondent applied to the Court of Queen's Bench for a declaration that he was entitled to take the next step in his wrongful dismissal action and counterclaim in Hurricane #2 action, and sought to add to the Hurricane #1 action a counterclaim, which was, again, virtually identical to the wrongful dismissal action and the counterclaim in the Hurricane #2 action. The Hurricane companies applied to strike the wrongful dismissal action and the counterclaim in Hurricane #2 action, and opposed the addition of a counterclaim in the Hurricane #1 action.

9 The chambers judge dismissed the wrongful dismissal action, struck the counterclaim and refused to allow the addition of a counterclaim to the Hurricane #1 action.

10 The respondent filed a notice of appeal in this Court and was advised by the Deputy Registrar that leave pursuant to section 13 of the CCAA might be required. The Hurricane companies brought this motion to strike the appeal.

Issue

11 Does section 13 of the CCAA apply to the respondent's wrongful dismissal action and counterclaim?

Relevant legislation

12 Section 13 of the CCAA provides:

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

Decision

13 The requirement for leave furthers the objects and purpose of the CCAA which has been described by Farley J. in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at para.31 as follows:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court.

14 To further the goal of enabling a company to deal with creditors in order to continue to carry on business, the CCAA proceedings seek to resolve matters and obtain finality without undue delay. A drop dead date is one means of bringing disputed claims to an end and allowing a company to move forward. The requirement for leave to appeal similarly reinforces the finality of orders made under a CCAA proceeding and prevents continuing litigation where there are no serious and arguable grounds of significance to the parties. As noted by numerous courts, delay and uncertainty caused by appeals is a matter of concern in a CCAA proceeding: *Smoky River Coal Ltd., Re*, 1999 ABCA 62 (Alta. C.A.) at para. 22, citing *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]).

15 The scope of CCAA proceedings has been interpreted expansively by the courts and may even include non-judicial proceedings because the objective is to include proceedings that may work against the interests of creditors and render impossible the achievement of effective arrangements: *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 237 A.R. 326 (Alta. C.A.) at para. 31.

16 Before us, the respondent conceded that the wrongful dismissal action was a "claim" in the CCAA proceeding and that leave is required. However, the respondent says that the counterclaims ought not to be considered "claims" because they were filed in the Hurricane #1 and #2 actions which were not CCAA proceedings. The respondent submits that it would be unfair to permit Hurricane to pursue its actions, but to prevent him from advancing his counterclaim.

17 We conclude that the decision of the chambers judge is an order or decision made under the CCAA because its operation affects a claim submitted in the CCAA proceedings. The respondent submitted a claim in the CCAA for wrongful dismissal.

His claim was disputed; it was not excluded from the Plan, was not resolved before the drop dead date and no extension of that deadline was obtained. The Court of Queen's Bench action and the counterclaims are all based on the same alleged wrongful dismissal that the respondent claimed in the CCAA proceedings. The chambers judge recognized that the respondent was attempting to prosecute his wrongful dismissal claim when it has already been deemed to be extinguished, terminated and cancelled by the terms of the Plan.

18 It follows that the respondent must obtain leave to appeal the decision of the chambers judge. There was no proper application for leave before us and we make no decision in that regard. Accordingly, the application is granted and the appeal is struck.

Motion granted.

TAB 3

2016 ONCA 138
Ontario Court of Appeal

Essar Steel Algoma Inc., Re

2016 CarswellOnt 2444, 2016 ONCA 138, 263 A.C.W.S. (3d) 583, 33 C.B.R. (6th) 172

**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

David Brown J.A., In Chambers

Heard: February 16, 2016
Judgment: February 19, 2016
Docket: CA M46093, M46104

Counsel: Markus Koehnen and Jeffrey Levine, for the Moving parties / Responding parties by way of cross-motion, Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company

Eliot Kolers and Maria Konyukhova, for the Responding parties / Moving parties by way of cross-motion, 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

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

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.d Effect of arrangement](#)

[XIX.3.d.ii Stay](#)

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay
Debtor, steel manufacturer, obtained initial order under Companies' Creditors Arrangement Act (CCAA) — Debtor also obtained order under Chapter 15 of US Bankruptcy Code recognizing CCAA proceeding as main foreign proceeding — Debtor then filed notice with Ohio court advising that breach of contract action previously commenced by supplier of iron ore pellets automatically stayed — Debtor subsequently brought motion in CCAA proceeding for declaration that supplier's termination of contract was ineffective with result that supplier was obliged to provide debtor with iron ore pellets at contract price — Supplier brought motion for order staying debtor's motion on jurisdictional grounds — Judge in CCAA proceeding dismissed motion on basis that court did have jurisdiction over dispute and supplier had failed to establish more appropriate forum — Supplier brought motion for directions as to whether it was required to obtain leave to appeal, and for stay of debtor's motion pending appeal — Debtor brought cross-motion for order expediting motion for leave to appeal, if required, and appeal — Motions granted — Under s. 13 of CCAA, any person dissatisfied with order or decision made under CCAA was required to obtain leave to appeal — Purpose and object of CCAA proceedings supported expansive interpretation of words "made under" — Given purpose, and fact that secure supply of iron ore pellets was key component of business plan being developed by debtor in furtherance of reorganization, contract dispute and jurisdictional order made by CCAA judge should be considered order made under CCAA

— Supplier was required to obtain leave to appeal — Motion was to be heard on expedited basis — Balance of convenience warranted order for stay of debtor's motion in interim.

Table of Authorities

Cases considered by *David Brown J.A., In Chambers*:

- AbitibiBowater Inc., Re* (2010), 2010 QCCA 965, 2010 CarswellQue 4782, 52 C.E.L.R. (3d) 1, 68 C.B.R. (5th) 57 (C.A. Que.) — considered
- BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust* (2011), 2011 ONCA 620, 2011 CarswellOnt 10330, 283 O.A.C. 321 (Ont. C.A. [In Chambers]) — considered
- Concrete Equities Inc., Re* (2012), 2012 ABCA 91, 2012 CarswellAlta 417 (Alta. C.A.) — considered
- Hemosol Corp., Re* (2007), 2007 CarswellOnt 1083, 31 C.B.R. (5th) 83, 2007 ONCA 124 (Ont. C.A.) — considered
- Hurricane Hydrocarbons Ltd. v. Komarnicki* (2007), 2007 ABCA 361, 2007 CarswellAlta 1521, 37 C.B.R. (5th) 1, (sub nom. *Komarnicki v. Hurricane Hydrocarbons Ltd.*) 425 A.R. 182, (sub nom. *Komarnicki v. Hurricane Hydrocarbons Ltd.*) 418 W.A.C. 182 (Alta. C.A.) — considered
- M.J. Jones Inc. v. Kingsway General Insurance Co.* (2004), 2004 CarswellOnt 3244, 242 D.L.R. (4th) 139, 189 O.A.C. 272, 72 O.R. (3d) 68, 6 C.P.C. (6th) 121 (Ont. C.A. [In Chambers]) — referred to
- Monarch Land Ltd. v. Sanderson of Fish Creek (Calgary) Developments Ltd.* (2014), 2014 ABCA 143, 2014 CarswellAlta 645, 575 A.R. 46, 612 W.A.C. 46, 577 A.R. 143, 613 W.A.C. 143 (Alta. C.A.) — distinguished
- Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re* (2013), 2013 QCCS 5194, 2013 CarswellQue 10709 (C.S. Que.) — considered
- RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed
- Sandvik Mining & Construction Canada Inc. v. Redcorp Ventures Ltd. (Interim Receiver of)* (2011), 2011 BCCA 333, 2011 CarswellBC 3716, 94 C.B.R. (5th) 53 (B.C. C.A. [In Chambers]) — distinguished
- Smoky River Coal Ltd., Re* (1999), 1999 CarswellAlta 128, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.*) 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.*) 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — referred to
- Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC* (2014), 2014 ONCA 546, 2014 CarswellOnt 9417, 122 O.R. (3d) 472, 327 O.A.C. 22 (Ont. C.A.) — referred to
- Ted Leroy Trucking Ltd., Re* (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — considered
- Van Damme v. Gelber* (2013), 2013 ONCA 388, 2013 CarswellOnt 7839, 115 O.R. (3d) 470, 307 O.A.C. 81, 42 C.P.C. (7th) 100, 363 D.L.R. (4th) 250 (Ont. C.A.) — considered
- Yaiguaje v. Chevron Corp.* (2014), 2014 ONCA 40, 2014 CarswellOnt 456, 315 O.A.C. 109, 62 C.P.C. (7th) 368 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 15 — considered

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

Generally — referred to

s. 11 — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 13 — considered

MOTION by supplier for directions as to whether it was required to obtain leave to appeal, and for stay of debtor's motion pending appeal; CROSS-MOTION by debtor for order expediting motion for leave to appeal, if required, and appeal.

David Brown J.A., In Chambers:

I. The Motions

1 Essar Steel Algoma Inc., and certain related companies (collectively, "Essar"), are under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA"). The Cleveland-Cliffs Iron Company, Cliffs Mining Company, and Northshore Mining Company (collectively, "Cliffs"), move for directions as to whether they require leave to appeal from the order of the CCAA judge, Newbould J., dated January 25, 2016 (the "Order"). Whether leave to appeal is required or not, Cliffs seeks a stay of the contract dispute motion Essar has brought against Cliffs before the CCAA judge pending Cliffs' exercise of its appeal rights in respect of the Order.

2 Essar brings a cross-motion for an order expediting the hearing of Cliffs' motion for leave to appeal, or its appeal.

3 At the hearing of the motions, I released an endorsement (the "Endorsement") in which I concluded that Cliffs required leave to appeal the Order and its leave to appeal motion should be expedited. I also granted a stay of Essar's contract dispute motion pending the determination of Cliffs' leave to appeal motion. These are my reasons for so ordering.

II. Background

4 Essar manufactures steel in Sault Ste. Marie, Ontario. Iron ore pellets are a key input in its manufacturing process. In 2002, Essar's predecessor entered into a long-term iron ore pellet supply contract with Cliffs (the "Contract"). The Contract obliged Essar to purchase iron ore pellets exclusively from Cliffs until 2016 and to purchase a portion of its pellets from Cliffs from 2017 until 2024.

5 In recent years the business relationship between Essar and Cliffs has been a rocky one, with disputes arising over the quantities of iron ore pellets Essar was obliged to order and take up under the Contract.

6 In January 2015, Cliffs filed a complaint in the United States District Court for the Northern District of Ohio (Eastern District) (the "Ohio Court") alleging that Essar had breached the Contract by failing to take timely delivery of iron ore pellets in the requisite amounts. In late July 2015, Cliffs brought a motion for partial summary judgment. The motion was decided on October 7, 2015. The Ohio Court dismissed Cliffs' motion for summary judgment for breach of contract relating to Essar's 2014 quantity nomination, but granted its motion to dismiss Essar's counterclaim with respect to moisture content. A trial of all the issues in the Ohio litigation was scheduled to commence on December 7, 2015.

7 On October 5, 2015, Cliffs terminated the Contract alleging multiple material breaches by Essar.

8 On November 9, 2015, Essar sought and obtained an initial order under the CCAA. On November 10, 2015, Essar's foreign representative sought and obtained orders under Chapter 15 of the U.S. Bankruptcy Code, 11 U.S.C (2010) recognizing and enforcing in the United States the orders granted in the CCAA proceeding, which was recognized as the foreign main proceeding.

9 On November 11, 2015, Essar filed with the Ohio Court a notice that the Ohio litigation was automatically stayed in respect of Essar. On December 3, 2015, the Ohio Court dismissed Cliffs' action without prejudice. As a result, the scheduled trial of Cliffs' action did not proceed. Cliffs has moved to vacate that dismissal, but no decision has been rendered on its motion.

10 In mid-November, Essar served a motion under s. 11.4 of the CCAA seeking an order declaring Cliffs a critical supplier; the motion did not proceed because Essar was able to find short-term alternate suppliers.

III. Proceedings Under Appeal

11 On December 8, 2015, Essar moved in the *CCAA* proceeding for a declaration that Cliffs' purported termination of the Contract was not effective and Cliffs must supply Essar with iron ore pellets at the Contract price (the "Contract Dispute Motion"). Essar also sought orders directing Cliffs to comply with the Contract and to pay damages resulting from the purported termination of the Contract.

12 On December 23, 2015, Cliffs served a motion seeking an order dismissing Essar's Contract Dispute Motion on the ground that the Ontario court lacks jurisdiction to grant the relief sought or, alternatively, Ontario is not the convenient forum in which to adjudicate the dispute.

13 Cliffs' motion was heard on January 14, 2015 by Newbould J., the judge conducting the *CCAA* proceedings in respect of Essar. The *CCAA* judge dismissed Cliffs' motion in an Order and Endorsement dated January 25, 2016. He held that the Ontario court has jurisdiction over Essar's Contract Dispute Motion and Cliffs had not demonstrated that a clearly more appropriate forum than Ontario existed in which to adjudicate the dispute.

IV. Issues

14 Cliffs moves in this court for directions and for a stay of the Order pending Cliffs' exercise of its appeal rights. Cliffs argues that it is not required to obtain leave to appeal the Order. Alternatively, Cliffs submits that in the event "leave is granted from a portion of the decision of" the *CCAA* judge, that appeal should be consolidated "with the other aspects of the appeal which Cliffs has as of right."

15 Essar has brought a cross-motion seeking an order expediting the hearing of Cliffs' leave to appeal motion, if required, or the hearing of the appeal.

V. Whether Cliffs Requires Leave to Appeal the Order

16 Section 13 of the *CCAA* requires that "any person dissatisfied with an order or a decision made under this Act" obtain leave to appeal. The sole issue on Cliffs' motion for directions is whether the Order of the *CCAA* judge was "made under" the *CCAA*.

17 The Order resulted from a motion brought in the Essar *CCAA* proceeding, before the judge seized with hearing all matters in the Essar *CCAA* proceeding, with the judge explaining, in his reasons, how he was exercising his powers as a *CCAA* judge. The Order bears a style of cause stating that it was made "In the Matter of the *Companies' Creditors Arrangement Act*" in respect of a "Plan of Compromise or Arrangement of Essar Steel Algoma Inc." and other companies.

A. Positions of the Parties

18 Nevertheless, Cliffs submits that the Order was not "made under" the *CCAA*, for two reasons. First, the fact that an order is made "in" a *CCAA* proceeding does not necessarily mean that it was "made under" the *CCAA*. Second, an order is not "made under" the *CCAA* if it is one that "could have properly been made in a normal civil action without any regard to the *CCAA* or the *CCAA* proceeding." According to Cliffs, to constitute an order "made under" the *CCAA*, the order must rely upon or be grounded in a specific section of the *CCAA*. In support of its submissions, Cliffs relies on decisions made by Tysoe J.A. in *Sandvik Mining & Construction Canada Inc. v. Redcorp Ventures Ltd. (Interim Receiver of)*, 2011 BCCA 333, 94 C.B.R. (5th) 53 (B.C. C.A. [In Chambers]), and O'Brien J.A. in *Monarch Land Ltd. v. Sanderson of Fish Creek (Calgary) Developments Ltd.*, 2014 ABCA 143, 575 A.R. 46 (Alta. C.A.).

19 Essar submits that *CCAA* proceedings have a wide scope. Consequently, if *CCAA* considerations inform the decision and exercise of discretion of the judge, the decision can fairly be said to be "made under" the *CCAA*. Such considerations informed the making of the Order, so leave to appeal is required.

B. Analysis

The Purpose of s. 13 of the CCAA

20 The analysis must start with an examination of the legislative purpose underlying the leave requirement contained in s. 13 of the *CCAA*. In *Hurricane Hydrocarbons Ltd. v. Komarnicki*, 2007 ABCA 361, 425 A.R. 182 (Alta. C.A.), the Alberta Court of Appeal observed that the requirement for leave to appeal furthers the objects and purpose of the *CCAA*. At paras. 14 and 15, the court stated:

To further the goal of enabling a company to deal with creditors in order to continue to carry on business, the *CCAA* proceedings seek to resolve matters and obtain finality without undue delay...The requirement for leave to appeal similarly reinforces the finality of orders made under a *CCAA* proceeding and prevents continuing litigation where there are no serious and arguable grounds of significance to the parties. As noted by numerous courts, delay and uncertainty caused by appeals is a matter of concern in a *CCAA* proceeding: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 62, [1999] A.J. No. 185at para. 22, citing *Re Pacific National Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.).

The scope of *CCAA* proceedings has been interpreted expansively by the courts and may even include non-judicial proceedings because the objective is to include proceedings that may work against the interests of creditors and render impossible the achievement of effective arrangements: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179, 237 A.R. 326at para. 31.

21 More recently, in *AbitibiBowater Inc., Re*, 2010 QCCA 965, 68 C.B.R. (5th) 57 (C.A. Que.), at para. 26, Chamberland J.A. described the purpose of the leave to appeal requirement in s. 13 of the *CCAA*:

This requirement stems from a clear intention of Parliament to restrict appeal rights having regard to the nature and object of *CCAA* proceedings; an appeal court should be cautious about intervening in the *CCAA* process. This is not to say that leave will never be granted but it should be so only "sparingly" (*In Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]), at 272).

22 That legislative purpose for the leave requirement supports an expansive interpretation of the term "made under" the Act in s. 13: *Smoky River Coal Ltd., Re*, 1999 ABCA 62, 237 A.R. 83 (Alta. C.A.), at para. 20. Such an expansive interpretation was adopted by Paperny J.A. in *Concrete Equities Inc., Re*, 2012 ABCA 91, [2012] A.W.L.D. 2836 (Alta. C.A.), at para. 16, where she held that when "*CCAA* considerations informed the decision of and the exercise of discretion by the chambers judge ... it can be fairly said that the order was made 'under' the *CCAA* in accordance with section 13 of the Act."

The Decisions in Sandvik Mining and Monarch Lands

23 Cliffs submits that the interpretation given to "made under" the Act in *Concrete Equities* should be limited to the facts of that case, where there was no dispute that the notices of disallowance dealt with by the chambers judge resulted from a claims process ordered under the *CCAA*. Cliffs argues that the *Sandvik Mining* and *Monarch Lands* decisions employed different interpretations of "made under" the Act which are more appropriate for the present case.

24 I agree that both the *Sandvik Mining* and *Monarch Lands* decisions offer guidance on the meaning of "made under" the *CCAA*, but I do not accept Cliffs' submission that the principles emerging from those cases would lead to the conclusion that Cliffs is not required to seek leave to appeal from the Order. Both cases involved exceptional fact situations that lay beyond the boundaries of the usual *CCAA* proceeding.

25 Dealing first with the *Sandvik Mining* decision, Tysoe J.A. concluded that the decision of the judge below regarding the ownership of some equipment was not an order "made under" the *CCAA*, notwithstanding that the order resulted from an application styled as brought in a *CCAA* proceeding involving Redcorp and related companies. Tysoe J.A. wrote, at para. 9: "it does not follow from the fact that the order was made in the *CCAA* proceeding that it was necessarily an order made under the *CCAA*." He continued by observing the judge below "did not rely on any provision of the *CCAA*, and the determination of the issue in question was not incidental to any order made under the *CCAA*." Tysoe J.A. went on to state, at para. 11:

It was a decision made under general law and the *Sale of Goods Act*, and while the decision may have been made within the *CCAA* proceeding as a matter of convenience, it was a decision that was made independently of the provisions of the *CCAA* and the *BIA* and of any order previously made under the *CCAA*.

26 Those statements must be understood in the specific factual context in which they were made. In *Sandvik Mining*, the debtor companies had secured an initial order under the *CCAA* in March 2009. Two months later, a judge lifted the stay of proceedings against certain creditors, appointed an interim receiver over some of the debtors' assets, and discharged the monitor from most of its duties. A month after that, the debtors were assigned into bankruptcy. Almost two years later, the receiver brought its application seeking a declaration regarding the ownership of the equipment and styled the application as one brought in the *CCAA* proceeding. It was against that background that Tysoe J.A. stated, at para. 8:

In my opinion, the order or decision of [the judge below] was not made under the *CCAA*. The efforts to reorganize Redcorp had come to an end, and there was no ongoing attempt to have Redcorp file a plan of arrangement. [The receiver] simply filed its application in the *CCAA* proceeding as a matter of convenience. The fact that [the receiver] was appointed in the *CCAA* proceeding did not require the application to be filed in that proceeding. [The receiver] could have, and more properly should have, commenced a separate proceeding. [The receiver] was not appointed as interim receiver or receiver pursuant to the *CCAA*, but rather pursuant to the *BIA* and the *Law and Equity Act*, R.S.B.C. 1996, c. 253 (while the order lifting the stay undoubtedly had to be made within the *CCAA* proceeding, there is a question in my mind about the appropriateness of appointing receivers within *CCAA* proceedings after the reorganization attempt has failed).

27 *Sandvik Mining*, therefore, involved a case where the *CCAA* proceedings had run their course and failed, but the *CCAA* court file had not yet been closed. The receiver, "as a matter of convenience", took advantage of that state of affairs to bring its application in the *CCAA* court file. The message from the *Sandvik Mining* decision is that where the *CCAA* proceedings have come to an end for all intents and purposes, an order made several years later in a dormant *CCAA* court file may well not be an order "made under" the *CCAA*.

28 Cliffs also relies on the decision in *Monarch Land*, which considered whether an order resulting from a trial of issues was "made under" the *CCAA*, and therefore required leave to appeal. Again, the context of that case explains its result.

29 Sanderson was one of a group of companies that obtained an initial order under the *CCAA*. In those proceedings, a trial of issues was directed. Prior to the trial, the list of issues was expanded. As a result, the trial judge considered two issues: (i) an accounting for sale proceeds as between two of the secured creditors of the debtors; and (ii) the ownership of parking stalls pursuant to an agreement between the debtor and a secured creditor.

30 In respect of the first part of the trial order — dealing with the accounting between two secured creditors — O'Brien J.A. stated, at para. 11:

It is common ground that the accounting issue arises out of a Postponement and Priority Agreement, a separate and distinct agreement between CMI and Monarch. Monarch concedes that this determination, including the limitations issue, "could properly have been made in a normal civil action between Monarch and CMI without any regard to the *CCAA*", and accordingly that no leave is required with respect to that part of the judgment.

31 However, O'Brien J.A. concluded that the part of the trial order disposing of the second issue concerning the ownership of the parking stalls was "made under" the *CCAA*. Distinguishing the case from *Sandvik Mining*, he wrote, at paras. 7 and 8:

Here the order of Horner J., the supervising judge in the *CCAA* proceedings, granted "a trial of an issue ... to determine whether the Purchase and Sale Agreement of December 1, 2010, between [Sanderson] and [Monarch] included parking stalls for the development of phase 3 of the Sanderson project". She lifted the stay in the *CCAA* proceedings specifically for that purpose. It is common ground that the subject Purchase and Sale Agreement was approved by an order made in the *CCAA* proceedings...

In my view, it cannot be said, as it was in *Sandvik*, that "the determination of the issue in question was not incidental to any order made in the CCAA". To the contrary, the issue Horner J directed to trial required the interpretation of an agreement that the court had expressly approved in the CCAA proceedings, and involved the need to interpret the order approving the sale. Both interpretations had a potential impact upon other Sanderson's other creditors in addition to CMI and Monarch.

32 Accordingly, *Sandvik Mining* and *Monarch Land* involved circumstances which lay beyond the boundaries of the usual CCAA proceeding: in *Sandvik Mining*, the CCAA proceeding had run its course long before the order was made, and in *Monarch Land* an issue between two secured creditors was tacked on, as a matter of procedural convenience, to a trial of an issue in the CCAA proceeding. Consequently, I do not think that *Sandvik Mining*'s distinction between an order "made in" a CCAA proceeding and one "made under" the CCAA or *Monarch Land*'s reference to orders that "could properly have been made in a normal civil action" offers general guidance for considering whether leave to appeal is required under s. 13 of the CCAA.

A Purpose-Focused Approach to s. 13 of the CCAA

33 The inquiry, instead, should be purpose-focused. When asked to determine whether an order requires leave to appeal under s. 13 of the CCAA, an appellate court should ascertain whether the order was made in a CCAA proceeding in which the judge was exercising his or her discretion in furtherance of the purposes of the CCAA by supervising an attempt to reorganize the financial affairs of the debtor company, either by way of plan of arrangement or compromise, sale, or liquidation: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter *Century Services*], at para. 59. If the order resulted from such an exercise of judicial decision-making, then it is an order "made under" the CCAA for purposes of s. 13.

34 To aid that purpose-focused inquiry, the case law has identified some indicia about when an order is "made under" the CCAA. In *Sandvik Mining*, Tysoe J.A. stated a court should ask whether the order was "necessarily incidental to the proceedings under the CCAA" or "incidental to any order made under the CCAA": at paras. 9 and 10. In *Monarch Land*, O'Brien J.A. looked at whether the order required the interpretation of a previous order made in the CCAA proceeding or involved an issue that impacted on the restructuring organization of the insolvent companies: at paras. 8 and 15. As mentioned, in *Concrete Equities*, Paperny J.A. stated that s. 13 of the CCAA would apply if "CCAA considerations informed the decision of and the exercise of discretion by the chambers judge" or "if a claim is being prosecuted by virtue of or as a result of the CCAA": at paras. 16 and 17. Finally, additional indicia were identified by this court in *Hemosol Corp., Re*, 2007 ONCA 124 (Ont. C.A.), at para. 3:

In our view, the proceeding before the motion judge and the decision under appeal were conducted and rendered under the CCAA within the meaning of s. 13 and therefore leave to appeal is required. The notice of motion and the reasons of the motion judge explicitly state that the matter is a CCAA proceeding. Directions were sought, amongst other things, to determine rights and requirements of voting in relation to the proposed plan of arrangement. There was no independent originating process to justify any other conclusion. The order determined rights arising under an agreement that arose out of and that was related entirely to the CCAA proceeding.

Application of the Purpose-Focused Approach

35 Applying those principles to the present case, I conclude that the Order was "made under" the CCAA. It was made by the judge supervising an active CCAA proceeding in furtherance of the purposes of the CCAA. The evidence before the CCAA judge disclosed that what, if any, rights Essar possesses under the Contract, which Cliffs purported to terminate on October 5, 2015, is an issue in the CCAA proceeding. In its Sixth Report dated January 11, 2016, the Monitor stated that Essar is preparing a business plan that will form part of the information made available to potential purchasers or investors in its Sale and Investment Solicitation Process ("SISP") recently approved under the CCAA. The Monitor reported: "A key component of the Business Plan is Algoma's raw material supply strategy, and in particular its strategy for the supply of iron ore pellets... In canvassing the iron ore pellet market and finalizing its supply strategy, Algoma needs certainty concerning the status of the Cliffs Contract." Based on that and other evidence, the CCAA judge concluded, at para. 31, that the "claim of Essar Algoma against Cliffs is an asset of the applicants to be dealt with in this Court." See also, *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, 2013 QCCS 5194 (C.S. Que.), at paras. 17 and 19.

36 Cliffs advances two additional reasons about why the Order was not "made under" the *CCAA*. I do not accept either.

37 First, Cliffs submits that the *CCAA* judge did not, on the face of his reasons, rely on a specific section of the *CCAA* to assume jurisdiction. In *Sandvik Mining*, Tysoe J.A. commented that the judge below had not relied on any provision of the *CCAA*. However, it does not follow, as Cliffs submits, that an order is not "made under" the *CCAA* unless the judge expressly relies on a section of the Act in granting the order. In *Century Services*, the Supreme Court of Canada recognized that a judge supervising a *CCAA* proceeding will draw on both statutory authority under the *CCAA* and the court's residual authority under its inherent and equitable jurisdiction in order to decide specific issues that arise during the *CCAA* proceeding. Deschamps J. stated, at para. 65:

I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding...

38 In any event, the *CCAA* judge expressly relied on s. 11 of the *CCAA* in his decision on jurisdiction. He stated, at para. 28:

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

39 Whether or not the *CCAA* judge was correct at law in reaching that conclusion is a matter for consideration by the leave to appeal panel, but is not relevant to the inquiry into the proper route Cliffs must follow to appeal the Order. The *CCAA* judge purported to rely on s. 11 of the *CCAA* in making the Order, so the Order was "made under" the *CCAA*.

40 Second, Cliffs argues that because the contractual claim Essar seeks to assert against Cliffs could properly have been made in a normal civil action without regard to the *CCAA*, the Order was not "made under" the *CCAA*. I do not accept this submission. To decide the appeal route Cliffs must follow, the issue is not what claims Essar could have asserted in some hypothetical proceeding; the issue is how to characterize the Order — was it "made under" the *CCAA*? The purpose-focused inquiry under s. 13 of the *CCAA* must look at the order actually made, not at some order that could have been made in a hypothetical proceeding.

Conclusion

41 For these reasons, I concluded that the Order was "made under" the *CCAA*, and Cliffs therefore required leave to appeal under s. 13 of the *CCAA*.

VI. Order Expediting Leave to Appeal

42 Cliffs' motion for leave to appeal will be heard by a panel of this court on an expedited basis. In the Endorsement, I gave directions that the parties serve and file the completed leave materials no later than Wednesday, February 24, 2016, so that the materials could be placed before the panel on February 25, 2016.

VII. Stay Pending Appeal

43 Cliffs seeks a stay of Essar's Contract Dispute Motion before the *CCAA* judge pending its leave to appeal motion. Essar opposes the request for a stay.

44 As set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.), at p. 334, the three-part test for obtaining a stay pending appeal requires the moving party to demonstrate (a) there is a serious question to be determined on the appeal, (b) the moving party will suffer irreparable harm if the stay is not granted, and (c) the balance of convenience favours granting the stay: *Yaiguaje v. Chevron Corp.*, 2014 ONCA 40, 315 O.A.C. 109 (Ont. C.A.), at para. 3.

A. Serious Question

45 Cliffs has demonstrated that its leave to appeal motion raises a serious question to be determined. Essar conceded as much in its factum when it stated that this was, at best, a "neutral factor." And, at the hearing, Essar advised it was not contesting that the serious question factor had been satisfied. In my view, that was a proper concession to make given the low threshold to meet on this factor. Cliffs' stay motion turns on the other two factors.

B. Irreparable harm

Positions of the parties

46 Cliffs submits if a stay is not issued, it would effectively be deprived of the right to seek leave to appeal because Essar's Contract Dispute Motion would proceed before the *CCAA* judge in the face of Cliffs' jurisdictional challenge.

47 The parties provided an update on what has transpired in that proceeding since the Order was made. Last week, the parties participated in two conference calls with the *CCAA* judge to discuss the procedure by which Essar's Contract Dispute Motion would be adjudicated in the *CCAA* proceeding. Counsel advised that a further videoconference call was scheduled to take place on Wednesday, February 17, 2016 before the *CCAA* judge at which time they expected the judge would render a decision on the adjudication procedure. Cliffs stated it was not participating voluntarily in those scheduling calls, even though it had been permitted to file its procedural proposals with the *CCAA* judge on a without prejudice basis.

48 Cliffs submits that although Essar has undertaken not to treat Cliffs' participation in the scheduling and organization of the Contract Dispute Motion as an attornment to the jurisdiction of the Ontario court, conflicting decisions from this court create the risk that such an undertaking might not be given effect, posing a serious risk to Cliffs' ability to challenge the Ontario court's jurisdiction.

49 In response, Essar argues that a stay is not necessary in light of its agreement to expedite the hearing of Cliffs' motion for leave to appeal and the undertakings it has given on the stay motion.

50 Essar filed an affidavit from its Chief Financial Officer, Rajat Marwah. He deposed that Essar wants the parties to ready themselves for an adjudication of the Contract Dispute Motion. To that end, Essar has proposed to Cliffs that it deliver its responding affidavit evidence on the dispute on "an informal, without- prejudice basis outside the formal bounds of these court proceedings." Essar, in turn, would complete certain documentary disclosure. Mr. Marwah provided the court with three undertakings in order to permit Cliffs to exercise its appeal rights while enabling preparation to continue on the Contract Dispute Motion:

- (i) Cliffs would not be required to file in the *CCAA* court any affidavit or other material delivered in preparation for the contract dispute hearing;
- (ii) Essar undertakes not to argue that the delivery of such materials by Cliffs or the taking of any steps toward a hearing of Essar's motion would amount to an act of attornment to the jurisdiction of the Ontario court; and
- (iii) Essar would not invoke the jurisdiction of the Ontario court until Cliffs' appeal or motion for leave to appeal has been decided.

Analysis

51 Over the past decade, judges of this court sitting in Chambers on stay motions have expressed different views about whether a party risks attorning to the jurisdiction of the Ontario court by performing court-ordered procedural steps in the face of the party's on-going challenge to the court's jurisdiction. Some decisions have viewed such participation as risking attornment, thereby creating some risk of irreparable harm: *M.J. Jones Inc. v. Kingsway General Insurance Co.* (2004), 72 O.R. (3d) 68, 242 D.L.R. (4th) 139 (Ont. C.A. [In Chambers]), at paras. 27-31; *Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC*,

2014 ONCA 546, 122 O.R. (3d) 472 (Ont. C.A.), at paras. 29-36. On the other hand, in *Van Damme v. Gelber*, 2013 ONCA 388, 115 O.R. (3d) 470 (Ont. C.A.), at paras. 21-23, the court minimized any such risk from court-ordered participation, and in *Yaiguaje v. Chevron Corp.*, at para. 11, MacPherson J.A. regarded any risk as a weak factor in the irreparable harm analysis.

52 I need not express a view on the effect of court-ordered participation in a proceeding on a party's ability to continue to advance a jurisdictional challenge because decisions of this court uniformly have held that where the responding party provides the court with undertakings of the kind given by Essar in this case, the undertakings significantly reduce or remove the risk of irreparable harm.

53 In *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2011 ONCA 620, 283 O.A.C. 321 (Ont. C.A. [In Chambers]), at para. 14, Laskin J.A. described the undertakings given by BTR:

BTR wants to proceed with the Ontario action. It is content to have LBIE deliver a statement of defence without filing it with the court. It undertakes not to argue that delivery of the statement of defence or participation in examinations for discovery constitute acts of attornment. BTR also undertakes not to invoke the jurisdiction of the Ontario court, by, for example, a motion for summary judgment, while LBIE's leave motion is outstanding.

[Emphasis added.]

54 Laskin J.A. did not consider the delivery of a statement of defence or participation in discoveries outside of the "formal bounds" of the court proceedings as amounting to attornment: at para. 31. Similar undertakings given in *Yaiguaje v. Chevron Corp.*, led MacPherson J.A., at paras. 11 and 16, to follow the decision in *BTR Global* and conclude that the moving parties had made a very weak showing that they would suffer irreparable harm.

55 In light of the undertakings given by Essar to the court in the present case, I conclude that Cliffs have not demonstrated that they would suffer irreparable harm if a stay pending appeal is not granted.

C. Balance of convenience

56 Both parties point to some "big picture" factors as tipping the balance of convenience in their favour. Cliffs contends that Essar will not suffer any prejudice should a stay not issue because to date it has found sufficient quantities of replacement iron ore pellets. As well, Essar did not pursue its critical supplier motion in the *CCAA* proceeding.

57 On its part, Essar stresses the need for an expedited determination of the contract dispute in light of the end of April deadline for bids under the SISP process. Essar also advises that the Chapter 15 court in Delaware has deferred Cliffs' motion to lift the *CCAA* stay until the jurisdiction issue is resolved.

58 Although these factors are relevant to the determination of which party will suffer the greater harm from the granting or refusal of a stay, in my view the most significant factor is much narrower in scope. While the parties did not file on this stay motion the procedural proposals they have presented to the *CCAA* judge, Essar advises that neither proposal contemplates Cliffs delivering any materials over the next two weeks. Instead, during that time Essar will be required to deliver certain productions.

59 In those circumstances, the balance of convenience favours granting a stay. I have ordered Cliffs' leave to appeal motion to be expedited. As a result, within the next two weeks the leave motion will be placed before a panel of this court for determination. If leave is not granted, the Contract Dispute Motion can proceed on the merits with little delay in preparation having occurred. If leave to appeal is granted, then the leave panel will consider whether or not to continue the stay.

D. Conclusion

60 In *BTR Global*, Laskin J.A. stated, at para. 16, that the three components of the stay test "are interrelated in the sense that the overriding question is whether the moving party has shown that it is in the interests of justice to grant a stay." In my view, the most significant factor affecting the interests of justice is the balance of convenience. It favours granting a stay. I therefore granted a stay in the terms set out in para. 3 of the Endorsement:

As to that part of Cliffs' motion which seeks a stay of Essar's contract motion before the *CCAA* judge pending its exercise of appeal rights in respect of the Order, I grant a stay of Essar's contract motion until such time as the panel of this court disposes of Cliffs' motion for leave to appeal. If the panel grants leave to appeal, the panel may consider whether or not to continue the stay based upon the stay motion materials already filed with the court.

61 Having granted a stay, I went on to state in para. 4 of the Endorsement:

Of course, nothing in this endorsement prevents Cliffs from voluntarily taking steps to prepare for an adjudication of the contract dispute with Essar, without prejudice to its argument that the Superior Court of Justice of Ontario lacks the jurisdiction to adjudicate that dispute. As part of such voluntary steps, it is always open to Cliffs to request, on a voluntary, without prejudice basis, the informal assistance of the *CCAA* judge on any hearing planning or preparation issues, and it is always open to the *CCAA* judge to provide any such requested informal assistance on a without prejudice basis.

VIII. Disposition

62 For the reasons set out above, I ordered (i) Cliffs to seek leave to appeal the Order under s. 13 of the *CCAA*, (ii) the hearing of the leave to appeal motion be expedited, and (iii) the issuance of a stay pending the disposition of the leave to appeal motion in the terms set out in para. 3 of the Endorsement.

Motion granted; cross-motion granted.

TAB 4

2001 CarswellOnt 1742
Ontario Court of Appeal

Algoma Steel Inc., Re

2001 CarswellOnt 1742, [2001] O.J. No. 1943, 105 A.C.W.S. (3d) 585, 147 O.A.C. 291, 25 C.B.R. (4th) 194

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT
ACT, R.S.C. 1985, c. C-36 AND THE BUSINESS CORPORATIONS
ACT, R.S.O. 1990, c. B.16; AND IN THE MATTER OF A PROPOSED
PLAN OF ARRANGEMENT WITH RESPECT TO ALGOMA STEEL
INC.; ALGOMA STEEL INC. (Applicant/Responding Party)**

Osborne A.C.J.O., Doherty, MacPherson JJ.A.

Heard: May 18, 2001
Judgment: May 25, 2001
Docket: CA M27359

Proceedings: Refusing leave to appeal from [2001 CarswellOnt 1999](#), (April 23, 2001), Doc. 01-CL-4115 (Ont. S.C.J. [Commercial List]); refusing leave to appeal (April 23, 2001), Doc. 01-CL-4115 (Ont. S.C.J. [Commercial List])

Counsel: *John B. Laskin, David Outerbridge*, for Moving Party, First Mortgage Noteholders
Michael Barrack, Geoff Hall, Sarit Batner, for Responding Party, Algoma Steel Inc.
John T. Porter, Alan Merskey, Mario Forte, for DIP Lenders
Ken Rosenberg, Lily Harmer, Marcus Knapp, for United Steelworkers of America
James H. Grout, for Monitor
Andrew Hatnay, for Superintendent of Financial Services
Michael Weinczok, for Directors of Algoma Steel Inc.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.d Effect of arrangement](#)

[XIX.3.d.i General principles](#)

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General

Creditors held \$550-million mortgage on corporation — Corporation entered into arrangement with creditors under Companies' Creditors Arrangement Act — Corporation's ex parte motion for authorization to obtain additional financing was allowed — Order gave certain other charges priority over creditors' charges — Creditors brought application for leave to appeal — Application dismissed — Motion judge's order contained comeback clause that creditors were using in alternate proceedings — Proceedings were urgent, complex and dynamic and required immediate resolution — Appeals under Act should be limited — Appeal would be premature — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered:

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

Statutes considered:

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

Generally — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 13 — pursuant to

APPLICATION for leave to appeal from judgment respecting mortgage arrangement, 2001 CarswellOnt 1999 (Ont. S.C.J. [Commercial List]).

Endorsement. *Per curiam*:

1 The First Mortgage Noteholders ("the Noteholders") seek leave to appeal, pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("the CCAA"), from the order of Farley J. dated April 23, 2001 [2001 CarswellOnt 1999 (Ont. S.C.J. [Commercial List])]. The Noteholders are a consortium of about a dozen companies and groups which holds first mortgage notes totalling about \$550 million issued by the respondent Algoma Steel Inc. ("Algoma").

2 Farley J.'s order was an initial order made pursuant to s. 11(3) of the CCAA, on a motion by Algoma. It was made without notice to the Noteholders. The essence of Farley J.'s order was an authorization to Algoma to obtain additional financing ("the DIP Financing") from its existing bank lenders during the 30 day stay period permitted by s. 11(3) of the CCAA. The purpose of the order was to respond, on an urgent and interim basis, to a serious negative cash flow crisis at Algoma. Indeed, without short-term financial assistance designed to serve as a base for restructuring Algoma's current indebtedness, Algoma might well have had to cease operations. The order also gave priorities (which the parties call superpriorities) to the DIP Financing charge and to certain Administration and Directors Charges over the Noteholders' existing security.

3 In his endorsement, Farley J. said, *inter alia*:

Algoma qualifies as a corporation with the threshold debt re seeking relief under the CCAA.

.....

The noteholders who are owed in excess of \$1/2 billion were not represented today for the very simple reason that none of them were served. The reason for that as I understand it is that there is no set up at the present time of a Creditor's Committee or any equivalent. *I note that there is a comeback clause and I would particularly emphasize that if it is felt appropriate and needed, this clause should be used on a timely basis.*

Order to issue as per my fiat.

[Emphasis added.]

4 The comeback clause in the underlined passage is reflected in paragraph 48 of Farley J.'s order:

48. THIS COURT ORDERS that any interested person may apply to this court to vary or rescind this order or seek other relief upon seven (7) days' notice to the Applicant, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this court may order.

5 Once the Noteholders became aware of Farley J.'s order, they decided to challenge it. They did so in two ways: by seeking leave to appeal to this court and by initiating a motion to vary before Farley J. The former proceeded before this court, on a preliminary basis, on May 15 and, on the merits, on May 18. The latter was scheduled to be heard by Farley J. on May 23.

6 The Noteholders seek leave to appeal Farley J.'s order on three bases, which they frame as Proposed Questions for this court:

- (1) Did the motions judge exceed his jurisdiction in making the initial order by altering existing priorities of and between secured creditors through the granting of superpriorities without the consent of the First Mortgage Noteholders?
- (2) Did the motions judge exceed his jurisdiction or otherwise err in law by granting these superpriorities without any notice to the First Mortgage Noteholders or to the trustee under the trust indenture?
- (3) Did the motions judge err in law by failing: (a) to treat the First Mortgage Noteholders in an equitable and even-handed manner relative to the Bank Lenders; and (b) to give due regard to the prejudice suffered by the First Mortgage Noteholders as a result of the initial order?

7 In our view, the motion for leave to appeal is premature. Initial orders, made on a without notice basis, are specifically authorized by s. 11(1) of the *CCAA*. Proceedings under the *CCAA* are often urgent, complex and dynamic. The Algoma proceedings fit that description. Farley J. was faced with complex facts and a difficult decision potentially implicating the closure of one of the largest companies in Ontario. Moreover, he had to make his decision in a very timely fashion. In these circumstances, he recognized that his initial order might not be acceptable to all interested parties, including some of Algoma's creditors. That is why he included a comeback clause in his order and specifically invited parties to resort to it in his endorsement.

8 The fact that the *CCAA* provides that an appeal of an initial order is only available with leave indicates that appeals in *CCAA* proceedings should be limited. An appeal court should be cautious about intervening in the *CCAA* process, especially at an early stage. On this point, we are attracted to the reasoning of MacFarlane J.A. (in chambers) in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 ((B.C. C.A. [In Chambers])) , at 272:

[T]here may be an arguable case for the petitioners to present to a panel of this court on discrete 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. . . .

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.

. . . 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 appellant 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.

9 Like MacFarlane J.A., we do not say that leave to appeal should never be granted in the midst of *CCAA* proceedings. However, it is premature to grant such leave at this juncture in the Algoma proceedings. Farley J.'s order was only an initial order brought on an urgent basis to deal with seemingly desperate circumstances. Moreover, the order specifically opened the proceedings to all interested parties and invited dissatisfied parties to bring their concerns to the court on a timely basis. The Noteholders availed themselves of this opportunity by initiating a motion to vary which was scheduled to be heard on the very day the initial order expired. In our view, this is precisely how a dynamic *CCAA* proceedings should unfold. Accordingly, it would be unwise to interrupt this normal and desirable process by granting leave to appeal at this juncture. The issues that the Noteholders want to raise can be considered by Farley J., importantly in the context of the entire proceedings with which he is familiar. Moreover, if at a later point in time this court grants leave to appeal, it will then have the benefit of the considered reasons of the motions judge flowing from a complete record and from full argument by all interested parties.

10 For these reasons, the motion for leave to appeal is dismissed, without prejudice to the right of the Noteholders, or any other interested party, to make a similar motion at a later juncture in the proceedings, and to do so on an expedited basis. Only the United Steelworkers of America requested their costs of the motion. They are entitled to their costs which we would fix at \$1000.

Application dismissed.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 5

Most Negative Treatment: Leave to appeal allowed

Most Recent Leave to appeal allowed: [AbitibiBowater Inc., Re](#) | 2010 CarswellQue 11963, 2010 CarswellQue 11964, 413 N.R. 397 (note) | (S.C.C., Nov 25, 2010)

2010 QCCA 965
Cour d'appel du Québec

AbitibiBowater Inc., Re

2010 CarswellQue 4782, 2010 QCCA 965, 190 A.C.W.S. (3d) 9, 52
C.E.L.R. (3d) 1, 68 C.B.R. (5th) 57, J.E. 2010-963, EYB 2010-174149

**Her Majesty the Queen in right of the province of Newfoundland and Labrador,
Petitioner-Petitioner, v. AbitibiBowater Inc. and others, Respondents-Debtors,
and Ernst & Young Inc., Impleaded Party-Monitor, and Ad Hoc Committee
of the Senior Secured Noteholders and U.S. Bank National Association,
Indenture Trustee for the Senior Secured Noteholders, Impleaded Parties**

Chamberland J.A.

Heard: May 12, 2010

Judgment: May 18, 2010

Docket: C.A. Montréal 500-09-020594-107

Proceedings: refused leave to appeal *AbitibiBowater inc., Re* (2010), 2010 QCCS 1261 (C.S. Que.)

Counsel: Mr. David R. Wingfield, Mrs. Catherine Powell, for Petitioner

Mr. Sean F. Dunphy, Mr. Joseph Reynaud, for Respondents

Mr. Robert I. Thornton, Mtre Gilles Paquin, for Ernst & Young Inc.

Mr. Fred Myers, Mtre Jean-Yves Simard, for the Ad Hoc Committee of Bondholders

Mtre Vanessa Jodoin, for the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association,
Indenture Trustee for the Senior Secured Noteholders

Subject: Insolvency; Environmental

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.4 Appeals](#)

Environmental law

[III Statutory protection of environment](#)

[III.2 Approvals, licences and orders](#)

[III.2.g Water](#)

[III.2.g.i General principles](#)

Headnote

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

Pulp and paper company had carried on industrial activities at several locations in province of Newfoundland and Labrador between 1905 and 2008 — In December 2008, company announced closure of its last remaining mill operation in province — Company experienced financial difficulties and placed itself under protection of Companies' Creditors Arrangement Act (CCAA) — Initial order was extended and claims procedure order (CPO) was issued for purpose of setting up claims procedure for company's creditors — Province, acting pursuant to Environmental Protection Act, issued five ministerial orders requiring

company to perform, at its own expense, remediation actions with respect to sites where company had previously carried on its industrial activities — Province brought motion seeking declaration that orders were affected by neither CPO nor CCAA proceedings, and company contested motion, asserting that orders were stayed by stay of proceedings issued in initial order — Motion judge held that orders were financial in nature, should be treated as claims in CCAA proceedings and should be subject to compromise — Thus, province's motion was dismissed and company's conclusions were granted, albeit in part — Province brought motion for leave to appeal from judgment — Motion dismissed — Court applied test put forward by jurisprudence, and burden of proof rested on province — However, constitutional issues raised by province were irrelevant regarding true nature of orders — Motion judge had jurisdiction to determine nature of orders without being bound to form in which province had clothed its position — Motion judge did not immunize company from compliance with orders but merely characterized them in context of restructuring process — Motion judge's conclusion that orders were in substance financial in nature was finding of fact, thus unassailable — Appellate courts should be cautious about intervening in CCAA process, especially when restructuring process could be jeopardized — Therefore, appeal contemplated by province had no reasonable chance of success and leave to appeal should be denied.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Land — General principles
Pulp and paper company had carried on industrial activities at several locations in province of Newfoundland and Labrador between 1905 and 2008 — In December 2008, company announced closure of its last remaining mill operation in province — Company experienced financial difficulties and placed itself under protection of Companies' Creditors Arrangement Act (CCAA) — Initial order was extended and claims procedure order (CPO) was issued for purpose of setting up claims procedure for company's creditors — Province, acting pursuant to Environmental Protection Act, issued five ministerial orders requiring company to perform, at its own expense, remediation actions with respect to sites where company had previously carried on its industrial activities — Province brought motion seeking declaration that orders were affected by neither CPO nor CCAA proceedings, and company contested motion, asserting that orders were stayed by stay of proceedings issued in initial order — Motion judge held that orders were financial in nature, should be treated as claims in CCAA proceedings and should be subject to compromise — Thus, province's motion was dismissed and company's conclusions were granted, albeit in part — Province brought motion for leave to appeal from judgment — Motion dismissed — Court applied test put forward by jurisprudence, and burden of proof rested on province — However, constitutional issues raised by province were irrelevant regarding true nature of orders — Motion judge had jurisdiction to determine nature of orders without being bound to form in which province had clothed its position — Motion judge did not immunize company from compliance with orders but merely characterized them in context of restructuring process — Further, motion judge's conclusion that orders were in substance financial in nature was finding of fact, thus unassailable — Furthermore, appellate courts should be cautious about intervening in CCAA process, especially when restructuring process could be jeopardized — Therefore, appeal contemplated by province had no reasonable chance of success and leave to appeal should be denied.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Appels

Papetière avait poursuivi des activités industrielles en plusieurs endroits de la province de Terre-Neuve-et-Labrador entre 1905 et 2008 — En décembre 2008, la papetière a annoncé la fermeture de sa dernière usine encore en exploitation dans la province — Papetière a connu des difficultés financières et s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Ordonnance initiale a été prolongée et une ordonnance portant sur la procédure relative aux réclamations (OPPR) a été émise dans le but de mettre en place une procédure relative aux réclamations des créanciers de la papetière — Province, agissant sous le régime de la Environmental Protection Act, a émis cinq arrêtés ministériels exigeant de la papetière qu'elle exécute, à ses propres frais, la remise en état des endroits où la papetière avait auparavant poursuivi ses activités industrielles — Province a déposé une requête visant à faire déclarer que les arrêtés n'étaient visés ni par la OPPr ni par les procédures relatives à la LACC, et la papetière a contesté la requête en faisant valoir que l'exécution des arrêtés était suspendue en raison de la suspension des procédures ordonnée dans l'ordonnance initiale — Juge de la requête a statué que la nature des arrêtés était d'ordre financier, que les arrêtés devraient être traités comme des réclamations dans le cadre des procédures de restructuration et devraient être assujettis à un compromis — Ainsi, la requête de la province a été rejetée et les conclusions recherchées par la papetière ont été accueillies, quoiqu'en partie — Province a déposé une requête pour permission d'appeler à l'encontre du jugement — Requête rejetée — Tribunal a appliqué le test mis de l'avant par la jurisprudence, et le fardeau de la preuve appartenait à la province — Toutefois, les questions constitutionnelles soulevées par la province étaient sans pertinence en regard de la véritable nature des arrêtés — Juge de la requête avait la compétence pour déterminer la nature des arrêtés sans se

sentir limité par la description qu'en faisait la province dans son argumentaire — Juge de la requête n'a pas permis à la papetière de se libérer de ses obligations découlant des arrêtés mais a tout simplement placé ces arrêtés dans le contexte d'un processus de restructuration — Conclusion du juge de la requête à l'effet que la nature des arrêtés était d'ordre financier constituait une conclusion de fait, et à ce titre elle était inattaquable — Tribunaux d'appels devraient faire preuve de prudence avant d'intervenir dans le cadre d'un processus de restructuration, surtout lorsque ce processus pourrait être mis en péril — Par conséquent, l'appel envisagé par la province n'avait aucune chance raisonnable de succès et la permission d'appeler ne devrait pas être accordée.

Droit de l'environnement --- Protection accordée par la loi à l'environnement — Autorisations, permis et ordonnances — Terrain — Principes généraux

Papetière avait poursuivi des activités industrielles en plusieurs endroits de la province de Terre-Neuve-et-Labrador entre 1905 et 2008 — En décembre 2008, la papetière a annoncé la fermeture de sa dernière usine encore en exploitation dans la province — Papetière a connu des difficultés financières et s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Ordonnance initiale a été prolongée et une ordonnance portant sur la procédure relative aux réclamations (OPPR) a été émise dans le but de mettre en place une procédure relative aux réclamations des créanciers de la papetière — Province, agissant sous le régime de la Environmental Protection Act, a émis cinq arrêtés ministériels exigeant de la papetière qu'elle exécute, à ses propres frais, la remise en état des endroits où la papetière avait auparavant poursuivi ses activités industrielles — Province a déposé une requête visant à faire déclarer que les arrêtés n'étaient visés ni par la OPPR ni par les procédures relatives à la LACC, et la papetière a contesté la requête en faisant valoir que l'exécution des arrêtés était suspendue en raison de la suspension des procédures ordonnée dans l'ordonnance initiale — Juge de la requête a statué que la nature des arrêtés était d'ordre financier, que les arrêtés devraient être traités comme des réclamations dans le cadre des procédures de restructuration et devraient être assujettis à un compromis — Ainsi, la requête de la province a été rejetée et les conclusions recherchées par la papetière ont été accueillies, quoiqu'en partie — Province a déposé une requête pour permission d'appeler à l'encontre du jugement — Requête rejetée — Tribunal a appliqué le test mis de l'avant par la jurisprudence, et le fardeau de la preuve appartenait à la province — Toutefois, les questions constitutionnelles soulevées par la province étaient sans pertinence en regard de la véritable nature des arrêtés — Juge de la requête avait la compétence pour déterminer la nature des arrêtés sans se sentir limité par la description qu'en faisait la province dans son argumentaire — Juge de la requête n'a pas permis à la papetière de se libérer de ses obligations découlant des arrêtés mais a tout simplement placé ces arrêtés dans le contexte d'un processus de restructuration — Conclusion du juge de la requête à l'effet que la nature des arrêtés était d'ordre financier constituait une conclusion de fait, et à ce titre elle était inattaquable — Tribunaux d'appels devraient faire preuve de prudence avant d'intervenir dans le cadre d'un processus de restructuration, surtout lorsque ce processus pourrait être mis en péril — Par conséquent, l'appel envisagé par la province n'avait aucune chance raisonnable de succès et la permission d'appeler ne devrait pas être accordée.

Table of Authorities

Cases considered by *Jacques Chamberland J.A.*:

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

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Statutes considered:

Abitibi-Consolidated Rights and Assets Act, S.N. 2008, c. A-1.01

Generally — referred to

Code de procédure civile, L.R.Q., c. C-25

art. 95 — considered

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

Generally — referred to

s. 13 — pursuant to

s. 14 — pursuant to

Environmental Protection Act, S.N. 2002, c. E-14.2

Generally — referred to

s. 99 — considered

s. 102(2) — considered

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612

Chapter 11 — referred to

MOTION by province, seeking leave to appeal from judgment reported at *AbitibiBowater inc., Re* (2010), 2010 QCCS 1261, 2010 CarswellQue 2812 (C.S. Que.), dismissing province's motion seeking declaration that environmental orders were not affected by process under *Companies' Creditors Arrangement Act*.

Jacques Chamberland J.A.:

1 I am seized, as a judge in chambers, of a motion by petitioner Her Majesty the Queen in the Right of the Province of Newfoundland and Labrador (the "Province") for leave to appeal from a judgment rendered by Gascon J. of the Quebec Superior Court, on March 31, 2010, under the *Companies' Creditors Arrangement Act* (R.S. Canada, 1985, c. C-36, as amended) (the "CCAA").¹

2 The respondents ("Abitibi") form one of the world's largest publicly traded pulp and paper manufacturers.

3 From approximately 1905 to the end of 2008, it carried on extensive industrial activities at several locations in the province of Newfoundland and Labrador: mining and processing of minerals, at Buchans; pulp and paper operations, at Grand Falls-Windsor and Stephenville; shipping and storing, at Botwood; and logging camps at many different locations across the province.

4 On December 4, 2008, Abitibi announced the closure of its last remaining mill operation in the province, that located at Grand Falls-Windsor; the mill closure was scheduled to be effective March 2009.

5 On December 16, 2008, the Province introduced and passed the *Abitibi-Consolidated Rights and Assets Act* (S.N.L. 2008, c. C-A-1.01) (the "*Abitibi Act*"), the purpose of which was, as summarized by the judge of first instance (at par. 54), a) to seize with immediate effect substantially all of the assets, property and undertakings of Abitibi in the province, b) to cancel substantially all outstanding water and hydroelectric contracts and agreements between Abitibi and the Province, c) to cancel pending legal proceedings of Abitibi against the Province in respect of water rights, d) to deny Abitibi any compensation for the seized assets and, finally, e) to deny Abitibi access to the courts to seek redress.²

6 In April 2009, Abitibi filed a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement ("NAFTA") for the losses allegedly arising from this confiscation effected by the Province.³

7 Abitibi also filed for protection under the CCAA.

8 On April 17, 2009, the Quebec Superior Court issued an initial order (the "Initial Order") pursuant to the CCAA with respect to Abitibi. The initial stay of proceedings has been extended a few times since, and more recently to June 18, 2010.

9 During the restructuring process undertaken as a result, a First Stay Extension Order was issued on May 14, 2009 and a Claims Procedure Order (the "CPO") on August 26, 2009, the purpose of the CPO being to set up a claims procedure for Abitibi's creditors.

10 On June 12, 2009, the Province asked Abitibi to provide certain reports for the Abitibi sites, including environmental site assessment reports. On June 18, 2009, Abitibi replied that the request would remain under consideration in light of the *Abitibi Act*, the Initial Order issued under the CCAA and another pending ministerial order concerning the Buchans site. In July 2009, the Province's attorneys retained the services of environmental consultants to undertake environmental site assessments at the sites. On September 3, 2009, Abitibi and the Province entered into an agreement whereby the former would provide access

to the sites to the environmental consultants for the purpose of conducting the assessments envisaged, subject to a number of conditions.

11 On October 16, 2009, the Province filed a Motion for a Declaration that the Petitioner is entitled to Access the Electronic Data Rooms Created by the Debtors (the "Data Room Motion"), the result of which is summarized by the judge of first instance in the judgment *a quo*:

[72] In that motion, the Province alleged that it needed to access the electronic data rooms of Abitibi to properly assess its financial status and make informed decisions in the restructuring. It maintained that it had a duty to inform itself of the present and future potential ability of Abitibi to cover the Province's claims.

[73] In particular, the Province argued that Abitibi was responsible towards it for alleged environmental contamination from the mine located in Buchans. Relying on numerous media reports that it then filed in the record, the Province claimed that because of Abitibi's economic activities, the latter had exposed itself to many environmental obligations, the precise extent of which remained unclear.

[74] The Province notably alleged that it had incurred significant costs in that regard. It added, furthermore, that agreements had been entered into for the Province's environmental consultants to have access to the sites for the purpose of determining the full nature and extent of Abitibi's environmental obligations.

[75] On November 9, 2009, the Court dismissed the Data Room Motion with costs. The Province did not appeal that ruling.

[76] The Court notably concluded that the Province had not yet provided reasonable and convincing evidence in support of its alleged status of potential creditor for environmental problems resulting from Abitibi's economic activities.

[77] The Court emphasized that the Province wanted access to the electronic data rooms not to enhance the restructuring process, but to assess the extent of Abitibi's present and future ability to cover its undetermined and potential environmental claims that had yet to be filed in the claims process:

[88] Lastly, the alleged legitimate public interest relied upon by the Province is not in furtherance of the purposes of the *CCAA*. It is, to the contrary, in furtherance of the Province's own interest of determining the real value of its potential claims that are yet to be established.

[89] Put otherwise, the Province wants to have access to the electronic data rooms to better evaluate whether Abitibi's pockets will, one day, be deep enough.

12 In November 2009, the Province's environmental consultants issued the reports setting out the results of their environmental site assessment reports.⁴

13 On November 12, 2009, the Minister of Environment and Conservation of the Province, acting pursuant to *The Environmental Protection Act*, S.N.L. 2002, C-E-14.2, section 99 (the "*EPA*"), issued five Ministerial Orders against Abitibi (the "*EPA Orders*"), which the judge of first instance summarizes as follows:

[15] The *EPA Orders* were in relation to five (5) sites located in Newfoundland and Labrador ("*NL*") where Abitibi had carried on industrial activities at different times between 1905 and 2008. In essence, they purported to order Abitibi to perform, at its own expense, the following:

a) the submission for approval by the Province, by January 15, 2010, of a detailed Remediation Action Plan for all sites identified as allegedly having exceedances greater than the applicable limits;

b) the completion of the approved site remediation actions by January 15, 2011, or by another date as may be agreed upon with the Province's Department of Environment and Conservation ("ENVC"); and

c) the closure of all landfills and lagoons/impoundments associated with each site by January 15, 2011.

14 On the very same day, the Province served the Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act (the "EPA Motion"), the conclusions of which read as follows in its amended version of February 15, 2010:

GRANT this amended motion for a declaration regarding orders issued pursuant to the *Environmental Protection Act*, S.N.L. 2002, chap. E-14.02.

DECLARE that the Claims Procedure Order shall not bar, extinguish or otherwise affect the enforceability of orders made against the Debtors, the Property or the Directors (all as defined in the Initial Order) or others, by Her Majesty the Queen in Right of the Federal or a provincial government, or her agents, pursuant to her exercise of powers, rights or duties in relation to matters involving public health, safety, security, public order or the environment, provided that any financial or monetary fines or orders may be affected by the Claims Procedure Order.

DECLARE that, for greater certainty, that the orders issued by the Minister against Abitibi on 12 November 2009 pursuant to s. 99 of the EPA are not barred or extinguished and their enforceability is not otherwise affected by the Claims Procedure Order and, in particular, but without limiting the generality of the foregoing, by paragraphs 3(1) and 15 of that order.

EXEMPT, if applicable, the Petitioner from having to serve this motion and from any notice or delay of presentation.

GRANT such further and other relief as this Court deems just and proper.

GRANT the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

THE WHOLE WITHOUT COSTS, save and except in case of contestation.

15 For the Province, the EPA orders are in relation to the environment. They are not financial or monetary fines or orders and cannot qualify as "Claims" under the CCAA. They simply require Abitibi to take steps to comply with its statutory obligations under the Province's *EPA*. As such the EPA Orders fall within the ambit of the First Stay Extension Order (par. 10.1) and are neither stayed nor subject to the claims process. In the alternative, if the judge intended for the CPO to nevertheless bar, extinguish or otherwise affect the enforceability of orders like the EPA Orders, he would be acting outside its statutory jurisdiction. In other words, to the extent that the CPO affects the enforceability of the EPA Orders it is constitutionally ineffective.

16 In regard to this alternative constitutional argument the Province served a Notice of Intention pursuant to Article 95 of the *Quebec Code of Civil Procedure* to the Attorney General for Canada and all the other provinces:

[25] In that regard, the Province served a Notice of Intention pursuant to Article 95 *C.C.P.* to the Attorney Generals for Canada and all the other provinces, indicating that it was hereby seeking a declaration that:

(1) a court vested with jurisdiction over a company pursuant to the *CCAA* does not possess the constitutional competence to exercise a statutory or discretionary power to bar or extinguish liabilities, obligations or duties owed to a province arising out of laws enacted by its legislature pursuant to s. 92 of the *Constitution Act, 1867*, save and except to the extent that the liability, obligation or duty is a "claim provable" within the meaning of s. 2 of the *BIA*;

(2) a court vested with jurisdiction over a company pursuant to the *CCAA* does not possess the constitutional competence to exercise a statutory or discretionary power to fetter the discretion of a Minister of a provincial Crown under a law validly enacted by that province; and

(3) the Quebec Superior Court does not have the constitutional competence to exercise a statutory or discretionary power under the *CCAA* to bar the enforcement of or to extinguish the non-monetary EPA Orders issued by the Province or to fetter the discretion of the Minister under the *EPA*.⁵

17 As a result of this Notice of Intention, the Province of British-Columbia intervened to support the EPA Motion; the other Attorneys General did not.

18 The EPA Motion was contested by Abitibi, which not only asked for its dismissal but also sought itself a declaration confirming that:

(a) the EPA Orders are stayed by the stay of proceedings issued in the Initial Order and are not subject to the narrow exception provided at paragraph 10.1 of the First Stay Extension Order; and

(b) the Province's filing of any claim based in whole or in part on the EPA Orders is now barred by paragraph 15 of the Claims Procedure Order, such that no extension of the Claims Bar Date should be granted to allow the latter to file a claim on that basis in the claims process.

19 Abitibi's position was supported by key groups of its creditors and by the Impleaded Party (the "Monitor") who, however, did not express any view on the issue of the extension, if any, of the claims bar date for the benefit of the Province.

20 The Motion was heard by Gascon J. on February 24, 25 and 26, 2010.

21 The judgment *a quo* was rendered on March 31, 2010. It is 312 paragraphs long. The questions to be resolved are identified at par. 125 of the judgment *a quo*:

[125] Based on this review of the motion at issue, the positions of the parties involved, and the applicable factual background and legal framework, the questions to be resolved in this case can be summarized as follows:

a) what is the true nature of the EPA Orders? Are they orders issued in regard of statutory non-monetary obligations of Abitibi or orders that are in substance financial or monetary in nature?

b) if the EPA Orders are orders issued in regard of statutory non-monetary obligations of Abitibi, does the Court have either the statutory jurisdiction or constitutional authority to include them in the definition of "Claim" found in the Claims Procedure Order?

.

22 Gascon J.'s reasoning is summarized at paragraph 127-139:

[127] Contrary to Abitibi, the Province and the HMQBC did not put much emphasis on the factual context relevant to the questions at issue. With all due respect to their position, the Court considers that this case must, in the end, be decided first and foremost taking into consideration the particular fact pattern in dispute.

[128] To that end, nobody truly contests that in facilitating the conclusion of an arrangement under the *CCAA*, the Court has jurisdiction to subject "claims" to a claims process and to determine who Abitibi's "creditors" might be in that regard. In doing so, the Court can certainly seek to uncover the true nature of the EPA Orders. Their proper characterization is within the jurisdiction of the Court.

[129] Despite being framed as "regulatory orders", the EPA Orders have the effect of compelling Abitibi to expend material sums of money to remediate property that it either no longer owns or no longer uses in its business, while having little or no net value to Abitibi and its stakeholders.

[130] In the Court's opinion, based on the evidence filed in the record, the EPA Orders are in substance financial or monetary in nature. Consequently, they are not exempted from the First Stay Extension Order or the Claims Procedure Order.

[131] As a result, the monetary consequences of these orders should be treated as claims in these *CCAA* proceedings. Such claims shall be subject to compromise and the Province, if it asks and is allowed to file a late proof of claim in this respect, shall be entitled to participate in the negotiation of, and to receive its pro-rata distribution under, any plan of arrangement to be filed by Abitibi.

[132] There is, accordingly, no basis in fact or in law to grant the conclusions sought in the EPA Motion. This would have the effect of giving the Province a preference over other creditors, which is simply unacceptable.

[133] To reach this conclusion, the Court relies on many considerations, including:

- The provisions of the *CCAA*;
- The true nature and impact of the EPA Orders;
- The factual context of their issuance and their content;
- The Province's behavior prior and after their issuance;
- The EPA and the applicable case law; and
- The end result of the Province's position.

[134] In view of this conclusion, it is not necessary to discuss the Province's and the Intervening Parties' other arguments on the lack of statutory jurisdiction or constitutional authority for the Court to include statutory non-monetary obligations in the definition of "Claim" found in the Claims Procedure Order.

[135] As the Court concludes that the Province's EPA Orders are indeed claims because of their obvious financial and monetary nature, the determination of these other questions will have to wait another day, if not another restructuring. Declaratory judgments and questions of statutory jurisdiction or constitutional authority should not be issued or decided in a factual vacuum. As shown here, the facts involved are normally critical in assessing such matters.

[136] This finding entails the dismissal of the Intervention of HMQBC and the AGBC as well.

[137] Abitibi remains in ownership and occupation of the relevant properties it still possesses in BC. No orders of any sort and no notice of non-compliance are outstanding in regard of any environmental obligations of Abitibi in that province. Simply put, there are no pending issue to resolve between Abitibi and the Intervening Parties.

[138] This being so, the conclusions sought by Abitibi in its Amended Contestation will be granted, albeit only in part. The Court considers that it is premature to immediately rule that the Province is barred from filing any late claim in the claims process as a result of the EPA Orders. This issue will be addressed, if need to, if and when such a request is in fact presented.

[139] The Court's explanations follow.

23 The conclusions of the judgment read as follows:

[307] **DISMISSES** the Amended Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act of the Petitioner, Her Majesty the Queen in Right of the Province of Newfoundland and Labrador (the "**Province**");

[308] **DISMISSES** the Intervention of the Intervening Parties, Her Majesty the Queen in right of the Province of British Columbia (the "**HMQBC**") and the Attorney General for British Columbia (the "**AGBC**");

[309] **DECLARES** that the orders issued against the Debtors by the Minister of Environment and Conservation of the Province on November 12, 2009, pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, chap. E-14.02, (the "**EPA Orders**"), are stayed under paragraph 10 of the Initial Order issued by the Court on April 17, 2009, and are not subject to the exception found at paragraph 10.1 of that Initial Order;

[310] **DECLARES** that the Province's filing of any claim based on the EPA Orders is subject to the Claims Procedure Order issued by the Court on August 26, 2009, including the claims process detailed therein;

[311] **RESERVES** to the Province its right, if any, to request an extension of the Claims Bar Date (as defined in the Claims Procedure Order) in that regard and to the Debtors their right, if any, to contest any such extension request;

[312] **WITH COSTS** against the Province in favor of the Debtors, but **WITHOUT COSTS** against the HMQBC and the AGBC.

.....

24 A summary presentation of the Province's grounds of appeal, going by chapter titles only, would read as follows:

1. The judge of first instance disregarded the principles of federalism.

i) He was required to give effect to the *EPA* and the *Abitibi Act* but failed to do so;

ii) The Minister of Environment and Conservation, and not the judge acting pursuant to the CCAA, has the exclusive jurisdiction to decide how the *EPA* is to be applied to Abitibi;

iii) The Legislature of the Province, and not the judge acting pursuant to the CCAA, has the exclusive jurisdiction to determine property and civil rights in the Province.

2. Provincial legislation operates in the insolvency context.

3. The CCAA cannot be interpreted to give a judge acting pursuant to the CCAA the power to immunise Abitibi from compliance with the EPA Orders or to avoid the *Abitibi Act*.

i) The judge acting pursuant to the CCAA cannot define "claim" however he or she wishes;

ii) The judge acting pursuant to the CCAA does not have the discretionary power to ensure a successful restructuring regardless of the law.

.....

25 There is no appeal as of right from decisions made under the CCAA; leave to appeal is a condition precedent to an appeal being allowed to proceed (s. 13 CCAA).

26 This requirement stems from a clear intention of Parliament to restrict appeal rights having regard to the nature and object of CCAA proceedings; an appeal court should be cautious about intervening in the CCAA process. This is not to say that leave

will never be granted but it should be so only "sparingly" (*Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), at 272).

27 The test for determining whether leave should be granted was enunciated by Wittman J.A. (as he then was) in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]):

The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: (. . .) Subsumed in the general criterion are four applicable elements: (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.

28 This test was considered and applied by this Court in many instances.

29 The burden rests on the party applying for leave to demonstrate that the cumulative criteria set forth above are met.

30 This is the test I intend to apply here.

31 It is my view that the Province's application raises no issue which satisfies the test for granting leave to appeal under the CCAA.

32 The Province's grounds of appeal are ably couched in constitutional terms (articulated mainly around the power of a judge acting pursuant to the CCAA to "immunise" a company from compliance with orders issued under provincial environmental legislation or to avoid the consequences of provincial expropriation legislation) but, as the judge of first instance noted, these constitutional issues, albeit of undeniable intellectual interest, are of no genuine importance in the face of his conclusion regarding the true nature of the EPA Orders.

33 The judgment *a quo* does not "immunise" Abitibi from compliance with the EPA Orders, it merely characterizes these orders in the context of the restructuring process engaged pursuant to the CCAA.

34 As a matter of fact, Gascon J. declined to grant Abitibi's conclusion seeking, in its Amended Contestation of January 20, 2010, a declaration confirming that the EPA Orders were stayed and that the Province's filing of a claim based on such orders is now barred by the terms of the CPO (par. 15 thereof); on the contrary, he explicitly reserved the Province's right to seek an extension of the claims bar date in order to file a claim and, should its claim be allowed, to participate in the negotiation of, and share in the proceeds from, any plan of arrangement, alongside Abitibi's other unsecured creditors. There is thus no question of relieving Abitibi from its environmental obligations under the Province's relevant legislation.

35 The first question the judge of first instance had to answer was whether the EPA Orders were issued in regard to statutory non-monetary obligations of Abitibi or were in substance financial or monetary in nature. All parties appearing before him agreed that if the EPA Orders were financial or monetary in nature, as opposed to being pure regulatory orders, they then would fall within the meaning of "claim" under the CCAA and "provable or contingent claim" under the BIA; a claims process such as the one ordered in the Abitibi restructuring would therefore cover them.

36 A judge acting pursuant to the CCAA has jurisdiction to subject "claims" to a precise claims process and to determine who Abitibi's "creditors" might be in that regard. As mentioned above, the Province does not dispute this essential premise; rather it disputes whether the EPA Orders were properly found to be truly financial or monetary in nature.

37 In my view there is no reasonable chance of success to the Province's position in this connection.

38 Gascon J. found, on the facts and in the context of this case, that the EPA Orders were in substance financial or monetary in nature. This is essentially a finding of fact reached after considering 1) the true nature and impact of the CCAA (judgement *a quo*, par. 160-183), 2) the factual context of the issuance of the EPA Orders, and their content (par. 184-211), 3) the Province's

behaviour prior and after the issuance of the EPA Orders (par. 212-236), 4) the *EPA* and the applicable case law (par. 237-271) and 5) the end result of the Province's position (par. 272-296).

39 I fail to see how this conclusive finding of fact definitively fixing the true character of the dispute as being in pith and substance one which relates to a monetary claim against Abitibi could be successfully challenged in appeal.

40 The Province's position is a) that it alone holds the right to modify the nature of its claim - from one issued in regard of Abitibi's statutory non-monetary obligation into a financial or monetary one - by converting the regulatory order into a monetary one, using the debt-creating provision of the *EPA*,⁶ and b) that it can, if it so chooses, postpone that conversion until after the restructuring is completed.

41 This position is, in my opinion, untenable in the context of an insolvent company involved in a restructuring process pursuant to the CCAA; this contention, as Gascon J. observed, boils down to claiming "that a provincial regulator could have the non reviewable right to determine whether obligations it controls or creates will be subject to compromise under the CCAA or whether they will enjoy a superiority beyond the reach of compromise" (judgment *a quo*, par. 273).

42 The judge of first instance, acting pursuant to the CCAA, had jurisdiction to subject all "claims" against Abitibi to a claims process (the "CPO"), to determine who Abitibi's "creditors" might be and, in that context, to determine the nature of the EPA Orders without being bound to the form in which the Province had clothed its position.

43 The compromise of monetary claims is at the very core of the bankruptcy and insolvency jurisdiction underpinning the CCAA. It was made clear in the evidence adduced before the judge of first instance that the EPA Orders advanced by the Province, if found to survive the CCAA process uncompromised, would be fatal to a restructuring of Abitibi.

44 I agree with counsel for Abitibi that there is nothing new or unusual in the analysis brought by the judge of first instance of what a "claim" is under the CCAA: the broad definition of "claim" under the CCAA includes "contingent claims", a legal reality reflected in the definition of "claim" in the CPO which, it is worth noting in passing, was not contested by the Province, either before it was issued, by making representations to the judge of first instance, or after, by lodging an appeal against it, despite the fact that its name appeared on the service list and that it was made aware of its existence (judgment *a quo*, footnote 9).

45 Again I agree with counsel for Abitibi that Gascon J., by dismissing the notion that the Province could choose the timing of the creation of its financial or monetary claim against Abitibi deriving from the EPA Orders, properly prevented it from gaining an unfair advantage over the company's other creditors, the whole in line with the purposes of the CCAA.

46 For these reasons, and without getting into all the details of the reasoning of the judge of first instance, I see no *prima facie* merit to the appeal envisaged by the Province.

47 In the context of an appeal presenting no reasonable chance of success, it becomes obvious that the appeal proceedings would "unduly hinder the progress of the action". The fundamental purpose of the CCAA proceedings is to enable Abitibi to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. All parties to the CCAA proceedings, except the Province, agree that the appeal would necessarily lengthen the restructuring process and would, according to the Monitor (Plan of Argument of the Monitor, May 10, 2010, par. 10), "hinder the ability of [Abitibi] to successfully restructure".

48 A draft of Abitibi's plan of arrangement or compromise was filed on May 4, 2010 with a view, according to its attorneys, to conforming to a timetable for a rapid exit from the CCAA proceedings by the end of September 2010. If leave to appeal was to be granted, the fate of the EPA Orders would in all likelihood remain outstanding at the time of the meeting of creditors and the vote in respect of Abitibi's plan. According to the Monitor, the fact that the matter is not finally determined prior to the vote in respect of the plan will have a material impact on the net value available to Abitibi's creditors and create concerns for the sources of potential exit financing. The restructuring process, concludes the Monitor, will likely become more complicated, including further delays and costs.

49 One final word before concluding. The Province is concerned with the judge of first instance referring to the possibility for Abitibi "to raise the counter-claim argument in front of the CCAA Court"⁷ notwithstanding the fact that the *Abitibi Act* immunises the Crown from all proceedings based on a cause of action arising from or incidental to the operation of the Act.

50 This concern does not justify, in my opinion, granting leave to appeal. First, this statement from the judge of first instance is nowhere to be found in the conclusions of the judgement *a quo*. Second, the statement is only one of the many reasons expressed by the judge of first instance to justify the dismissal of the Province's motion. Third, no doubt this issue will be raised again, and fully debated, if the Province is allowed to file a late claim based on the EPA Orders.

51 The Province's Motion for Leave to Appeal pursuant to Sections 13 and 14 of the CCAA is dismissed, with costs.

Motion dismissed.

Footnotes

1 Any reference to the CCAA shall refer to the version of the Act applicable to the present proceedings, and not to the "Amended CCAA" in force since the amendments of September 18, 2009.

2 "According to Abitibi, its losses resulting from the enactment of the *Abitibi Act* will exceed \$300 million" (judgment *a quo*, par. 59).

3 "(. . .) Abitibi officially filed, on February 25, 2010, a Notice of Arbitration under chapter 11 of NAFTA to pursue its claim for redress" (judgment *a quo*, par. 62).

4 "These reports concluded that the Abitibi Sites covered by the assessments (and, in many instances, the property adjacent thereto) suffered from extensive contamination allegedly in excess of applicable standards" (judgment *a quo*, par. 78).

5 Judgment *a quo*, par. 25.

6 S. 102(2) of the *EPA* permits the minister to take action to carry out the terms of the order if the person to whom it is directed fails to comply with it; the costs, expenses or charges so incurred are recoverable "as a debt owed to the Crown".

7 Judgment *a quo*, par. 189.

TAB 6

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Arrangement relatif à Bloom Lake](#) | 2017 QCCS 3529, 2017 CarswellQue 6700, 54 C.B.R. (6th) 155, EYB 2017-282980, 283 A.C.W.S. (3d) 253 | (C.S. Qué., Jul 25, 2017)

2005 BCCA 192

British Columbia Court of Appeal

New Skeena Forest Products Inc., Re

2005 CarswellBC 705, 2005 BCCA 192, [2005] 8 W.W.R. 224, [2005] B.C.W.L.D. 3441,
[2005] B.C.W.L.D. 3442, [2005] B.C.J. No. 671, 138 A.C.W.S. (3d) 275, 210 B.C.A.C.
247, 348 W.A.C. 247, 39 B.C.L.R. (4th) 338, 7 M.P.L.R. (4th) 153, 9 C.B.R. (5th) 278

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

And In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44

And in the Matter of the Company Act, R.S.B.C. 1996, c. 62, as amended

And In the Matter of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd. and
9753 Acquisition Corp. (Respondents / Petitioners) and Kitwanga Lumber Co. Ltd. (Respondent / Respondent)

Esson, Newbury, Smith JJ.A.

Heard: February 28, 2005

Judgment: April 1, 2005

Docket: Vancouver CA032484

Proceedings: reversing [\(2005\)](#), [2005 CarswellBC 2](#) (B.C. S.C. [In Chambers])

Counsel: R.J.M. Janes, M.D.B. Paine for Appellant, City of Prince Rupert

R.A. Millar for Interim Receiver and Trustee in Bankruptcy Ernst & Young Inc.

P.J. Reardon for 646325 B.C. Ltd.

R.D. Leong for Attorney General of Canada

D.J. Hatter for Her Majesty the Queen in Right of the Province of British Columbia

Subject: Civil Practice and Procedure; Insolvency; Public

Related Abridgment Classifications

Bankruptcy and insolvency

[XVII](#) Practice and procedure in courts

[XVII.8](#) Costs

[XVII.8.h](#) Miscellaneous

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.1](#) General principles

[XIX.1.e](#) Jurisdiction

[XIX.1.e.ii](#) Single judge

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous issues

Municipality was creditor of paper mill — Mill entered protection under Companies' Creditors Arrangement Act ("CCAA"), and later began liquidation of assets — Municipality claimed that court order burdened municipality with disproportionately high level of CCAA costs, by assessing costs on value of mill property without taking into consideration likely environmental cleanup costs, which it estimated at \$103m — Municipality's application for leave to appeal order regarding CCAA costs was dismissed on basis that chambers judge, who had approved allocation of charges scheme put forward by receiver, had properly exercised his discretion and did not make error of law — Court determined that, as costs were based on future speculation, municipality could not demonstrate with certainty that it would suffer prejudice and that granting leave would interfere with orderly liquidation of assets — Municipality appealed on ground that chambers judge ignored issue of true value of mill property and therefore, in granting approval, failed to consider relevant matter — Municipality also appealed on ground that chambers judge did not have discretion to approve allocation that contained risk that secured creditor, in this case municipality, would have to pay receiver amount exceeding value of its security interest in property — Appeal allowed — Chambers judge was entitled to weigh all competing interest and to decide that interests of all creditors as group overshadowed municipality's particular objections — However, chambers judge exceeded his equitable and statutory jurisdiction under CCAA when he approved method of allocation that might require municipality to pay its share of CCAA costs in amount greater than value of land over which municipality held tax lien.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act

Municipality was creditor of paper mill — Mill entered protection under Companies' Creditors Arrangement Act ("CCAA"), and later began liquidation of assets — Municipality claimed that court order burdened municipality with disproportionately high level of CCAA costs, by assessing costs on value of mill property without taking into consideration likely environmental cleanup costs, which it estimated at \$103m — Municipality's application for leave to appeal order regarding CCAA costs was dismissed on basis that chambers judge, who had approved allocation of charges scheme put forward by receiver, had properly exercised his discretion and did not make error of law — Court determined that, as costs were based on future speculation, municipality could not demonstrate with certainty that it would suffer prejudice and that granting leave would interfere with orderly liquidation of assets — Municipality appealed on ground that chambers judge ignored issue of true value of mill property and therefore, in granting approval, failed to consider relevant matter — Municipality also appealed on ground that chambers judge did not have discretion to approve allocation that contained risk that secured creditor, in this case municipality, would have to pay receiver amount exceeding value of its security interest in property — Appeal allowed — Chambers judge was entitled to weigh all competing interest and to decide that interests of all creditors as group overshadowed municipality's particular objections — However, chambers judge exceeded his equitable and statutory jurisdiction under CCAA when he approved method of allocation that might require municipality to pay its share of CCAA costs in amount greater than value of land over which municipality held tax lien.

Table of Authorities

Cases considered by *Newbury J.A.*:

Charles Oseinton & Co. v. Johnston (1941), [1942] A.C. 130, [1941] 2 All E.R. 245, 110 L.J.K.B. 420, 57 T.L.R. 515 (U.K. H.L.) — considered

Cowichan Tribes v. Canada (2003), 2003 FCA 476, 2003 CarswellNat 4081, 246 F.T.R. 318 (note), 2003 CAF 476, 2003 CarswellNat 4796, 314 N.R. 384 (F.C.A.) — considered

Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, 48 F.T.R. 160, 1992 CarswellNat 649, 1992 CarswellNat 1313 (S.C.C.) — referred to

Harelkin v. University of Regina (1979), [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 26 N.R. 364, 96 D.L.R. (3d) 14, 1979 CarswellSask 79, 1979 CarswellSask 162 (S.C.C.) — considered

Hunters Trailer & Marine Ltd., Re (2001), 2001 ABQB 1094, 2001 CarswellAlta 1636, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — considered

Lochson Holdings Ltd. v. Eaton Mechanical Inc. (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630, 1984 CarswellBC 572, 53 C.B.R. (N.S.) 177 (B.C. C.A.) — referred to

Musqueam Indian Band v. Glass (1998), 235 N.R. 164, 1998 CarswellNat 2798, [1999] 2 F.C. 138, 160 F.T.R. 12 (note), 1998 CarswellNat 2904 (Fed. C.A.) — referred to

Musqueam Indian Band v. Glass (2000), 2000 SCC 52, 2000 CarswellNat 2405, 2000 CarswellNat 2406, [2000] 11 W.W.R. 407, 36 R.P.R. (3d) 1, 82 B.C.L.R. (3d) 199, 192 D.L.R. (4th) 385, 261 N.R. 296, 186 F.T.R. 248 (note), [2000] 2 S.C.R. 633, [2001] 1 C.N.L.R. 208 (S.C.C.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123 (Ont. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) — referred to

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

Skeena Cellulose Inc., Re (2003), 43 C.B.R. (4th) 187, 184 B.C.A.C. 54, 302 W.A.C. 54, 2003 BCCA 344, 2003 CarswellBC 1399, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — followed

Skydome Corp., Re (1998), 1998 CarswellOnt 5922, 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]) — considered

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

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

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — considered

Westar Mining Ltd., Re (1993), 75 B.C.L.R. (2d) 16, 17 C.B.R. (3d) 202, 22 B.C.A.C. 106, 38 W.A.C. 106, 1993 CarswellBC 529 (B.C. C.A.) — considered

Westar Mining Ltd., Re (1993), 80 B.C.L.R. (2d) 11, [1993] 2 S.C.R. 448, 155 N.R. 157, 20 C.B.R. (3d) 1, 29 B.C.A.C. 43, 48 W.A.C. 43, 1993 CarswellBC 553, 1993 CarswellBC 1262, 1993 CarswellBC 2655 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

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

Generally — referred to

s. 11 — referred to

s. 11(3) — considered

s. 11(4) — referred to

s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 11.3(a) [en. 1997, c. 12, s. 124] — considered

s. 11.3(b) [en. 1997, c. 12, s. 124] — considered

Local Government Act, R.S.B.C. 1996, c. 323

Generally — referred to

s. 403(1) — referred to

s. 407(1) — considered

s. 407(4) — considered

ss. 414-418 — referred to

APPEAL from judgment of chambers judge reported at *New Skeena Forest Products Inc., Re* (2004), 2004 CarswellBC 3193, 8 C.B.R. (5th) 107 (B.C. S.C. [In Chambers]), refusing leave to appeal order regarding distribution of costs under *Companies' Creditors Arrangement Act*.

Newbury J.A.:

1 On August 30, 2004 New Skeena Forest Products Inc. ("New Skeena"), formerly known as Skeena Cellulose Inc., brought to an end its most recent attempt at financial restructuring under the *Companies' Creditors Arrangement Act* ("CCAA") by filing an assignment in bankruptcy. The last CCAA proceeding had been initiated in November 2003 when the Supreme Court made an order in the usual terms, staying proceedings against the company, authorizing debtor-in-possession ("DIP") financing to rank ahead of most other charges, appointing a monitor, and granting New Skeena the right to "proceed with an orderly disposition" of its assets in order to facilitate the "downsizing and consolidation of [its] business and operations". But the strenuous efforts made by many creditors and other stakeholders to streamline and restructure New Skeena's business — a mainstay of the economy of northwestern British Columbia — ultimately failed, and the decision was made to move the company into liquidation.

2 On September 20, 2004, the Supreme Court lifted the stay previously imposed under the CCAA, imposed a new stay under the *Bankruptcy and Insolvency Act*, and appointed Ernst & Young Inc. as receiver to offer for sale "all or any of the Assets, including any of the properties (whether real, personal or otherwise), rights, assets, businesses, and undertakings of the Company, whether *en bloc* or on a piecemeal basis, as a going concern or otherwise, but subject to the approval of [the Supreme] Court." An auction of many of the remaining assets is scheduled for April of this year.

3 It is para. 17 of the September order which is significant for purposes of this case. It directed the Receiver to report to the Court concerning the "enforcement" of the so-called "Priority Charges" and the allocation of the sale proceeds of New Skeena's assets proposed to be made by the Receiver among the secured creditors. The order also specified that any proposed allocation could not defeat the priority afforded to any Priority Charges under the Court's previous orders or seek to invoke marshalling or other equitable principles applicable to creditors' remedies. In due course, the Receiver recommended a scheme of allocation of the Priority Charges and it was approved by the Chambers judge below. The discrete question raised by this appeal is whether he erred in so doing, and in particular, whether it was open to him to approve an allocation that may require one key creditor to pay as its share of the Priority Charges an amount greater than its secured charge and indeed greater than what is said to be the true value of the asset against which it holds its security.

4 This question is complicated by two facts. First, the creditor with which we are concerned is the City of Prince Rupert, appellant in this court. Its security is a statutory tax lien and the enforcement thereof is governed by the *Local Government Act*, R.S.B.C. 1996, c. 323. Under that Act, the local collector must in September of each year offer for sale by public auction any real estate on which taxes are delinquent. (Evidently, certain obligations under the tax sale provisions of the Act were postponed by special Act of the Legislature in response to the plight of Prince Rupert and other neighbouring municipalities affected by New Skeena's insolvency, but no further special deferments are anticipated.) The upset price at such auction is specified by s. 407(1) and in this case would exceed some \$18,000,000, the amount of the City's unpaid taxes. If no bid is received at least equal to the upset price, s. 407(4) of the Act states that the City "must be declared the purchaser" of the property. Thus it is possible the City will not receive an offer at or above the amount of its claim, and that it will be deemed to be the purchaser of the property. In return it would receive nil proceeds, at least until it succeeds in selling the property at some future time. Obviously, this could take years, and the *Local Government Act* preserves for some time the owner's ability to redeem the property: see ss. 414-418. In any event, the City stands to receive only the upset price and interest thereon.

5 The second complicating factor is that the value of the property over which the City holds its statutory lien is New Skeena's now defunct kraft pulp mill, located on Watson Island. The value of this property is unknown: although in recent years it was assessed for tax purposes at some \$8,480,000, an appraisal carried out in January 2004 set its value at only \$3,920,000. Now, there are indications that the property may carry a large environmental liability. There is some evidence, which the Chambers judge below did not expressly adopt, that the cost of decommissioning the mill and restoring the property to its original condition might be as much as \$100,000,000 — although it seems unlikely any purchaser of the mill site would be willing to do more

than restore it to "industrial" standard. Remediation to that standard is expected to cost something less, and the Province has agreed to provide up to \$30,000,000 for the latter purpose. However, the possibility of a large liability remains, and to date, no private party has expressed interest in acquiring the property on terms that the Receiver has recommended for acceptance.

6 Together, these facts are said to place the City in a different position from that of other secured creditors: when the value of their interests falls below the amount of the secured indebtedness, most can simply accept the lesser amount, or even walk away from their secured claim. Indeed, most are lenders who have taken the business risk that their borrower will fail and that their security may prove inadequate to realize their claims. This is not true of the City, however: it is prohibited from accepting less than the statutory upset price, and "must" take the property as its own (subject to the owner's right to redeem) if no offer is received at or above the statutory minimum. This also gives rise to a general 'unfairness' argument that informs the City's other more specific arguments regarding process and jurisdiction.

Factual Background

7 I turn first, however, to the background of the impugned order of December 1, 2004, which adopted the method of cost allocation proposed by the Receiver. I note at the outset that the City, like all other secured creditors, had consented to the granting of "super-priority" for the DIP financing approved by the Court early on in the CCAA proceeding. The initial order of November 19, 2003 granted to one DIP lender, NWBC Timber & Pulp Inc. ("NWBC"), security in an amount up to \$2,300,000, "ranking in priority to all creditors of the Petitioners and any other encumbrances, security or security interests now outstanding save and except for the Administration Charge and the Directors' Charge which shall rank in priority to the DIP Charge." Subsequent orders reduced the principal amount of NWBC's priority and approved further borrowing from Northern Savings Credit Union ("NSCU") and granted that lender a charge ranking ahead of all charges (including NWBC's DIP Charge) other than the Administration Charge. Still further DIP financing, the "Woodbridge DIP Loan", the "MatlinPatterson DIP Charge", and the "Papyrus DIP Charge", was approved on similar terms in the summer of 2004 without any objection being made by the other secured creditors. However, the CCAA stay was, as earlier mentioned, finally lifted on September 20, 2004.

8 Pursuant to para. 17 of the Order of that date, Messrs. Ernst & Young prepared a report for the Court dated November 19, 2004 (the "Second Report"). The Receiver advised the Court of its progress (or lack thereof) in selling off the New Skeena assets and undertaking as a going concern. Under the heading "The Receiver's Sale Process", the Receiver stated:

33. At the commencement of the receivership process, the Receiver was advised by a number of significant secured creditors that they believed that the opportunities to transact with a credible *en bloc*, going concern buyer had been exhausted through what was expressed to be a lengthy and expensive CCAA process, and that they expected the Receiver to conduct a quick sale process with an emphasis on liquidation. The creditors were extremely clear in their communications with the Receiver that the administration, holding and preservation costs associated with the asset realization and receivership administration process were viewed as substantial. Their view was that a lengthy, multi-month asset marketing campaign was unnecessary and to the detriment of their recoveries.

34. The Receiver recognized the views expressed by these creditors with regard to the length of the sales process and the associated costs, but also recognized that it was important to pursue offers of an *en bloc* or operator nature, including opportunities for acquiring specific mill sites, concurrently with seeking liquidation proposals, given the very significant impact of the New Skeena assets on the economies of the local communities.

35. The Receiver commissioned an updated asset appraisal of the Company's machinery and equipment from Maynards Appraisals Ltd., the firm that conducted the January 2004 appraisal during the CCAA proceedings. No updated appraisal was commissioned for the Company's mill site real estate, as the Receiver considered this to be of a lower cost benefit. Appraisals of the Company's two residential properties situated in Prince Rupert were commissioned, and these properties were listed for sale with a local realtor. [Emphasis added.]

9 The Receiver's proposal for the allocation of the "Court Ordered Charges" was set out in detail at Appendix F to the Report. The terms "Court Ordered Charges", "Priority Charges" and "CCAA Costs" were all used to refer to the aggregate of

the "Administrative Charge" (consisting of the monitor's professional fees and fees for legal services rendered to the monitor and New Skeena), the "DIP Loan Charge" (consisting of amounts advanced by the DIP lenders mentioned above), and the "Directors' Charge" (consisting of amounts for which the directors of New Skeena might have become liable as a result of the insolvency). According to the report, the Administrative Charge amounted to approximately \$1,484,000; the DIP Loan Charge was some \$3,250,000; and no amount was outstanding in respect of the Directors' Charge.

10 The Receiver noted that no attempt had been made in the CCAA proceedings to track these Charges "against the various assets of [New Skeena] or the interests of any creditor or creditor group" and that there had been no discussion of the burden each group of assets might be expected to bear in relation to the costs of the CCAA process. The Receiver expressed the view that it was important for the secured creditors to be able to assess their positions reasonably when considering the potential sale of the assets and that "[w]ithout a framework that contemplates some reasonable expectation as a basis for distributing costs, a realistic assessment of potential sales [would] be very problematic for secured creditors to undertake." This was particularly so with respect to New Skeena's real estate, since it was uncertain when those assets would be sold and, the Receiver stated, it would be "cumbersome to rely on a framework for cost allocation that takes effect only upon the full liquidation of all assets." Further, it would be "neither productive nor accurate" to try to link the CCAA Costs to any specific asset or creditor. Accordingly, the Receiver recommended that:

15. As a proxy for the expected values being preserved or enhanced by undertaking the CCAA proceeding, and accordingly incurring the CCAA Costs, an appropriate reference would be appraisals of real estate and equipment at the operating locations of New Skeena. The Monitor commissioned these appraisals in January 2004 as part of the sales efforts at that time. Those appraisals represent information which was current at the time that the CCAA Costs were being incurred, and formed at least some context for the potential value of the restructuring efforts.

16. The real estate appraisals did not consider potential environmental issues that may be prevalent on a given site, and so do not necessarily represent the best possible indication of value. Not all operating locations were appraised, and the real estate information is therefore incomplete insofar as the major participants in the CCAA process are concerned.

17. One alternative would be to use the values provided by the BC Municipal Assessment Authority instead of the appraised values (the "Tax Values"). The Tax Values can consist of land only, or can include the improvements on the lands as well. Use of the Tax Values as a value basis has the advantage of being a consistent measure of value, in that each property has a Tax Value for assessment purposes, and has the further advantage of matching expected values against the basis by which the municipal tax obligations are computed.

18. When comparing the calculation of improvements for Tax Value purposes with the equipment appraisals performed by Maynards, it is apparent that there is opportunity for overlap between these two categories. There is not a direct method of assessing this potential overlap, or calculating a corrective measure. As well, when comparing the land portion of the Tax Value with the appraised values to the extent both are available, it would appear that the Tax Value of both lands and improvements is higher than the value attributed to the real estate in the appraisal information. Accordingly, it is the Receiver's view that preference should be given to use of the appraised value of the lands, where available, and to use Tax Values for those other properties where necessary.

19. The Receiver's proposal is to use appraised values as a basis for allocating the CCAA Costs pro rata against those operating assets for which appraisals are available, and in the cases where no land appraisals were commissioned to use the land portion only of the Tax Values, all on an interim basis as described further below. The use of Tax Values shall only apply to land at the operating locations of New Skeena.

20. Using appraised or assessed values instead of ultimate sale values to allocate costs represents, in some respects, an artificial measure by which to burden participants in the process. By using a measure that is a proxy for ultimate sales value, rather than that sales value itself, the Receiver recognizes that those who believe they may be adversely affected by this basis of allocation may question this proposal. [Emphasis added.]

This method, the Receiver stated, would provide an "independent basis" for dealing with the interests of secured creditors at an early stage of the distribution process. It would avoid "waiting for particular asset sales to occur before allocating costs", and minimize additional disputes "to the extent that actual sales of assets contain price allocations that may be arbitrary, as could occur in multi-asset sales or if secured creditors take assets using their security positions as partial satisfaction of the transaction price." In the Receiver's analysis, the certainty provided by the use of the appraised or assessed values would outweigh "the lack of precision inherent in using a measure other than the actual sales values obtained."

11 Accordingly, the Receiver recommended that with respect to those operating lands and equipment for which appraisals or assessments were available, an interim allocation of the CCAA Costs in full would be carried out. But notwithstanding the use of the term "interim", no later adjustment would be made to reflect the actual sale of *these* assets, including the Prince Rupert mill site. In the Receiver's words:

26. The Receiver's proposal is to apportion the CCAA Costs pro rata against the equipment and lands appraised in January 2004, on the basis of appraised values or Tax Values, as the case may be, rather than eventual sale proceeds. It is not proposed that the calculation of allocated costs be adjusted subsequently as sales of those assets occur. [Emphasis added.]

12 Under the heading "Distributions of Sale Proceeds", the Receiver acknowledged the possibility that certain assets could "accumulate a level of allocated costs in excess of their ultimate sales value." In such cases, the Receiver said:

. . . it is proposed that the shortfall in cost recovery become an additional General Cost, and [be] allocated against the remaining appraised and/or sales values as the case may be.

40. In the event that a secured creditor seeks to recover the asset against which it holds security, as for example could occur in the instance of a municipality taking title to real property rather than it being sold by the Receiver, then the Receiver would ask that the Court permit such a transaction to be completed only if, and when, the secured creditor provides the Receiver with the cash equivalent of the applicable allocated costs against that asset, as calculated by the Receiver under this proposal. [Emphasis added.]

It is this aspect of the proposal to which the City of Prince Rupert objects.

13 It does not appear that the recommendations contained in the Second Report were the subject of a court order. Rather, the Chambers judge requested certain additional information, leading to the Receiver's Third Report, dated November 29, 2004. It dealt with various substantive matters and again returned to the subject of cost allocation, on which the Receiver had received further comments from counsel for the concerned municipalities and others. The Receiver noted that certain of the municipalities (including Prince Rupert) had objected to the use of an appraisal that failed to consider any environmental liability attaching to the mill site. Another creditor had objected to the use of asset values generally, suggesting that funds actually generated from the DIP loans be traced to the locations or assets on which such funds had been spent, and that costs be allocated on that basis.

14 With respect to Prince Rupert's objections, the Receiver responded as follows:

52. The assessed value for tax purposes of the Prince Rupert land is \$8.48 million, whereas the appraised value used in our cost allocation proposal is \$3.92 million. The environmental remediation program currently being funded by the Province has seen almost \$19 million of a total funding available of \$30 million already expended, and our understanding from discussions with the professional remediation firm is that the completion of this project will render the Watson Island site comparable in condition to other industrial sites in the Province. The use of a value for the Prince Rupert lands is, in the Receiver's view, appropriate in the context of the ongoing remediation and the expectation that this likely will be a site with commercial value in the future, given its physical attributes of rail and water access to facilitate shipping and materials handling opportunities.

53. The Receiver understands that any reductions by the Assessment Authority in assessed values, due to the closure of operations, will affect only the industrial improvements values and not the land values, and so the values used in the Receiver's proposal would be unaffected by that development which, in any event, is prospective. [Emphasis added.]

15 With respect to the proposal that costs be linked to DIP loan expenditures, the Receiver predicted that hardly any costs could be directly tied to the interests of the secured creditors in real estate, which would mean that the cost burden would rest almost entirely on the secured creditors having interests in equipment and other operating assets. In conclusion, the Receiver stated:

Using a method of allocation that simply traces costs gives no recognition to the underlying basis for the CCAA process and the restructuring effort, which is to preserve and enhance the value of all assets, including the real estate, and in the Receiver's view is therefore inappropriate.

56. The comments from counsel for the various affected creditors have been considered further by the Receiver, but the Receiver remains of the view that the process set forward in our Receiver's Report #2 provides an appropriate outcome of allocation, taking into account the multiple objectives of early certainty as to the parties' exposure to costs, the relative ability of the affected assets to absorb the allocations (or, alternatively, the various parties' abilities to fund those costs) and the roles played by the various parties during the CCAA and receivership proceedings. [Emphasis added.]

The Order of the Chambers Judge

16 The matter came on for hearing before the Chambers judge on December 1, 2004. In his oral reasons, he briefly reviewed the Receiver's proposal as set out in its Second and Third Reports. With specific reference to Prince Rupert's situation, he reasoned:

With the exception of Prince Rupert all of the parties here want to have certainty at this stage. Prince Rupert says that the value that is proposed to be used in its case, which is the appraised value of \$3.92 million, is unrealistic because it is simply not known whether this property will fetch that amount, or even any amount, given the environmental contamination issues.

At paragraph 52 of his report number three, the Receiver addresses the conservatism in his proposal. The Receiver points out that the assessed value of the land set by Prince Rupert for tax purposes is some \$8.48 million; the appraised value used by the Receiver for the purpose of this cost allocation proposal is \$3.92 million.

There has been an ongoing remediation effort on the Prince Rupert mill site, which has been funded by the Province. Some \$19 million of a total funding available of \$30 million has been spent. While there is some issue as to the likely market value of these lands, it is the Receiver's view that, given this remediation which has taken place, and given the remediation which is going to continue, that the appraised value figure is a realistic figure to use for the purposes of his proposal.

The reality is that no method, in these circumstances, is perfect. The only way to achieve perfection, as I said at the outset, is to do nothing until everything has been sold. That clearly would not serve the interests of the parties and it is one that simply does not make sense. [paras. 16-19]

In the result, the Chambers judge concluded that it was in the best interests of all the parties to accept the Receiver's recommendation with respect to the cost allocations. The entered Order provided in this regard:

6. the Receiver's proposal:

(a) to allocate the CCAA Costs (as defined in the Report) on a preliminary basis against only those assets consisting of equipment and real property which are identified in the illustrative chart attached to Appendix F to the Report (the "Assets"), pro rata based upon the appraised or assessed value of the Assets at January, 2004, provided that such preliminary allocation will be subsequently adjusted based upon:

(i) the actual sale proceeds realized on the future disposition of the remaining assets of the Petitioners which do not have values attributed to them in Appendix F as aforesaid; or

(ii) such other value as may be subsequently attributed to such remaining assets by the Court; and

(b) to allocate the Receivership Costs (as defined in the Report) by:

(i) firstly, applying specific costs directly attributable against specific assets; and

(ii) secondly, applying any specifically allocated costs not fully recoverable from specific assets together with all general receivership costs which cannot be specifically allocated, pro rata against all assets on the same basis as the CCAA Costs;

is hereby approved, provided that the obligations of any affected creditor to pay its portion of the allocated costs in relation to any asset where they hold a first priority position (subject to the prior CCAA Costs and Receivership Costs) is [sic] postponed, pending further application at the time that the Receiver applies for approval to distribute any of the proceeds generated from the sale of any of the Petitioners' assets; [Emphasis added.]

17 It is worth emphasizing that notwithstanding the reference to "preliminary" allocation in subpara. 6(a) of the Order, the only adjustment contemplated is in respect of sale proceeds received from the "remaining assets" (which I understand consist mainly of intangibles such as forestry licences) and that no adjustment is contemplated in respect of the sale proceeds of the assets with which we are here concerned — those items of equipment and real property referred to in Appendix F to the Receiver's Second Report. Further, the Order does not specifically incorporate the Receiver's recommendation that if and when a secured creditor seeks to recover an asset on which it holds its security, the Court will permit such a transaction to be completed "only if, and when, the secured creditor provides the Receiver with the cash equivalent of the applicable allocated costs against that asset, as calculated by the Receiver under this proposal." Instead, the Order "postpones" the obligation of any creditor to pay its portion of the allocated costs in respect of any asset on which it holds first priority, pending further application. However, the Chambers judge did approve the entire proposal for cost allocation set out in the Receiver's reports and counsel have all agreed that the Court intended to impose the condition on recovery described at para. 12 above. I will also proceed on that assumption, although it would have been preferable if the Order had been worded to reflect this important aspect of the recommendation.

On Appeal

18 In this court, the City submits that the Chambers judge made two basic errors of law in acceding to the Receiver's recommendation regarding the allocation of CCAA Costs: first, that in exercising his discretion the Chambers judge "ignored" a relevant factor, namely, the actual value of the asset in question; and second, that it did not lie within the jurisdiction or discretion of the Chambers judge to approve an allocation that carried with it the risk that a secured creditor — i.e., the City — would have to pay to the Receiver an amount that exceeds the value of its security interest on the Watson Island property.

19 Counsel for the City acknowledged that the CCAA, which consists only of 22 sections, gives the court a broad discretion, in the sense that the court must consider a wide variety of competing interests which are likely to vary greatly from case to case. (See S. Waddams, "Judicial Discretion", (2001) 1 *Cmnwth. L.J.* 59.) As we observed in the previous *Skeena* appeal (*Skeena Cellulose Inc., Re* (2003), 13 B.C.L.R. (4th) 236, 2003 BCCA 344 (B.C. C.A.) [hereinafter "*Clear Creek Contracting Ltd.*"]), the case law that has developed under the CCAA "fills the gaps" between the provisions of the statute and has been informed by the "broad public policy objectives" thereof:

There is now a large body of judge-made law which "fills the gaps" between these provisions. Most notably, courts appear to have given full effect to the "broad public policy objectives" of the Act, which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. . . .

In accordance with these objectives, Canadian courts have adopted a "standard of liberal construction" that serves the interests of a "broad constituency of investors, creditors and employees" and reflects "diverse societal interests." (See *Re Smoky River Coal Ltd.* (1999) 175 D.L.R. (4th) 703 (Alta. C.A.), at 721-2.) [paras. 34-35]

20 Consistent with this approach, Canadian courts have now accepted that their discretion may be exercised to permit DIP financing and to grant "super-priority" to DIP lenders, albeit subject to certain restrictions and safeguards: see Michael B. Rotsztain, "Debtor-in-Possession Financing in Canada: Current Law and a Preferred Approach", (2000) 33 Can. Bus. L.J. 283, at 284-87; and *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]), aff'd (2000), 16 C.B.R. (4th) 141 (B.C. C.A.), superseding the more restrictive approach taken in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492, 21 C.B.R. (N.S.) 201 (Ont. C.A.) and *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (B.C. C.A.). Appellate 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. This court has stated that its powers should be exercised "sparingly" when it is asked to interfere with the exercise of discretion of a CCAA court: see *Clear Creek Contracting Ltd., supra*, at para. 52, citing *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]), and *Smoky River Coal Ltd., Re* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.). In the more general context, I note the statement of Viscount Simon L.C. in *Charles Oseinton & Co. v. Johnston* (1941), [1942] A.C. 130 (U.K. H.L.), which was quoted by the majority of the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), at 76-77. Viscount Simon L.C. stated:

The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. [at 138]

At the same time, discretionary decisions are not immune from review. As Viscount Simon L.C. stated in the same case:

But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [at 138]

(See also *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at 588, where it was said that in refusing to take into consideration a "major element for the determination of the case", the trial judge had failed to exercise his discretion on relevant grounds and thus gave the Court of Appeal "no choice" but to intervene.)

21 The City contends that the Chambers judge in the case at bar "ignored" or failed to consider a relevant matter — the actual value of the Watson Island property — and proceeded on an irrelevant criterion — whether a previous appraisal had been carried out — in approving the allocation method he did. Mr. Janes referred us to *Musqueam Indian Band v. Glass*, [2000] 2 S.C.R. 633 (S.C.C.), where the Supreme Court of Canada held that the Federal Court of Appeal [1998 CarswellNat 2798 (Fed. C.A.)] had wrongly interfered with a trial judgment fixing the "value" of a leasehold interest in certain reserve lands. The Court of Appeal had ruled that the value should be determined on the basis of land in fee simple with no reduction for the fact that it was located on a reserve. However, the Supreme Court of Canada restored the trial judgment, Gonthier J. noting for the majority that the Indian band was bound to "accept the realities of the market". (Para. 44.) Similarly, in *Cowichan Tribes v. Canada* (2003), 314 N.R. 384, [2003] F.C.J. No. 1919 (F.C.A.), the Federal Court of Appeal upheld a trial judgment which, in determining the "fair market rental value" of property that was subject to flooding, took that susceptibility into account. Létourneau J.A. for the Court stated that "[i]t defies common sense to think that a prudent and reasonable developer or tenant would allocate the same value to a land that is partly flooded annually as it would to a land that is not so flooded and that is ready for development or occupation. This is not a question of law: this is a fact of life, a practical reality which . . . the mortgage lenders and the insurers will soon remind you of when they assess the risk they have to assume." (Para. 9.)

22 In response to the City's submission that the Chambers judge in the case at bar erred in the same manner as the Federal Court of Appeal in *Glass*, counsel for the Receiver says it is implicit in the Chambers judge's Reasons that he did not accept the "negative value theory" with respect to Watson Island, particularly in light of the fact that the Province has already spent more than \$19,000,000 in restoring the mill site. Mr. Millar characterized the evidence of remediation liability of \$100,000,000 as "entirely vague" and noted that that estimate had included the cost of decommissioning and closure (dismantling, demolition, removal, transportation, resloping and grading) of the mill site. In his submission, it is unrealistic to think that this will ever be done in the near to middle term, and the Chambers judge must be taken to have been of the opinion that the property did have commercial value by reason of its location, its facilities, and the remediation work.

23 In my view, these are the kinds of considerations which the Chambers judge (who has heard most if not all of the Chambers applications relating to New Skeena) was especially qualified to make. Moreover, I do not agree that the Chambers judge "ignored" the issue of the true value of the Watson Island property. He specifically referred to this matter at paras. 16-18 of his Reasons (quoted above), but at the end of the day he concluded that "perfection" in terms of matching values with costs, was *outweighed* by the need for certainty and expediency. In my view, assuming for the moment that the Court had the jurisdiction to make the order it did, the Chambers judge was entitled to weigh these competing interests and to decide that the interests of all the creditors as a group overshadowed the City's particular objections.

24 Two other factors raised by the City, however, do in my view cast greater doubt on the Court's exercise of its discretion. First, there is the fact that Prince Rupert's security and the remedies available to it are very different from those of other creditors. As has been seen, if the Watson Island property cannot be sold, the *Local Government Act* requires Prince Rupert to take the land, environmental liabilities and all, whether or not it will realize anything after payment of its share of the CCAA Costs. Not surprisingly, there is no case law directly on point, but in *Hunters Trailer & Marine Ltd., Re* (2001), 305 A.R. 175, [2001] A.J. No. 1638 (Alta. Q.B.), the Court said it would be unfair to ignore "differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from CCAA proceedings" in allocating CCAA costs. Thus the Court in *Hunters Trailer & Marine Ltd.* approved the allocation of a share of CCAA costs to a mortgage lender that was smaller than the shares allocated to other creditors. Wachowich C.J.Q.B. commented:

The CCAA recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.

Under the circumstances, I conclude, as did the Interim Receiver, that UMC is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of CCAA costs. I agree with the Interim Receiver's proposal that UMC be charged 15 percent of the Monitor's fees and \$500.00 of the Monitor's legal fees, the same percentage proposed for its share of the interim receivership costs. I note that UMC also agreed with this proposal.

Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.

Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors. . . .

I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate

five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above. [paras. 20-23 and 26]

25 My second concern is that the Chambers judge proceeded on the assumption that there were urgent time pressures militating in favour of cost allocations that provided immediate certainty to creditors of what they were likely to be receiving net of the CCAA Costs. Indeed, at para. 3 of his Reasons, the Chambers judge noted that "time is the enemy of enterprise value" and at para. 19 that it would clearly not serve the interests of the parties to "do nothing until everything has been sold". But at this state of New Skeena's existence, the hope of "enterprise value" has had to give way to the reality of liquidation value, all efforts at restructuring the business of the company as a going concern having failed. As in *Westar Mining Ltd., Re* (1993), 75 B.C.L.R. (2d) 16 (B.C. C.A.), "The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities. . . ." (Para. 58, *per* McEachern C.J.B.C. dissenting, whose judgment was adopted by the Supreme Court of Canada on appeal at [1993] 2 S.C.R. 448 (S.C.C.)) The Chambers judge was not facing a "now or never" determination. As Mr. Janes noted, he could have elected to recognize the unusual position of the City and await any sale that might occur within a reasonable time. Failing such a sale, he could assign a value based on more up-to-date evidence. In the meantime, interim allocations and distributions could be made. In this regard, I note that para. 4 of the December 1 Order stated:

4. The sale proceeds from the sale of each specific asset shall stand in the place and stead of the asset sold and all liens, claims, encumbrances and other interests that are attached to an asset prior to its sale shall attach to the sale proceeds with the same validity, priority and in the same amounts, and subject to the same defences, that existed when the liens, claims, encumbrances and other interests attached to the asset;

As counsel for the Receiver suggested, this provision obviates in large measure any time pressure which might have made a more exact allocation of costs and proceeds impractical. Assets can be sold to the highest bidder free and clear of encumbrances. The charges attach instead to the proceeds held by the Receiver, and interim allocations and distributions can be made subject to final adjustment, all without unduly inconveniencing creditors.

26 I would prefer, however, not to decide this appeal on the basis that the Chambers judge erred in the exercise of his discretion by failing to give due weight to the two factors I have described. Again, an appellate court should not interfere with an exercise of discretion in the present context where the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion. Instead, I turn to the more fundamental question of jurisdiction — whether it lay within the Chambers judge's authority to adopt a method of cost allocation that might require the City to pay as its share of CCAA Costs an amount greater than the value of the land over which it holds its tax lien. I note that Mr. Janes and Mr. Millar have confirmed their view that this question relates to the equitable and statutory jurisdiction of the Court under the CCAA rather than under the *Bankruptcy and Insolvency Act*.

27 Mr. Janes for the City submitted that the potential imposition of a "personal liability" on the City over and above its interest in the Watson Island property is fundamentally inconsistent with the entire CCAA scheme, which empowers the court to impose stays and compromise creditors' rights but not to impose further financial liabilities on creditors. He characterizes the scheme as providing a "shield, not a sword". In his submission, this principle is implicit in s. 11 of the Act, which permits a court to *stay*, to *restrain* and to *prohibit* various proceedings (see especially, ss. 11(3) and (4)); and it is explicit in s. 11.3, which states:

11.3 No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

[Emphasis added.]

Further, Mr. Janes contends that the orders made during the CCAA proceedings in this case which permitted the DIP loans and granted the "super-priority" to them, all contemplated that the CCAA Costs would be paid out of the proceeds of realization of

the assets, not out of additional funds to be advanced by creditors. Certainly there was no explicit reference to the possibility that any secured creditor might have to advance or contribute funds beyond its existing exposure.

28 Mr. Janes also notes what he calls the "perverse" effect of the cost allocation order in this case: while the unsecured creditors, who were the parties who stood to gain the most from the attempted restructuring of New Skeena, will bear none of the CCAA Costs under the proposed allocation, the City of Prince Rupert will, if the Watson Island property cannot be sold for the statutory "upset price", actually end up worse off. Its unpaid tax debt will go unpaid and it will have to pay something — likely between \$1.5 and \$2.5 million — in CCAA Costs. This is particularly anomalous when one considers that the Legislature intended to grant municipalities such as the City of Prince Rupert a very high level of priority for its claims for unpaid taxes.

29 Counsel also notes the caution with which courts have approached the granting of the "extraordinary" remedy of priority for DIP financing, as illustrated by *United Used Auto & Truck Parts Ltd.*, *supra*, at paras. 21-30. In that case, Tysoe J. quoted a passage from the judgment of Blair J. in *Royal Oak Mines Inc.*, *Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) and a passage from a judgment of Farley J. in *Royal Oak Mines Inc.*, *Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) Farley J. stated in part:

Aside from the question of the lienholders who have registered liens which but for the Initial Order granted by Blair J. (but subject to the comeback clause) would have priority over the DIP financing, I see no reason to interfere with this superpriority granted. It would seem to me that Blair J. engaged properly in a balancing act as to the \$8.4 million of superpriority DIP financing as authorized. I am in accord with his views as expressed in *Re Skydome Corporation* [(1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div.)], where Blair J. stated [at para. 13]:

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

Implicit in his analysis and part of the equation is the reasonably anticipated benefits for all concerned which derive from these sacrifices. [para. 5; emphasis added.]

Tysoe J. in *United Used Auto & Truck Parts Ltd.* stated that in his view, "there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated." (Para. 28.) He was not so satisfied in that case and therefore declined to approve the application for a prior charge to secure DIP financing which was before him.

30 The City emphasizes the underlined sentence in the quotation above from *Skydome Corp.*, *Re* [(1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List])] and contrasts that with the situation here, where the City may well be "compelled" to advance further funds from its pocket simply in order to "recover" an asset that will fall into its possession in any event as a matter of law and that has little or no market value at present. (I note parenthetically that no argument was made by the City to the effect that the imposition on the City of the condition reproduced at para. 12 of these Reasons contravenes s. 403(1) of the *Local Government Act*, which requires that the local collector offer "each parcel of real property on which taxes are delinquent" for sale by public auction on the last Monday in September. See the discussion in *Clear Creek Contracting Ltd.*, *supra*, at paras. 40-42.)

31 The Receiver contends on the other hand that the proposed cost allocation is simply a consequence of the original grant of priority to the DIP financing early on in the CCAA process, and that it was "implicit in any priority scenario that where a creditor took title to an asset, it would have to first satisfy the burden of the Charge." In the Receiver's analysis, the question in this case is not whether the Order was made without jurisdiction by virtue of the fact that it imposes a "personal liability"

on the City, but rather whether it is appropriate that "if the City takes the property in lieu of taxes, it must as a condition of that taking, discharge or pay any priority charge that affects the property. That the City would have to discharge that liability upon taking title is a most uncontroversial and self-evident proposition. If one takes the benefit of an asset [one] must discharge the burdens associated with it."

32 Counsel also emphasizes that under the terms of the Order and the Receiver's recommendation, the City would not be required to "ante up" any amount unless it decided to take the property into its own name — i.e., that the City's obligation to pay the share of the CCAA Costs would not apply if the Watson Island property were sold to a third party without the City having to "recover" it. Further, since the mill was the "primary asset" of New Skeena, the City should, Mr. Millar argues, properly bear a large portion of the costs incurred in trying to sell the business as a going concern — a possibility that had obvious potential benefits for the City and its inhabitants. As for s. 11.3 of the CCAA, Mr. Millar says that it is not aimed at the situation with which we are concerned, but rather is intended to allow creditors the right to require "C.O.D." payment under supply contracts with the insolvent company.

33 I agree that para. (a) of s. 11.3 was intended for the purpose Mr. Millar describes, but para. (b) appears to have a wider reach that is engaged by the facts of this case, assuming the Chambers judge's order of December 1, 2004 was an order "made under s. 11" of the CCAA. (On this latter point, neither counsel for the City nor the Receiver argued to the contrary.) In my view, the effect of the Order is to require the further advance of money or credit in certain circumstances. Considering the purpose and tenor of the Act, which does generally operate as a "shield, not a sword", I am persuaded that the Chambers judge strayed beyond his authority in acceding to the recommendation of the Receiver that if a secured creditor sought to recover the asset against which it holds security, the creditor should be required as a condition of such transaction to pay to the Receiver in cash the amount of CCAA Costs allocated against that asset. To the extent that a creditor could be required to pay funds in excess of the value of its security interest, such a condition was not, in my view, an inevitable aspect of the granting of DIP priority but instead was an unusual feature that, in the almost unique circumstances of this case, contravenes s. 11.3(b). I would therefore allow the appeal.

34 The question then is what order this court should make to permit the sale of New Skeena's assets to proceed as quickly and conveniently as possible, while recognizing the City's unusual situation as a secured creditor. The City sought an order to the effect that the CCAA costs should be allocated on the basis of actual values as and when they are realized, or alternatively, that the Watson Island property be treated in the same way as the "remaining assets" referred to in the Order — i.e., based upon such values as may be attributed by the court. I find the latter alternative more attractive in that it does not affect all the other assets, minimizes the accounting that will be required, and thus retains much of the efficiency of the original order. It will be clear from these Reasons, however, that if and when the time comes for the Court to allocate a value to the Watson Island property for the purposes of allocating the CCAA Costs, the effect of the order cannot be to require that Prince Rupert pay cash from its pocket as a condition of taking the property, the "value" (as determined by the Court) of which is less than the amount required to be paid.

Costs

35 The City sought an order of costs "on a substantial indemnity scale, such costs not to form part of the Receiver's charge against the assets of the bankrupt." I would ask that the City provide us with written submissions of law concerning this prayer, to be filed within 15 days of the issuance of these Reasons. I would then ask the Receiver to file its written submissions within 10 days of the latter date.

Esson J.A.:

I agree.

Smith J.A.:

I agree.

Appeal allowed.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 7

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.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.d Effect of arrangement](#)

[XIX.3.d.ii Stay](#)

Civil practice and procedure

[XXII Judgments and orders](#)

[XXII.23 Res judicata and issue estoppel](#)

[XXII.23.b Issue estoppel](#)

[XXII.23.b.i General principles](#)

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay
A Ltd. and P Inc. entered into Cargo Handling Agreement (CHA) — A Ltd. received Companies' Creditors Arrangement Act (CCAA) protection — Under CCAA order, A Ltd. was to continue making payments to P Inc. under CHA — A Ltd. ceased making payments under CHA — P Inc. brought three separate unsuccessful motions for orders directing A Ltd. to resume making payments under CHA — It was breach of terms of DIP loan to permit payments by A Ltd. under CHA without approval of DIP lenders, who did not approve — There was insufficient cash available to A Ltd. to start to pay P Inc. and other creditors — Creditors held guarantee from E Global and no demand was made on guarantee — Decision that payments under CHA resume was stayed pending determination of two remaining oppression claims — P Inc. brought application for leave to appeal

— Application dismissed — Leave to appeal was to be granted sparingly in CCAA proceedings — Questions proposed to be determined on appeal if leave was granted were identical to those already determined adversely against moving parties three times and not appealed — There was no prima facie merit in attempting to seek leave to appeal from third unsuccessful attempt to invoke s. 11.01(a) of Act — Record did not support contention that law had changed or that judge had opened door for re-consideration of issue under s. 11.01(a) of Act when same judge had clearly determined issue against P Inc.'s interests on previous motions — Same legal question involving same parties had now been finally determined twice by presiding judge in court of competent jurisdiction, so issue estoppel applied to bind parties — In doing so, CCAA judge was exercising same discretion that would apply to estoppel issue — While s. 11.01(a) issues had considerable significance for particular proceeding, issues in proposed appeals arose out of unique and inter-related agreements and were of little relevance to general practice.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles A Ltd. and P Inc. entered into Cargo Handling Agreement (CHA) — A Ltd. received Companies' Creditors Arrangement Act (CCAA) protection — Under CCAA order, A Ltd. was to continue making payments to P Inc. under CHA — A Ltd. ceased making payments under CHA — P Inc. brought three separate unsuccessful motions for orders directing A Ltd. to resume making payments under CHA — It was breach of terms of DIP loan to permit payments by A Ltd. under CHA without approval of DIP lenders, who did not approve — There was insufficient cash available to A Ltd. to start to pay P Inc. and other creditors — Creditors held guarantee from E Global and no demand was made on guarantee — Decision that payments under CHA resume was stayed pending determination of two remaining oppression claims — P Inc. brought application for leave to appeal — Application dismissed — Questions proposed to be determined on appeal if leave was granted were identical to those already determined adversely against moving parties three times and had not been appealed — Same legal question involving same parties had now been finally determined twice by presiding judge in court of competent jurisdiction, so issue estoppel applied to bind parties — Nor did court retain residual discretion to decline to apply doctrine of issue estoppel — In concluding that payments should not resume, CCAA judge considered and weighed all parties' and stakeholders' interests and concluded that it would not be appropriate to lift CCAA stay in respect of those payments — In doing so, CCAA judge was exercising same discretion that would apply to estoppel issue.

Table of Authorities

Cases considered:

Danyluk v. Ainsworth Technologies Inc. (2001), 2001 SCC 44, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 7 C.P.C. (5th) 199, 272 N.R. 1, 149 O.A.C. 1, 2001 C.L.L.C. 210-033, 34 Admin. L.R. (3d) 163, [2001] 2 S.C.R. 460, 2001 CSC 44 (S.C.C.) — referred to

Diamond v. Western Realty Co. (1924), [1924] S.C.R. 308, [1924] 2 D.L.R. 922, 1924 CarswellOnt 116 (S.C.C.) — referred to

Ernst & Young Inc. v. Essar Global Fund Ltd. (2017), 2017 ONSC 1366, 2017 CarswellOnt 4049, 46 C.B.R. (6th) 107 (Ont. S.C.J. [Commercial List]) — referred to

Essar Steel Algoma Inc., Re (2016), 2016 ONSC 6459, 2016 CarswellOnt 16408, 41 C.B.R. (6th) 298 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2016), 2016 ONCA 332, 2016 CarswellOnt 6785, 36 C.B.R. (6th) 1, 130 O.R. (3d) 481, 348 O.A.C. 131 (Ont. C.A.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 15 C.B.R. (5th) 307, 11 B.L.R. (4th) 185, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

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

Generally — referred to

s. 11.01(a) [en. 2005, c. 47, s. 128] — considered

APPLICATION by creditor for leave to appeal judgment reported at *Essar Steel Algoma Inc., Re* (2017), 2017 ONSC 2585, 2017 CarswellOnt 6582 (Ont. S.C.J. [Commercial List]), dismissing creditor's motion.

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.

Footnotes

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.

TAB 8

Most Negative Treatment: Application/Notice of Appeal

Most Recent Application/Notice of Appeal: [Nortel Networks Inc. v. Pension Protection Fund](#) | 2016 CarswellOnt 14117 | (S.C.C., Jul 29, 2016)

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])

Counsel: Sheila Block, Scott A. Bomhof, Andrew Gray, Adam M. Slavens, Jeremy Opolsky, for Moving parties, U.S. Debtors(1) Richard B. Swan, S. Richard Orzy, Gavin H. Finlayson, for Moving party, Ad Hoc Group of Bondholders David R. Byers, Daniel S. Murdoch, for Moving party, Conflicts Administrator of Nortel Networks S.A. Shayne Kukulowicz, Michael Wunder, Ryan Jacobs, Geoffrey Shaw, Jane Dietrich, for Moving party, Official Committee of Unsecured Creditors of Nortel Networks Inc. et al. 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 Administrator of the Pension Benefits Guarantee Fund Mark Zigler, Ari Kaplan, for Responding parties, Former Employees of Nortel and LTD Beneficiaries 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.

Subject: Contracts; Estates and Trusts; Evidence; Insolvency; Intellectual Property; International; Property

Related Abridgment Classifications

Bankruptcy and insolvency

[XIV Administration of estate](#)[XIV.6 Sale of assets](#)[XIV.6.h Miscellaneous](#)

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)[XIX.4 Appeals](#)**Headnote**

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

Debtor group of companies (N group) operated as highly-integrated multinational enterprise — Cross-border insolvency proceedings went on for over seven years — Debtor group's assets, primarily intellectual property (IP), had been sold and proceeds had been placed in escrow (Lockbox Funds) — Ontario Commercial List judge (trial judge) and Judge of U.S. Bankruptcy Court presided over joint trial and both concluded that Lockbox Funds should be allocated among various N debtor estates on pro rata basis — Judges diverged on issue of IP rights under Master Research and Development Agreement (MRDA), which provided for payment of residual profits to certain entities — Trial judge held that MRDA did not govern allocation of Lockbox funds — Moving parties brought motions for leave to appeal trial judge's judgment — Motions dismissed — Test for leave to appeal was not met — There was no prima facie merit to arguments that pro rata allocation constituted substantive consolidation, that trial judge erred by failing to recognize distinct and separable property rights various N companies allegedly had in N group's IP, that allocation was arbitrary, or that trial judge erred in interpreting MRDA — Facts of case were unique and exceptional, so granting leave would not allow court to provide guidance on legal issues of significance to practice — Fact that allocation of Lockbox Funds was significant issue to parties was insufficient to warrant granting leave.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

Distribution of proceeds of sale — Debtor group of companies (N group) was highly integrated multinational enterprise — During lengthy cross-border insolvency proceedings, debtor group's assets, primarily intellectual property (IP), had been sold and proceeds had been placed in escrow (Lockbox Funds) — Ontario Commercial List judge (trial judge) and Judge of U.S. Bankruptcy Court presided over joint trial and both concluded that Lockbox Funds should be allocated among various N debtor estates on pro rata basis — Judges diverged on issue of IP rights under Master Research and Development Agreement (MRDA), which provided for payment of residual profits to certain entities — Trial judge held that MRDA did not govern allocation of Lockbox Funds — Moving parties brought motions for leave to appeal — Motions dismissed — Test for leave to appeal was not met — Grounds of appeal had no prima facie merit — There was no prima facie merit to arguments that pro rata allocation constituted substantive consolidation, that trial judge erred by failing to recognize distinct property rights various N companies allegedly had in N group's IP, that allocation was arbitrary, or that trial judge erred in interpreting MRDA — There was no reason to interfere with trial judge's interpretation of MRDA — Trial judge was alive to fairness concerns and gave reasons for adopting approach he did.

Table of Authorities**Cases considered:**

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellIBC 2267, 2014 CarswellIBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.*) [2014] 2 S.C.R. 633 (S.C.C.) — followed

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Nortel Networks Corp., Re (2013), 2013 ONCA 427, 2013 CarswellOnt 8231, 5 C.B.R. (6th) 254 (Ont. C.A.) — referred to

Nortel Networks Inc., Re (2015), 532 B.R. 494 (U.S. Bankr. D. Del.) — referred to

Nortel Networks Inc., Re (2011), 669 F.3d 128 (U.S. C.A. 3rd Cir.) — considered

Northland Properties Ltd., Re (1988), 69 C.B.R. (N.S.) 266, 29 B.C.L.R. (2d) 257, 73 C.B.R. (N.S.) 146, 1988 CarswellBC 531 (B.C. S.C.) — considered

PSINET Ltd., Re (2002), 2002 CarswellOnt 1261, 33 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]) — referred to
Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — referred to

Timminco Ltd., Re (2012), 2012 CarswellOnt 9633, 2012 ONCA 552, 2 C.B.R. (6th) 332 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

ss. 1101-1174 — referred to

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

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 13 — considered

Insolvency Act, 1986, c. 45

Generally — referred to

MOTIONS for leave to appeal from decisions reported at *Nortel Networks Corp., Re* (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) and *Nortel Networks Corp., Re* (2015), 2015 ONSC 4170, 2015 CarswellOnt 10304, 27 C.B.R. (6th) 51 (Ont. S.C.J. [Commercial List]), regarding allocation of proceeds of sale of debtor's assets.

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 Estate¹⁰ 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 prorata 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.

TAB 9

2007 ABCA 266
Alberta Court of Appeal (In Chambers)

Calpine Canada Energy Ltd., Re

2007 CarswellAlta 1097, 2007 ABCA 266, [2007] A.W.L.D. 3481, [2007] A.J. No. 917, 161 A.C.W.S. (3d) 370, 33 B.L.R. (4th) 94, 35 C.B.R. (5th) 27, 410 W.A.C. 25, 417 A.R. 25, 80 Alta. L.R. (4th) 60

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

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

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

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

C. O'Brien J.A.

Heard: August 15, 2007

Judgment: August 17, 2007

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

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

Counsel: P.T. Linder, Q.C., R. Van Dorp for Applicant, CPL
L.B. Robinson, Q.C., S.F. Collins, J.A. Carfagnini for CCAA Applicants and the CCAA Parties (Respondents)
H.A. Gorman for Ad Hoc ULCI Noteholders Committee
P.H. Griffin, U. Sheikh for Calpine Corporation and other US Debtors
F.R. Dearlove for HSBC
P. McCarthy, Q.C., J. Kruger for Ernst & Young Inc., the Monitor
N.S. Rabinovitch for Lien Debtholders
R. De Waal for Unsecured Creditors Committee

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.b Approval by court](#)

[XIX.3.b.i "Fair and reasonable"](#)

Headnote

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

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

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

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) — referred to
Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to
Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to
Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — referred to
Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta. C.A.) — followed
Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — referred to
Smoky River Coal Ltd., Re (1999), 12 C.B.R. (4th) 94, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, [1999] 11 W.W.R. 734, 1999 CarswellAlta 491 (Alta. C.A.) — considered
Stelco Inc., Re (2005), 204 O.A.C. 216, 78 O.R. (3d) 254, 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.) — referred to
T. Eaton Co., Re (1999), 14 C.B.R. (4th) 288, 1999 CarswellOnt 3542 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

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

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 11(4) — referred to

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

C. O'Brien J.A.:

Introduction

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

Background facts

2 In December 2005, Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (CCAA Applicants) sought and obtain protection under the CCAA. At the same time, the parties referred to as the US Debtors sought and obtained similar protection under Chapter 11 of the U. S. Bankruptcy Code.

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

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

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

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

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

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

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

10 Sections 4 and 5 of the CCAA provide:

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

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

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

Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

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

Test for leave to appeal

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

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

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

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

Analysis

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

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

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

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

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

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

Application in this case

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

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

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

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

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

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

and further at para. 60:

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

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

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

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

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

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

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

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

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

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

(i) a priority payment of \$75 million out of the proceeds of the sale of bonds owned by Calpine Canada Resources Company;

(ii) the release of a potential claim against Calpine Canada Energy Limited, the parent of Calpine Canada Resources Company, which is a partner of Calpine Energy Services Canada Ltd., against which CPL has a claim;

(iii) the dismissal of a claim by Calpine Canada Energy Limited against Quintana Canada Holdings LLC, thereby depleting Calpine Canada Energy Limited of a potential asset which that company could use to satisfy any potential claim by CPL for any shortfall, were it not for the release of claims against Calpine Canada Energy Limited (see (ii) above); and

(iv) the dismissal of the Greenfield Action brought by another CCAA Debtor against Calpine Energy Services Canada Ltd. for an alleged fraudulent conversion of its interest in Greenfield LP which was developing a 1005 Megawatt generation plant.

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

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

36 The GSA does not usurp the right of the creditors to vote on a plan of arrangement if it becomes necessary to propose such a plan to the creditors. As explained by the supervising judge, the settlement between the CCAA Debtors and the US

Debtors unlocked the Canadian proceedings to meaningful progress in asset realization and claims resolution, and provided the mechanisms for resolving the remaining issues and significant creditor claims, and the clarification of priorities.

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

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

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

Conclusion

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

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

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

Application dismissed.

TAB 10

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Longuepée v. University of Waterloo](#) | 2020 ONCA 830, 2020 CarswellOnt 18852, 325 A.C.W.S. (3d) 556 | (Ont. C.A., Dec 21, 2020)

2019 ONCA 1025
Ontario Court of Appeal

Canadian Broadcasting Corporation v. Ferrier

2019 CarswellOnt 21120, 2019 ONCA 1025, 148 O.R. (3d) 705, 313
A.C.W.S. (3d) 456, 441 D.L.R. (4th) 632, 63 Admin. L.R. (6th) 280

Canadian Broadcasting Corporation (Applicant / Appellant in Appeal) and Lee Ferrier, Q.C., Exercising powers and duties of the Thunder Bay Police Services Board (Respondents / Respondents in Appeal except the First Nation Public Complainants)

G.R. Strathy C.J.O., Doherty, Robert J. Sharpe J.J.A.

Heard: October 31, 2019
Judgment: December 27, 2019
Docket: CA C66995, C66998

Proceedings: reversing *Canadian Broadcasting Corporation v. Ferrier* (2019), 53 Admin. L.R. (6th) 236, 2019 CarswellOnt 64, 2019 ONSC 34, Aitken J., Mulligan J., Warkentin R.S.J. (Ont. Div. Ct.)

Counsel: Ryder L. Gilliland, Agatha Wong, for Appellant, Canadian Broadcasting Corporation
Julian N. Falconer, Mary (Molly) Churchill, for Appellants, the First Nation Public Complainants
Joanne E. Mulcahy, for Respondent Officers
Holly Walbourne, for Respondent, the Chief of Police of the Thunder Bay Police Service
Jean C.H. Iu, Pamela Stephenson Welch, for Respondent, the Independent Police Review Director
David Migicovsky, for Respondent, Lee Ferrier, Q.C., exercising powers and duties of the Thunder Bay Police Services Board
Daniel Guttman, for Intervener, the Attorney General (Ontario)

Subject: Civil Practice and Procedure; Public

Related Abridgment Classifications

Administrative law

[III](#) Standard of review

[III.1](#) Correctness

Administrative law

[XII](#) Practice and procedure

[XII.2](#) Judicial review

[XII.2.b](#) Standing

Administrative law

[XII](#) Practice and procedure

[XII.2](#) Judicial review

[XII.2.h](#) Miscellaneous

Administrative law

[XII](#) Practice and procedure

[XII.6](#) Appeal

XII.6.b Miscellaneous

Law enforcement agencies

I Police**I.1** Organization of police forces**I.1.d** Disciplinary proceedings**I.1.d.xiii** Miscellaneous**Headnote**

Administrative law --- Standard of review — Correctness

Case involved tragic death of Indigenous man and allegations that members of police service were guilty of misconduct in relation to their investigation of his death — Complaint that they were guilty of misconduct formed part of much larger pattern of concern regarding conduct of police service in relation to Indigenous community — Because it took longer than six months for Ontario Independent Police Review Director to report that there were reasonable grounds to believe that officers were guilty of misconduct, it was necessary to ask police services board for extension before disciplinary hearing could be commenced — Decision maker determined that hearing of extension application should be held in camera — Application by Canadian Broadcasting Corporation (CBC) for judicial review was dismissed — CBC and complainants appealed — Appeal allowed; matter remitted for reconsideration — Decision that Dagenais/Mentuck test did not apply was reviewable on correctness standard of review — If Canadian Charter of Rights and Freedoms rights are considered by administrative decision maker, standard of reasonableness will ordinarily apply — Refusal or failure to consider applicable Charter right should attract correctness standard of review.

Administrative law --- Practice and procedure — Judicial review — Miscellaneous

Case involved tragic death of Indigenous man and allegations that members of police service were guilty of misconduct in relation to their investigation of his death — Complaint that they were guilty of misconduct formed part of much larger pattern of concern regarding conduct of police service in relation to Indigenous community — Because it took longer than six months for Ontario Independent Police Review Director to report that there were reasonable grounds to believe that officers were guilty of misconduct, it was necessary to ask police services board for extension before disciplinary hearing could be commenced — Decision maker determined that hearing of extension application should be held in camera — Application by Canadian Broadcasting Corporation (CBC) for judicial review was dismissed — CBC and complainants appealed — Appeal allowed; matter remitted for reconsideration — Decision maker did not err when he found that Dagenais/Mentuck test did not apply to decision he had to make under s. 35(4) of Police Services Act — On state of law as it now stood, Dagenais/Mentuck test did not apply to this administrative hearing — However, presumption of open hearing under s. 35(3) of Act and s. 2(b) Canadian Charter of Rights and Freedoms right recognized in certain case law did apply.

Law enforcement agencies --- Police — Organization of police forces — Disciplinary proceedings — Miscellaneous

Case involved tragic death of Indigenous man and allegations that members of police service were guilty of misconduct in relation to their investigation of his death — Complaint that they were guilty of misconduct formed part of much larger pattern of concern regarding conduct of police service in relation to Indigenous community — Because it took longer than six months for Ontario Independent Police Review Director to report that there were reasonable grounds to believe that officers were guilty of misconduct, it was necessary to ask police services board for extension before disciplinary hearing could be commenced — Decision maker determined that hearing of extension application should be held in camera — Application by Canadian Broadcasting Corporation (CBC) for judicial review was dismissed — CBC and complainants appealed — Appeal allowed; matter remitted for reconsideration — Decision maker did not err when he found that Dagenais/Mentuck test did not apply to decision he had to make under s. 35(4) of Police Services Act — On state of law as it now stood, Dagenais/Mentuck test did not apply to this administrative hearing — However, presumption of open hearing under s. 35(3) of Act and s. 2(b) Canadian Charter of Rights and Freedoms right recognized in certain case law did apply.

Administrative law --- Practice and procedure — Appeal — Miscellaneous

Fresh evidence — Case involved tragic death of Indigenous man and allegations that members of police service were guilty of misconduct in relation to their investigation of his death — Complaint that they were guilty of misconduct formed part of much larger pattern of concern regarding conduct of police service in relation to Indigenous community — Because it took longer than six months for Ontario Independent Police Review Director to report that there were reasonable grounds to believe that officers were guilty of misconduct, it was necessary to ask police services board for extension before disciplinary

hearing could be commenced — Decision maker determined that hearing of extension application should be held in camera — Application by Canadian Broadcasting Corporation (CBC) for judicial review was dismissed — CBC and complainants appealed — Complainants brought motion for introduction of fresh evidence — Motion dismissed — Fresh evidence was unnecessary for resolution of appeal.

Administrative law --- Practice and procedure — Judicial review — Standing

Table of Authorities

Cases considered by *Robert J. Sharpe J.A.*:

Ackerman v. Ontario Provincial Police Service (2010), 2010 ONSC 910, 2010 CarswellOnt 1060, (sub nom. *Ackerman v. Ontario Provincial Police Service*) 259 O.A.C. 163, 11 Admin. L.R. (5th) 304 (Ont. Div. Ct.) — considered

Alberta (Information and Privacy Commissioner) v. University of Calgary (2016), 2016 SCC 53, 2016 CSC 53, 2016 CarswellAlta 2247, 2016 CarswellAlta 2248, 9 Admin. L.R. (6th) 177, 403 D.L.R. (4th) 1, [2017] 1 W.W.R. 1, 2017 C.L.L.C. 210-004, [2016] 2 S.C.R. 555 (S.C.C.) — referred to

British Columbia (Attorney General) v. British Columbia (Information & Privacy Commissioner) (2004), 2004 BCSC 1597, 2004 CarswellBC 2893, 34 B.C.L.R. (4th) 298, [2005] 3 W.W.R. 352, 21 Admin. L.R. (4th) 305 (B.C. S.C.) — referred to

Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System) (1997), 1997 CarswellNat 1387, 1997 CarswellNat 1388, 48 Admin. L.R. (2d) 1, 151 D.L.R. (4th) 1, (sub nom. *Canada (Attorney General) v. Royal Commission of Inquiry on the Blood System in Canada*) 216 N.R. 321, (sub nom. *Canada (Attorney General) v. Royal Commission of Inquiry on the Blood System in Canada*) 132 F.T.R. 160 (note), (sub nom. *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*) [1997] 3 S.C.R. 440 (S.C.C.) — referred to

Canada (Minister of Citizenship and Immigration) v. Vavilov (2019), 2019 SCC 65, 2019 CSC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884 (S.C.C.) — considered

Canadian Broadcasting Corp. v. R. (2010), 2010 ONCA 726, 2010 CarswellOnt 8225, 102 O.R. (3d) 673, (sub nom. *R. v. Canadian Broadcasting Corp.*) 262 C.C.C. (3d) 455, (sub nom. *R. v. Canadian Broadcasting Corp.*) 327 D.L.R. (4th) 470, 271 O.A.C. 7, (sub nom. *R. v. Canadian Broadcasting Corporation*) 221 C.R.R. (2d) 242 (Ont. C.A.) — considered
Canadian Broadcasting Corp. v. Summerside (City) (1999), 1999 CarswellPEI 12, 170 D.L.R. (4th) 731, 173 Nfld. & P.E.I.R. 56, 530 A.P.R. 56, 61 C.R.R. (2d) 311 (P.E.I. T.D.) — considered

Canadian Broadcasting Corp. v. Thunder Bay Police Services Board (2018), 2018 ONSC 5872 (Ont. Div. Ct.) — considered

Coombs v. Toronto (Metropolitan) Police Services Board (December 5, 1997), Doc. 120/95 (Ont. Gen. Div.) — referred to
Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — considered

Doré c. Québec (Tribunal des professions) (2012), 2012 SCC 12, 2012 CarswellQue 2048, 2012 CarswellQue 2049, (sub nom. *Doré v. Barreau du Québec*) 343 D.L.R. (4th) 193, 34 Admin. L.R. (5th) 1, (sub nom. *Doré v. Barreau du Québec*) 428 N.R. 146, [2012] 1 S.C.R. 395, (sub nom. *Doré v. Barreau du Québec*) 255 C.R.R. (2d) 289 (S.C.C.) — considered

Dunsmuir v. New Brunswick (2008), 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125, D.T.E. 2008T-223, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 372 N.R. 1, 329 N.B.R. (2d) 1, 844 A.P.R. 1, 2008 CSC 9, 2008 C.L.L.C. 220-020, 291 D.L.R. (4th) 577, 170 L.A.C. (4th) 1, 95 L.C.R. 65, [2008] 1 S.C.R. 190 (S.C.C.) — considered

Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry Commissioner (2007), 2007 CarswellOnt 112, 219 O.A.C. 129, 2007 ONCA 20, (sub nom. *Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Ontario (Cornwall Public Inquiry, Commissioner)*) 278 D.L.R. (4th) 550 (Ont. C.A.) — followed

Figueiras v. York Police Services Board (2013), 2013 ONSC 7419, 2013 CarswellOnt 18038, (sub nom. *Figueiras v. York (Regional Municipality)*) 317 O.A.C. 179 (Ont. Div. Ct.) — referred to

Forestall v. Toronto Police Services Board (2007), 2007 CarswellOnt 5073, 228 O.A.C. 202, 72 Admin. L.R. (4th) 299 (Ont. Div. Ct.) — considered

Gehl v. Canada (Attorney General) (2017), 2017 ONCA 319, 2017 CarswellOnt 5673, 19 Admin. L.R. (6th) 251, 413 D.L.R. (4th) 1, [2017] 3 C.N.L.R. 103, 382 C.R.R. (2d) 10, 138 O.R. (3d) 52 (Ont. C.A.) — referred to

Giguère c. Chambre des notaires du Québec (2004), 2004 SCC 1, 2004 CarswellQue 19, 2004 CarswellQue 20, (sub nom. *Giguère v. Chambre des notaires du Québec*) 315 N.R. 346, 235 D.L.R. (4th) 422, [2004] 1 S.C.R. 3, [2004] R.R.A. 5, 2004 CSC 1 (S.C.C.) — referred to

Langenfeld v. TPSB (2018), 2018 ONSC 3447, 2018 CarswellOnt 9661, 414 C.R.R. (2d) 85, 51 Admin. L.R. (6th) 47 (Ont. S.C.J.) — referred to

Langenfeld v. Toronto Police Services Board (2019), 2019 ONCA 716, 2019 CarswellOnt 14511, 55 Admin. L.R. (6th) 322, 58 C.C.L.T. (4th) 27, 437 D.L.R. (4th) 614 (Ont. C.A.) — considered

Lifford Wine Agencies Ltd. v. Ontario (Alcohol & Gaming Commission) (2003), 2003 CarswellOnt 4717, 179 O.A.C. 76, 180 O.A.C. 151 (Ont. Div. Ct.) — considered

Oakwood Development Ltd. v. St. François Xavier (Rural Municipality) (1985), [1985] 2 S.C.R. 164, (sub nom. *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*) 18 Admin. L.R. 59, (sub nom. *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*) 61 N.R. 321, (sub nom. *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*) 20 D.L.R. (4th) 641, (sub nom. *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*) 36 Man. R. (2d) 215, (sub nom. *Oakwood Development Ltd. v. St. François Xavier*) [1985] 6 W.W.R. 147, (sub nom. *Oakwood Development Ltd. v. St. François Xavier*) 37 R.P.R. 101, (sub nom. *Oakwood Development Ltd. v. St. François Xavier*) 31 M.P.L.R. 1, 1985 CarswellMan 202, 1985 CarswellMan 383 (S.C.C.) — referred to

Payne v. Peel (Regional Municipality) Police Services Board (2003), 2003 CarswellOnt 322, 168 O.A.C. 69, 50 Admin. L.R. (3d) 161 (Ont. Div. Ct.) — referred to

R. v. Mentuck (2001), 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409, 163 Man. R. (2d) 1, 269 W.A.C. 1, [2001] 3 S.C.R. 442 (S.C.C.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — considered

Southam Inc. v. Canada (Attorney General) (1997), 47 C.R.R. (2d) 210, 154 D.L.R. (4th) 370, 36 O.R. (3d) 721, 1997 CarswellOnt 4376, 45 O.T.C. 52 (Ont. Gen. Div.) — considered

Telfer v. Canada Revenue Agency (2009), 2009 FCA 23, (sub nom. *CRA v. Telfer*) 2009 D.T.C. 5046 (Eng.), 2009 CarswellNat 655, [2009] 4 C.T.C. 123, 386 N.R. 212, 2009 CAF 23, 2009 CarswellNat 5698, 2009 D.T.C. 5046 (F.C.A.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, [2003] 3 S.C.R. 77, 9 Admin. L.R. (4th) 161, 31 C.C.E.L. (3d) 216 (S.C.C.) — considered

Toronto Star Newspapers Ltd. v. Ontario (2005), 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, (sub nom. *R. v. Toronto Star Newspapers Ltd.*) 200 O.A.C. 348, (sub nom. *R. v. Toronto Star Newspapers Ltd.*) 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188 (S.C.C.) — considered

Toronto Star v. AG Ontario (2018), 2018 ONSC 2586, 2018 CarswellOnt 6712, 421 D.L.R. (4th) 687, 142 O.R. (3d) 266, (sub nom. *Toronto Star Newspapers Ltd. v. Ontario (Attorney General)*) 410 C.R.R. (2d) 1 (Ont. S.C.J.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — considered

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — referred to

s. 1 — considered

Police Services Act, R.S.O. 1990, c. P.15

Generally — referred to

s. 35 — considered

s. 35(3) — considered

s. 35(4) — considered

s. 35(4)(b) — considered

s. 37 — considered

s. 83(17) — considered

s. 95 — considered

Public Officers Act, R.S.O. 1990, c. P.45

s. 16 — referred to

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

Generally — referred to

APPEAL by Canadian Broadcasting Corporation and complainants from decision reported at *Canadian Broadcasting Corporation v. Ferrier* (2019), 2019 ONSC 34, 2019 CarswellOnt 64, 53 Admin. L.R. (6th) 236 (Ont. Div. Ct.), dismissing application for judicial review of decision determining that certain hearing should be held in camera; MOTION by complainants for introduction of fresh evidence.

Robert J. Sharpe J.A.:

1 This appeal raises an important issue regarding the openness of police board hearings. The case involves the tragic death of an Indigenous man and allegations that the members of the Thunder Bay Police Service (the "TBPS") were guilty of misconduct in relation to their investigation of his death. Within hours of the discovery of the body, they concluded that the death was not suspicious, and they failed to conduct any further investigation. The complaint that they were guilty of misconduct forms part of a much larger pattern of concern regarding the conduct of the TBPS in relation to the Indigenous community.

2 Because it took longer than six months for the Ontario Independent Police Review Director (the "OIPRD") to report that there were reasonable grounds to believe that the officers were guilty of misconduct, it was necessary to ask the TBPS Board for an extension before a disciplinary hearing could be commenced.

3 The *Police Services Act*, R.S.O. 1990, c. P.15, provides that subject to certain exceptions, police services board hearings are presumptively open to the public. The decision maker, a retired judge appointed to make the decision the TBPS Board would ordinarily make, entertained submissions and ordered that hearing would be closed.

4 The Canadian Broadcasting Corporation (the "CBC") and the Complainants appeal the order of the Divisional Court refusing to interfere with the decision, arguing that both the Divisional Court and the decision maker failed to pay adequate attention to the s. 2(b) *Charter* right to freedom of expression by failing to require an open hearing.

5 For the following reasons, I would allow the appeal, set aside the judgment of the Divisional Court, quash the decision ordering a closed hearing and remit the matter for reconsideration in the light of these reasons.

A. BACKGROUND

6 The body of Stacy DeBungee, an Indigenous man, was discovered in the McIntyre River in Thunder Bay on October 19, 2015. Within hours, the TBPS advised that the death was not suspicious. The two Complainants, Brad DeBungee, Stacy's brother, and Chief Jim Leonard, Rainy River First Nations, asked the OIPRD to investigate allegations of misconduct against

the officers who had conducted the investigation and to undertake a systemic review of the relationship between First Nations peoples and the TBPS.

7 On April 22, 2016, the OIPRD decided to undertake an investigation into the handling of the DeBungee death. Under the *Police Services Act*, this is referred to as the day that the complaint was "retained" by the OIPRD. On November 3, 2016, the OIPRD announced terms of reference for a systemic review into the TBPS policing of First Nations peoples. The OIPRD report issued on February 15, 2018 found that there was sufficient evidence to believe, on reasonable grounds, that the officers had committed misconduct in their investigation of Stacy DeBungee's death.

8 Because more than six months had elapsed from the date the complaint was retained, no notice of hearing to consider the complaint and disciplinary action could be served unless the TBPS granted an extension on the ground that the delay in serving the notice was reasonable: *Police Services Act*, at s. 83(17). The OIPRD directed the Chief of the TBPS to bring an extension application to the TBPS Board.

9 On account of the ongoing OIPRD systemic review of the TBPS's relationship with the Indigenous community, the Board was concerned about potential bias allegations. Accordingly, it sought the appointment of a "disinterested person" under the *Public Officers Act*, R.S.O. 1990, c.P.45, s. 16, to hear the extension application in its place. The Superior Court appointed a retired judge, the Honourable Lee Ferrier, Q.C., to act as the substitute decision maker to consider and exercise the Board's powers in relation to the extension.

10 The parties at the extension application hearing included the Chief of Police, the OIPRD, the officers and the Complainants. The Complainants had standing to make and receive submissions.

11 The *Police Services Act*, at s. 35(3), provides that police board meetings and hearings are presumptively open:

Meetings and hearings conducted by the board shall be open to the public, subject to subsection (4), and notice of them shall be published in the manner that the board determines.

12 Section 35(4) allows the board to hold a closed meeting and defines the circumstances when that may be done:

(4) The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,

(a) matters involving public security may be disclosed and, having regard to the circumstances, the desirability of avoiding their disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public; or

(b) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.

13 The decision maker sought the views of the parties as to whether the hearing of the extension application should be *in camera*. Counsel for the Chief of Police, the OIPRD and the officers asked that the hearing be closed. Counsel for the Complainants advised that his clients sought an open hearing. The decision maker asked for written submissions. Counsel for the Complainants notified the CBC, and the CBC advised the decision maker of its interest in being heard on the *in camera* issue. The decision maker allowed the CBC to make written submissions.

14 The CBC and the Complainants submitted that an open hearing was required by s. 2(b) of the *Charter*:

Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression including freedom of the press and other media of communication.

15 The CBC and the Complainants argued that principles enunciated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.) and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 (S.C.C.), (the "*Dagenais/Mentuck*" test) applied. This test applies to discretionary decisions limiting freedom of the press in relation to court proceedings. As restated in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 (S.C.C.), at para. 26, and explained by this court in *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726, 102 O.R. (3d) 673 (Ont. C.A.), at para. 20, the *Dagenais/Mentuck* principle, is as follows:

Restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that

- (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.

B. DECISION ORDERING A CLOSED HEARING

16 The decision maker cited a Divisional Court decision for the proposition that the consideration of a request for an extension under s. 83(17) of the *Police Services Act* is administrative in nature and that procedural fairness and natural justice do not always require a police services board to hold a public hearing. He also noted that the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, does not apply to a Board meeting to consider an extension. The decision maker then cited a series of decisions and Board orders to support the proposition that employment and disciplinary matters qualify as "intimate . . . personal matters" under s. 35(4)(b) of the *Police Services Act*, noting that investigations of conduct undertaken by the OIPRD are confidential pursuant to s. 95. The decision maker found that if the investigative report completed by the OIPRD in this case was made public, it could taint the witnesses and result in negative stigma for the officers involved. He suggested that as the extension application hearing precedes the commencement of proceedings, it was akin to the swearing of an information or a *pre-enquete* in criminal proceedings, both of which are held *in camera*.

17 For two reasons, the decision maker rejected the submission that the *Dagenais/Mentuck* test applies. First, the proceeding to consider the reasonableness of the delay was administrative as opposed to judicial or quasi-judicial and the *Dagenais/Mentuck* test applies only to judicial or quasi-judicial proceedings. Second, s. 35(4) lays out a test for determining whether to conduct a public or closed proceeding and *Dagenais/Mentuck* did not supersede the prescribed statutory test. Finally, the decision maker concluded that, although the investigative report had been made public by the Complainants, the hearing should be held *in camera* in order to ensure the integrity of the proceedings.

C. DIVISIONAL COURT: INTERIM INJUNCTION DECISION (2018 ONSC 5872 (Ont. Div. Ct.))

18 The CBC sought an interim injunction to enjoin the decision maker from proceeding with the *in camera* hearing pending consideration of the CBC's application to the Divisional Court for judicial review.

19 The motion judge, who is based in Thunder Bay, granted the interim injunction. She found that there was a serious question to be tried as "it is important for the court to consider the extent to which the public can expect openness in administrative decision-making" (at para. 48). The question of whether the *Dagenais/Mentuck* test should apply in the context was an important issue that required the court's attention (at para. 43). The motion judge found that given the context in which the case arose — allegations of racist policing practices relating to Indigenous peoples — the need for transparency in the complaint procedure was heightened (at paras. 48-49). She also found that as the OIPRD report had already been made public, there was "no evidence that intimate financial or personal matters may be disclosed on an extension application" (at para. 40).

20 The motion judge found that the CBC and the First Nations community would suffer irreparable harm if a stay were not granted because, regardless of whether an extension is granted or not, an *in camera* hearing would deny the public their right to understand the process (at para. 60).

21 Finally, the motion judge held that "the balance of convenience favours transparency in the circumstances of this case where racist policing is alleged" (at para. 66).

D. DIVISIONAL COURT: JUDICIAL REVIEW (2019 ONSC 34, 53 Admin. L.R. (6th) 236 (Ont. Div. Ct.))

22 The Divisional Court identified the sole issue arising on the CBC's application for judicial review as whether the decision maker erred by not applying the *Dagenais/Mentuck* test to the question of whether the extension application should be heard *in camera* (at para. 23). The Complainants, the officers and the Chief of Police were added as respondents as they had taken part in the proceedings before the decision maker. As an interested party, the OIPRD was also added as a respondent

23 The court took note of the social context surrounding the dispute; namely, that there is a "very high level of distrust between the First Nations community and the TBPS, with many Indigenous peoples in the Thunder Bay area believing that the policing practices relating to them are racist" (at para. 25). However, the court held that, despite this context and the fact that the community "has a strong interest in the circumstances surrounding the death of Stacy DeBungee and in the TBPS's investigation of his death," it is important to "not lose sight of the reality that the extension application is being determined in the context of possible disciplinary proceedings against employees" (at paras. 29-33). The level of public concern should not change "the nature of the decision-making process or the nature of the role being undertaken by [the decision maker]" (at para. 33).

24 The court found that the applicable standard of review was reasonableness. The case law established that the function of the Board under s. 83(17) of the *Police Services Act* is not judicial or quasi-judicial but rather administrative and procedural in nature. The case law also established that the standard of review for the Board's decision on an extension application is reasonableness. The court found that the reasonableness standard was supported by the Supreme Court of Canada's decision in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.).

25 The Divisional Court held that neither the open court principle nor the *Dagenais/Mentuck* test applied because the extension hearing was not a judicial or quasi-judicial proceeding. The *Dagenais/Mentuck* test was also excluded as the *Police Services Act*, ss. 35(3) and (4) set out a specific statutory test for how to address the question of whether a hearing is to be open to the public. As the statute itself laid out the "balancing act to be undertaken and there is no ambiguity in the legislative provisions", there was no need for the *Dagenais/Mentuck* test to apply (at paras. 52-53).

26 The Divisional Court concluded that the decision was both reasonable and correct (at para. 60). He was transparent in his decision-making process, his reasons were clear and intelligible, he adequately justified his decision, and he considered the important public interest at play.

E. ISSUES

27 The following issues arise on the Complainants' and the CBC's appeal to this court:

1. What is the appropriate standard of review?
2. Does the decision ordering a closed hearing satisfy the applicable standard of review?
3. Should the Complainants' fresh evidence motion be granted?
4. If the appeal is allowed, what is the appropriate remedy?

F. ANALYSIS

(1) *What is the appropriate standard of review?*

28 As an appellate court hearing an appeal from a judgment refusing judicial review, the question for us to decide is "whether the court below identified the appropriate standard of review and applied it correctly": *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212 (F.C.A.), at para. 18.

29 This appeal had been argued and a complete draft of these reasons had been written before the Supreme Court released its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.) modifying standard of review analysis. As I will explain, it is my view that *Vavilov* confirms that the appropriate standard of review is correctness. Moreover, even if the appropriate standard of review were reasonableness, *Vavilov* confirms that the decision to hold a closed hearing was unreasonable.

30 The decision to hold a closed hearing, as explained by the Divisional Court, would ordinarily attract the deferential "reasonableness" standard of review mandated by *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.).

31 I note that in oral argument, the Complainants withdrew the submission in their factum that the standard of review was altered by the fact that the decision was that of a substitute decision maker without the expertise of a police services board. In any event, *Vavilov*, at para. 30, holds that expertise is no longer a factor to be considered when determining the appropriate standard of review.

32 In my respectful view, the Divisional Court failed to recognize that the attack on the decision focussed on the refusal to apply the *Dagenais/Mentuck* test when concluding that the extension hearing should be closed. The challenged decision was not, as the Divisional Court suggested, a decision under s. 83(17) whether to grant an extension. Rather, it was a decision under s. 35(4) whether to hold a closed hearing. The appellants argued that that decision could only be made if the *Charter* rights to freedom of expression and freedom of the press were considered. They argued that the decision maker was wrong to conclude that the exercise of his discretion was governed solely by the terms of s. 35(4) and to refuse to take those *Charter* rights into accounts.

33 I agree with the appellants' submission that the decision that the *Dagenais/Mentuck* test does not apply is reviewable on a correctness standard of review.

34 If the *Charter* rights are considered by the administrative decision maker, the standard of reasonableness will ordinarily apply. In *Doré*, the Disciplinary Council of the Barreau du Québec considered and rejected the argument that the *Code of ethics of advocates* requirement that advocates conduct themselves with "objectivity, moderation and dignity" infringed the s. 2(b) *Charter* right to freedom of expression. Similarly, in *Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry Commissioner*, 2007 ONCA 20, 278 D.L.R. (4th) 550 (Ont. C.A.), the commissioner of inquiry considered the *Dagenais/Mentuck* test and rejected the argument that he should issue a publication ban regarding an alleged wrong-doer. In both cases, a reasonableness standard of review was applied when the decisions were challenged.

35 On the other hand, the refusal or failure to consider an applicable *Charter* right should, in my opinion, attract a correctness standard of review. As the Supreme Court explained in *Dunsmuir*, at para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 62: "where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise' . . . uniform and consistent" answers are required. See also *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 (S.C.C.), at paras. 20-21. This is confirmed by *Vavilov*, at para. 17: "[T]he presumption of reasonableness review will be rebutted . . . where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies".

36 The s. 2(b) *Charter* right to freedom of expression and freedom of the press relied upon by the appellants is both a matter of central importance to the legal system and a constitutional question. As confirmed by *Vavilov*, at para. 53, the application of the correctness standard to "constitutional questions, general questions of law of central importance to the legal system as a

whole . . . respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary".

37 The issue before the decision maker was *whether* the *Dagenais/Mentuck* test had a bearing on the discretionary decision he had to make. That is not the same as the issue presented in *Doré* and *Episcopal* of *how* the s. 2(b) *Charter* right impacted or affected the discretionary decision he had to make. The decision maker did not reach the point of factoring the *Dagenais/Mentuck* test into his discretionary decision because he decided that it did not apply. A reasonableness standard assumes a range of possible outcomes all of which are defensible in law: see *Vavilov*, at para. 83. That standard is inappropriate here. The *Dagenais/Mentuck* test either applied or it did not.

38 I refer here to a passage in *Episcopal* which, in my view, has a direct bearing on this issue. In that case, the inquiry commissioner applied the *Dagenais/Mentuck* test when declining to order an *in camera* hearing. This court held that his decision was reviewable on a reasonableness standard because he did consider the impact of the *Charter* right on the decision he had to make. However, we noted, at para. 36, that in *Dagenais* itself, the judge who made the challenged decision did not have available the new test enunciated when the case went to the Supreme Court. That meant that his "failure to arrive at a result that could be supported under the new test . . . amount[ed] to an error of law", reviewable on a standard of correctness. The same applies here. As I will explain, the decision maker did not have the benefit of the decision of this court in *Langenfeld v. Toronto Police Services Board*, 2019 ONCA 716, 437 D.L.R. (4th) 614 (Ont. C.A.), an authority that bears directly upon the discretionary decision he was asked to make.

(2) Does the decision ordering a closed hearing satisfy the applicable standard of review?

39 The appellants submit that the decision maker erred by concluding that the *Dagenais/Mentuck* test did not apply to the s. 35(4) decision whether to hold an open or closed extension hearing. They submit that *Dagenais/Mentuck* establishes a general standard that applies to all judicial, quasi-judicial and administrative decisions, and that it is not ousted by statutory provisions such as s. 35(4) that prescribe a specific test to determine whether a meeting should be open or closed. They urge us to take a contextual approach and to recognize the paramount importance of openness in the circumstances of this case. The issues surrounding allegations of racism and mistreatment on the part of the TBPS towards the Indigenous community have attracted wide attention and the appellants assert that it is of utmost importance that the s. 83(17) extension hearing be open.

40 The appellants also rely heavily on the recent decision of this court in *Langenfeld*, delivered after the decision ordering a closed hearing was made and after the Divisional Court dismissed the application for judicial review.

41 The respondents submit that *Dagenais/Mentuck* test only applies to judicial or quasi-judicial proceedings and that a s. 83(17) extension hearing is administrative in nature. Supported by the intervener, the Attorney General of Ontario, they also submit that as the appellants did not challenge the validity of s. 35(4), they cannot use the *Dagenais/Mentuck* test to, in effect, re-write that provision to alter the test applicable to a s. 83(17) extension hearing.

42 I turn first to the question of whether the *Dagenais/Mentuck* test applies to a s. 83(17) hearing.

43 *Dagenais* and *Mentuck* hold that the *Charter's* s. 2(b) guarantee of freedom of expression and freedom of the press fortifies the common law open court principle. "[T]he presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society". Closed proceedings can only be ordered upon "a convincing evidentiary basis" that such an order "is necessary in order to prevent a serious risk to the proper administration of justice": *Mentuck*, at paras. 39 and 32.

44 The respondents rely on a strong line of authority for the proposition that a s. 83(17) extension hearing is an administrative rather than judicial or quasi-judicial matter. They point out that while the procedural protections of the *Statutory Powers Procedure Act* apply when a police services board is conducting a disciplinary hearing, the Act is explicitly excluded when a board considers a request for s. 87(17) extension: *Police Services Act*, at s. 37.

45 In *Forestall v. Toronto Police Services Board* (2007), 228 O.A.C. 202 (Ont. Div. Ct.), the Divisional Court held, at para. 44, that as an extension hearing does not determine the merits of allegations or impose discipline, the decision is "administrative in nature", purely procedural, and, at para. 53, that while "some degree of procedural fairness is required", the Board is "not required to hold a judicial-type of hearing" and that only "minimal rights of procedural fairness", including notice, disclosure, and an opportunity to respond, apply. Similarly, in *Ackerman v. Ontario Provincial Police Service*, 2010 ONSC 910, 259 O.A.C. 163 (Ont. Div. Ct.), the court held that a decision to allow an extension is "clearly interlocutory" as all that has been decided is that it is "reasonable to delay service of the notice of hearing" (at para. 20). There has been no determination of the officer's rights. The Board is "exercising a procedural, administrative function in extending the time for service of the notice" (at para. 21). In its reasons, the Divisional Court cited a number of other decisions to the same effect: *Coombs v. Toronto (Metropolitan) Police Services Board*, [1997] O.J. No. 5260 (Ont. Gen. Div.); *Payne v. Peel (Regional Municipality) Police Services Board* (2003), 168 O.A.C. 69 (Ont. Div. Ct.); *Figueiras v. York Police Services Board*, 2013 ONSC 7419, 317 O.A.C. 179 (Ont. Div. Ct.).

46 The appellants do not suggest that these cases were wrongly decided or seriously challenge the characterization of a s. 83(17) extension hearing as being administrative and procedural in nature. However, the appellants urge us to hold that *Dagenais/Mentuck* applies to the meetings of all public institutions and therefore, even if the s. 83(17) extension hearing is characterized as administrative in nature, the TBPS Board cannot escape its reach.

47 In my view, to accept that submission would represent a significant expansion of the reach of the *Dagenais/Mentuck* test beyond judicial and quasi-judicial decisions, in a manner not supported by authority.

48 The *Dagenais/Mentuck* test evolved in relation to discretionary judicial decisions in criminal proceedings. As the Supreme Court stated in *Toronto Star Newspapers Ltd. v. Ontario*, at para. 7: the *Dagenais/Mentuck* test applies "to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings" (italics in original, underlining added). The test was extended to civil proceedings in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.), but civil proceedings are judicial in nature.

49 The CBC relies on the application of the *Dagenais/Mentuck* test in relation to a commission of inquiry: *Episcopal*. However, in *Episcopal*, the applicability of the *Dagenais/Mentuck* test was assumed by the inquiry commissioner and not challenged in this court. That is hardly surprising. The public hearing and fact-finding phase of a commission of inquiry "may well have an adverse effect upon a witness or a party to the inquiry" and although the findings of the commissioner do not result on penal or civil liability, "procedural fairness is essential": *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 (S.C.C.), at para. 55. The applicability of the *Dagenais/Mentuck* test in *Episcopal* also fits with case law finding commissions of inquiry to be quasi-judicial proceedings: *British Columbia (Attorney General) v. British Columbia (Information & Privacy Commissioner)*, 2004 BCSC 1597, 34 B.C.L.R. (4th) 298 (B.C. S.C.), at paras. 48-72.

50 The appellants also rely upon the application of *Dagenais/Mentuck* by some administrative tribunals and professional discipline bodies. In my view, those cases are also distinguishable as they deal with proceedings classified as quasi-judicial in nature. For example, *Lifford Wine Agencies Ltd. v. Ontario (Alcohol & Gaming Commission)* (2003), 179 O.A.C. 76 (Ont. Div. Ct.), dealt with quasi-judicial a proceeding to which the *Statutory Powers Procedure Act* applied. As I have noted, that Act does not apply to police services board meetings to consider s. 83(17) extension requests. *Southam Inc. v. Canada (Attorney General)* (1997), 36 O.R. (3d) 721 (Ont. Gen. Div.), and *Canadian Broadcasting Corp. v. Summerside (City)* (1999), 170 D.L.R. (4th) 731 (P.E.I. T.D.), dealt with police discipline proceedings at the stage of the actual hearing which, again, brings them into the quasi-judicial category.

51 The appellants also rely on *Toronto Star v. AG Ontario*, 2018 ONSC 2586, 421 D.L.R. (4th) 687 (Ont. S.C.J.), striking down as an infringement of s. 2(b) the application of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("FIPPA") to the adjudicative records of thirteen administrative tribunals. Those tribunals were subject to the *Statutory Powers Procedure Act* and exercised quasi-judicial powers. The adjudicative records included: documents by which proceedings were commenced, notices of hearing, interlocutory orders made by the tribunal, documentary evidence filed with the tribunal, transcripts of evidence and reasons for decision. The court held that the open court principle and the right to freedom of

expression guaranteed by s. 2(b) applied to these adjudicative records and that the restrictions imposed by FIPPA on access could not be justified as a reasonable limit under s. 1. While the case represents a strong statement on the need for openness in proceedings before quasi-judicial administrative tribunals, it does not apply here for the same reason I have distinguished the cases discussed above: it deals with quasi-judicial proceedings and the case before us does not.

52 I conclude that the decision maker did not err when he found that the *Dagenais/Mentuck* test did not apply to the decision he had to make under s. 35(4).

53 However, that does not end the matter. The *Dagenais/Mentuck* test does not exhaustively define the application of the s. 2(b) right to freedom of expression and freedom of the press in the context of this case. This court's decision in *Langenfeld* deals directly with the issue we must decide, namely, the application of 2(b) to administrative meetings of police services boards.

54 Regrettably, neither the decision maker nor the Divisional Court had the benefit of the *Langenfeld* decision.

55 In *Langenfeld*, this court allowed an appeal from the decision of the Superior Court (2018 ONSC 3447, 414 C.R.R. (2d) 85 (Ont. S.C.J.)), striking down a security protocol instituted by the Chief of Police requiring any person entering Toronto Police Headquarters to pass through a metal detector and wand process designed to uncover dangerous items and weapons. The protocol was challenged by an individual who regularly attended police board meetings and who asserted that the protocol infringed his s. 2(b) right to freedom of expression.

56 While the court allowed the appeal on the ground that the security protocol was a reasonable limit on the s. 2(b) right to freedom of expression, at paras. 18-21, it agreed with and adopted Copeland J.'s conclusion the right to attend the police services board meeting was protected by s. 2(b).

57 In the portion of her reasons adopted by this court, Copeland J. stated, at paras. 50-52, as follows. The public meeting requirement of s. 35 of the *Police Services Act* "fosters the objective of public confidence in decision making through transparency and accessibility to the public". The rationale of openness to foster public confidence "is similar to the rationale for the open courts principle (it differs only in that the open courts principle has a further basis of ensuring that litigants are treated fairly)". Copeland J. identified the "two pillars" for the proposition that the right to attend court proceedings is protected expression. First, "public confidence in the courts, an important institution of democratic government, is fostered by transparency and accessibility", and second, "freedom of expression protects listeners as well as speakers, particularly in the context of members of the public receiving information about the activities of public institutions." She then applied those principles to the right to attend public meetings of police services boards:

The *Police Services Act* makes public meetings the default for police services boards in order to foster public confidence in the decisions of the boards, by way of transparency and accessibility. Police services boards perform an important democratic function. Thus, I find that the right of members of the public to attend public meetings of police services boards is protected by s. 2(b) of the *Charter*.

58 If Mr. Langenfeld had a s. 2(b) *Charter* right to attend a regular and purely administrative meeting of the Toronto Police Services Board, it is difficult to see why, subject to the exclusions set out in s. 35(4), the CBC does not enjoy the same right to attend the s. 83(17) hearing.

59 On the state of the law as it now stands, the *Dagenais/Mentuck* test does not apply to this administrative hearing. However, the presumption of an open hearing under s. 35(3) of the *Police Services Act* and the s. 2(b) *Charter* right recognized in *Langenfeld* do apply.

60 While I reach that conclusion on a correctness standard, I add here that even if a reasonableness standard of review applies, I fail to see how a decision resulting from an unexplained refusal or failure to consider an applicable *Charter* right could be considered reasonable. This court's application of s. 2(b) in *Langenfeld* means that the decision ordering a closed hearing, through no fault of the decision maker, failed to consider an applicable right protected by the *Charter*. That decision cannot survive scrutiny under the *Vavilov* test for reasonableness. The reasonableness standard requires "an internally coherent and

rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker"; *Vavilov*, at para. 85. A decision that fails to consider an applicable *Charter* right cannot satisfy that standard or "the principle that the exercise of public power must be justified, intelligible and transparent": *Vavilov*, at para. 95.

61 For convenience, I repeat here s. 35(4), the test the legislature has prescribed for determining when a police services board may conduct a closed hearing:

The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,

(a) matters involving public security may be disclosed and, having regard to the circumstances, the desirability of avoiding their disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public; or

(b) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.

62 The question the decision maker had to decide was whether the desirability of avoiding disclosure or "intimate financial or personal matters . . . outweighs the desirability of adhering to the principle that proceedings be open to the public." In my view, that statutory test and not the *Dagenais/Mentuck* test governed the exercise of his discretion. However, the s. 2(b) right recognized in *Langenfeld* has a direct bearing on the exercise of that discretion. Through no fault of his own, the decision maker did not consider *Langenfeld*. The "principle that proceedings be open to the public", recognized by s. 35(4), is considerably fortified by the s. 2(b) *Charter* right recognized by *Langenfeld* in relation to police services board meetings.

63 *Doré*, at para. 56, explains that the administrative decision maker is "to ask how the *Charter* value at issue will best be protected in view of the statutory objectives" and that the core of this "proportionality exercise" will require the decision maker "to balance the severity of the interference of the *Charter* protection with the statutory objectives." As *Doré* explains, at para. 57, this proportionality exercise "calls for integrating the spirit of [the *Charter*'s s. 1 reasonable limits scrutiny] into judicial review".

64 As I will explain when discussing the issue of remedy, it will be for the decision maker to conduct that proportionality exercise. However, I propose to outline what seem to me to be some of the relevant considerations.

65 Section 35 reflects three relevant statutory objectives. The first objective is congruent with s. 2(b). Meetings of police services boards are presumptively open to the public. The second and third relevant statutory objectives are the protection of "intimate financial or personal matters" and the public interest in a fair and impartial hearing. Both factors require a proportional response, appropriately balancing the severity of interfering with the *Charter* right with the achievement of the statutory objectives.

66 For reasons I have explained, I do not think that the *Dagenais/Mentuck* test applies. On the other hand, the measuring of a proportional response in the context of an administrative hearing such as this is bound to take on a similar hue. As Morgan J. explained in *Toronto Star Newspapers Ltd. v. Ontario*, at para. 92: "The judicial considerations of the *Dagenais/Mentuck* test have tended to arise in the course of criminal prosecutions, which raise unique factors that may not apply to the regulatory contexts of most administrative tribunals". He added, at para. 93: "The particular institution and circumstances of the particular case may require the most stringent application of the *Dagenais/Mentuck* test or a modified and more relaxed version of the test. There is no 'one size fits all' application of the openness principle."

67 The administrative decision maker should, as required by the *Dagenais/Mentuck* test, consider reasonably alternative measures that could avoid the risk of impeding the statutory objective. Counsel for the decision maker argues that it was not open to the decision maker to consider as an alternate measure a limited publication ban that would preclude publication of the OIPRD report and the names of the officers in order to protect their interest and the public interest in a fair and impartial hearing. I disagree with that submission. Section 35(4) provides that "[t]he board may exclude the public from all or part of a meeting or hearing" (emphasis added). In my view, that language indicates that the Board is not required to make an "all or

nothing" order and that where an order less restrictive than a total ban will achieve the relevant statutory objectives, such an order can and should be made. It was therefore open to the decision maker to make an order banning further publication of the OIPRD investigative report and/or the names of the Respondent Officers.

68 Consideration of the s. 35(4) test in the light of s. 2(b) and freedom of the press is a highly contextual exercise and framing an appropriate order will very much depend upon the circumstances of each case. The decision maker identified the factors favouring an *in camera* hearing. Here are the factors that, in my respectful view, he should consider as favouring an open hearing.

69 The first contextual feature of the present case is that the extension hearing forms one small part of a much larger controversy. As the interim injunction judge noted, at paras. 14-15: the question of "whether there has been systemic racism in policing Indigenous cases" in Thunder Bay was a matter "of keen interest to members of the Thunder Bay community, including or perhaps especially its Indigenous citizens." At para. 48 of her reasons she observed: "Because of the complaint underlying this process — the policing practices related to Indigenous citizens in Thunder Bay are racist — it is even *more critical* that every step in the complaint procedure be dealt with transparently" (emphasis in original). Similarly, the Divisional Court observed, at para. 25, the context is important and "there is a very high level of distrust between the First Nations community and the TBPS, with many Indigenous peoples in the Thunder Bay area believing that the policing practices relating to them are racist." The racial tension between the Indigenous community and the TBPS, the distrust of the Indigenous community towards the TBPS and the current state of administration of criminal justice all point strongly to the need for openness and transparency.

70 The second contextual factor is that, as the decision maker noted, rightly or wrongly, the OIPRD investigative report has already been made public. The issues surrounding Stacy DeBungee's death and the details of the OIPRD report on the TBPS investigation have attracted significant media interest and were well-known in the Thunder Bay community and beyond.

71 The third contextual feature of this case is that the TBPS Board and the decision maker have structured the consideration of the request for a s. 83(17) extension as if it were a quasi-judicial decision. The Board appropriately applied quasi-judicial considerations when it decided that there could be a reasonable apprehension of bias if it were to consider the extension request in the ordinary course. Rather than appoint someone with a background in police services administration as a substitute decision maker, the Superior Court appointed a retired judge. The decision maker quite properly treated the issue of whether to order a closed hearing as requiring adversarial submissions for the interested parties, considered those submissions and then handed down a reasoned, judgment-like decision. I do not retreat from the characterization of the extension request as an administrative act. However, it seems to me that these steps were taken to lend a dimension of quasi-judicial legitimacy to the decision. It is arguable that the price to be paid for that added element of legitimacy is the kind of openness that quasi-judicial proceedings ordinarily attract.

72 The fourth contextual factor to consider is the interest of transparency in relation to police discipline. The purpose of the *Police Services Act* has been judicially described as being "to enhance public confidence in policing by ensuring a more transparent and independent process for dealing with complaints against the police": *Figueiras*, at para. 41. *Figueiras*, at para. 62, also described the statutory framework as being "designed to increase the transparency of and public accountability for the way in which the conduct of the police is dealt with." In his 2005 "Report On The Police Complaints System In Ontario", (Toronto: Ministry of the Attorney General of Ontario, 2005), the Honourable Patrick J. LeSage emphasized the importance of transparency. He suggested, for example, that "if the review of a decision not to order a hearing is transparent, there will be greater understanding and acceptance of the system" (at p. 75).

(3) Should the Complainants' fresh evidence motion be granted?

73 The Complainants move for the introduction of fresh evidence. First, they ask the court to admit two reports issued after the matter was heard by the Divisional Court: the OIPRD's systemic review "Broken Trust: Indigenous People and the Thunder Bay Police Service"; and Senator Murray Sinclair's Ontario Civilian Police Commission report "Thunder Bay Police Services Board Investigation: Final Report". Second, they ask us to consider a revised standard form letter sent by the OIPRD to the Complainants upon completion of an investigation. Third, they ask for the admission of two newspaper articles, the first reporting an incident of alleged police misconduct and the second reporting that the progress of the OIPRD and Sinclair reports.

74 I would not admit the fresh evidence as I believe it to be unnecessary for the resolution of this appeal. As I have pointed out, both the interim injunction judge and the Divisional Court were fully aware of the allegations of racism and the tension between the TBPS and the Indigenous community. While the reports explore those issues in considerable detail, I do not think we require that level of detail to decide this appeal.

75 The revised standard form letter and the newspaper articles have no relevance to the issues we must decide.

76 Accordingly, I would dismiss the fresh evidence motion.

(4) If the appeal is allowed, what is the appropriate remedy?

77 This brings me to the issue of the appropriate remedy. Ordinarily, where a court grants judicial review and quashes a decision, the appropriate remedy is to remit the matter to the decision maker for reconsideration in the light of the court's decision: *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] 2 S.C.R. 164 (S.C.C.), at p. 176. There is an exception to that rule where remitting the matter would be "pointless" as there is only one possible outcome in view of the court's decision: *Giguère c. Chambre des notaires du Québec*, 2004 SCC 1, [2004] 1 S.C.R. 3 (S.C.C.) at para. 66; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52 (Ont. C.A.), at para. 54; *Vavilov*, at para. 142.

78 The respondents and the decision maker submit that if we allow the appeal, the matter should be remitted to the decision maker. The Complainants submit that the reasons for an open hearing are so strong that we should simply make the order the decision maker should have made.

79 This appeal deals with a preliminary issue and the open hearing issue has further stalled the very slow pace of the OIPRD recommendation for disciplinary proceedings. In these circumstances, I am tempted to do as the Complainants ask: see *Vavilov*, at para. 142, holding that "urgency of providing a resolution to the dispute" is a relevant factor to consider.

80 In the end, however, I am not persuaded that this is one of those exceptional cases where the court should put itself in the shoes of the decision maker. My view of the matter largely turns on the *Langenfeld* decision that was not available and therefore not considered by the decision maker. *Vavilov* holds, at para. 142, that a factor to consider on this issue is "whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question". The decision maker should be permitted to take another look at the matter with the benefit of *Langenfeld*. Accordingly, I would remit the matter to the decision maker for reconsideration in light of these reasons.

G. DISPOSITION

81 For these reasons, I would allow the appeal from the Divisional Court's judgment and set aside its order dismissing the application for judicial review. I would quash the decision and remit the matter to him for reconsideration in light of these reasons.

82 No party seeks costs of the appeal.

G.R. Strathy C.J.O.:

I agree.

Doherty J.A.:

I agree.

Appeal allowed; motion dismissed.

TAB 11

Most Negative Treatment: Check subsequent history and related treatments.

2011 ONSC 1205

Ontario Superior Court of Justice [Commercial List]

Hollinger Inc., Re

2011 CarswellOnt 9087, 2011 ONSC 1205, 207 A.C.W.S. (3d) 58, 84 C.B.R. (5th) 70

**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 Hollinger Inc., 4322525 Canada Inc. and Sugra Limited

Hollinger Inc., KPMG LLP Canada and Torys LLP, (Applicants)

C. Campbell J.

Heard: February 18, 2011

Judgment: February 22, 2011 *

Docket: 07-CL-7120

Counsel: Michael Barrack, Megan Keenberg for Hollinger Inc.

Mathew B. Lerner for Monitor, Ernst & Young Inc.

Peter White, David Moore for Catalyst Fund General Partner I Inc.

J.L. McDougall, Q.C. Norm Emblem for KPGM LLP

Ronald Foerster for Torys LLP

G. Benchetrit for Indenture Trustees

Kenneth Kraft, Lisa C. Munro for Conrad Black, Conrad Black Capital Corporation

Kathryn Podrebarac for Ralph Barford

R.M. Slattery for Mrs. Black

Luisa Ritacca for R. Donald Fullerton, Canadian Imperial Bank of Commerce

Paul Guy, Faren Bogach for Daniel W. Colson

Harry R. Burkman for Argus Corporation

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

Headnote

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings — B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor brought motion for sealing order with respect to terms under settlement agreements — Motion granted — Litigation settlement privilege applied to settlement agreements — There was commercially important issue at stake with no reasonable measures available to alleviate harm from lack of confidentiality — Claims against former directors, officers and advisors represented major asset of the debtor; those parties would be granted access to full terms of proposed settlement subject only to certain terms of confidentiality which they agreed to apart from those opposing — Sealing order was in public interest.

Civil practice and procedure --- Disposition without trial — Settlement — Miscellaneous

Disclosure of draft settlement agreement — Confidentiality agreement — Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings — B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor brought motion for sealing order with respect to terms under settlement agreements — Motion granted — Litigation settlement privilege applied to settlement agreements — There was commercially important issue at stake with no reasonable measures available to alleviate harm from lack of confidentiality — Claims against former directors, officers and advisors represented major asset of the debtor; those parties would be granted access to full terms of proposed settlement subject only to certain terms of confidentiality which they agreed to apart from those opposing — Sealing order was in public interest. Bankruptcy and insolvency --- Practice and procedure in courts — Discovery and examinations — Evidentiary issues — Privilege — Miscellaneous

Settlement privilege — Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings — B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor brought motion for sealing order with respect to terms under settlement agreements — Motion granted — Litigation settlement privilege applied to settlement agreements — There was commercially important issue at stake with no reasonable measures available to alleviate harm from lack of confidentiality — Claims against former directors, officers and advisors represented major asset of the debtor; those parties would be granted access to full terms of proposed settlement subject only to certain terms of confidentiality which they agreed to apart from those opposing — Sealing order was in public interest.

Evidence --- Privilege — Privileged communications — Miscellaneous

Settlement privilege — Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings — B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor brought motion for sealing order with respect to terms under settlement agreements — Motion granted — Litigation settlement privilege applied to settlement agreements — There was commercially important issue at stake with no reasonable measures available to alleviate harm from lack of confidentiality — Claims against former directors, officers and advisors represented major asset of the debtor; those parties would be granted access to full terms of proposed settlement subject only to certain terms of confidentiality which they agreed to apart from those opposing — Sealing order was in public interest.

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

Draft settlement agreement — Sealing order — Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings — B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor brought motion for sealing order with respect to terms under settlement agreements — Motion granted — Litigation settlement privilege applied to settlement agreements — There was commercially important issue at stake with no reasonable measures available to alleviate harm from lack of confidentiality — Claims against former directors, officers and advisors represented major asset of the debtor; those parties would be granted access to full terms of proposed settlement subject only to certain terms of confidentiality which they agreed to apart from those opposing — Sealing order was in public interest.

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Confidentiality or sealing orders

Draft settlement agreement — Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings —

B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor brought motion for sealing order with respect to terms under settlement agreements — Motion granted — Litigation settlement privilege applied to settlement agreements — There was commercially important issue at stake with no reasonable measures available to alleviate harm from lack of confidentiality — Claims against former directors, officers and advisors represented major asset of the debtor; those parties would be granted access to full terms of proposed settlement subject only to certain terms of confidentiality which they agreed to apart from those opposing — Sealing order was in public interest.

Table of Authorities

Cases considered by C. Campbell J.:

Dagenais v. Canadian Broadcasting Corp. (1994), 1994 CarswellOnt 1168, 1994 SCC 102, 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112 (S.C.C.) — referred to

Inter-Leasing Inc. v. Ontario (Minister of Finance) (2009), 256 O.A.C. 83, [2010] 1 C.T.C. 177, 2009 CarswellOnt 6920 (Ont. Div. Ct.) — considered

R. v. Mentuck (2001), 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 163 Man. R. (2d) 1, 269 W.A.C. 1, 2001 CarswellMan 535, 2001 CarswellMan 536, 2001 SCC 76, 47 C.R. (5th) 63, [2002] 2 W.W.R. 409, 277 N.R. 160, [2001] 3 S.C.R. 442 (S.C.C.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Cases considered by C. Campbell J.:

Inter-Leasing Inc. v. Ontario (Minister of Finance) (2009), 256 O.A.C. 83, [2010] 1 C.T.C. 177, 2009 CarswellOnt 6920 (Ont. Div. Ct.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

MOTION by debtor for sealing order with respect to terms under settlement agreements.

C. Campbell J.:

1 The motion of the Applicant seeks a time-limited Sealing Order¹ of the terms of two settlements which by their terms and the context of the CCAA process, will require Court approval that if granted will allow for the expiry of the Order.

2 The terms of the Order are either agreed to or unopposed by most of the parties to whom notice has been given of this motion. It is noted that the Indenture Trustee, which has first priority security in excess of \$150 million, supports the Order sought on this motion as well as settlement approval.

3 The Order sought is a compromise achieved by protracted and difficult negotiations and agreement among the Applicants, and various parties will be directly affected in ongoing litigation or settlements by the third party releases that are contemplated when the settlement motion comes before the Court.

4 The Order sought is opposed by Conrad Black, Barbara Amiel-Black, Black Corporation, and two former directors and one corporation closely associated with Conrad Black, each of whom was represented by separate counsel.

5 The opposing parties each take the position that the Applicants have not provided evidence to the Court that it is in the public interest that a sealing order be granted within the guidelines set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.). Those principles may be systemically stated as follows:

53. Applying the rights and interests engaged in this case to the analytical framework of *Dagenais*² 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 Rule 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*³, 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 *F.N. (Re)*, 2000 SCC 35 (CanLII), [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.)

6 I fully accept the general statement of the principles. The question now is appropriately applying those in this case and balancing the competing interests. At the outset of submissions I inquired of counsel for the Applicants whether there would be any objection to the inclusion in the draft Order, if granted, of a "comeback" clause such that if any party who would be directly affected by the settlement motion was of the view that the Order sought operated in a manner that would prevent that party making full submissions on the settlement itself, they could request further relief.

7 No counsel who supported or did not oppose the original draft Order objected to the inclusion of the suggested term.

8 I am satisfied that the time-limited provisions and other conditions to meet the *Sierra* test in the context of this case. There is in my view a commercially important issue at stake with no reasonable measures available to alleviate the harm from lack of confidentiality at this stage.

9 Claims against former directors, officers and advisors represent the major asset of the Applicant Hollinger. Those parties will be granted access to the full terms of the proposed settlement subject only to certain terms of confidentiality which they have now agreed to apart from those opposing.

10 I am satisfied that, in the context of a litigation privilege which arises from a protracted mediated settlement that is consistent with the public interest, the full terms not be placed on the public record at least until the settlement motion itself comes before the Court or other good reason is shown for removing the sealing.

11 The proposition advanced on behalf of the Blacks and those supporting their position is that the above stated principles from the Supreme Court of Canada decision in *Sierra* represent direction to judges not to be departed from except in the most extraordinary of circumstances, which do not exist here. They urged that it is appropriate and in the public interest that the full terms be known now.

12 Counsel were unable to advise me of a single decision where, in the context of a litigation settlement in which the affected parties would have access to the full terms and in the context of a CCAA restructuring, the public interest of immediate disclosure of the settlement terms would trump all other considerations.

13 I accept that the onus to establish confidentiality for the present purposes rests on the Applicants. I am satisfied that in the context of this case the onus has been met.

14 Litigation settlement privilege in my view of applies in this case at least until the Court either accepts or rejects the settlement that those parties directly affected will be able and entitled to review with the conditions proposed.

15 Dealing with litigation privilege, Swinton J speaking for her colleagues in the Divisional Court decision in *Inter-Leasing Inc. v. Ontario (Minister of Finance)*, [2009] O.J. No. 4714 (Ont. Div. Ct.) at paragraphs 10 and 21:

10. Communications, whether oral or written, made in furtherance of the settlement of a litigious dispute are subject to privilege. According to Bryant, Lederman and Fuerst, *The Law of Evidence in Canada* (at para. 14.322), three conditions must be present for settlement privilege to apply:

1. A litigious dispute must be in existence or within contemplation.
2. The communication must be made with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed.
3. The purpose of the communication must be to attempt to effect a settlement.

...

21. Moreover, the applicant has not satisfied the necessity test. To satisfy this test, the applicant must demonstrate a compelling or overriding interest of justice that outweighs the public interest in protecting settlement discussions from disclosure. While the applicant argues that disclosure of this information will not affect the issue of its tax liability, settlement privilege exists not only to protect a party against disclosure of information that may affect its position on liability. It extends, as well, to protect other statements against interest made in the course of settlement negotiations that a party may wish to remain confidential.

16 The draft Order as revised is approved.

17 The issue of costs raised by the Applicants can be addressed in written submissions to be exchanged by counsel before being sent to me.

Motion granted.

Footnotes

* Affirmed at *Hollinger Inc., Re* (2011), 2011 ONCA 579, 2011 CarswellOnt 9272, 107 O.R. (3d) 1 (Ont. C.A.).

1 Often the term "protective" rather than "scaling" is used to describe an order that is intended to be time limited.

2 *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (S.C.C.), [1994] 3 S.C.R. 835 (S.C.C.)

3 *R. v. Mentuck*, [2001 SCC 76 \(CanLII\)](#), [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.)

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 12

Most Negative Treatment: Check subsequent history and related treatments.

2011 ONCA 579
Ontario Court of Appeal

Hollinger Inc., Re

2011 CarswellOnt 9272, 2011 ONCA 579, [2011] O.J. No. 3977, [2011] S.C.C.A. No. 473, 107 O.R. (3d) 1, 12 C.P.C. (7th) 29, 207 A.C.W.S. (3d) 234, 283 O.A.C. 264, 341 D.L.R. (4th) 182, 84 C.B.R. (5th) 79

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

And in the Matter of a Proposed Plan of Compromise or Arrangement with
Respect to Hollinger Inc., 4322525 Canada Inc. and Sugra Limited (Applicants)

Goudge, Sharpe, Karakatsanis JJ.A.

Heard: August 24, 2011
Judgment: September 8, 2011
Docket: CA C53706

Proceedings: affirming *Hollinger Inc., Re* (2011), 2011 ONSC 1205, 2011 CarswellOnt 9087 (Ont. S.C.J. [Commercial List])

Counsel: Earl A. Cherniak Q.C., Kenneth D. Kraft, Jason Squire for Conrad Black, Conrad Black Capital Corporation
Paul D. Guy, Faren Bogach for Daniel Colson
Michael E. Barrack, Megan Keenberg for Hollinger Inc.
John Lorn McDougall, Q.C., Norman J. Emblem, Matthew Fleming for KPMG LLP
Ronald Foerster for Torys LLP
David C. Moore for Catalyst Fund General Partner I Inc.
George Benchetrit for Indenture Trustee
Lawrence Thacker for Ernst & Young Inc., Monitor

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

Related Abridgment Classifications

Bankruptcy and insolvency

[XVII](#) Practice and procedure in courts

[XVII.6](#) Discovery and examinations

[XVII.6.d](#) Evidentiary issues

[XVII.6.d.iii](#) Privilege

[XVII.6.d.iii.B](#) Miscellaneous

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.5](#) Miscellaneous

Business associations

[V](#) Legal proceedings involving business associations

[V.3](#) Practice and procedure in proceedings involving corporations

[V.3.n](#) Confidentiality or sealing orders

Civil practice and procedure

[XVI](#) Disposition without trial

[XVI.7](#) Settlement

[XVI.7.e Miscellaneous](#)

Evidence

[XIV Privilege](#)[XIV.4 Settlement privilege \[communications without prejudice\]](#)

Judges and courts

[XVI Jurisdiction](#)[XVI.11 Jurisdiction of court over own process](#)[XVI.11.c Sealing files](#)**Headnote**

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings — B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor successfully brought motion for sealing order with respect to amounts to be paid under settlement agreements — Motion judge held litigation settlement privilege applied to settlement agreements — Motion judge held sealing order was in public interest — B appealed sealing order — Appeal was dismissed — Motion judge applied correct legal test to grant sealing order — Motion judge did not err in finding there was sufficient evidence to justify sealing order — Motion judge did not err in concluding that settlement privilege applied until court approved or rejected settlement — It was open to motion judge to conclude that sealing order's salutary effects of protecting settlement privilege outweighed its deleterious effects on public interest in open court proceedings — Sealing order appropriately balanced public interest in promotion of settlements and public interest in open court principle — Sealing order appropriately balanced competing private interests of parties.

Civil practice and procedure --- Disposition without trial — Settlement — Miscellaneous

Disclosure of draft settlement agreement — Confidentiality agreement — Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings — B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor successfully brought motion for sealing order with respect to amounts to be paid under settlement agreements — Motion judge held litigation settlement privilege applied to settlement agreements — Motion judge held sealing order was in public interest — Term of sealing order provided that non-settling parties could have access to redacted portion if they signed confidentiality agreement — B appealed sealing order — Appeal was dismissed — Right of B or other non-settling parties to obtain disclosure of settlement amounts was not unduly burdened by confidentiality agreement — Term of sealing order protected non-settling parties' procedural right to have full access to terms of settlement while protecting litigation settlement privilege.

Bankruptcy and insolvency --- Practice and procedure in courts — Discovery and examinations — Evidentiary issues — Privilege — Miscellaneous

Settlement privilege — Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings — B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor successfully brought motion for sealing order with respect to amounts to be paid under settlement agreements — Motion judge held litigation settlement privilege applied to settlement agreements — Motion judge held sealing order was in public interest — Term of sealing order provided that non-settling parties could have access to redacted portion if they signed confidentiality agreement — B appealed sealing order — Appeal was dismissed — Settling parties did not waive privilege by putting most terms of settlements on public record and disclosing redacted portions to non-settling parties who signed confidentiality agreements — Such terms

were imposed by court order — Abiding by terms of court order did not amount to waiver of privilege — Terms of order were motivated to ensure sealing order was minimally intrusive on open court principle.

Evidence --- Privilege — Privileged communications — Miscellaneous

Settlement privilege — Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings — B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor successfully brought motion for sealing order with respect to amounts to be paid under settlement agreements — Motion judge held litigation settlement privilege applied to settlement agreements — Motion judge held sealing order was in public interest — Term of sealing order provided that non-settling parties could have access to redacted portion if they signed confidentiality agreement — B appealed sealing order — Appeal was dismissed — Settling parties did not waive privilege by putting most terms of settlements on public record and disclosing redacted portions to non-settling parties who signed confidentiality agreements — Such terms were imposed by court order — Abiding by terms of court order did not amount to waiver of privilege — Terms of order were motivated to ensure sealing order was minimally intrusive on open court principle.

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

Draft settlement agreement — Sealing order — Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings — B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor successfully brought motion for sealing order with respect to amounts to be paid under settlement agreements — B appealed sealing order — Appeal was dismissed — Sealing order struck appropriate balance between public interest in promotion of settlements and public interest in open court principle — Sealing order was time-limited, lasting only so long as settlements were contingent on court approval — Sealing order struck appropriate balance between competing private interests of parties — It protected settling parties' interest in maintaining confidentiality of privileged information by sealing redacted portions — It met interests of non-settling parties, including B, by allowing them to have access to redacted portion by signing confidentiality agreement. Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Confidentiality or sealing orders

Draft settlement agreement — Debtor was granted protection under Companies' Creditors Arrangement Act (CCAA) — Litigation trustee was appointed to deal with debtor's assets, which consisted of debtor's claims against former officers, directors and advisors, including accountants and appellant non-settling party B — B had claim against debtor in CCAA proceedings — B had indemnity claims against accountants in relation to claims asserted against him by debtor — Settlement agreements were negotiated between debtor, trustee, and accountants that were subject to court approval — Debtor successfully brought motion for sealing order with respect to amounts to be paid under settlement agreements — B appealed sealing order — Appeal was dismissed — Sealing order struck appropriate balance between public interest in promotion of settlements and public interest in open court principle — Sealing order was time-limited, lasting only so long as settlements were contingent on court approval — Sealing order struck appropriate balance between competing private interests of parties — It protected settling parties' interest in maintaining confidentiality of privileged information by sealing redacted portions — It met interests of non-settling parties, including B, by allowing them to have access to redacted portion by signing confidentiality agreement.

Table of Authorities

Cases considered:

Inter-Leasing Inc. v. Ontario (Minister of Finance) (2009), 256 O.A.C. 83, [2010] 1 C.T.C. 177, 2009 CarswellOnt 6920 (Ont. Div. Ct.) — referred to

Loewen, Ondaatje, McCutcheon & Co. c. Sparling (1992), (sub nom. *Kelvin Energy Ltd. v. Lee*) 97 D.L.R. (4th) 616, (sub nom. *Kelvin Energy Ltd. v. Lee*) [1992] 3 S.C.R. 235, (sub nom. *Kelvin Energy Ltd. v. Lee*) 51 Q.A.C. 49, 143 N.R. 191, 1992 CarswellQue 126, 1992 CarswellQue 126F (S.C.C.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club*

of Canada) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, 1988 CarswellOnt 121, 41 B.L.R. 22 (Ont. H.C.) — considered

Statutes considered:

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

Generally — referred to

APPEAL by non-settling party from judgment, reported at *Hollinger Inc., Re* (2011), 2011 ONSC 1205, 2011 CarswellOnt 9087 (Ont. S.C.J. [Commercial List]), granting sealing order redacting amounts to be paid in settlement agreements.

Per curiam:

1 Conrad Black and Conrad Black Capital Corporation ("Black") appeal a sealing order redacting the amounts to be paid by the respondents, Torys LLP and KPMG LLP Canada, to the respondent, Hollinger Inc., pursuant to two proposed settlement agreements. The settlement agreements were made in the context of a *Companies' Creditor Arrangement Act* ("CCAA") proceeding and are subject to court approval. The sealing order provides for the immediate full disclosure of all terms of the settlements, other than the amounts to be paid, and details as to the manner of payment in the Torys agreement. The sealing order further provides that any non-settling party may have access to the redacted information upon signing a confidentiality agreement only to use the redacted information in the settlement approval proceeding. The sealing order terminates upon final approval of the settlements.

2 For the following reasons, we reject Black's argument that the sealing order constitutes a serious and unjustified infringement of the open court principle and dismiss the appeal.

Facts

3 Hollinger and two related corporations have been granted CCAA protection pursuant to a Commercial List order made in August 2007. The order appoints a Litigation Trustee to deal with the assets available to Hollinger's creditors which consist almost entirely of Hollinger's claims against former officers, directors and advisors, including Black, Torys and KPMG.

4 Black asserts a claim against Hollinger in the CCAA proceedings, as well as claims for contribution and indemnity against Torys and KPMG in relation to several claims asserted against him by Hollinger.

5 Settlement discussions and mediations between Hollinger, the Litigation Trustee, Torys and KPMG led to two settlement agreements that require court approval. The draft settlement agreements were circulated to all parties with the amounts to be paid by way of settlement redacted. The respondents moved before the judge dealing with the CCAA proceedings for the sealing order that is the subject of this appeal. The crucial paragraph of the affidavit filed by Hollinger in support of that motion reads as follows:

21. In my view, disclosure of the commercially sensitive terms contained in the Settlements and the strategy of the Litigation Trustee and other confidential details relating to Litigation Assets set out in the Litigation Trustee's Report would undermine the Litigation Trustee's initiatives with respect to the remaining Litigation Assets including, without limitation, any possible settlements the Litigation Trustee may reach in respect of any of the remaining Litigation Assets and litigation with KPMG or Torys, in the event that the settlements are not approved.

6 The Litigation Trustee's Report has since been disclosed. There was no cross-examination on that affidavit.

7 Although the terms of the settlements are not directly at issue on this appeal, Black relies on the fact that both settlement agreements provide for a "bar order" that would prevent anyone sued by Hollinger; any shareholder, officer, director, or creditor of Hollinger; and any person who could claim rights or interest through Hollinger, from making any claim against Torys or KPMG in relation to the advice given by those parties to Hollinger. Black points out that the bar orders would extinguish his

indemnity claims against Torsys and KPMG. On the other hand, the respondents submit that the bar orders are economically neutral for Black and other non-settling defendants. This is because Hollinger waives its right to claim joint and several liability with respect to shared liability between settling and non-settling defendants if the non-settling defendant can establish a right to contribution and indemnity from a settling defendant.

Decision of the Motion Judge

8 The motion judge found that litigation settlement privilege applied to the terms of the two settlement agreements. He concluded that the onus to establish that a sealing order protecting the confidentiality of the amounts of the settlements was in the public interest had been satisfied and that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) ("*Sierra Club*") had been met.

9 On the motion judge's suggestion, the sealing order included a "comeback" clause, permitting any party affected by the settlement motion to request relief from the sealing order if it operated in a manner that would prevent that party from making full submissions as to the approval of the settlement.

Issues

10 Black submits:

1. That the evidence was insufficient to justify a sealing order and departure from the open court principle;
2. That the requirement that a party seeking disclosure of the settlement amounts must sign a confidentiality agreement imposes an undue burden; and
3. That the respondents have waived privilege.

Analysis

1. Sufficiency of the evidence to justify a sealing order.

11 It is common ground that the motion judge applied the correct legal test, namely that laid down by the Supreme Court of Canada in *Sierra Club* at para. 53:

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.

12 Before us, there were two significant concessions.

13 First, the respondents indicated that they place no reliance upon the portions of the Litigation Trustee's affidavit referring to the "commercial sensitivity" of the redacted terms of the settlement. They rely solely upon the evidence that public disclosure of the settlement amounts before the agreements had been approved "would undermine the Litigation Trustee's initiatives with respect to ... litigation with KPMG or Torsys, in the event that the settlements are not approved."

14 Second, Black conceded that his attack on the terms of the sealing order rests on the open court principle and that he does not assert that the terms of the sealing order give rise to any procedural disadvantage.

15 The respondents assert that their interest in maintaining the confidentiality of the amounts of the proposed settlements falls squarely within litigation settlement privilege. Simply put, the respondents say that should the settlement agreements not be approved, they would be unfairly prejudiced in the litigation that would follow if they had to disclose publicly the amounts they were prepared to pay or accept in settlement of the claims asserted by the Litigation Trustee.

16 It is well established that in order to foster the public policy favouring the settlement of litigation, the law will protect from disclosure communications made where;

1) there is a litigious dispute;

2) the communication has been made "with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed;" and

3) the purpose of the communication is to attempt to effect a settlement: see Bryant, Lederman & Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009) at p. 1033, § 14.322); *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (2009), 256 O.A.C. 83 (Ont. Div. Ct.).

17 We agree with the motion judge that those conditions are met here. We see no error in the motion judge's conclusion that "[l]itigation settlement privilege ... applies in this case at least until the Court either accepts or rejects the settlement". In the context of this case, Hollinger, Torys and KPMG have a legally protected interest in being afforded a zone of confidentiality to shelter the most sensitive aspect of their proposed settlement.

18 The sealing order protects litigation settlement privilege and thereby fosters the strong public interest in the settlement of disputes and the avoidance of litigation. "*This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system,*" (Loewen, Ondaatje, McCutcheon & Co. c. Sparling, [1992] 3 S.C.R. 235 (S.C.C.), at p. 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at p. 28 (emphasis added by the Supreme Court)).

19 The rationale for litigation settlement privilege is that unless parties have an assurance that their efforts to negotiate a resolution will not be used against them in litigation should they fail to resolve their dispute, they will be reluctant to engage in the settlement process in the first place. A legal rule that created a disincentive of that nature would run contrary to the public policy favouring settlements.

20 We agree with the respondents that litigation settlement privilege constitutes a social value of super-ordinate importance capable of justifying a sealing order that limits the open court principle.

21 In our view, it was open to the motion judge to conclude under the *Sierra* test that the salutary effects of the sealing order outweighed its deleterious effects on the important right to free expression and the public interest in open and accessible court proceedings.

22 While the evidence led in support of the sealing order is limited to a bald statement that full disclosure of the terms of the settlement agreement "would undermine the Litigation Trustee's initiatives with respect to ... litigation with KPMG or Torys, in the event that the settlements are not approved," in light of the strong public policy favouring settlements and the recognized privilege that protects the confidentiality of settlement discussions, the motion judge did not err in concluding that the evidence was sufficient to satisfy the onus under the *Sierra* test.

23 We agree with the respondents that the motion judge's sealing order was a minimal intrusion on the open court principle and on the procedural rights of the non-settling parties. The sealing order protected only the amounts of the settlements and it gave the non-settling parties ready access to the amounts of the settlement upon signing a confidentiality agreement. The "come back" clause allowed any party to return to court for a reassessment of the need for the sealing order should the circumstances change.

24 We do not accept Black's submission that these are concluded agreements for which the litigation settlement privilege is spent. The settlement agreements at issue here have no legal effect until they are approved. In the context of this litigation and these settlement discussions, we are satisfied that just as the threat of disclosure of pre-resolution discussions would likely discourage parties from attempting to settle, so too would the threat of disclosure of their tentative settlement requiring court approval. We add, however, that our conclusion on the privileged nature of a settlement requiring court approval is based on the facts and circumstances of this case, and we leave to another day the issue of whether the privilege always attaches to other settlements requiring court approval, for example, class action settlements or infant settlements, where different values and considerations may apply.

25 Nor do we agree with Black's argument that because the litigation settlement privilege would still prevent any party from introducing the terms of the settlement into evidence in any trial that might follow should the court not approve the settlements, the information can now be made available to the public at large. We know of no authority that limits the reach of litigation settlement privilege in this manner. Moreover, the argument that no harm could flow from full public disclosure appears to us to ignore the practical reality that allowing for full public disclosure of all terms of the settlement agreements prior to court approval would have a very perverse effect on the desired incentives to engage in settlement discussions in the context of high stakes, high profile litigation.

2. Did the confidentiality agreement impose an undue burden?

26 We see no merit in the submission that Black's right to obtain disclosure of the settlement amounts was unduly burdened by the term of the sealing order requiring him to sign a confidentiality agreement as a pre-condition to disclosure. This term of the sealing order protects the non-settling parties' procedural right to have full access to the terms of the settlement agreements while maintaining the protection of the litigation settlement privilege. It is only if Black uses the privileged information for some improper purpose that he would face the prospect of some sanction for breach. Contrary to the submission that that sanction would inevitably be "draconian," it would be a matter for the discretion of the court to decide an appropriate sanction in the circumstances and we see no reason to fear that the court would decide to impose a sanction that did not fit the circumstances of the case.

27 We add here that we do not consider the terms of the bar orders relevant to the issue of the sealing order. Neither the motion judge nor this court was asked to pass upon the appropriateness of the bar orders at this stage and as the sealing order allows Black to obtain full disclosure of the terms of the settlement, Black suffers no disadvantage if he chooses to challenge the settlement on the ground that the bar orders should not be approved.

3. Did the respondents waive privilege?

28 Black submits that by putting virtually all of the terms of the settlements on the public record and by disclosing the redacted portions of the settlement agreements to those non-settling parties who sign confidentiality agreements, the respondents have waived privilege.

29 We disagree. These terms were imposed by court order (albeit at the suggestion of the parties) and we fail to see how or why abiding by the terms of a court order should result in a finding that a party has waived privilege. Moreover, in our view, this argument is inconsistent with Black's purported reliance on the open court principle as requiring disclosure of the settlement amounts. The terms of the order said to amount to a waiver of privilege were plainly motivated to ensure that the sealing order was minimally intrusive on the open court principle. To accept Black's submission that those terms of the order constitute waiver would be to require sealing orders to be more restrictive than necessary to protect the public interest in fostering settlements. Such a rule would be self-defeating and contrary to the public interest in open access to court proceedings.

4. Conclusion

30 We conclude that the sealing order strikes an appropriate balance between the public interest in the promotion of settlements and the public interest in the open court principle:

(i) the public interest in the promotion of settlements and the protection of settlement privileged information and communications is met by the sealing of the redacted portions of the settlement agreements from the public record; and

(ii) the public interest in the open court principle is met by the public disclosure of all but the redacted terms of the settlement agreements, and the time-limited nature of the sealing order, lasting only so long as the settlements remain contingent on court approval.

31 In addition, the sealing order strikes the appropriate balance between the competing private interests of the parties:

(i) the settling parties' interest in maintaining the confidentiality of their privileged information is met by the sealing of the redacted portions of the Settlement Agreements;

(ii) the interests of all non-settling defendants (including Black) are met by the approval of the confidentiality agreement provision affording them access to the redacted portions of the settlement agreements and thereby enabling them to respond meaningfully to the settlement approval motion.

Disposition

32 The appeal is dismissed. In accordance with the agreement of counsel, the respondents Hollinger, Torys and KPMG are entitled to costs of \$10,000 each, inclusive of disbursements and applicable taxes.

Appeal dismissed.

TAB 13

2019 ONSC 408
Ontario Superior Court of Justice [Commercial List]

Crystallex International Corp. (Re)

2019 CarswellOnt 679, 2019 ONSC 408, 72 C.B.R. (6th) 318

**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 Crystallex International Corporation

Glenn A. Hainey J.

Judgment: January 15, 2019

Docket: CV-11-9532-00CL

Counsel: Counsel — not provided

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

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.3](#) Arrangements

[XIX.3.b](#) Approval by court

[XIX.3.b.i](#) "Fair and reasonable"

Business associations

[V](#) Legal proceedings involving business associations

[V.3](#) Practice and procedure in proceedings involving corporations

[V.3.n](#) Confidentiality or sealing orders

Civil practice and procedure

[XII](#) Discovery

[XII.2](#) Discovery of documents

[XII.2.m](#) Miscellaneous

Civil practice and procedure

[XIV](#) Practice on interlocutory motions and applications

[XIV.6](#) Conduct of hearing

[XIV.6.a](#) Adjournments

Headnote

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Confidentiality or sealing orders

Applicant brought motion for order approving amended and restated settlement agreement and sealing motion material marked confidential — Motion granted — Facts set out in evidence filed by applicant justified why amended settlement agreement and subject matter and substance of motion should remain confidential — Applicant satisfied test for sealing materials.

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

Applicant brought motion for order approving amended and restated settlement agreement and sealing motion material marked confidential — Motion granted — Amended settlement agreement was fair and reasonable and was in best interests of applicants and its stakeholders based on material before court.

Civil practice and procedure --- Practice on interlocutory motions and applications — Conduct of hearing — Adjournments

Applicant applied for order approving amended and restated settlement agreement and sealing motion material marked confidential — Noteholder committee and trustee and shareholder committee requested adjournment of applicant's motion and for disclosure of unredacted monitor's report to stakeholders — Request denied — In light of terms of amended settlement agreement, urgency of motion and approval required, requested relief not appropriate — Applicant had satisfied test for sealing order — Counsel for Noteholder committee and trustee and counsel for shareholder committee had signed confidentiality agreements and viewed unredacted materials pertaining to motion and it was reasonable that if stakeholders were not prepared to sign confidentiality agreement, they could not receive confidential information about amended settlement agreement.

Civil practice and procedure --- Discovery — Discovery of documents — Miscellaneous

Applicant applied for order approving amended and restated settlement agreement and sealing motion material marked confidential — Noteholder committee and trustee and shareholder committee requested adjournment of applicant's motion and for disclosure of unredacted monitor's report to stakeholders — Request denied — In light of terms of amended settlement agreement, urgency of motion and approval required, requested relief not appropriate — Applicant had satisfied test for sealing order — Counsel for Noteholder committee and trustee and counsel for shareholder committee had signed confidentiality agreements and viewed unredacted materials pertaining to motion and it was reasonable that if stakeholders were not prepared to sign confidentiality agreement, they could not receive confidential information about amended settlement agreement.

MOTION for order approving amended and restated settlement agreement and sealing confidential motion materials; REQUEST by stakeholders for adjournment and disclosure of unredacted monitor's report.

Glenn A. Hainey J.:

1 This is a motion for an order approving an Amended and Restated Settlement Agreement dated September 10, 2018 between the Applicant and the Republic of Venezuela (the "Amended Settlement Agreement") and sealing the motion materials marked "Confidential" as well as those redacted portions of the Monitor's Twenty-Seventh Report.

2 The evidence filed by the Applicant in support of this motion sets out facts which justify why the Amended Settlement Agreement and the subject matter and substance of the motion should remain confidential at this time. I note that the Monitor supports the Applicant's request for an order approving the Amended Settlement Agreement and sealing the relevant material.

3 I hereby approve the Applicant's request for sealing, having found that the Applicant has satisfied the burden for sealing the materials under the test set forth in *Sierra Club*, including the subject matter of the motion, the Approval Order dated September 17, 2018, this endorsement and the redacted portions of the Monitor's Twenty-Seventh Report.

4 I also hereby approve the Amended Settlement Agreement on the basis that the provisions and terms of the Amended Settlement Agreement are proper, fair and reasonable and are in the best interests of the Applicant and its stakeholders based on the material before me.

5 Counsel for Computershare Trust Company of Canada in its capacity as Trustee for the holders of Senior Notes and an ad hoc committee of holders of the Senior Notes (the "Noteholder Committee and Trustee") as well as an ad hoc committee of shareholders (the "Shareholder Committee") requested an adjournment of this motion to permit it to obtain and consider further information concerning the Amended Settlement Agreement. In particular, Counsel for the Noteholder Committee and Trustee requested an order for disclosure of the unredacted Monitor's Report to stakeholders (most notably paragraphs 5, 10, 11 and 26) arguing that the confidentiality provision in the Amended Settlement Agreement permits disclosure as ordered by the Court, that CCAA proceedings are to be fair transparent and open to all stakeholders, that similar settlements involving Venezuela had been publically disclosed, and that the Applicant's request for sealing did not meet the test set forth in *Sierra Club*.

6 I declined to grant the relief requested by the Noteholder Committee and the Trustee and the Shareholder Committee in view of the terms of the Amended Settlement Agreement, the urgency of this motion and the approval required. I also found that the Applicant had satisfied the *Sierra Club* test for sealing of the materials. Counsel to the Noteholder Committee and the Trustee as well as counsel to the Shareholder Committee have each signed a confidentiality agreement and have reviewed all of the unredacted materials pertaining to this motion. In the circumstances before me, it is reasonable that if stakeholders are

not prepared to sign a confidentiality agreement (unless it is subject to a condition that all confidential information received will be made public by a date certain or the happening of specified events), they cannot receive confidential information about the Amended Settlement Agreement.

7 Counsel for the Noteholder Committee and Trustee further requested that the matter be heard in open court. For the same reasons I declined to grant this request and ordered that the hearing be held in chambers.

8 At the request of counsel for the Shareholder Committee, the Monitor will provide the Court and the parties to this proceeding with its views concerning the acceptability of the Acceptable Collateral (as defined in the Amended Settlement Agreement) from time to time.

9 Without suggesting any existing non-compliance, all parties who have signed or will sign confidentiality agreements are reminded that the Court expects strict observance of the requirements of those agreements.

Motion granted; request denied.

TAB 14

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Dos Santos \(Committee of\) v. Sun Life Assurance Co. of Canada](#) | 2003 BCSC 1378, 2003 CarswellBC 2182, 40 C.P.C. (5th) 118, 3 C.C.L.I. (4th) 205, [2003] B.C.J. No. 2092, 18 B.C.L.R. (4th) 306, 125 A.C.W.S. (3d) 42, [2003] 10 W.W.R. 629, [2003] B.C.W.L.D. 842 | (B.C. S.C., Sep 9, 2003)

1992 CarswellBC 267
British Columbia Court of Appeal

Middelkamp v. Fraser Valley Real Estate Board

1992 CarswellBC 267, [1992] B.C.W.L.D. 2262, [1992] B.C.J. No. 1947, 10 C.P.C. (3d) 109,
17 B.C.A.C. 134, 29 W.A.C. 134, 45 C.P.R. (3d) 213, 71 B.C.L.R. (2d) 276, 96 D.L.R. (4th) 227

**JAMES DOUGLAS MIDDELKAMP and GOLD STAR REALTY LTD. v.
FRASER VALLEY REAL ESTATE BOARD, HACKER PRESS LTD. and others**

McEachern C.J.B.C., Locke, Proudfoot, Hollinrake and Gibbs J.J.A.

Heard: April 14, 1992
Judgment: September 17, 1992
Docket: Doc. Vancouver CA012990

Counsel: *R.W. Lusk, Q.C.*, and *S.C.D. Neylan*, for appellant.
Christopher Harvey, Q.C., and *Susan Weist*, for respondents.
D.F. Robinson and *Gail Dickson*, for defendant Hacker Press Ltd.

Subject: Intellectual Property; Civil Practice and Procedure; Property; Evidence

Related Abridgment Classifications

Civil practice and procedure

[XII](#) Discovery

[XII.2](#) Discovery of documents

[XII.2.h](#) Privileged document

[XII.2.h.ii](#) "Without prejudice" communications

Evidence

[XIV](#) Privilege

[XIV.4](#) Settlement privilege [communications without prejudice]

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Letter sent without prejudice

Practice --- Discovery — Discovery of documents — Privileged document — "Without prejudice" communications

Civil procedure — Discovery — Discovery of documents — Documents subject to production — Confidential documents — Communications prepared without prejudice — Public interest in settlement of disputes requiring privilege to attach to documents created for or communicated in course of settlement negotiations.

The plaintiffs complained to the *Competition Act* director about the defendant real estate board's conduct. The director referred the matter to the Attorney General of Canada, who proceeded against the board by way of information. During lengthy negotiations, which resulted in a consent prohibition order in Federal Court, the board, its agents, and the federal authorities exchanged numerous documents. In the plaintiffs' action against the board and others, the board claimed privilege over that documentation on the ground that it was exchanged on a without prejudice basis. The plaintiffs' application for production was allowed and the board appealed.

Held:

Appeal allowed.

The public interest in the settlement of disputes generally requires "without prejudice" documents created for or communicated in the course of settlement negotiations to be privileged. It is a "blanket," "prima facie," "common law" or "class" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.

Table of Authorities

Cases considered:

Belanger v. Gilbert, 58 B.C.L.R. 191, [1984] 6 W.W.R. 474, 9 C.C.L.I. 244, 14 D.L.R. (4th) 428 (C.A.) — referred to
Compagnie Financière et Commerciale du Pac. v. Peruvian Guano Co. (1882), 11 Q.B.D. 55 (C.A.) — referred to
Cory v. Bretton (1830), 4 C. & P. 462 — considered
Derco Industries Ltd. v. A.R. Grimwood Ltd., 57 B.C.L.R. 395, [1985] 2 W.W.R. 137, 47 C.P.C. 82 (C.A.) — considered
Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 61 Alta. L.R. (2d) 319, 90 A.R. 323, 22 C.P.C. (3d) 290 (C.A.) — considered
Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co., [1990] 4 W.W.R. 39, 72 Alta. L.R. (2d) 330, 105 A.R. 4, affirmed [1990] 5 W.W.R. 377, 74 Alta. L.R. (2d) 271 (C.A.) — considered
Field v. Commissioner for Railways (1957), 99 C.L.R. 285 (Aus. H.C.) — considered
Hoghton v. Hoghton (1852), 15 Beav. 278, 51 E.R. 545 — considered
I. Waxman & Sons Ltd. v. Texaco Canada Ltd., [1968] 2 O.R. 452, 69 D.L.R. (2d) 543, affirming [1968] 1 O.R. 642, 67 D.L.R. (2d) 295 (C.A.) — applied
Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd., 5 B.C.L.R. (2d) 1, [1986] 5 W.W.R. 481, 15 C.P.C. (2d) 52, 12 C.P.R. (3d) 347, 30 D.L.R. (4th) 65 (C.A.) — considered
La Roche v. Armstrong, [1922] 1 K.B. 485 — considered
London Drugs Ltd. v. Kuehne & Nagel International Ltd., 45 B.C.L.R. (2d) 1, [1990] 4 W.W.R. 289, 31 C.C.E.L. 67, 2 C.C.L.T. (2d) 161, 70 D.L.R. (4th) 51 (C.A.) — considered
O'Rourke v. Darbishire, [1920] A.C. 581 (H.L.) — referred to
Peter Kiewit Sons Co. of Canada v. British Columbia Hydro & Power Authority (1982), 36 B.C.L.R. 58, 134 D.L.R. (3d) 154 (S.C.) — referred to
Pirie v. Wyld (1886), 11 O.R. 422 (C.A.) — considered
R. v. Fosty, [1991] 3 S.C.R. 263, [1991] 6 W.W.R. 673, 75 Man. R. (2d) 112, 7 C.R.R. (2d) 108, 8 C.R. (4th) 368, 130 N.R. 161, (sub nom. *R. v. Gruenke*) 67 C.C.C. (3d) 289 — considered
Rush & Tompkins Ltd. v. Greater London Council, [1988] 3 All E.R. 737 (H.L.) — applied
Schetky v. Cochrane, [1918] 1 W.W.R. 821, 24 B.C.R. 496 (C.A.) — considered
Scott Paper Co. v. Drayton Paper Works Ltd. (1927), 44 R.P.C. 151 [reversed 44 R.P.C. 529 (C.A.)] — considered
Station Square Developments Inc. v. Amako Construction Ltd. (1990), 44 B.C.L.R. (2d) 73, 42 C.C.L.I. 169, 68 D.L.R. (4th) 743 (C.A.) — referred to
Stretton v. Stubbs (February 28, 1905), Times (C.A.) — referred to
Teign Valley Co. v. Woodcock (July 22, 1899), Times — referred to
Underwood v. Cox (1912), 26 O.L.R. 303, 4 D.L.R. 66 (C.A.) — considered
Warrick v. Queen's College, Oxford (1867), L.R. 4 Eq. 254 — considered

Statutes considered:

Competition Act, R.S.C. 1970, c. C-23 [title am. R.S.C. 1985, c. 19 (2nd Supp.), s. 19; formerly Combines Investigation Act; now R.S.C. 1985, c. C-34]

s. 7 [now s. 9]referred to

s. 8 [now s. 10]referred to

s. 21.1 [now s. 23(1)]referred to

Competition Act, R.S.C. 1985, c. C-34

s. 34(2) *considered*

s. 36 *considered*

Rules considered:

British Columbia Rules of Court, 1990

R. 26(2)

Appeal from judgment of Davies J. (1990), 48 B.C.L.R. (2d) 395, [33 C.P.R. \(3d\) 214](#) (S.C.), granting order requiring production of documents.

McEachern C.J.B.C. (Proudfoot, Gibbs and Hollinrake J.J.A. concurring):

1 Mr. Justice Locke has fully stated the facts of this case which I need not repeat. He bases his judgment upon an immunity equivalent to privilege arising out of the interest the public has in the settlement of disputes. While reaching the same conclusion I prefer, with respect, to base my judgment on slightly different grounds. I shall omit some case citations which are included in Mr. Justice Locke's judgment.

2 I have no doubt that it is in the public interest, that parties to disputes should be free to negotiate *Competition Act* matters and other disputes freely, and without fear of later prejudice arising out of the steps taken during efforts to arrange settlements.

3 I am, however, hesitant to establish an immunity other than privilege because parties to negotiations, such as the appellant in this case, have no control over without prejudice communications once they are sent off to the other side, and documents of the kind in question in this case can easily find their way into the hands of strangers to the dispute being settled. There is no effective protection against the prejudice caused by such communications unless they are characterized as privileged.

4 For example, Mr. Lusk in argument was unable to suggest any way the appellant could prevent the director from handing these documents over to the respondent as there is no statutory provision preventing the director from assisting the respondent in his damage action. In fact, as Locke J.A. has pointed out, some of these documents have already been obtained by the respondent. Thus, in my view, the documents are either privileged or they must be produced for inspection during the discovery process, and if they are relevant, they will probably be admissible at trial.

5 In *R. v. Fosty*, [\[1991\] 3 S.C.R. 263](#), [\[1991\] 6 W.W.R. 673](#), [75 Man. R. \(2d\) 112](#), [7 C.R.R. \(2d\) 108](#), [8 C.R. \(4th\) 368](#), [130 N.R. 161](#), (sub nom. *R. v. Gruenke*) [67 C.C.C. \(3d\) 289](#), Lamer C.J.C., in giving the judgment of the court, described the two principal kinds of privilege. At p. 303 [C.C.C.], he said:

... I think it is important to clarify the terminology being used in this case. The parties have tended to distinguish between two categories; a "blanket", *prima facie*, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should *not* be privileged (*i.e.*, why they should be admitted into evidence as an exception to the general rule). Such communications are excluded not because the evidence is not relevant, but rather because there are overriding policy reasons to exclude this relevant evidence. Solicitor-client communications appear to fall within this first category: see *Geffen v. Goodman Estate* (1991), [81 D.L.R. \(4th\) 211](#), [80 Alta. L.R. \(2d\) 293](#), [127 N.R. 241](#) (S.C.C.); *R. v. Solosky* (1979), [50 C.C.C. \(2d\) 495](#), [105 D.L.R. \(3d\) 745](#), [\[1980\] 1 S.C.R. 821](#). The term "case-by-case" privilege is used to refer to communications for which there is a *prima facie* assumption that they are *not* privileged (*i.e.*, are admissible). The case-by-case analysis has generally involved an application of the "Wigmore test" (see above), which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case.

6 Case-by-case privilege, as discussed in *Fosty*, may arise in unstructured circumstances where sufficient reasons exist outside a recognized common law or "class" setting, to warrant treating communications as privileged. In this respect, however, case-by-case privilege will not likely be recognized on subjective or ad hoc bases, but only when reasonably certain criteria have been satisfied. I think it is apparent from *Fosty* that Wigmore's four tests are the standard by which case-by-case privilege will be measured. In that case Lamer C.J.C. at p. 306 said that these four principles should not be considered as "carved in stone," but he added that they provide a "general framework within which policy considerations" may be analyzed.

Wigmore's four tests are found in the McNaughton revision (1961), vol. 8, p. 257, para. 2285, as follows:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

7 *Fosty* was a case where it was sought to exclude evidence of statements made by an accused person to a lay pastor and his associate on the grounds of confidence, but the courts at all levels found no such privilege existed as a class or common law privilege. In addition, the communications did not qualify for a "case-by-case" privilege because they did not satisfy the first of Wigmore's four tests. That being so, the court did not find it necessary to consider the other Wigmore tests.

8 In my judgment, any claim to case-by-case privilege in this case must fail for the same reason as the appeal failed in *Fosty*, that is that the appellant must have known when the communications were made to the director that there was no assurance that they would be kept confidential. They did not, therefore, originate in the confidence required by Wigmore's first test.

9 I digress for a moment to observe that my views about case-by-case privilege in this case might be different if the appellant had sent these communications to the director conditionally upon them being kept confidential, particularly if the stated condition included the useful requirement that the communications should be returned without any copies being made if the condition of confidentiality was not acceptable.

10 This loss of confidentiality is often a potential problem in litigation of which *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.*, 5 B.C.L.R. (2d) 1, [1986] 5 W.W.R. 481, 15 C.P.C. (2d) 52, 12 C.P.R. (3d) 347, 30 D.L.R. (4th) 65 (C.A.), is an example. But notwithstanding *Kyuquot*, I recall making an unreported order in one of the minor applications in the memorable *Richardson Greenshields* litigation in the mid-1980s that a conditional delivery such as is described above was sufficient to impose an obligation of confidentiality upon the parties.

11 Apart from such devices, the protection of private communications is as much a matter of manners as of law. Reasonable civility and the law of defamation persuade most persons to treat private communications as confidential, but there are exceptions. One obvious exception, of course, is litigation where the fair trial of most issues requires broad disclosure of, and access to, relevant material. But the reach of litigation must not be extended unnecessarily.

12 This court dealt with just such a problem in *Derco* [*Derco Industries Ltd. v. A.R. Grimwood Ltd.*, 57 B.C.L.R. 395, [1985] 2 W.W.R. 137, 47 C.P.C. 82] where one party to litigation sought discovery of possibly relevant documents created in the settlement of a different dispute. In that case the court gave judgment only two days after argument because the trial, estimated to last four weeks, was starting that very day. For that reason the court gave a limited judgment ordering production restricted to cases where there was a completed settlement, and also restricted to production under the *Peruvian Guano* principle [*Compagnie Financière et Commerciale du Pac. v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.)], and the court expressly restricted the operation of its judgment to production as opposed to admissibility.

13 Although recognizing that "litigants should be encouraged to settle their differences," this court in *Derco* considered itself not bound by *Schetky* [*Schetky v. Cochrane*, [1918] 1 W.W.R. 821, 24 B.C.R. 496 (C.A.)] (because no ratio emerges from the judgments), but nevertheless reached the same conclusion as in *Schetky* by balancing this interest in encouraging settlement against the *Peruvian Guano* principle of complete disclosure of any material that might be relevant, particularly at the suit of a stranger to the "without prejudice" negotiations. The court relied in part on the 11th edition of *Phipson on Evidence* (London: Sweet & Maxwell, 1970), and the court at p. 400 [B.C.L.R.] expressly decided against privilege for "without prejudice" documents created during negotiations for settlement.

14 In reaching that result the court did not have the advantage of the older English and Ontario authorities cited by Locke J.A. which protected settlement documents without always characterizing that protection as "privilege," and the court in *Derco* also chose not to follow the 1968 decision of the Ontario Court of Appeal in *Waxman* [*I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*, [1968] 2 O.R. 452, 69 D.L.R. 543, affirming [1968] 1 O.R. 642, 67 D.L.R. (2d) 295], which expressly based its judgment on privilege and reached a different conclusion from *Schetky*.

15 Since the judgment of this court in *Derco*, the House of Lords in *Rush & Tompkins* [*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737], and the Alberta Court of Queen's Bench in *Ed Miller Sales*, have both declined to follow *Derco*, preferring the view of the Ontario Court of Appeal in *Waxman*. Also since *Rush & Tompkins*, the learned editors of *Phipson* have altered their views to conform to the recent jurisprudence.

16 Keeping in mind that *Derco* is a severely qualified judgment, and also the subsequent jurisprudence, I think it is appropriate that we should endeavour to pronounce, as decisively as possible, upon this important question of practice.

17 Considering the enormous scope of production which is required by our almost slavish adherence to the *Peruvian Guano* principle, the questionable relevance and value of documents prepared for the settlement of disputes, and the public interest, I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a " 'blanket', *prima facie*, common law, or 'class' " privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.

18 In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.

19 I recognize that there must be exceptions to this general rule. An obvious exception would be where the parties to a settlement agree that evidence will be furnished in connection with the litigation in which the application is made. In such cases, the public interest in the proper disposition of litigation assumes paramountcy and opposite parties are entitled to know about any arrangements which are made about evidence. Other exceptions could arise out of such matters as fraud, or where production may be required to meet a defence of laches, want of notice, passage of a limitation period or other similar matters which might displace the privilege. As we did not have argument on these matters I prefer to say nothing further about them.

20 I would allow the appeal accordingly.

Locke J.A.:

21 This appeal deals with a litigant's obligation to produce certain documents for inspection prior to a civil trial when those documents were generated in negotiating the resolution of potential criminal charges against him.

The facts

22 The long history can be briefly covered. The Fraser Valley Real Estate Board ("the board") is a society incorporated according to the laws of British Columbia and carries on business in the Fraser Valley area. Its members are the vast majority of real estate corporations and individual licensees engaged in business in the local municipalities. The plaintiff corporation and its owner, Middelkamp, were at all material times members of the association. The defendant Hacker Press Ltd. was not a member but is the publisher of a newspaper.

23 The board operates a "Multiple Listing Service" ("M.L.S.") and limits access to this to members of the board. Access to this listing service is a practical necessity for a practising realtor.

24 In 1981 Consumer Realty Co., a company owned by James Middelkamp, offered a "For Sale By Owner" consulting service for 1 per cent commission. This initiated a protracted dispute between Middelkamp and the board. The board has the exclusive control over the trademark "Realtor" and the M.L.S. in the geographical area of the Fraser Valley. The dispute was instigated by an amendment to the rules and regulations of the board on November 29, 1985 which read:

Professional Conduct:

Members of FVREB shall not offer as an inducement to list or purchase through them any form of gifts, refunds, rebates, prizes or monetary compensation.

Advertising:

Members of the Board shall not advertise For Sale By Owner consulting services ...

25 The majority of the board realtors charge 7 per cent for M.L.S. listings of resale residential property. Prior to May 28, 1986 Consumer Realty Co. advertised its commission rates, which are lower than 7 per cent, in the Real Estate Review. Central Valley "Real Estate Review" is a real estate advertising publication published by Hacker Press Ltd. In a letter written by Kenneth S. Wood, the manager of advertising for Hacker Press, it was stated:

We act simply as printers of the Real Estate Review and as such accept our instruction from the members of the FVREB. If your membership should wish to restrict "commission advertising" within their publication, The Real Estate Review, simply notify us in writing and we will comply with your wishes, as publishers ...

Since May 31, 1986 Hacker Press has restricted commission advertising in the Real Estate Review.

26 James Middelkamp complained about the conduct of the board to the director of investigation and research pursuant to ss. 7 and 8 (now ss. 9 and 10) of the *Competition Act* [R.S.C. 1970, c. C-23] ("the Act"). The director conducted an investigation and in March 1987 the Attorney General of Canada, to whom the director of investigation had referred the matter pursuant to s. 21.1 (s. 23(1)) of the Act, proceeded criminally by way of an information against the board. In the course of the earlier inquiry, the board and Hacker Press were searched by investigators pursuant to a warrant issued under the Act. It was alleged that the board had violated the criminal offence provisions of the Act.

27 Middelkamp personally was extensively involved with the director of investigation throughout the inquiry.

28 In these proceedings relief from production of certain documents is claimed on the ground that the documents were exchanged on a "without prejudice" basis between Fraser Valley Real Estate Board and the Department of Justice during the course of compromise negotiations for an order of prohibition in the Federal Court, a procedure sanctioned by s. 34(2) of the [1985] Act:

34 ...

(2) Where it appears to a superior court of criminal jurisdiction in proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section that a person has done, is about

to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part VI, the court may prohibit the commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed toward the commission of the offence.

29 Under this procedure an agreed statement of facts is signed and filed in open court and if the court thinks fit, an order is made. As this obviates the need for a criminal trial it is encouraged by the director. From time to time he issues information bulletins explaining the Act and its remedies and in the bulletin of November 1989 appears inter alia the following:

Orders on Consent

When referring a potential offence to the Attorney General of Canada, the Director may recommend that the Attorney General seek a prohibition order on consent under subsection 34(2) of the Act. This is not a new procedure and has, in fact, been used to resolve several matters pursued under the provisions of the Combines Investigation Act and the Competition Act. The Director supports the increased use of such orders in a wider range of situations as a means of providing effective and timely remedies for certain types of conduct.

When a Court issues an order under subsection 34(2) of the Act, the parties need not plead guilty and do not stand convicted and no fine or other sentence is imposed. This procedure also avoids the costs of protracted litigation ...

30 In protracted negotiations, both verbal and written, the board signed an agreed "Statement of Facts" which contained certain admissions. On December 20, 1988 a consent prohibition order was granted by Addy J. of the Federal Court of Canada. That document is, of course, public.

31 It is conceded by the appellant that much paper was generated in the course of reaching the admissions of fact and resolution of the potential charges.

32 The [1985] Act contains a provision for a civil action at the suit of one who deems himself aggrieved by an offender under the Act. Section 36 reads:

36. (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him ...

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action ...

33 Not unnaturally, the appellant says that if one who enters into negotiations with the Attorney General or the director for a consent order is obliged to disclose all his negotiating correspondence to anyone who applies, compromises will be few and far between.

34 The respondent, on the other hand, says that if there had been a conviction it would have been able to use the record of proceedings as evidence to prove its case. In the absence of this, it argues it should be able to scrutinize the available material and use it as an admission or any other advantageous purpose at trial.

35 The board originally claimed privilege over this documentation on the ground that it was exchanged on a "without prejudice" basis. On August 21, 1990 Mr. Justice Davies ordered production. This appeal is taken from that decision [(1990), 48 B.C.L.R. (2d) 395, 33 C.P.R. (3d) 214 (S.C.)].

36 This court heard submissions from the parties in April 1991 but then adjourned the matter to allow the board to provide a compendious description of the nature of the documents and state more specifically the ground or grounds upon which the claim for privilege exists in accordance with Supreme Court R. 26(2). On July 19, 1991 the board delivered to the respondent a revised list of documents and made the following claim of privilege:

E. The said documents consist of without prejudice communications written for the purpose of, and passing in the course of bona fide negotiations between the Board or its solicitors and:

(a) the Director appointed under the *Competition Act*, R.S., c. C-23 or his representatives or solicitors, or

(b) the Attorney General of Canada or his representatives or solicitors, for the settlement of litigation and anticipated litigation between the Board and the Director and the Board and the Attorney General of Canada arising in or from an Inquiry commenced by the Director in or about March, 1987, which negotiations resulted in a Prohibition Order by consent dated December 20, 1988 in the Federal Court of Canada, proceeding No. T-2432-88.

37 The trial judge examined the existing law at some length. He decided he was bound by previous authority in this court. He identified two competing issues: the promotion of negotiations leading to compromise, and the desirability of full discovery. He followed the case of *Derco Industries Ltd. v. A.R. Grimwood Ltd.*, 57 B.C.L.R. 395, [1985] 2 W.W.R. 137, 47 C.P.C. 82 (C.A.), and ordered production.

From Derco to Rush v. Tompkins

38 In that case an oral judgment was given by Lambert J.A. and concurred in by Anderson and Esson JJ.A. One of two separate actions arising from a construction project was settled between the parties. Derco Industries, the plaintiff in the second action, demanded production of the settlement documents from the defendants, who had all been parties to the first action. They refused as the settlement had been made on a "without prejudice" basis. The decision of the Court of Appeal was given under some pressure of time. The court said [p. 397 B.C.L.R.]:

... because the trial is due to begin today and is set for four weeks, it is important that judgment on this appeal should not be delayed. The issue in this appeal is one of considerable importance, with ramifications that may affect the law relating to the confidentiality of settlement negotiations, generally. But because of the urgency of this appeal from the point of view of the litigation itself, I propose to confine these reasons very closely to the circumstances of this appeal.

The plaintiff's demand for production rests on the principle that any document which may either directly or indirectly assist a party to advance his own case or damage the case of his adversary is compellable on discovery. He relies on *Compagnie Financière et Commerciale du Pac. v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.), particularly Brett L.J., at pp. 62-63. He says that there may well be admissions in the documents leading to settlement, or in the settlement agreement itself, that will be relevant to, and perhaps even determinative of, the issues in his action. But, of course, he does not know, and cannot know until he sees them.

The defendants' opposition to the production of the documents rests, first, on an assertion that the documents were created for the purpose of without prejudice negotiations, or, in the case of the settlement agreement, as the culmination of without prejudice negotiations, and as such are privileged, subject only to certain specific exceptions, such as fraud, or being required to meet a defence of laches, want of notice, or passage of a limitation period. And the defendant says that there was no foundation in the material before Spencer J. to permit the invoking of an exception, so the general rule must govern. The defendants say, also, that it was a term of the negotiations, and of the settlement itself, that the settlement would not be disclosed, except with Grimwood's consent.

39 The court then went on to consider the theoretical basis of the law [pp. 397-98]:

The theoretical foundation of the law relating to compelling the production of settlement documents, and of the law relating to the admissibility of settlement documents, is discussed in Wigmore on Evidence, Chadbourne revision (1972), vol. 4, para. 1061, pp. 33-47. There are a number of competing theories, as follows:

1. That admissions in settlement negotiations are likely to be hypothetical or conditional only, as a supposition on which a settlement might rest, whether that supposition is true or false, and that such an admission has no relevance and is inadmissible on that ground, though if an admission is clearly an unqualified admission of fact, it would be admissible;
2. That all admissions in the course of negotiations towards settlement are without prejudice, whether those words are used or not, and are protected by a privilege based on public policy, and are not admissible in evidence;
3. That settlement negotiations are conducted on the normal contractual basis of offer and acceptance and with an express reservation of secrecy, and that, if a contract is reached, the negotiations are superseded by the contract itself, and become irrelevant and inadmissible, and if no contract is reached, then the negotiations are, for that reason, irrelevant;
4. That admissions made in the course of settlement negotiations may not be concessions of wrongs done, but merely an expression of a desire to purchase peace, and as such irrelevant and inadmissible.

No matter what theoretical foundation is adopted, Wigmore indicates that there are a number of exceptions to any principle of admissibility of evidence of settlement material: see particularly pp. 43-47.

Wigmore prefers the first theory that I have set out. But he concedes that other scholars prefer other theories, particularly the second theory, based on the existence of a privilege on the grounds of public policy.

It should also be borne in mind that Wigmore's views are formed and expressed in relation to admissibility and not in relation to producibility. Under the rule in the *Peruvian Guano* case, *supra*, it is the possibility of relevance that governs producibility, not relevance itself. And, of course, it is relevance itself that is the most fundamental criterion of admissibility.

40 Spencer J. had decided the matter in the lower court. He had considered an earlier decision of this court, *Schetky v. Cochrane*, [1918] 1 W.W.R. 821, 24 B.C.R. 496, and the Ontario appellate decision of *I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*, [1968] 2 O.R. 452, 69 D.L.R. (2d) 543. Lambert J.A. commented on this [p. 399]:

Spencer J. considered the reasons of the four judges of this court who sat in *Schetky v. Cochrane*. In that case an application for an order compelling production was granted and the appeal was dismissed. Macdonald C.J.A. adopted Wigmore's view and decided that the documents were producible, but thought that they might not be admissible, depending on relevance. He seems to have rejected the privilege theory, though he does not expressly say so. Martin J.A. decided the case was within the fraud, notice, election or laches exception and relied on an allegation of fraud in the pleadings. Eberts J.A. adopted a contract theory of settlement. He said the contract could not bind a person who was not a party to the contract. McPhillips J.A. merely expressed his agreement to the dismissal of the appeal.

Spencer J., in this case, concluded that this court, through the reasons of Macdonald C.J.A. and Martin J.A., must have recognized and adopted the conditional admission theory preferred by Wigmore, and that the conditional admission theory now underlies the law on this question in this province. On that view, Spencer J. decided that the law in British Columbia is not the same as the law in Ontario, as the law in Ontario is set out in *I. Waxman & Sons Ltd. v. Texaco Can. Ltd.*, where the privilege theory of settlement agreements is adopted and extended to cover a person who is a party to the litigation but not a party to the settlement.

41 Lambert J.A. then decided the case [pp. 399-400]:

In my opinion, no ratio decidendi emerges from the decision of this court in *Schetky v. Cochrane* that is binding on us in this case. I do not think it is either necessary or desirable, in the urgent circumstances in which this decision is required, to express any opinion on the theory that should be adopted in considering the producibility or admissibility, as between the parties to a concluded settlement, or as between the parties to inconclusive settlement negotiations, of documents or other evidence arising in the course of the negotiations or setting out the terms of the settlement itself. The answers to those questions depend on a balancing of competing legal interests. On the one hand, anything which may tend to the finding of the truth should be brought forward. On the other hand, litigants should be encouraged to settle their differences.

But the balance that should be reached between those competing legal interests may well be different in a case between a third party litigant, on the one hand, and the parties to the settlement, on the other hand, than that balance would be between the parties to the settlements themselves. It is simple to conceive of cases where a settlement between a plaintiff and one of two several tortfeasors may operate to the detriment of the other several tortfeasor, or where a compromise may in some other way induce cooperation. I am not thinking of cases of fraud, which must come within an exception to any principle that prevents production, but of cases where the outcome of the litigation with one tortfeasor may be influenced by the consequences of a compromise with the other tortfeasor. *So, to the extent that there is a rule that prevents the production of documents that were prepared in the course of negotiations leading to a concluded settlement, it is my opinion that the rule does not extend to the prevention of the production of those documents at the instance of a litigant who was not a party to the settlement and whose claim for production comes under the rule in the Peruvian Guano case. This is the view adopted by Phipson on Evidence (13th ed. (1982), para. 19-11), and was the view of Phipson on Evidence at the time of the Schetky case (6th ed. (1921), p. 232) and at the time of the Waxman case (11th ed. (1970), para. 680). It is consistent with the reasons of the four judges of this court who sat on the Schetky case.*

This decision is restricted to documents demanded by a third party to a settlement; it is restricted to documents arising in the course of settlement negotiations that have led to a completed settlement, including the settlement agreement itself; it is restricted to documents and does not extend to other forms of evidence; and it is restricted to production and not to admissibility.

But I should add that in my view the question of admissibility, should it arise at trial, will depend only on the question of relevance, and not on any issue of privilege as between this plaintiff and these defendants.

I would dismiss the appeal. [emphasis supplied]

42 In the case at bar this court now sits with five members as it is said that a recent decision of the House of Lords has shown that the earlier decision of this court, *Schetky*, supra, was based on flawed authority and because of this and for other reasons, the case of *Derco* should be reconsidered.

43 In *Schetky's* case Macdonald C.J. and Martin and Eberts J.J.A. reached the same conclusion by different routes. McPhillips J.A. agreed with the result with no reasons. Lambert J.A. found no common ratio and I agree. But as did Martin J.A. he relied on the 6th and 13th editions of *Phipson on Evidence* where it is stated:

The protection applies only in the same action (*Stretton v. Stubbs* (1905), Times 28 Feb. C.A.) and between the same parties and not between them and third persons; (*Teign Valley Co. v. Woodcock* (1899), Times 22 July) ...

and adopted this as support for his own views and consistent with the *Schetky* case.

44 There do not appear to be any other recorded cases on point in British Columbia until *Derco*. One earlier Ontario authority quotes *Schetky*, only to distinguish and disagree with it. In *I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*, [1968] 1 O.R. 642, 67 D.L.R. (2d) 295 (H.C.), Fraser J. gave a long and careful analysis of the Ontario cases. He adopted the public policy theory which encourages the settlement of disputes without proceeding to trial and said at p. 309 [D.L.R.]:

In my opinion the privilege as so often stated, is intended to encourage amicable settlements and to protect parties to negotiations for that purpose. It is in the public interest that it not be given a restrictive application.

45 He also held that the principles for protection of "without prejudice" documents and letters were the same on discovery or production and at trial. The Court of Appeal endorsed the entire judgment at [1968] 2 O.R. 452, 69 D.L.R. (2d) 543.

46 There then follows *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737, a single judgment of the House of Lords. The plaintiff contractor settled its claim against the council on global terms and undertook to reimburse the subcontractors. Careys was such a subcontractor who had negotiated privately with the council at the time of the global settlement in order to quantify its claim. It was conceded that relevant documents concerning the value of that claim had then come into existence and in an action and application by Rush & Tompkins to value Careys' claim it was sought to discover the papers. It is of value to reproduce portions of the judgment by Lord Griffiths in extenso. The House canvassed a number of topics, the first of which was the "without prejudice" rule [pp. 739-40]:

The "without prejudice rule" is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v Head* [1984] 1 All ER 597 at 605-606, [1984] Ch 290 at 306:

That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice". I believe that the question has to be looked at more broadly and resolved by balancing two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation.

Nearly all the cases in which the scope of the without prejudice rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement ... I regard [*Waldridge v Kennison* (1794) 1 Esp 143, 170 ER 306] as an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence.

I cannot accept the view of the Court of Appeal that *Walker v Wilsher* is authority for the proposition that if the negotiations succeed and a settlement is concluded the privilege goes, having served its purpose ...

47 He next considered the two cases of *Stretton v. Stubbs* [(February 28, 1905), Times (C.A.)] and *Teign Valley Co. v. Woodcock* [(July 22, 1899), Times] both reported in the Times and mentioned in the judgment of Martin J.A. in *Schetky v. Cochrane*, supra, as the support of *Phipson's* view that documents in a settlement were disclosable at the behest of a third party. As to the first case Lord Griffiths cited the lack of quoted authority and reasoning and said he could not regard it as an authority of any weight for the proposition that documents "without prejudice" should, in all circumstances, be produced at the suit of a third party. As to the second he agreed with the Court of Appeal that "The report is such that it is not worthy of citation as constituting authority for any proposition of law ..."

48 He next discussed the question of any distinction between discoverability and admissibility. The House of Lords had previously held the right to discovery did not depend on the admissibility of the documents in evidence: see *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.). Griffiths J.A. then referred to Canada [p. 743]:

In Canada there are conflicting decisions. In *Schetky v Cochrane* [1918] 1 WWR 821 the Court of Appeal in British Columbia ordered oral discovery to be given to a defendant of negotiations between the plaintiff and another defendant in the action but held that on the trial there would be no higher right to use the statements or admissions than that which a party to the negotiations would have who sought to introduce them in evidence. This decision was followed in British Columbia in *Derco Industries Ltd v A R Grimwood Ltd* [1985] 2 WWR 137 at 142, in which Lambert JA said:

... to the extent that there is a rule that prevents the production of documents that were prepared in the course of negotiations leading to a concluded settlement, it is my opinion that the rule does not extend to the prevention of the production of those documents at the instance of a litigant who was not a party to the settlement and whose claim for production comes under the rule in [*Cie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55].

Schetky v Cochrane was not followed by the Court of Appeal of Ontario in *I Waxman & Sons Ltd v Texaco Canada Ltd* [1968] 2 OR 452. The Court of Appeal in a short judgment upheld a long reasoned judgment by Fraser J, who expressed the following opinion ([1968] 1 OR 642 at 656):

... I am of opinion that in this jurisdiction a party to a correspondence within the 'without prejudice' privilege is, generally speaking, protected from being required to disclose it on discovery or at trial in proceedings by or against a third party.

I suspect that until the present decision of the Court of Appeal the general understanding of the profession was that without prejudice negotiations between parties to litigation would not be discoverable to other parties and that admissibility and discoverability went together. For instance *The Supreme Court Practice* 1988 vol I, para 24/5/17 under "Discovery and Inspection of Documents" reads:

Without prejudice communications — Any discussions between the parties for the purpose of resolving the dispute between them are not admissible, even if the words 'without prejudice' or their equivalent are not expressly used (*Chocoladefabriken Lindt & Sprungli A.G. v Nestlé Co. Ltd.* ([1978] RPC 287)). It follows that documents containing such material are themselves privileged from production.

He concluded with the following [p. 744]:

I have come to the conclusion that the wiser course is to protect without prejudice communications between parties to litigation from production to other parties in the same litigation. In multi-party litigation it is not an infrequent experience that one party takes up an unreasonably intransigent attitude that makes it extremely difficult to settle with him. In such circumstances it would, I think, place a serious fetter on negotiations between other parties if they knew that everything

that passed between them would ultimately have to be revealed to the one abudrate litigant. What would in fact happen would be that nothing would be put on paper, but this is in itself a recipe for disaster in difficult negotiations which are far better spelt out with precision in writing.

If the party who obtains discovery of the without prejudice correspondence can make no use of it at trial it can be of only very limited value to him. It may give some insight into his opponent's general approach to the issues in the case but in most cases this is likely to be of marginal significance and will probably be revealed to him in direct negotiations in any event. In my view, this advantage does not outweigh the damage that would be done to the conduct of settlement negotiations if solicitors thought that what was said and written between them would become common currency available to all other parties to the litigation. In my view, the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties. Accordingly, I would allow this appeal and restore the decision of the official referee.

49 A portion of Martin J.A.'s judgment in *Schetky v. Cochrane* was mentioned in *Belanger v. Gilbert*, 58 B.C.L.R. 191, [1984] 6 W.W.R. 474, 9 C.C.L.I. 244, 14 D.L.R. (4th) 428 (C.A.), and in a chambers decision, *Station Square Developments Inc. v. Amako Construction Ltd.* (February 22, 1990) (C.A.) [now reported 44 B.C.L.R. (2d) 73, 42 C.C.L.I. 169, 68 D.L.R. (4th) 743], the principles of *Derco* were applied. *Rush & Tompkins*, supra, was not referred to in *Station Square*.

50 In the latest reported Canadian decision, *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1990] 4 W.W.R. 39, 72 Alta. L.R. (2d) 330, 105 A.R. 4, Wachowich J. of the Alberta Queen's Bench made a scholarly analysis of all recent decisions and elected to follow *Rush & Tompkins* and specifically adopted the public policy theory. The decision was appealed and affirmed as to principle in a memorandum decision at [1990] 5 W.W.R. 377, 74 Alta. L.R. (2d) 271 (C.A.).

The positions of the parties

51 The appellant's argument is straightforward enough: *Schetky's* case was wrongly decided, or alternatively was founded on such dubious authority that it should now be not followed. It is pointed out that apart from there being no common ratio, the passage from the 6th edition of *Phipson* then cited had now been changed in the latest 14th edition (1990) to read that with regard to the same subject matter the correspondence is shielded whether the litigation be between the same or different parties. It was submitted that insofar as the *Derco* decision was influenced by *Schetky*, it would be subject to a similar taint. Also, that very decision commented on urgency, lack of time for reflection, and severely limited its own ambit. In addition, it did not involve a potential criminal prosecution where the director had actually invited those under suspicion to attempt to resolve the matter. Under all the circumstances, and also considering the principle of comity between courts, the appeal should be allowed.

52 The respondent mounted a number of arguments. It was said that any protection should only extend to one who bargained for a settlement in good faith and in this case the appellant had at the least mixed motives, one of them being to deny the plaintiff access to evidence and thus defeat its claim for damages. Apart from fraud, I am of the view that motives for settlement are irrelevant. It was then said that if the privilege were not upheld all it would only mean was that the parties would have to be more careful in their language. I reject this as an argument without merit. It was further said the privilege (if any) was spent as the settlement had been completed. The House of Lords disposed of this in *Rush* and in my view correctly. And there were other arguments pointing out differences in detail between the case at bar and *Rush* and other cases which I will not deal with as while the facts of these cases are of the greatest importance I regard the matter here as one of principle.

53 It was argued that as the appellants had admitted that they had contravened the provisions of the *Competition Act*, they had in essence confessed to a criminal offence, and as the private lawsuit provisions of the Act are an integral part of the enforcement provisions of the Act it is not in the public interest that the plaintiff here should be hindered in getting at the truth. But if the Parliament of Canada saw fit to enact these somewhat unusual sections, everything that was done in relation to the settlement was sanctioned by law. The information bulletin says "the parties need not plead guilty and do not stand convicted and no fine or other sentence is imposed ..." While it may be more difficult, nothing stands in the way of the plaintiffs proving their claim. The remedy is not barred: certain sources of evidence have been made unobtainable. This is not an unusual situation;

Parliament decreed that the formal admissions had to be made public, but not the negotiations. This is not really different from the law of contract.

54 There are, however, other more formidable arguments. One is that *Rush & Tompkins* ought not to be slavishly followed because that decision was after all given in a different jurisdiction: see McLachlin J.A. in *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.*, 5 B.C.L.R. (2d) 1, [1986] 5 W.W.R. 481, 15 C.P.C. (2d) 52, 12 C.P.R. (3d) 347, 30 D.L.R. (4th) 65 (C.A.), where she comments that "Pre-trial discovery is much more extensive in this province than in England." And Anderson J.A. said at p. 483 [W.W.R.]:

In matters of practice where our own practice has worked well we should not, unless good cause be shown, change our procedures to conform to rules of procedure pronounced by the courts of another jurisdiction ...

55 In *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, 45 B.C.L.R. (2d) 1, [1990] 4 W.W.R. 289, 31 C.C.E.L. 67, 2 C.C.L.T. (2d) 161, 70 D.L.R. (4th) 51 (C.A.), at p. 24 [B.C.L.R.], McEachern C.J.B.C. said "... [Canadian courts] should try to develop [their] own jurisprudence ..." and indeed in the *Kyuquot* case this court completely parted company with English practice on the matter of the existence of an implied undertaking not to use discovery questions in another action.

56 It is of course well to be independent: but in a good cause. Where the underpinnings of previous decisions are shown to be frail, it is not always correct to endeavour to sustain them. There is also something to be said for comity in decisions which are not mere matters of practice and procedure. The instant case is not one of mere practice, but a matter of balancing two important aspects of the public interest.

57 In the earlier of two cases, *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 61 Alta. L.R. (2d) 319, 90 A.R. 323, 22 C.P.R. (3d) 290 (C.A.), in an argument on solicitor-client privilege it was argued that lawyers' and accountants' "work product" should be disclosed, as an investigation under the *Combines Investigation Act* was not really a criminal charge. The Chief Justice of the Court of Appeal of Alberta said at p. 295 [C.P.R.] in relation to proceedings under the *Combines Investigation Act*:

I confess that, to me, to say they were "merely being investigated" seems an unduly sanguine description of the process in which the Caterpillar companies were then involved. They were "merely being investigated" but that investigation had the potential for the gravest consequences, both civil and criminal. It was the first step in a procedure which could ultimately lead to huge fines, to jail sentences for individuals, to the destruction of their marketing and warranty system, and to civil liability if the facts established showed breaches of the statute.

It is safe to say that anyone against whom has been set in motion the complex processes of the *Combines Investigation Act* has immediately sought, and certainly required, legal assistance. While the procedures of the statute are lengthy and cumbersome, and while the conclusion of them may be years away when the inquiry is launched, the danger is nevertheless real. I would consider that litigation was anticipated and, indeed, was then in progress.

While the claim in the case at bar is not made under this head, the passage vividly describes the travails of those investigated.

The basis of "without prejudice"

58 This claim for protection from production of documents "without prejudice" is often considered to be one that the documents are "privileged" and the cases and writers on occasion classify it as a branch of this doctrine. This is no doubt satisfactory provided it is understood that the claim rests on a very different theoretical base than those other forms which arise because of the relationship between two parties which prohibits admission of their evidence at trial without the consent of the other: legal professional privilege, marital privilege, and concerning landlord and tenant as against disclosure of title deeds, by way of example. Those arise because society deems the relationships to be of such importance that it will not permit their sanctity to be undermined. The "privilege" with which we are concerned here deals not with a relationship but with competing legal interests, both of which are intrinsically meritorious. But as the doctrine we discuss is not a true "privilege" but really a rule of public policy, in my opinion papers leading up to a settlement, no matter how obtained, could not be produced in evidence at all.

59 Some of the difficulties of dealing with it as a "privilege" are dealt with in an article entitled "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 U.B.C. L. Rev. 85, where the author D. Vaver has this to say at p. 107 of his dissertation:

The undesirability of calling the "without prejudice" rule a "privilege" may also be pointed out in those cases where inadmissibility depends on irrelevancy and where the assertion of a privilege is an impossibility. Suppose that a motor accident arises involving A, B and C. A alleges that B is at fault and B alleges that C is at fault. C compromises with B, but A sues B alone, claiming the accident was solely B's fault. B calls C to testify as to the fact of the offer of compromise. A is unable to object to the evidence on the grounds of privilege, for B and C alone can claim privilege. However, the evidence ought to be excluded on the grounds of irrelevancy, for a compromise *per se* is not evidence of an admission but merely implies a desire to buy peace. If the offer of compromise did contain an admission of liability by C and was thus admissible, "privilege" being waived by B and C, A could not prevent inclusion of the evidence. He could not claim privilege, since privilege is personal to the parties, and the evidence was clearly relevant. It may therefore be seen that there are good reasons for eschewing the use of the description "privilege" in the context of the "without prejudice" rule and for not considering the basis of the rule as one of "privilege".

60 It is worthwhile examining the precise reason for the development of the rule as distinct from later rationalizations. From the earliest times, it was always considered in relation to efforts to compromise. This was the only factual background in which it was ever considered. This has always been emphasized by the judges for a century and a half. *Wigmore on Evidence*, Chadbourne rev., vol. 4, s. 1061, gives all the old English cases. In *Cory v. Bretton* (1830), 4 C. & P. 462, the letter was an offer of settlement: Tindal C.J. said: "... if it were a verbal communication, I should certainly not admit it in evidence. It is clearly a conditional statement ..." In *Hoghton v. Hoghton* (1852), 15 Beav. 278, 51 E.R. 545, Sir John Romilly said:

... such communications made with a view to an amicable arrangement ought to be held very sacred ... even if the correspondence contained any admission affecting the plaintiff's rights, I should disregard such admissions made solely with a view to compromise ...

61 There followed the other authorities I have mentioned and more upon which I will later comment. Finally in *Rush & Tompkins*, supra, in 1988 affirms this very exactly. The intent to at least explore compromise has always been the touchstone.

62 This reason for the rule was also specifically considered in Ontario in two older cases. *Pirie v. Wyld* (1886), 11 O.R. 422 (C.A.), refers to it as long established. In *Underwood v. Cox* (1912), 26 O.L.R. 303, 4 D.L.R. 66 (C.A.), Chancellor Boyd said [p. 315 O.L.R.]:

On grounds of public policy, letters written without prejudice and written *bonâ fide* to induce the settlement of litigation, are not to be used against the party sending them ...

63 A close examination of *Schetky* shows that the principle of shielding a compromise was never in doubt. The complicated judgments all dealt with either the theoretical basis for this, or else discussed in much detail the limits of the doctrine related to the facts of that case: e.g., were the statements of collateral facts? What would be the situation at trial as opposed to mere production? (Macdonald C.J.) Whether the documents would disclose actual terms or not? (this conceived to make a difference) (Martin J.A.). The major point was decided on the basis of *Stretton v. Stubbs* and *Teign Valley*, both supra. But the court was not referred to *Warrick v. Queen's College, Oxford* (1867), L.R. 4 Eq. 254, where in an action against B, A sought production of documents relating to a compromise between B and C (not a party to the present proceedings) in order to establish his case. Lord Romilly M.R. ruled against B's claim of legal professional privilege, but nevertheless held that A could not enforce production of the compromise agreement:

The question is, whether a person who claims property in the hands of the Defendant is entitled to require the terms of, and the documents relating to, a compromise made between the Defendant and a third person relating to the same property at an anterior period, to be produced without that other party to the compromise being before the Court. I am of opinion that this Court will not compel such production ...

So while in that case the privilege being discussed was that existing between solicitor and client, and it was held not to be applicable, the plaintiff still could not force production. Obviously this could only be because of the operation of the underlying principle of forbidding production of settlement documents at the hands of a third party.

64 In *La Roche v. Armstrong*, [1922] 1 K.B. 485, Lush J. said at p. 489:

If the solicitor cannot place before the other side all the material reasons which make the offer of settlement reasonable without fear of an action if the offer is refused, it would be difficult to negotiate at all.

65 In 1927 in *Scott Paper Co. v. Drayton Paper Works Ltd.* (1927), 44 R.P.C. 151, Clauson J. (in a case involving the parties only) said at p. 157 that:

It appears to me that every element is present which makes it necessary for me to hold that these were negotiations for the settlement of pending litigation, each party hoping by these frank communications to prevent the anticipated litigation. It would, I think, be lamentable if admissions or statements made at an interview of that character were admissible.

I am glad to think I have ample authority in the decision of Lord Romilly in *Hoghton v. Hoghton*, (1852) 15 Beav. 278; Lord Romilly again in *Jones v. Foxall*, (1852) 15 Beav. 388; the statement of Chief Justice Tindale in (1846) *Jardine v. Sheridan*, 2 Car. & K. 24; the language used by Mr. Justice Vaughan Williams in *In re Daintrey*, L.R. (1893) 2 Q.B. 116, and, finally, the decision of Mr. Justice Lush in *La Roche v. Armstrong*, L.R. (1922) 1 K.B. 485, for holding that this evidence is inadmissible ...

66 In 1957 the High Court of Australia in *Field v. Commissioner for Railways*, 99 C.L.R. 285, commented in substantially the same terms on what the court called the "privilege" of without prejudice correspondence in negotiations for compromise.

67 Fraser J. in *Waxman*, supra, in 1968 adopted the Ontario learning and said (I repeat) [p. 309]:

In my opinion the privilege as so often stated, is intended to encourage amicable settlements and to protect parties to negotiations for that purpose. It is in the public interest that it not be given a restrictive application.

68 In the Ontario Court of Appeal at [1968] 2 O.R. 452, the court said [p. 453]:

Fraser, J., expresses the view that the principle upon which he concluded the case is supported in large measure by two Ontario cases referred to by him and in this we also agree. The two Ontario cases are *Pirie v. Wyld* (1866), 11 O.R. 422, and *Underwood v. Cox* (1912), 26 O.R. 303, 4 D.L.R. 66, a decision of a Divisional Court of this Province. I may add that although there are numerous decisions elsewhere on subject-matter related to the matters to be decided here, although not specifically in point, we prefer, so far as the principle expressed by Fraser, J., is concerned, the reasoning in four of those cases and apply it by way of analogy to the problem which we are here deciding. Those four cases are *Hoghton v. Hoghton* (1852), 15 Beav. 278, 51 E.R. 545; *Warrick v. Queen's College, Oxford (No.2)* (1867), L.R. 4 Eq. 254; *Cory v. Bretton* (1830), 4 Car. & P. 462, 172 E.R. 783, and finally *La Roche v. Armstrong*, [1922] 1 K.B. 485.

69 And finally in *Rush & Tompkins* the House put the quietus to the only two previous English decisions which had dealt with a third-party production problem apart from *Warrick*, considered *Derco* and *Waxman*, and restated the principle in the terms already quoted.

70 And so it is seen that the overwhelming current of authority is in favour of endorsing the protection from production with the aim of curtailing or shortening litigation. This has been the underlying object. I have laboriously canvassed all these cases to show that the principle has always been accepted from the earliest times. There has been much litigation, but it has all been to define the scope of the doctrine: Does it apply to arbitrations? Does it apply to opinion evidence? Does it apply to lawyers as well as clients? Does it apply when there has been a concluded settlement? And so on. Never has the principle, which is really one example of applying the principle of economy of means, been doubted.

71 In later times much intellectual power has been expended in attempting to state the true theoretical basis for the doctrine. *Hoghton v. Hoghton* in 1852, *Underwood v. Cox* in 1912, one judge in *Schetky v. Cochrane* in 1918, *Scott Paper* in 1927, *Waxman* in 1968 and *Rush & Tompkins* in 1988 have all placed it in the ground of public interest.

72 I agree with this. It has to my mind the immense advantage of enabling one to balance competing interests not on forms of words but on intrinsic strengths. One is enabled to apply principle to the kaleidoscope of circumstance.

The present case

73 It poses the problem of production at the demands of a third party. *Warrick*, *Teign Valley*, *Stretton v. Stubbs*, *Schetky*, *Derco*, *Waxman*, *Ed Miller Sales*, and *Rush* have each dealt with it. *Teign Valley* and *Stretton v. Stubbs*, upon which *Schetky* substantially depended, have been discredited. While *Derco* reached an independent conclusion, it was specifically not founded on any one theoretical basis, and has not been followed by two appellate courts.

74 With all respect I cannot in law see one reason why this province, alone in the Commonwealth, should not recognize the overriding importance of this protection from the eyes of a third party. To refuse it is to inhibit and penalize one who wishes to settle. It is easy to envisage a building owner loath to compromise the minor claim of a small subcontractor, because of concern an admission of fact would be held against him in another major subcontractor's proceeding.

75 All the cases emphasize that no bars should be placed in the way of one who wishes to compromise, and to allow the production is by definition to inhibit. Such barriers to settlement should only be permitted if the other competing interest absolutely demands it.

76 In examining the conflict between privilege and disclosure it must be recalled that British Columbia already has the widest of discovery laws: far greater than England, and wider in scope than Ontario. Therefore, ab initio, the need for production to do justice is the less. One assumes that England has done justice, and that with a poverty-stricken discovery compared to the engines available in British Columbia, where abuses are often worked in the name of completeness: see McEachern C.J.S.C. in *Peter Kiewit Sons Co. of Canada v. British Columbia Hydro & Power Authority* (1982), 36 B.C.L.R. 58, 134 D.L.R. (3d) 154 (S.C.), criticizing the invariant application of the *Guano* rule to all large litigations.

77 In my view, the guiding principle and one promising the greatest good for the greatest number of disputants is to shield these documents from production.

78 There have been other objections raised to this conclusion. For one, it appears that the plaintiff has already obtained from the director or from other sources a certain number of the documents sought to be shielded from production, though exactly how this occurred is not clear. It is suggested this is destructive of the doctrine in some way. I do not agree. In a case of "true" privilege an accidentally overheard conversation between lawyer and client can be given in evidence. Privileged documents accidentally dropped on the courtroom floor have been used in cross-examination: see *Cross on Evidence*, 6th ed. (London: Butterworths, 1985), p. 400. Nobody suggests this abolishes the solicitor-client privilege. For another, it is also suggested that there is no need to alter the existing law as expressed in *Derco* as there is no evidence that any settlements had ever been inhibited, as witness the hundreds or thousands of actions settled in any year in British Columbia. But in the first place, we do not know how many more actions would have been settled had the law been different. In the second place, we have three examples of objections being raised in this jurisdiction alone in *Derco*, and *Belanger* and *Station Square* mentioned earlier. Third, and in my view unanswerable, it offends what I conceive to be the long-standing basic principle I have canvassed. This principle existed long before our modern laws of discovery were even invented. It should take precedence.

79 Some argument can be made that this case should be narrowly decided and limited to the situation presenting itself here: that in investigations under the *Competition Act*, it is enough to decide that in this case the appeal succeeds. But in my view this is not sufficient. To remove doubts it is my opinion this court should state clearly its view as to where the main public interest lies in the event of future collisions in the course of bona fide efforts to settle.

80 In summary:

81 (a) In the case at bar, considering the fact that it was a criminal matter, that the state was involved, that the Act spells out express machinery, and the published bulletins of the director invite negotiations, production of settlement documents should not be ordered at the hands of any third party.

82 (b) As to *Derco*, I think in retrospect it was wrongly decided. It is obvious that the time for consideration was short, and I am not convinced that the force of the principle of facilitation of settlements was fully argued.

83 (c) As to the future, and always apart from fraud, any production to a third party, be they either a true third party or a stranger, ought not to be ordered if the court is persuaded in the particular circumstances of that future case that the disclosure could fairly be said to inhibit the parties from settling that action or any other actions.

84 I would allow the appeal.

Appeal allowed.

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 OF APPEAL FOR ONTARIO

**BOOK OF AUTHORITIES OF THE RESPONDING PARTY,
LAURENTIAN UNIVERSITY OF SUDBURY
(Motion for Leave to Appeal Confidentiality Order)**

THORNTON GROUT FINNIGAN LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200|
Toronto, Ontario M5K 1K7
Fax: (416) 304-1313

D.J. Miller (LSO# 34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Scott McGrath (LSO #59346K)
Tel: (416) 304-1592
Email: smcgrath@tgf.ca

Derek Harland (LSO #79504N)
Tel: (416) 304-1127
Email: dkharland@tgf.ca

Lawyers for the Responding Party,
Laurentian University of Sudbury