Court of Appeal File No.: M52471
Superior Court File No.: CV-21-656040-00CL

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

RESPONDING BOOK OF AUTHORITIES OF THE DIP LENDER

(Motion by Thorneloe University for Leave to Appeal)

June 4, 2021

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INDEX

Court of Appeal File No.: M52471
Superior Court File No.: CV-21-656040-00CL

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

I N D E X

TAB 1

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
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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.

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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

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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. <u>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.</u> 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, <u>an appropriate reference would be appraisals of real estate and equipment at the operating locations of New Skeena</u>. 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 <u>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</u>.
>
> 19. <u>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</u>, 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, <u>the Receiver recognizes that those who believe they may be adversely affected by this basis of allocation may question this proposal</u>. [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. <u>It is not proposed that the calculation of allocated costs be adjusted subsequently as sales of those assets occur.</u> [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. <u>In the event that a secured creditor seeks to recover the asset against which it holds security</u>, 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 <u>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</u> 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. <u>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</u>, 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 Osenton & 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) <u>requiring the further advance of money or credit.</u>
>
> [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

TAB 2

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 CCAA [1] 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 3

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 JJ.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 CarswellBC 2267, 2014 CarswellBC 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 billion [1] 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 factums [3] 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. Debtors [4], and the EMEA Debtors [5], 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 Debtors [6] or (ii) ... determination by the relevant dispute resolver(s) under the terms of the Protocol ... applicable to the Sale Proceeds". The parties were then to negotiate and attempt to reach agreement "on a protocol for resolving disputes concerning the allocation

of Sale Proceeds from Sale Transactions (the "Interim Sales Protocol")". Despite numerous attempts at resolution, agreement on both an Interim Sales Protocol and allocation proved to be elusive.

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

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

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

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

C. Trial Judge's Decision

(1) Trial Decision

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

> [16] The Nortel Group operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world. Each entity, such as NNL, NNI, NNUK, NN Ireland and NNSA, was integrated into regional and product line management structures to share information and perform research and development ("R&D"), sales and other common functions across geographic boundaries and across legal entities. The matrix structure was designed to enable Nortel to function more efficiently, drawing on employees from different functional disciplines worldwide, allowing them to work together to develop products and attract and provide service to customers, fulfilling their demands globally.
>
> [17] As a result of Nortel's matrix structure, no single Nortel entity, either NNL or any of the other Canadian debtors in Canada, NNI or any of the other US debtors in the United States or NNUK or any of the other EMEA debtors, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis. While Nortel ensured that all corporate entities complied with local laws regarding corporate governance, no corporate entity carried on business on its own.

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

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

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

• The Monitor (on behalf of the Canadian Debtors), supported by the Canadian Creditors' Committee ("CCC"), took the position that under the MRDA, NNL owned the IP whereas other participants to the MRDA were simply licensees. They argued that the proceeds derived from the sale of the residual IP belonged exclusively to NNL.

• The U.S. Debtors and other U.S. interests, including the Bondholders, argued that NNI and the other licensees held all of the rights and value in the IP in their respective exclusive territories as defined in the MRDA.

• The EMEA Debtors asserted that parties to the MRDA jointly owned all of the IP in proportion to their financial contributions to R&D and that all should share in the sale proceeds attributable to IP in those same proportions. The joint ownership arose independent of, but was recognized in, the MRDA.

• The UKPC took the position that the MRDA should not govern allocation and that a *pro rata* allocation based on a *pari passu* distribution should be used. The CCC also adopted this as its alternative position.

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

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

> [177] I accept that the MRDA was a transfer pricing document created for tax purposes. The licenses were a part of it. The licenses granted under it were never dealt with separately from the MRDA. Their only purpose was to support the intended tax treatment resulting from the MRDA.
>
> . . . . .
>
> [185] I conclude that the circumstances surrounding the creation of the MRDA lead to no other result but that the construct of legal title to the NN Technology being in NNL in return for NNL granting exclusive licenses to the Licensed Participants was only for the purpose of supporting the proposed method to split profits or losses on a tax efficient basis while Nortel operated as a going concern business. The agreement in its application was intended to apply only to Nortel while it operated and not to deal with rights after Nortel and its subsidiaries stopped operating its businesses.

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

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

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

> [197] This was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multi-national enterprise with all RPEs doing R&D that led to patents being granted. It was R&D that drove Nortel's

business. R&D and the intellectual property created from it was the primary driver of Nortel's value and profits. All parties agree on that. It would unjustly enrich NNL to deprive all of the other RPEs of the work that they did in creating the IP just because the patents were registered in NNL's name.

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

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

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

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

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

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

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

> (a) Each Debtor Estate [10] is to be allocated that percentage of the Lockbox Funds that the total allowed pre-filing claims against that Debtor Estate bear to the total allowed pre-filing claims against all Debtor Estates.
>
> (b) In determining what the claims are against the Debtor Estates, pre-filing claims of the kind provable under the *Companies' Creditors Arrangement Act* that have received court approval and which have been paid may be taken into account to the extent that they have been paid under the settlement.
>
> (c) In determining what the pre-filing claims are against each Debtor Estate, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once.
>
> > i. Claims on bonds are to be made on the Debtor Estate of the issuer and shall be included in that Debtor Estate's total allowed claims for the purpose of determining its allocation. A claim can be recognized by the Debtor Estate that guaranteed the bond, but those claims will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

ii. If the UK Pension Claimants make a claim for the approximately £2.2 billion deficit in the NNUK pension plan against NNUK and also against other EMEA Debtors or the EMEA Non-Filed Entities, the claim against NNUK will be taken into account in determining claims against the Debtor Estates for allocation purposes but the additional claims against the EMEA Debtors or the EMEA Non-Filed Entities will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

(d) Subject to the general proviso in (c), above, in respect of claims that can be made against more than one Debtor Estate, pre-filing intercompany claims against a Debtor Estate shall be included in the determination of the claims against that Debtor Estate for purposes of its allocation.

(e) The following specific pre-filing claims shall be included in the determination of the allowed claims against NNL for purposes of determining its allocation:

i. the US$2.0627 billion claim of NNI against NNL that was approved by this Court and the U.S. Court;

ii. the claims of NNUK and Nortel Networks SpA against NNL pursuant to the Agreement Settling EMEA Canadian Claims and Related Claims dated July 9, 2014; and

iii. the claim of the UK Pension Claimants against NNL recognized in this Court's judgment of December 9, 2014, as such claim is finally determined.

(f) Cash on hand in any Debtor Estate will not be taken into account in determining its allocation. Each Debtor Estate with cash on hand will continue to hold that cash and deal with it in accordance with its administration.

D. Analysis

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

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

(1) Test for Leave to Appeal

34 Section 13 of the *CCAA* provides that any person dissatisfied with an order or a decision made under the Act may appeal from the order or decision with leave. Leave to appeal is granted sparingly in *CCAA* proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In addressing whether leave should be granted, the court will consider whether:

(a) the proposed appeal is *prima facie* meritorious or frivolous;

(b) the points on the proposed appeal are of significance to the practice;

(c) the points on the proposed appeal are of significance to the action; and

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

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

(a) Whether Appeal is Prima Facie Meritorious

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

(i) Substantive consolidation

Position of the Moving Parties

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

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

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

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

Analysis

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

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

> Substantive consolidation essentially treats member entities of a corporate group as one entity. In the context of liquidation, it creates a common pool of assets to meet creditors' claims. In the context of restructuring, it may create the opportunity f or 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 <u>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;</u>
>
> [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.

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TAB 4

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 23 rd 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 5

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-022267-116
(500-11-041305-117)

DATE: APRIL 12, 2012

PRESIDING: THE HONOURABLE ALLAN R. HILTON, J.A.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

STATOIL CANADA LTD.
PETITIONER – Impleaded party
v.

HOMBURG INVEST INC.
RESPONDENT – Debtor-Petitioner
and

THE CADILLAC FAIRVIEW CORPORATION LIMITED
BOS SOLUTIONS LTD.
CANADIAN TUBULAR SERVICES INC.
KEYWEST PROJECTS LTD.
MHI FUND MANAGEMENT INC.
SPT GROUP CANADA LTD. formerly NEOTECHNOLOGY CONSULTANTS LTD.
PREMIER PETROLEUM CORP.
TUCKER WIRELINE SERVICES CANADA INC.
SURGE ENERGY INC.
MOE HANNAH MCNEIL LLP
LOGAN COMPLETION SYSTEMS INC.
CE FRANKLIN LTD.
IMPLEADED THIRD PARTIES – Impleaded parties
and

SAMSON BELAIR/DELOITTE & TOUCHE INC.
IMPLEADED PARTY – Monitor

JUDGMENT

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

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

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

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

- whether the point on appeal is of significance to the practice;
- whether the point raised is of significance to the action itself;

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

2 I omit from consideration any grounds that essentially argue questions of interpretation of fact, which, even in the context of complicated commercial real estate transactions, would be highly unlikely to persuade a judge in chambers to grant leave. I also take no account of its argument that it was more or less bulldozed into a hearing that occurred 13 days after the service of the proceeding, thus, it says, preventing it from adequately conducting pre-trial discovery, since it seeks no relief, such as a new trial, that is directly related to the expedited process about which it complains.

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

- whether the appeal is prima facie meritorious, or, on the other hand, whether it is frivolous, and;
- whether the appeal will unduly hinder the progress of the action.

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

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

> 24 For DLL to obtain leave to appeal under the CCAA, it must meet the test set out by the Alberta Court of Appeal in *Fairmont Resort Properties Ltd. (Re)*, 2009 ABCA 360 at para. 10, where the court said:
>
>> The test for leave involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; (4) whether the appeal will unduly hinder the progress of the action.
>
> 25 Before this Court considers the factors involved in the "test for leave," it is worthwhile to outline the applicable standard of review that the Court of Appeal will apply if leave were to be granted. In *Canadian Airlines Corp. (Re)*, 2000 ABCA 149 at paras. 28-29, the court held that:

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

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

> 28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the CCAA. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p. 95:
>
> > .... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

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

> The fact that an appeal lies only with leave of an appellate court (s. 13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.
>
> The standard of review of this Court, in reviewing the CCAA decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

[…]

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

> of the factors does not guarantee that the applicant has met the "test for leave." The court must weigh all the factors.
>
> [Emphasis added.]

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

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

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

[9] With respect to the jurisdictional issue, Statoil argues that the motions judge overstepped the limits to which he was subject in a *CCAA* application of the type with which he was seized because the orders issued were not "necessary"[10] to facilitate Homburg's reorganization and to achieve the *CCAA* objectives. Instead, it says that he adopted what it characterizes as a "broad and result-driven" approach that is reflected in paragraph [114] of the judgment to the effect that granting the orders sought in Homburg's motion is a "fair, equitable, practical and efficient solution to HII's[11] default under the Head Lease".

[10] To this argument, Homburg replies that Statoil misstates the law, and notes that section 11 *CCAA* refers not to necessity but to the power of a supervising judge "to

[6] Supreme Court of Canada file 33797.
[7] *Supra* note 3.
[8] 2010 QCCS 1061.
[9] The appeal was heard by the full bench on November 16, 2011, after which judgment was reserved.
[10] Relying on *Century Services Inc. v. Canada (A.G.)*, [2010] 3 S.C.R. 379, 2010 SCC 60.
[11] For ease of understanding, I am using the first name of the company, Homburg, rather than its initials, HII, to identify the respondent.

make any order that it considers appropriate in the circumstances". It adds that by releasing Homburg from financial obligations under the agreements, the judgment promotes the remedial purpose of the *CCAA* by enhancing the possibility of a successful restructuring.

[11] Next is the issue of standing.

[12] Statoil argues that Homburg had no legal standing, with the exception of one conclusion that it does not contest, to seek declarations that relating to the enforcement of its obligations to Cadillac Fairview under the Head Lease between it and Statoil, the effect of which is to remove Homburg from the line of fire. Statoil contends that only Cadillac Fairview had the required standing, and that Gouin, J. misconstrued the identity of the proper party before him.

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

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

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

[16] In a nutshell, while at the same time disputing Statoil's interpretation of the contractual agreements, Homburg argues that the issue is not, in and of itself, of any

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[12] 261 D.L.R. (4th) 368; [2005] O.J. No. 4883.
[13] *Ibid.*, para. 32.
[14] *Ibid.*, para. 33.

relevance to the ongoing *CCAA* proceedings, nor likely to be of any precedential value to insolvency practice in Canada.

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

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

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

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

[21] Statoil's motion is accordingly dismissed with costs.

ALLAN R. HILTON, J.A.

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Mtre Stefan Chripounoff
LANGLOIS KRONSTRÖM DESJARDINS
For the petitioner

Mtre Éric Préfontaine
Mtre Martin Desrosiers
Mtre Alexandre Fallon
OSLER HOSKIN & HARCOURT
For the respondent

Mtre Mark Meland
FISHMAN FLANZ MELAND PAQUIN
For the impleaded third party THE CADILLAC FAIRVIEW CORPORATION LIMITED

Mtre Mathieu Lévesque
BORDEN LADNER GERVAIS
For the impleaded third parties BOS SOLUTIONS LTD.; CANADIAN TUBULAR SERVICES INC.; PREMIER PETROLEUM CORP.; MOE HANNAH MCNEIL LLP

Mtre Louis Dumont
FRASER MILNER CASGRAIN
For the impleaded third party TUCKER WIRELINE SERVICES CANADA INC.

Mtre Michael John Hanlon
HEENAN BLAIKIE
For the impleaded third party SURGE ENERGY INC.

Mtre Jocelyn Perreault
McCARTHY TÉTRAULT
For the impleaded party SAMSON BELAIR/DELOITTE & TOUCHE

Unrepresented
KEYWEST PROJECTS LTD.; MHI FUND MANAGEMENT INC.; SPT GROUP CANADA LTD. formerly NEOTECHNOLOGY CONSULTANTS LTD.; LOGAN COMPLETION SYSTEMS INC.; CE FRANKLIN LTD.

Date of hearing: March 1, 2012

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.: M52471
Superior Court File No.: CV-21-656040-00CL

COURT OF APPEAL FOR ONTARIO

RESPONDING BOOK OF AUTHORITIES
OF THE DIP LENDER
(Motion by Thorneloe University for Leave to Appeal)

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