Court File No. CV-14-10663-00CL

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(Commercial List)**

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1992, c. 27, s.2, AS AMENDED AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE ISLE OF MAN WITH RESPECT TO BANNERS BROKER INTERNATIONAL LIMITED**

**APPLICATION OF MILES ANDREW BENHAM AND PAUL ROBERT APPLETON, IN THEIR CAPACITY AS JOINT LIQUIDATORS OF BANNERS BROKER INTERNATIONAL LIMITED, UNDER PART XIII OF THE *BANKRUPTCY AND INSOLVENCY ACT* (CROSS-BORDER INSOLVENCIES)**

**AFFIDAVIT OF MILES ANDREW BENHAM AND PAUL ROBERT APPLETON, IN THEIR CAPACITY AS JOINT LIQUIDATORS OF BANNERS BROKER INTERNATIONAL LIMITED**

# BOOK OF AUTHORITIES

**(Application for Recognition of Foreign Main Proceeding, Returnable August 22, 2014)**

August 19, 2014

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## BOOK OF AUTHORITIES INDEX

**TAB**

9. *Re Digital Domain Media Group Inc.*, 2012 BCSC 1565

10. *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 CarswellOnt 5867, 2011 ONSC 4136, 204 A.C.W.S. (3d) 543, 80 C.B.R. (5th) 259

11. *Loblaw Brands Ltd. v. Thornton*, 2009 CarswellOnt 1588, [2009] O.J. No. 1228, 176 A.C.W.S. (3d) 141, 78 C.P.C. (6th) 189

# Tab 1

2013 ONSC 2682
Ontario Superior Court of Justice

Bell, Re

2013 CarswellOnt 7249, 2013 ONSC 2682, 229 A.C.W.S. (3d) 23

# In the Matter of the Proposal of Thomas Albert Botley Bell of the City of Toronto, in the Province of Ontario

Reg. D.E. Short

Heard: July 27, 2012
Judgment: June 3, 2013
Docket: 31-1571629

Counsel: Sean N. Zeitz, for Trustee, MSI Spergel Inc.
Arlindo Aragao, for Appealing Party, Your Business Partner Inc.

Subject: Insolvency; Civil Practice and Procedure; Public

## Headnote

**Bankruptcy and insolvency --- Proving claim — Practice and procedure — Disallowance of claims — Time of appeal from disallowance**

C, bankrupt's brother-in-law, was solicitor and authorized representative of Y Inc. — C claimed that Y Inc. loaned money to bankrupt, but after bankrupt and wife separated, bankrupt denied loans — Y Inc. brought three actions against bankrupt in relation to loans — Bankrupt filed proposal — Y Inc. filed two proofs of claim against bankrupt — Trustee issued notice of disallowance — Y Inc. sought to appeal — Trustee took position that appeal had been served one day outside 30-day time period in s. 135 of Bankruptcy and Insolvency Act — In circumstances, notice of appeal to be treated as timely — Trustee received notice of objection on May 18th, which was well within 30-day period for objection established in s. 135 — There was not actual personal service upon creditor in this case — Most just result in his case would be to modify decision of trustee based on liberal interpretation of service requirements and to hold that receipt of disallowance on April 17th, in unique circumstances, did not constitute effective service on that date upon creditor — In circumstances, it was not appropriate to allow trustee to simply reject claim rather than fully investigating it — Act was form of remedial legislation and should be interpreted in fair, large and liberal manner to ensure that its object was attained according to true meaning, spirit and intent — To allow claim to be stopped at this stage in insolvency proceedings would not accord with true meaning, spirit and intent of Act.

## Table of Authorities

**Cases considered by *Reg. D.E. Short*:**

*Caron v. Minister of National Revenue* (1996), 108 F.T.R. 137, 1996 CarswellNat 195 (Fed. T.D.) — considered

*Friedland, Re* (2013), [2013] 5 W.W.R. 213, 98 C.B.R. (5th) 316, 42 B.C.L.R. (5th) 13, 2013 BCCA 119, 2013 CarswellBC 633 (B.C. C.A.) — considered

*Goldray Inc., Re* (2005), 15 C.B.R. (5th) 98, (sub nom. *Tamglass American Inc. v. Richter, Allen & Taylor Inc.)* 380 A.R. 286, (sub nom. *Tamglass American Inc. v. Richter, Allen & Taylor Inc.)* 363 W.A.C. 286, 2005 ABCA 341, 2005 CarswellAlta 1524, (sub nom. *Tamglass American Inc. v. Goldray Inc. (Trustee of))* 259 D.L.R. (4th) 108 (Alta. C.A.) — considered

*Park City Products Ltd., Re* (2001), 2001 MBQB 200, 2001 CarswellMan 433, 27 C.B.R. (4th) 314, (sub nom. *Park City Products Ltd. (Bankrupt), Re)* 159 Man. R. (2d) 168 (Man. Q.B.) — considered

*Rizzo & Rizzo Shoes Ltd., Re* (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — followed

**Statutes considered:**

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

s. 2 — considered

s. 2 "claim provable in bankruptcy", "provable claim" or "claim provable" — considered

s. 2 "creditor" — considered

s. 37 — considered

s. 121 — referred to

s. 121(1) — considered

s. 121(2) — considered

s. 135 — considered

s. 135(1) — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

s. 135(2) — considered

s. 135(3) — considered

s. 135(4) — considered

*Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.)
Generally — referred to

*Employment Standards Act*, R.S.O. 1980, c. 137
Generally — referred to

  

s. 40 — considered

s. 40(a) — considered

*Interpretation Act*, R.S.C. 1985, c. I-21
s. 12 — considered

*Interpretation Act*, R.S.O. 1990, c. I.11
s. 10 — considered

*Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B
Generally — referred to

*Real Property Limitations Act*, R.S.O. 1990, c. L.15
Generally — referred to

**Rules considered:**

*Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368
Generally — referred to

R. 3 — considered

R. 13 — considered

R. 113 — considered

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194
Generally — referred to

R. 1.04(1) — considered

R. 1.04(1.1) [en. O. Reg. 438/08] — considered

R. 3.01(1)(a) — considered

R. 3.01(1)(b) — considered

R. 16.06 — considered

R. 16.06(2) — considered

R. 16.07 — considered

R. 16.07(b) — considered

**Forms considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
Form 77 — referred to

RULING on timeliness of notice of appeal from disallowance of claim.

***Reg. D.E. Short*:**

**I. Motion**

1 What at first blush appeared to be a straight forward disputed claim disallowance turned out to be out of the ordinary and presented a number of issues which seem not to have been fully resolved by prior case law.

2 Following my initial meeting with counsel I determined that there were two distinct phases with respect to the dispute before me. The first dealt with whether or not the notice of appeal was filed on a timely basis. The second would address whether or not the disallowance was proper. That issue was intended to be deferred until the final resolution of the "appeal timeliness" issue.

3 Counsel understandably have been concerned about the delay in delivering these reasons, particularly as at first blush the matter would seem to only involve a question of whether or not the notice of appeal was served in time. In an early email counsel pointed noted "Seeing as the main issue is straightforward (when is service effective?), the Court's reasons in arriving at its conclusion are important."

4 In light of that position and my view that properly doing justice between the parties in this particular case required additional thought and analysis. As a consequence my decision was delayed until this point in time.

5 That said, I nevertheless regret that my other responsibilities as both Registrar in Bankruptcy and a Master of the Superior Court of Justice have meant that I was not in a position to deliver these reasons until now. Because of that situation, I felt it appropriate to provide counsel with an indication of my preliminary views with respect to the issues originally intended to be resolved in the second phase.

**II. Overview**

6 The background to the relationship between the parties is somewhat complex and in my view is relevant to the issues before me.

7 Dr. Thomas Bell is a plastic surgeon with his own practice in downtown Toronto. A proposal under the *Bankruptcy and Insolvency Act* was signed by Dr. Bell on February 21, 2012 and sent out by his trustee, msiSpergel inc., by letter dated February 24, 2012.

8 The covering letter contained an outline of Dr. Bell's assets and liabilities and, in part, provided the following

  

background information:

> "Dr. Bell entered into business and real estate arrangements which he advises were structured by his lawyer. These "investments" included substantial fee payments which drained him of working capital. As well, these investments were highly leveraged and, when wound up and sold, resulted in substantial shortfalls to repay debt. **These dispositions of investments and real estate holdings have generated several litigation matters against the debtor.**
>
> During the past several years, Dr. Bell advises that he has incurred, and continues to incur, extraordinary legal costs to date of approximately $250,000 related to a very acrimonious marital separation with ongoing litigation. Dr. Bell advises that his former spouse, Ms. Lorie Bell, continuously eroded his personal asset base to fund her lifestyle. On an interim basis, Dr. Bell is subject to court orders require substantial monthly support payments.
>
> As a result of the extreme demands on his available cash, Dr. Bell fell behind in his tax instalments and currently faces an overwhelming debt for personal income taxes, plus other personal debts. **He has filed this Proposal with a view to settling these debts in the best manner possible**.
>
> [my emphasis]

9 The entity that filed the two proofs of claim which are the subject matter of these motions was Your Legal Business Partner Inc. ("YLBP"). The affidavit filed in support of their claims was sworn by Calin Lawrynowicz, a solicitor and an authorized representative of YLBP. ("Calin") Apparently Dr. Bell and he were brothers-in-law through their respective marriages to two sisters Nancy Lawrynowicz and Lorie Bell.

10 In his June 19, 2012 affidavit Calin asserts;

> 9. Prior to the separation, [from his wife] Dr. Bell sought loans and assistance from YLBP. I agreed on behalf of YLBPto various loans all at the same interest rate of 12% per annum, compounded monthly. After separation, Dr. Bell denied the various loans completely and refused to pay anything more to YLBP. Mrs. Bell does not deny the loans or her liability and seeks indemnity from Dr. Bell for her liability.
>
> 10 YLBP was forced to take court action and initiated three separate claims in relation to the loans in 2010. One was already successful and Dr. Bell immediately filed the Proposal.
>
> 11. Dr. Bell defended all three claims Dr. Bell cross claimed his wife Mrs. Bell for indemnity in the largest action. In that action, Dr. Bell even named Nancy and I for indemnity on the YLBP loans."

11 The affidavit goes on to assert that if YLBP's remaining two claims are successful "then it would be the single largest creditor of Dr. Bell."

12 The two remaining actions were started two years previously in 2010 and were defended by Dr. Bell. The amounts asserted by YLBP in the two challenged proofs of claim, dated March 13, 2012, are $1,237,624.00 and $425,747.20 respectively.

13 The first meeting of creditors with respect to the Proposal was scheduled and held March 14, 2012.

**III. The Notice of Disallowance**

14 *The Bankruptcy and Insolvency Act* (the "BIA") addresses the process of reviewing claims against a debtor in Section 121:

> (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt **or to which the bankrupt *may* become subject before the bankrupt's discharge** by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act. *Contingent and Unliquidated Claims*
>
> (2) **The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.**

[my emphasis]

15 Section 135 provides for the review of claims received. In part that section reads:

> 135 (1) **The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.**
>
> (1.1) **The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim**, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.
>
> (2) The trustee may disallow, in whole or in part,
>
> (a) any claim;
>
> (b) any right to a priority under the applicable order of priority set out in this Act; or
>
> (c) any security.
>
> (3) **Where the trustee makes a determination** under subsection (1.1) **or**, pursuant to subsection (2), **disallows, in whole or in part, any claim**, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), **a notice in the prescribed form setting out the reasons for the determination or disallowance.**
>
> (4) **A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after *the service of the notice* referred to in subsection (3)** or such further time as the court may on application made within that period allow, **the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.**
>
> [my emphasis]

16 Form 77 is a prescribed form. An electronic version of that form is included with *Bennetton Bankruptcy Precedents, (2nd edition)* which (with my emphasis added) reads in part:

**Notice of Disallowance of Claim, Right to Priority or Security or Notice of Valuation of Claim (Subsection 135(3) of the Act)**

Take notice that:

(A) as trustee acting in the matter of the bankruptcy (or proposal) of _____, **I have disallowed your claim** (or your right to a priority or your security on the property) in whole (or to the extent of $ _____), pursuant to subsection 135(2) of the Act, for the following reasons:

**(Set out the reasons for the disallowance.)**

(or)

(B) as trustee acting in the matter of the bankruptcy (or proposal) of _____, I have determined that your contingent or unliquidated claim is a provable claim and have valued it at $ _____ and therefore, it is deemed a proved claim to this amount pursuant to subsection 135(1.1) of the Act.

And further take notice that if you are dissatisfied with my decision in disallowing your claim in whole or in part (or a right to priority or your security or valuation of your claim), you may appeal to the court within the 30 day period after the day **on which this notice is served**, or within such other period as the court may, on application made within the same 30 day period, allow.

17 It should be noted that the form requires reasons and that it is the trustee who personally is to make the determination of disallowance.

18 The form also outlines the appeal procedure and, in particular, the relevant time constraints. The BIA and Form 77 refer to the Day "on which this notice is served". I observe that the word used is "served" and not "received".

19 Before proceeding with my analysis, I need to set out a synopsis of my understanding of the factual matrix surrounding the response to the Notice of Disallowance.

**IV. Timing and Other Factual Issues**

20 On March 13, 2012 counsel for Your Legal Business Partner Inc. filed the company's two proofs of claim with the Trustee. The covering letters advised the Trustee that "if you have any questions or concerns please contact the under signed". The claimant asserts this conveyed the direction that any correspondence in regard to the claims could be sent to Lawrynowicz and Associates at *2592* Weston Road Toronto (the "LA Offices"). The address issues are highlighted below by my underlining.

21 A corporate profile report for YLBP indicates that the registered head office is *2596* Weston Rd., *Suite 200.*

22 On April 10, 2012, less than a month after the first meeting of creditors, the Trustee prepared the two Notices of Disallowance (the "Notices") which were addressed to "Your Legal Business Partner Inc." at "*2596* Weston Road, *2nd Floor.*"

  

23 When a proof of claim provides an address for correspondence regarding a claim, to which address should the trustee direct a Notice of Disallowance?

24 The Notices delivered follow the prescribed form with respect to setting out the statutory appeal rights. There is no notification in regard to the effective date of service or an explicit date by which the appeal should be served. The notices simply indicate that "you may appeal to the court within the 30-day period after the day on which the notice is served."

25 The Notices were sent by registered mail on *April 13, 2012*. The customer receipt indicates that the letter was delivered to "Your Legal Business Partner Inc." at "*2596 Weston Road, 2nd Floor*."

26 On cross examination the representative of the Trustee firm acknowledged that Trustee did not receive notification when the letter had been delivered. The Trustee did not rely on the Canada Post Tracking document to establish that service had occurred on *April 17, 2012*.

27 The Trustee did not expect an acknowledgment from the creditor of receipt of the Notices. As of April 13, 2012 the Trustee was relying on the Canada Post receipt as proof that the notices had been delivered to the creditor. The Trustee did not diarize the deadline for appeal.

28 As of April 17th the Trustee did not know the exact date of the deadline to appeal the Notices. The Trustee, at a later time, after the receipt of the appeal Notice of Motion sought advice in regard to the calculation of the deadline. The Trustee after the fact determined the effective date of service.

29 In its responding materials the Trustee took the position that it attended to delivering the Notices to the solicitors of the creditor as per the proof of claim and so, service had been effected.

30 Under examination the Trustee admitted that its affidavit did not accurately reflect what occurred and that it did not intend on sending the Notices to the solicitor for the creditor but rather to the creditor at its head office.

31 However in fact, on April 17, 2012 the Notices actually did arrive at the LA Offices at *2592* Weston Road, Toronto. The notices were within an envelope that was addressed to Your Legal Business Partner Inc. at *2596* Weston Road, Toronto.

32 That day the law firm's receptionist, Ms. Ruttan contacted Mr. Aragao, a lawyer at LA in regard to an envelope that "a courier" was attempting to deliver. The envelope was from the Trustee and was addressed to YLBP at *2596* Weston Road. The courier advised that he required a signature confirming receipt. Although it was addressed to YLBP at the 2592 address, Mr. Aragao, advised Ms. Ruttan, as a courtesy to the Trustee, to accept the envelope.

  

33 There is nothing before me to indicate that Ms. Ruttan had any authority to sign on behalf of YLBP to accept Registered Mail on the company's behalf.

34 On *April 23, 2012* Mr. Aragao wrote to the Trustee to confirm that that the firm had received the Notices. *Mr. Aragao indicated that the Notices had been received by the firm on April 17, 2012*. Mr. Aragao did *not* indicate that YLBP been served with the notices or that he had accepted service of the notices.

35 The Trustee did not respond to the April 23rd letter. The Trustee did not indicate that it considered April 17th to be the date of effective service.

36 On May 18, 2012 Mr. Aragao served the Appeal. On May 18, 2012 the Trustee wrote back to acknowledge receipt of the Appeal. The Trustee did not indicate, at that time, that it considered the Appeal to be late.

37 On June 8, 2012 counsel for the Trustee wrote to Mr. Aragao and again confirmed receipt of the Appeal but did not advise that it considered the Appeal to be late.

38 The Appeal was scheduled to be heard on Tuesday June 26, 2012. On June 20, 2012 counsel for the Trustee advised that it would take the position that the Appeal had been served one day too late. It was his position that the effective date of service was April 17, 2012 (the date Mr. Aragao acknowledged he had received the notices). Given this date, counsel for the Trustee took the position that the Notice of Motion should have been served by May 17, 2012 as opposed to May 18, 2012.

39 Was it one day late? If so, does the court have the power to validate the appeal?

## V. Time

40 In its factum before me the Trustee's position is enunciated:

> 10. It is the Trustee's position that YLBP's Notice of Motion was served outside of the prescribed 30 day time period as set out in section 135(4) of the BIA and as such, being mindful of the case law in connection with the aforesaid provision, the Trustee takes the position that YLBP's intended appeal of the Trustee's Notices of Disallowance has been irreparably prejudiced such that the Trustee's disallowances are final and conclusive.
>
> 11. YLBP failed to move before the Court seeking an extension of the 30 day period within the 30 day period commencing the day after it provided confirmation of receipt of the Trustee's Notices of Disallowance.

41 In its factum YLBP asserts the belief that "the effective date of service was April 18, 2012 as per the service rules for registered mail in Ontario" and that the position that the Trustee was taking was untenable given the *Rules of Civil Procedure* and the Rules of the BIA.

42 After counsel for the Trustee took the position that the Appeal was not served in time counsel for YLBP took the position that the Notices had not been served as per the BIA Rules.

43 YLBP argues that registered mail provides an ascertainable date of delivery. My problem is determining the correct approach when the date of actual delivery is prior to the deemed date of receipt under the *Rules.* Assuming that there was ever an effective date of receipt by the claimant corporation.

44 It is argued that by virtue of the post mark, a clear start date is established which can be relied on by a creditor to determine the effective date of service and to calculate the deadline for the Appeal.

45 The Trustee can know when it sent the registered letter and thus both sides have a common, verifiable starting point. That would make practical sense in many respects. However there is jurisprudence on the point to consider.

46 Does the clock start on the date of mailing, or on the date of actual receipt by mail or on the deemed date of receipt by that mail?

47 Is a written acknowledgement of the date of delivery, in this case, a sufficient basis to deny the right to challenge these disallowances?

48 On his examination, the Trustee stated that absent the acknowledgment being given, it would defer to the date of mailing. The YLBP factum asserts that the witness acknowledged, as well that when the Trustee sent the Notices it was not aware of the service rules in Ontario, was not aware of case law in regard to an acknowledgment and was not relying on the receipt of an acknowledgment letter from the creditor.

49 Was the notice of objection too late?

**VI. Service Issues**

50 Houlden and Morawetz in the *2003 Annotated Bankruptcy and Insolvency Act*, observed at annotation G 69(3):

> "In the 1949 Bankruptcy Act (S.94) the 30 days ran from **the day of service *or* mailing** of the notice by registered mail. Under this provision, it was held that the 30 days for appealing ran from the day of mailing....but the reference to "mailing" was dropped from s.135 (4) in the 1992 amendments. If service is made by mail or courier, since the *Bankruptcy and Insolvency Rules* do not provide when service is to be effective, reference must be had to the practice of the court in civil actions or matters: Rule 3..."
>
> [my emphasis]

  

51 Rule 3 under the BIA directs that the courts shall apply their ordinary procedure to the extent that that procedure is not inconsistent with the BIA. These extract's from Ontario's *Rules of Civil Procedure* deal with service:

> **Manner of Service**
>
> 16.06 (1) Where a document is to be served by mail under these rules, a copy of the document shall be served by regular lettermail or by registered mail. *Effective Date*
>
> **(2) Service of a document by mail,...is effective on the fifth day after the document is mailed** but the document may be filed with proof of service *before* ***service*** *becomes effective.*
>
> **Where Document Does Not Reach Person Served**
>
> 16.07 **Even** though a person has been served with a document in accordance with these rules, the person may show on a motion to set aside the consequences of default, for an extension of time or in support of a request for an adjournment, that the document,
>
> (a) did not come to the person's notice; or
>
> (b) came to the person's notice only at some time later than **when it was served or is *deemed* to have been served.**
>
> [my emphasis throughout]

52 My reading of the rules is that regardless of the date the document was actually received, the date of mailing plus five days is the date the rules *deem* to be the date of service, whether receipt is *before or after* that date. The above provision of rule 16.06(2) is consistent with this interpretation in providing that "proof of *service*" can be given *before or after* service is *effective.*

53 Thus, regardless of the actual date of delivery, the *Rules* direct that for the purpose of computing the date of service, the fifth day after mailing is to be treated as the date of receipt.

54 Even that date can be extended as the *Rules* were amended as of January 1st, 2010 to provide:

> 3.01 (1) in the computation of time under these rules or an order, except where a contrary intention appears,
>
> (a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words "at least" are used;
>
> (b) **where a period of seven days or less is prescribed, holidays shall not be counted;**

55 Under the *Rules* the meaning of a "holiday" includes "any Saturday or Sunday".

56 April 13, 2012, perhaps appropriately, was a Friday the 13th in 2012. Thus the first day of the five day mail service

period, as defined by the rules was the following Monday and the fifth day was Friday the 20th of April.

57 That being the case it seems to me that the notice of objection received on May 18th by the Trustee was well within the thirty day period for objection established by section 135 of the BIA.

58 However the Trustee argues that since an earlier date was *acknowledged* as the date of actual receipt, it is not necessary to look to either to the BIA or the Rules when "the actual date of the service can be readily determined." In support of this position I was referred to *Park City Products Ltd., Re*, 2001 MBQB 200, 159 Man. R. (2d) 168, 27 C.B.R. (4th) 314 (Man. Q.B.). In that case Senior Registrar Goldberg held:

> 24 Safeway moved for an order extending the time allowed for filing of an appeal of the trustee's disallowance. I find that this motion is not necessary. Rule 113 of the *B.I.A.* Rules is the specific service rule relating to notices of disallowance. It provides that these documents are to be served, or sent by registered mail or courier, methods which result in an ascertainable and verifiable date of service. It is not necessary to look to either the B.I.A. Rules or to provincial civil procedure rules to determine a deemed or effective date of service when the actual date of the service can be readily determined. Queen's Bench Rule 16.06(2) is therefore not relevant.

59 The present Rule 113 under the BIA however reads in part:

> 113. The notice of disallowance...provided by the trustee under sub-section of the Act...must be served, or sent by registered mail or courier.

60 I do not find that there was actual personal service upon the creditor in this case. BIA Rule 13 while providing service may be by registered mail does not address when such service is effective.

61 Rule 1.04 under the Ontario *Rules* provides:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

62 Similarly my determination of all such matters as Registrar is to be guided by Section 37 of the BIA:

> 37. Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and **the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.**

63 In my view the most just result in this case would be to modify the decision of the trustee based on a liberal interpretation of the service requirements and to hold that the *receipt* of the disallowance on April 17th, in the unique circumstances of this case, did not constitute effective service, on that date, upon the creditor. The applicable Ontario rule

extends the effective date so as to initiate the 30 day appeal period at a later point in time.

### VII. Guidance from the Alberta Court of Appeal

64 However the Trustee's counsel submits that I need to consider how such a result can be reconciled with the Alberta Court of Appeal's decision in *Goldray Inc., Re*, 2005 ABCA 341, 259 D.L.R. (4th) 108, 380 A.R. 286, 15 C.B.R. (5th) 98 (Alta. C.A.).

65 There, as here, in a proposal situation, a claim was disallowed and the timeliness of the notice of motion was in issue. A number of approaches were considered with respect to whether the appeal motion ought to be heard.

*Estoppel*

66 One ground argued was that, by its conduct, the trustee was precluded from insisting on the strict 30 day period. In addressing estoppel the Court of Appeal observed (my emphasis added):

> 16. The chambers judge found the trustee to be estopped from asserting the earlier limitation start date. Tamglass argues that the chambers judge properly exercised his discretion in concluding that the circumstances of this case support a finding of estoppel against the trustee. But whether or not the facts would support a finding of estoppel does not address whether, as a matter of law, the equitable principle of estoppel is available to relieve Tamglass from the operation of a statutory time limit.
>
> 17. Estoppel is not available if its effect would be to nullify a statutory provision that imposes a positive obligation on a party: *Maritime Electric Co. v. General Dairies Ltd.*, [1937] 1 D.L.R. 609 (P.C.); *Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.*, [1994] 1 S.C.R. 80; *Principal Group Ltd. (trustee of) v. Anderson* (1997), 147 D.L.R. (4th) 229 (Alta. C.A.); *F. Hoffman-La Roche AG v. Canada (Commissioner of Patents)*, [2004] 2 F.C.R. 405, 2003 FC 1381 (T.D.).
>
> 18. In *Hoffman-La Roche*, *supra*, the applicant sought to preserve a re-issued patent for a drug which had lapsed for non-payment of the annual maintenance fees. Under the Patent Act, if a fee is not paid in time the patent is deemed to have expired. The non-payment was a result of errors made by both the Commissioner and the applicant, and the applicant argued the court has authority to provide equitable relief where a party loses a property right in part because of a government agency's error. The court disagreed, holding at para. 44 that it could not grant such relief where it would contradict the plain terms of the statute.
>
> 19 Subsection 135(4) of the BIA is clear and unambiguous. It provides that a disallowance is final and conclusive unless the trustee's decision is appealed within 30 days or unless an application to extend time is made within the same period. The provision enables the trustee in bankruptcy to conduct the affairs of the bankrupt in an orderly manner. To do so, the trustee must know within a reasonable time whether its decisions are final or whether there are to be further proceedings: *Re Computine Canada Ltd.*, [1974] 3 W.W.R. 61 (B.C.S.C.). Deeming disallowances to be final and conclusive within a limited time period assists in the timely distribution of assets contemplated by the BIA. Estoppel is not available, as a matter of law, to nullify the clear terms of the statute.

67 In coming to my conclusion here I do not rely upon the evidence lead which suggests that the trustee did not know about or rely upon the expiration on the 30 day period until after this motion was brought.

  

*Relief from Forfeiture*

68 Relief from forfeiture was an additional potential ground to allow the appeal to proceed discussed in *Tamglass*:

> 20. The chambers judge would have relied, in the alternative, on his jurisdiction to grant relief from forfeiture to permit the filing of the appeal. Section 10 of the *Judicature Act*, R.S.A. 2000, c. J-2 provides:
>
> > Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.
>
> 21. Tamglass relies on this provision and relies as well on s. 183(1) of the BIA, which provides that the Court of Queen's Bench sitting in bankruptcy is a court of equity. Accordingly, Tamglass says, the court has jurisdiction to grant equitable relief, including relief from forfeiture, in appropriate circumstances. Tamglass argues that the chambers judge properly exercised his equitable and statutory jurisdiction to grant relief from forfeiture in the circumstances of this case.
>
> 22. However, the equitable jurisdiction of the court to relieve against penalties and forfeitures is applicable only to contractual penalties and forfeitures. The power does not apply to penalties or forfeitures imposed by statute: *R. v. Canadian Northern Railway*, [1923] 3 D.L.R. 719 (P.C.). Further, this Court has interpreted the term "penalty" in the relevant provision of the *Judicature Act* (the predecessor to s. 10) to mean "contractual penalty"; the provision does not grant a new and extended right to intervene in any case of a forfeiture or penalty: *Olympia & York Developments Ltd. v. Calgary (City)* (1983), 26 Alta. L.R. (2d) 307 (C.A.) at para. 12 (see also *Mullen v. Flin Flon (City)* (2000), 193 D.L.R. (4th) 300 (Man. C.A.) for a similar interpretation of section 35 of the Court of Queen's Bench Act, S.M. 1988-89, c. 4). More recently, this Court has held that the doctrine does not apply to relieve against the mandatory operation of a rule of civil procedure, noting that "courts have no inherent power to do what statutes forbid": *Hansraj v. Ao*, [2004] A.J. No. 734, 2004 ABCA 223at para. 62-66.
>
> 23. Tamglass relies upon the Supreme Court of Canada decision in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 as setting out the test for relief from forfeiture. In that case, one of the questions before the Court of Appeal was whether the doctrine, and specifically s. 10 of the *Judicature Act*, could apply to insurance contracts that are regulated by statute. The Supreme Court of Canada decided the case on other grounds and did not directly address that issue. In any event, the case before us does not involve a private contract that is subject to statutory regulation; the statutory forfeiture from which Tamglass seeks relief is a mandatory matter of procedure.
>
> 24 Subsection 135(4) imposes a clear statutory time limit for the filing of an appeal. Granting relief from that time limit would, in effect, amount to amending the statute to substitute a different deadline for the one selected by the legislature. The court's power to grant relief from forfeiture cannot be used in these circumstances.

69 I am not totally convinced that a provision requiring an appeal within 30 days and providing that if not appealed the matter is final amounts, in this case, to the statute "forbidding" the granting of an extension where equity would otherwise dictate the courts should still be entitled in appropriate circumstances to exercise their equitable jurisdiction.

70 However my decision does not, in this case, require me to resort to a resolution of the issue of the extent of this court's power.

*Proof of Service*

71 The Alberta court then addressed the lack of clear proof of when the document was actually received:

> 25 On the basis of the foregoing discussion the trustee's appeal must succeed, but only if we assume that the notice of disallowance was served more than 30 days before Tamglass filed its appeal. Both the registrar and the chambers judge accepted the trustee's assertion of the January 20th delivery date, notwithstanding the contrary evidence of Tamglass's representative. However, neither seems to have considered the requirements for effective service under the BIA or whether the evidence presented by the trustee was sufficient to prove service.
>
> 26 Rule 113 of the Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368 requires that a notice of disallowance be "served, or sent by registered mail or courier". The affidavit filed by the trustee deposes that the trustee sent a notice of disallowance by registered mail to Tamglass on January 7, 2004. It further deposes that tracking information from Canada Post's website indicates the notice was successfully delivered to Tamglass at 12:55 p.m. on January 20, 2004. However, the exhibit relied upon, a printout from Canada Post's website, bears no signature as would be expected on proof of delivery by registered mail. Further, Tamglass has filed a conflicting affidavit, wherein an employee of Tamglass deposes that the company received the notice on January 26, 2004. Is this evidence sufficient to establish the date on which Tamglass received the notice of disallowance? The question was not addressed by the chambers judge and may not have been argued before him. It also was not argued before this court on appeal.
>
> 27 Accordingly, we direct that this matter be returned for a trial to determine the actual date of delivery of the notice of disallowance.

72 In my view, while the Court of Appeal directed that the matter go back for trial of the issue of the date of delivery, it does *not* address how that date will impact the determination of the effective date of "service".

73 In *Caron v. Minister of National Revenue*, [1996] F.C.J. No. 224 (Fed. T.D.), the Court considered the deeming provision with respect to service similar to Ontario's Rule 16.06(2) which provides that service is deemed effective on the 5th day after a document is mailed. The Court held that the Federal legislation that it was interpreting, in particular the *Customs Act*, contained no such deeming provision with respect to the service of a required document and therefore it reasoned that had Parliament intended to have a similar deeming provision with respect to the service of a document in Federal legislation then Parliament would have included such a section in the legislation.

74 That decision is distinguishable from the matter before me as the *Customs Act* has no provision providing for resort to the Ontario Court's *Rules*.

75 While these reasons were being drafted, on March 18, 2013 the Court of Appeal of British Columbia released its decision in *Friedland, Re*, 2013 BCCA 119 (B.C. C.A.). This was a case concerning the timeliness of appeals of disallowances of claims made in the bankruptcies of Steven B. Friedland and Western Liquid Funding Inc.

76 The following extract from the headnote catchlines provides a quick synopsis of the Court of Appeal's treatment of this issue:

> APPEAL — Re-hearing — Appellant applied for reconsideration — Appellant, creditor of bankrupts, filed notice of

  

claim — Trustee in bankruptcy disallowed claim on July 18, 2011 — Notice of disallowance was delivered by e-mail to appellant's counsel — Appellant filed notice of appeal on August 18, 2011 — Judge declared that appellant failed to appeal trustee's disallowance of its claim within 30-day time-limit imposed by s. 135(4) of Bankruptcy and Insolvency Act (Can.) — On appeal Court of Appeal concluded that appellant was obligated to file application to appeal trustee's disallowance of claim within 30 days according to Supreme Court Civil Rules (B.C.) — Appellant's new counsel then realized that trustee's notice of disallowance was served electronically on appellant's former counsel at 4:07 p.m. on July 18, 2011 — Under Civil Rules material filed after 4:00 p.m. was deemed delivered following business day and if that were case then appellant's appeal would have been filed in time — Application dismissed — Appeal should be re-opened to extent of considering whether to admit fresh evidence — Appellant could not satisfy due diligence criterion — Information was available to it before application was heard in Supreme Court — It was not clear that evidence would be determinative if it was admitted — Even if evidence that that notice was served electronically at 4:07 p.m. on July 18, 2011 was admitted, it would be necessary to consider effect of Bankruptcy and Insolvency General Rules (Can.), and Civil Rules, relationship between them, case law related to service and exchanges between counsel — Admission of fresh evidence was not in interests of justice.

77 Thus it would appear that at this stage, in this case it is appropriate for this court to address the deeming provisions in determining whether the appeal was filed in time and for me to consider it would be necessary to consider effect of Bankruptcy and Insolvency General Rules (Can.), and Ontario's Civil *Rules*, and the relationship between them.

78 Ultimately the factum filed by counsel for the trustee submits that "given the fact we know with certainty the Notices of Disallowance were received by YLBP on April 17, 2012 there is no reason to defer to any "deeming provisions" with respect to service."

79 Based on the above analysis I respectfully disagree with that conclusion. If I am in error in my assessment I still would be inclined to carefully examine whether in any event an effective Notice of Disallowance was ever in fact served.

**VIII. "Provable in Bankruptcy"**

80 If the Notice of Objection was late, was the Notice of Disallowance document a document that complied with the BIA requirements so as to be an effective and enforceable document?

81 Of particular interest to me in the case is the proper understanding of the issue to actually be addressed in making a determination as to whether a claim received is "provable in bankruptcy".

82 In considering the appropriate interpretation to be given to that phrase I first turned to the definitions set out in Section 2 of the BIA. There we find these two items:

- "claim provable in bankruptcy" "provable claim" or "claim provable" includes any claim or liability provable in proceedings under the Act by a creditor"
- "creditor" means a person having a claim provable as a claim under this Act;

  

83 There is however no statutory definition in the BIA of the word "provable".

84 In seeking assistance on approaches to the interpretation of that term I turned to the website of the Insolvency and Trustee Service Australia, which administers and regulates Australia's personal insolvency system. Their analysis can be found at [*https://www.itsa.gov.au/creditors/resources/glossary#Provabledebt*]:

> *Provable debt*
>
> A debt covered by bankruptcy. This is an amount that a creditor is entitled to claim for in a bankruptcy. If it is accepted by the trustee the creditor will participate in any distribution that may arise by way of a dividend.
>
> *Provable debts*
>
> Debts that are included in a bankruptcy, debt agreement or personal insolvency agreement (collectively called "administrations") are referred to as "provable debts". While most debts are included in an administration, some are not. This section will explain the differences in the types of debts that can or can't be considered in an administration.
>
> There are certain classes of debts under the Bankruptcy Act:
>
> *Provable debts*
>
> Most provable debts are extinguished after the administration ends. This means that when a bankruptcy, debt agreement or personal insolvency agreement ends, a debtor is not required to pay any outstanding amount and the creditor cannot take any further action against the debtor or their property.
>
> • Unsecured debts incurred prior to the administration, such as credit cards, personal loans, and trade debts are examples of provable debts.
>
> • Secured debts, such as a mortgage, are also generally included as provable debts if there is a shortfall following sale (or, if not sold, the value of the security is less than the amount owed). Once the debtor defaults on payments, the creditor has a right to take action in accordance with the security agreement, which might include repossessing and selling the asset. Any shortfall between the sale of the asset and the debt is covered by the Bankruptcy Act and is provable.
>
> *Non-provable debts*
>
> Non-provable debts are not covered in administrations and the debtor still has an obligation to pay these debts. Creditors owed these debts cannot claim in the administration and cannot participate in dividends that may be paid. However, creditors with non-provable debts may pursue the debtor for payment of the debt even if the debtor is a party to an active administration.
>
> • Non-provable debts are not extinguished after the administration ends and the debtor still has to pay these.
>
> • Non-provable debts are set out in the Bankruptcy Act and include fines and child support debts.
>
> Debts not extinguished by bankruptcy These are debts that a bankrupt is still liable to pay after discharge from bankruptcy. The debts may or may not be provable — that is:
>
> • some are provable and not extinguished: e.g. child support debts
>
> • some are not provable and not extinguished: e.g....fines or penalties imposed by a court.

  

- Provable debts that were incurred by fraud are not extinguished.

## IX. Guidance from the Supreme Court of Canadaon Provable Claims

85 An important element of this issue was addressed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, 36 O.R. (3d) 418, 154 D.L.R. (4th) 193, 106 O.A.C. 1, 50 C.B.R. (3d) 163 (S.C.C.). Justice Iacobucci delivered the decision of the Court made up of Justices Gonthier, Cory, McLachlin, Iacobucci and Major.

86 The headnote outlines the circumstances of that case:

> A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the Employment Standards Act ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to severance, termination or vacation pay under the ESA. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision.... At issue here is whether the termination of employment caused by the bankruptcy of an employer gives rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA.

87 At the heart of this conflict was an issue of statutory interpretation. The Court held that although the plain language of ss. 40 and 40a of the ESA suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

88 Moreover the Court noted that s. 10 of Ontario's *Interpretation Act* provided that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

89 The headnote concludes:

> As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the ESA. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40a of the ESA.

90 At the outset of the Court's reasons, Justice Iacobucci outlines the relevant statutory provisions which included:

  

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

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

*Interpretation Act*, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

91 I note as well that the present federal *Interpretation Act* provides:

*Enactments deemed remedial*

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. [R.S., c. I-23, s. 11.]

92 What would best ensure the attainment of the objects of the BIA in this case?

93 For my purposes it is necessary to consider the history of *Rizzo & Rizzo Shoes Ltd., Re* before the lower courts as described by Justice Iacobucci:

8 In addressing this question, Farley J. began by noting that the object and intent of the ESA is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the ESA is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the ESA.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the BA. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the BA.

94 That decision was reversed at the Ontario Court of Appeal. Austin J.A., writing for the court concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

  

95 Leave was eventually obtained to have the substance of the issue in *Rizzo & Rizzo Shoes Ltd., Re* was heard at the Supreme Court. Justice Iacobucci identifies the key issue which resonates in the matter before me:

> 20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.
>
> 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, *Driedger on the Construction of Statutes (3rd ed. 1994)* (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > **Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.**
> >
> > [my emphasis]
>
> Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550, *Friesen v. Canada*, [1995] 3 S.C.R. 103.
>
> 22 I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".
>
> 27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, [*The Interpretation of Legislation in Canada, 2nd ed.* 1991,] an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

96 The wording of the conclusion to the judgment is instructive:

> "I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute **an order declaring that Rizzo's former employees <u>are entitled *to make claims*</u> for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors**....
>
> [my emphasis].

97 I would interpret this to mean that the parties could submit details of their individual termination claims, as such claims had been found to be properly "provable" in bankruptcy, but had yet to be satisfactorily "proven".

98 Having determined that such a distinction is appropriate and apparently has been recognized by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd., Re*, I come to examining what happened to date in the matter before me.

99 In my view statutory interpretation is properly the key element here. If, after a full review of evidence it is determined that no claim was legally possible then the -trustee would be correct in ruling claim was not provable.

**X. Was there an effective"Notice of Disallowance"?**

100 The operative portions in each Form 77 sent to YLBP (with my emphasis added throughout) read as follows:

> Take notice that
>
> As trustee acting in the matter of the proposal of Thomas Albert Botly Bell, **we have disallowed your claim** (or your right to priority or your security on the property) in whole, pursuant to subsection 135 (2) of the Act, **for the following reasons:**
>
> **The debtor has disputed this claim and advises that the amount claimed is not owing to you.**
>
> And further take notice that if you are dissatisfied with our decision in disallowing your claim in whole (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30 day period after the day on which this notice is served or within any otherperiod that the court may, on application made within the same 30 day period, allow.
>
> Dated at the City of Toronto in the province of Ontario, this 10th day of April 2012.
>
> **msi Spergel inc. — trustee**
>
> **per: Alan Spergel:**

101 When an incorporated trustee in bankruptcy is involved there is some issue as to who is in fact making the decision. The individual signing the disallowance was Alan Spergel, yet in this case the affidavit filed on behalf of the trustee was filed by Mr. Frank Kisluk. In his affidavit he indicates that the following:

> 1. I am a Trustee in bankruptcy and senior vice president with MSI Spergel Inc. trustee in connection with the proposal of Thomas Albert Buckley Bell and as such have personal knowledge of the matters to which I hereinafter deposed....Where I do not have firsthand knowledge the information to which I depose I have indicated the source of my information and do verily believe same to be true.

102 In a section of his affidavit entitled"The disallowances:" Mr. Kisluk describes his discussions with Dr. Bell, as the Proponent of the Proposal under the BIA. The operative paragraphs of the affidavit read as follows:

> 26. The Trustee has reviewed YLBP's of proofs of claim with the Proponent. The Proponent vehemently denies YLBP's claims and confirmed that the claims are currently being disputed in various Superior Court proceedings.
>
> 27. The Trustee attended to obtaining and reviewing a "Legal Proceedings" brief prepared by the Proponent's solicitor

handling the litigation which reveals that the subject matter of YLBP's claims are complicated and factually complex....The Court will note that there are crossclaims, third party claimsand counterclaims at issue.

28. The Trustee is of the opinion YLBP's claim is at best a contingent claim however based on the voluminous amount of conflicting material the Trustee reviewed, including the Proponent's Statements of Defence to the Statements of Claim, the Trustee is not in a position to value YLBP's claim and has therefore proceeded to implement the procedure provided for in section 121(2) of the BIA by disallowing the two claims.

103 At paragraphs 29 and 30 of the affidavit the following appears with respect to the subject claims.

29. With respect to YLBP's proof of claim for the sum of $1,237,624.00, the Trustee made the following observations:

a. The Proof of Claim begins by referencing a "second mortgage" in the amount of $1,045,999.17 however the schedule annexed thereto reflects allegations of two loans advanced in the sum of $75,000 on August 12, 2008 and $643,350.17 on January 7, 2009 for a total of $718,358.17. The Trustee is advised by the Proponent that no such mortgage exists. The proof of claim is filed as unsecured;

b. Interest is reflected at $137,996.30 accruing at the fixed rate of 12% per annum however no evidence has been adduced in support of the interest rate claimed. Further it would appear that the $137,996.30 interest is already included in the $1,045,999.70 total as per YLBP's schedule;

c. The Trustee also notes that it appears no payments were made towards the alleged advances made in August 2008 and January 2009 towards either towards principal and/or interest such that the amounts claimed are statute barred in accordance with the *Ontario Limitations Act*;

d. The Proponent has disputed any of the legal fees claimed by YLBP totalling the sum of $42,444.74.

104 With regard to the second proof of claim for a lesser sum the affidavit continues:

30. With respect to YLBP's Proof of Claim for the sum of $425,742.20 the Trustee made the following observations:

a. YLBP claims unspecified "liquidated damages" in the sum of $342,950.60 and $73,125.97. These figures do not total the $425,747.20 claim;

b. The schedule attached begins with an opening balance as at July 30, 2008 in the sum of $224,182.71 and a further balance of the same date of $54,088.41. There is no indication as to what security if any underpins these claims;

c. Further, as is the case with YLBP's other claim, it appears that no interest and/or principal payments were made from July 30, 2008 be the date of the alleged initial balance to February 21, 2012 being the date of the Proponents filing of his Proposal such that any amounts claimed are also statute barred pursuant to the provisions of the *Ontario Limitations Act*;

d. There is no indication who advanced the funds and certainly no indication that the funds were advanced by YLBP.

105 The Trustee's affidavit also notes;

  

31. In undertaking its due diligence, the Trustee attended to obtaining a copy of the complaint filed by the Proponent with the Law Society of Upper Canada....The Proponent sets out therein his position with respect to the alleged legal fees that YLBP has invoiced him for which include, inter alia, the Proponent's allegation that at no time did Calin explain to him that he would be personally liable for the costs of any services rendered by YLBP to any of the Proponent's corporations.

32. The Trustee notes that YLBP's claim for legal costs totals $52,115.36 and forms the subject matter of the pending litigation.

**XI. What is to be Done?**

106 In my view it is not possible to enhance the grounds for disputing the plaintiffs' claims by way of a supplementary affidavit. Adding new grounds surely ought to extend the time for appealing on the basis of those grounds.

107 What is to be done is the question. How is the Trustee to deal with "claims that are "complicated and factually complex"?

108 I am not convinced that section 215 (2) is intended to allow the Trustee to simply reject the claim rather than fully investigating it.

109 I recognize that a trial of an issue can be expensive and in most bankruptcies a plaintiff is looking at a potentially worthless paper judgment. However the claimant and perhaps other creditors need to evaluate such claims and their economic interests. Creative counsel can come up with methods of abbreviating the process.

110 I again note the direction of Ontario Rule 1.04 (1.1):

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

111 A perfunctory disallowance at this stage, based on the grounds stated, does not accord with my present view of the statutory intent.

112 I am left to consider what matter to deal with pending litigation of substance which is on-going at the date of filing of a proposal or the date of a bankruptcy.

113 It is not uncommon for leave to be granted for an action to proceed in the civil courts, particularly where there are a

number of other parties and the involvement of the bankrupt is necessary to enable a complete story to be before the court. Terms are often proposed which in effect when state enforcement of any judgment against the bankrupt to allow the results of the litigation to be addressed by the Trustee and the inspectors as appropriate.

114 Experienced litigation counsel are not surprised when a new client tells them that the other side's claim is entirely worthless. Experience shows that such a view is rarely accurate and that instead there is often some middle ground established, either in the pretrial process or at trial.

115 To disallow a claim, in such cases, simply because the amount claimed may not be accurate to the penny seems inappropriate and unjustified. I do not think this falls within the statutory intent of the definition of "not provable in bankruptcy".

116 The Trustee can establish a reserve for the potential claims at the time of making any interim distributions. I am not satisfied that a disallowance is appropriate on the basis of the matter is complex and considered by the bankrupt to be worthless.

117 To take such an approach would encourage all defendants in substantial and complex cases to consider making a proposal with a view to denying any recovery to the plaintiff on a pre-emptory basis.

118 Conversely, in appropriate cases where it is in the interest of all creditors to resolve the matter relatively promptly, the Trustee will need to come to a determination as to whether or not the claim is "provable". As outlined above I interpret that term to mean incapable of being proven as recoverable at law. If there is a statutory reason why a claim cannot be made, then the Trustee may come to that determination and disallow the claim. Then, as in *Rizzo & Rizzo Shoes Ltd., Re*, the court can review that assessment of the legal position with a view to finalizing the legal question underlying the claim.

119 It seems to me that a clear limitation period which has expired might be such a circumstance. In that case the Trustees reasons for the discharge would make clear the applicable limitation period and the reason why the claim was being disallowed. In this case that was not done in the notice delivered. The affidavit raises the *Limitations Act* but does not address the potential applicability of matters such as "discoverability" or an "acknowledgment of liability" extending the limitation period.

120 Similarly I am without any guidance from the parties at this stage as to the possible applicability of the longer limitation periods found in *Real Property Limitations Act* R.S.O. 1990, Chapter L.15.

121 More importantly, I note that the litigation which underlies the disallowed claims was commenced by way of Notices of Action dated July 30, and August 10, 2010. There would appear to be no explanation from the Trusteeas to why the commencement of that litigation which not toll any applicable limitation period. Otherwise virtually all pending litigation would be wiped out if defendants could require the proof of claim in the bankruptcy to be filed within two years of the arising of the cause of action notwithstanding that an action against the bankrupt had previously been commenced in time.

 

122 Similarly Section 135 could be used to address family law related claims for matters such as child access or custody. Such claims are not claims capable of being determined and "proven in bankruptcy". Such claims would properly be disallowed as they ought to instead be resolved in a different forum.

123 More difficult are claims where after a full investigation, the trustee is satisfied the claim is simply not based on credible evidence. In such cases the successful appeal of such a disallowance will be dependent on the claimant meeting the onus of establishing that the trustee's determination was unfounded.

## XII. Disposition

124 As noted above in extract from the Supreme Court of Canada's decision in *Rizzo & Rizzo Shoes Ltd., Re*, Justice Farley concluded in that case thatconcluded that the ESA is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

125 In my view the *Bankruptcy and Insolvency Act* of Canada is also a form of remedial legislation and as such it too should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

126 To allow this claim to be stopped dead in its tracks at this stage in the insolvency proceedings relating to Dr. Bell would not accord with my view of the true meaning spirit and intent of the BIA.

127 As a consequence I am holding that the notice of appeal is to be treated as timely. Because the parties have not been given a full opportunity to make submissions with respect to whether or not the Trustee's determination ought to be upheld or set aside, I am directing that once my decision with respect to the timeliness of the appeal becomes final, the parties canvas whether or not, having regard to my comments in these reasons, a resolution can be reached between them without the need for further hearing. If no resolution is possible, then the parties schedule a return date for the balance of the motion before me.

128 I am reserving any determination with respect costs of this portion of the motion until all the matters raised in the initial notice of motion have been addressed.

*Order accordingly.*

End of Document

# Tab 2

2009 CarswellOnt 4232
Ontario Superior Court of Justice [Commercial List]

Lear Canada, Re

2009 CarswellOnt 4232, 179 A.C.W.S. (3d) 45, 55 C.B.R. (5th) 57

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

AND IN THE MATTER OF LEAR CANADA, LEAR CANADA INVESTMENTS LTD., LEAR CORPORATION CANADA LTD. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICATION UNDER SECTION 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Pepall J.

Judgment: July 14, 2009
Docket: CV-09-00008269-00CL

Counsel: K. McElcheran, R. Stabile for Applicants
E. Lamek for Proposed Information Officer
A. Cobb for J.P. Morgan Chase Bank, N. A.

Subject: Insolvency

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — Foreign bankruptcies**

Insolvent debtor American company had Canadian subsidiary — Debtor was unable to meet obligations and began restructuring process in United States — Subsidiary and company brought application for recognition of foreign order — Application granted — Stay of proceedings in Canada granted — Subsidiary was entitled to apply for order as interested person under s. 18.6(4) of Companies' Creditors Arrangement Act and as debtor within s. 18.6(1) — While Companies' Creditors Arrangement Act does not define person, Bankruptcy and Insolvency Act extends definition to partnership — Real and substantial connection existed to American proceedings — Canadian operations were inextricably linked with business in foreign jurisdiction — Restructuring process required to occur internationally — Multiplicity of proceedings should be avoided.

**Table of Authorities**

**Cases considered by *Pepall J.*:**

*Babcock & Wilcox Canada Ltd., Re* (2000), 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) — considered

*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* (2001), 2001 SCC 90, 2001 CarswellNat 2816, 2001 CarswellNat 2817, [2001] 3 S.C.R. 907, 30 C.B.R. (4th) 6, 280 N.R. 1, 207 D.L.R. (4th) 577 (S.C.C.) — referred to

*Magna Entertainment Corp., Re* (2009), 2009 CarswellOnt 1267, 51 C.B.R. (5th) 82 (Ont. S.C.J.) — referred to

*Matlack Inc., Re* (2001), [2001] O.T.C. 382, 26 C.B.R. (4th) 45, 2001 CarswellOnt 1830 (Ont. S.C.J. [Commercial List]) — considered

*United Air Lines Inc., Re* (2003), 43 C.B.R. (4th) 284, 2003 CarswellOnt 2786 (Ont. S.C.J. [Commercial List]) — referred to

**Statutes considered:**

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

Chapter 11 — referred to

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

s. 2 "debtor company" — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 18.6(1) "foreign proceeding" [en. 1997, c. 12, s. 125] — considered

s. 18.6(2) [en. 1997, c. 12, s. 125] — considered

s. 18.6(3) [en. 1997, c. 12, s. 125] — referred to

s. 18.6(4) [en. 1997, c. 12, s. 125] — considered

APPLICATION by subsidiary of debtor and debtor for recognition of foreign order in bankruptcy proceedings.

***Pepall J.*:**

  

**Relief Requested**

1 Lear Canada, Lear Canada Investments Inc., Lear Corporation Canada Ltd. (the "Canadian Applicants") and other Applicants listed on Schedule "A" to the notice of motion request:

> 1. an order pursuant to section 18.6 of the CCAA recognizing and declaring that the Chapter 11 proceedings in the U.S. Bankruptcy Court for the Southern District of New York constitute "foreign proceedings";
>
> 2. a stay of proceedings against any of the Applicants or their property; and
>
> 3. an order appointing RSM Richter Inc. as information officer to report to this Court on the status of the U.S proceedings.

**Backround Facts**

2 Lear Corporation is a corporation organized under the laws of the State of Delaware with headquarters in Southfield, Michigan. Its shares are listed on the New York Stock Exchange. It conducts its operations through approximately 210 facilities in 36 countries and is the ultimate parent company of about 125 directly and indirectly wholly-owned subsidiaries (collectively, "Lear"). Lear Canada Investments Ltd. and Lear Corporation Canada are both wholly-owned indirect subsidiaries of Lear Corporation. They are incorporated pursuant to the laws of Alberta. Lear Canada is a partnership owned 99.9% by Lear Corporation Canada Ltd. and 0.1% by Lear Canada Investments Ltd. and is the only operating entity of Lear in Canada.

3 Lear is a leading global supplier of automotive seating systems, electrical distribution systems, and electronic products. It has established itself as a Tier 1 global supplier of these parts to every major original equipment manufacturer ("OEM"). Lear has world wide manufacturing and production facilities, four of which are in Canada, namely Ajax, Kitchener, St. Thomas, and Whitby, Ontario. A fifth facility in Windsor, Ontario was closed in May of this year. Lear employs approximately 7,200 employees world wide of which 1,720 are employed by the Canadian operations. 1,600 are paid on an hourly basis and 120 are paid salary. 1,600 are members of the CAW and are covered by 5 separate collective bargaining agreements. Lear maintains a qualified defined contribution component of the Canadian salaried pension plan and 8 Canadian qualified defined benefit plans.

4 Lear conducts its North American business on a fully integrated basis. All management functions are based at the corporate headquarters in Southfield, Michigan and all customer relationships are maintained on a North American basis. The U.S. headquarters' operational support for the Canadian locations includes, but is not limited to, primary customer interface and support, product design and engineering, manufacturing and engineering, prototyping, launch support, programme management, purchasing and supplier qualification, testing and validation, and quality assurance. In addition, other support is provided for human resources, finance, information technology and other administrative functions.

5 Lear's Canadian operations are also linked to its U.S. operations through the companies' supply chain. Lear's facilities in Whitby, Ajax, and St. Thomas supply complete seat systems on a just-in-time basis to automotive assembly operations of the U.S. based OEMs, General Motors and Ford in Ontario. Lear's Kitchener facility manufactures seat metal components which are supplied primarily to several Lear assembly locations in the U.S., Canada and Mexico.

6 Lear Corporation, Lear Canada and others entered into a credit agreement with a syndicate of institutions led by J.P. Morgan Chase Bank, N.A. acting as general administrative agent and the Bank of Nova Scotia acting as the Canadian administrative agent. It provides for aggregate commitments of $2.289US billion. Although Lear Canada is a borrower under this senior secured credit facility, it is only liable for borrowings made in Canada and no funds have been advanced in this country.

7 Additionally, Lear Corporation has outstanding approximately $1.29US billion of senior unsecured notes. The Canadian Applicants are not issuers or guarantors of any of them.

8 Over the past several years, Lear has worked on restructuring its business. As part of this initiative, it closed or initiated the closure of 28 manufacturing facilities and 10 administrative/engineering facilities by the end of 2008. This included the Windsor facility for which statutory severance amounts owing to all employees have been paid.

9 Despite its efforts, Lear was faced with turmoil in the automotive industry. Decreased consumer confidence, limited credit availability and decreased demand for new vehicles all led to decreased production. As a result of these conditions, Lear defaulted under its senior secured credit facility in late 2008. In early 2009, Lear engaged in discussions with senior secured facility lenders and unsecured noteholders. It reached an agreement with the majority of them wherein they agreed to support a Chapter 11 plan.

10 On July 7, 2009, Lear filed voluntary petitions for relief under Chapter 11 of the US Bankruptcy Code and sought "first day" orders in those proceedings in the United States Bankruptcy Court for the Southern District of New York. The Applicants now seek recognition of those proceedings and the orders. Lear expects to emerge from the Chapter 11 proceedings and any associated proceedings in other jurisdictions as a substantially de-leveraged enterprise with competitive going forward operations, and to do so in a timely basis.

## Applicable Law

11 Section 18.6 of the CCAA was introduced in 1997 to address the rising number of international insolvencies. Courts have recognized that in the context of cross-border insolvencies, comity is to be encouraged Efforts are made to complement, coordinate, and where appropriate, accommodate insolvency proceedings commenced in foreign jurisdictions.

12 Section 18.6(1) provides that "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally. It is well recognized that proceedings under Chapter 11 of the U.S. Bankruptcy Code fall within that definition and that, while not identical, the substance and procedures of the U.S. Bankruptcy Code are similar to those found in the Canadian bankruptcy regime: *United Air Lines Inc., Re*[1]

13 *Babcock & Wilcox Canada Ltd., Re*[2] provided an early interpretation of section 18.6, and while not without some controversy[3], the practice in Canadian insolvency proceedings has evolved accordingly. In that case, Farley J. distinguished between section 18.6(2) of the Act, which deals with concurrent filings by a debtor company under the CCAA in Canada and corresponding bankruptcy or insolvency legislation in a foreign jurisdiction, and section 18.6(4) which may deal with ancillary proceedings such as this one. As with section 2 of the Act, section 18.6(2) is in respect of a debtor company whereas section 18.6 (4) permits any interested person to apply for recognition. As such, he held that the applicant before him was not required to meet the Act's definition of "debtor company" which required the company to be insolvent.[4] In addition,

he noted that section 18.6(3) provides that an order of the Court under section 18.6 may be made on such terms and conditions as the Court considers appropriate in the circumstances.

14 Applying those legal principles, the Applicants are entitled to apply for an order pursuant to section 18.6 of the CCAA. They are debtors within the definition of section 18.6(1) and interested persons falling within section 18.6(4). In this regard, while the CCAA does not define the term "person", the BIA definition extends to include a partnership. In the absence of a definition in the CCAA, by analogy it is reasonable to interpret the term "person" as including a partnership.

15 I must then consider whether the order requested should be granted. In exercising discretion under section 18.6, it has been repeatedly held that in the context of an insolvency, the Court should consider whether a real and substantial connection exists between a matter and the foreign jurisdiction: *Matlack Inc., Re*[5] and *Magna Entertainment Corp., Re*[6] Where the operations of debtors are most closely connected to a foreign jurisdiction and the Canadian operations are inextricably linked with the business located in that foreign jurisdiction, it is appropriate for the Court in the foreign jurisdiction to exercise principal control over the insolvency process in accordance with the principles of comity and to avoid a multiplicity of proceedings: *Matlack, Re*[7]. As noted in that case, it is in the interests of creditors and stakeholders that a reorganization proceed in a coordinated fashion. This provides for stability and certainty. "The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, wherever they are located."[8]

16 I am satisfied that an order recognizing the U.S. proceeding as a foreign proceeding within the meaning of section 18.6(1) should be granted and that a real and substantial connection has been established. The Applicants including Lear Canada are part of an integrated multi-national corporate enterprise with operations in 36 countries, one of which is Canada. Lear conducts its North American business on a fully integrated basis. As mentioned, all management functions are based at the U.S. corporate headquarters and all customer relationships are maintained on a North American basis. As such, the managerial and operational support for the Canadian locations is situate in the United States. In addition, Lear's Canadian operations are linked to the U.S. operations through the Lear's supply chain. As evidence of same, a note to Lear Canada's December 31, 2008 unaudited financial statement states that Lear Corporation provides Lear Canada with "significant operating support, including the negotiation of substantially all of its sales contracts. Such support is significant to the success of the Partnership's future operations and its ability to realize the carrying value of its assets."

17 I am also of the view that it is both necessary and desirable that the restructuring of this international enterprise be coordinated and that a multiplicity of proceedings in two different jurisdictions should be avoided. Granting relief will enable the Applicants to continue to operate in the ordinary course and preserve value and customer relationships. Coordination will also provide stability. The U.S. Court will be the primary court overseeing the restructuring proceedings of Lear. I also note that in its report filed with the Court, the proposed Information Officer, RSM Richter Inc., expressed its support for the relief requested by the Applicants.

18 That said, increasingly with the downturn in the global economy, this Court is entertaining requests for concurrent or ancillary orders relating to multi-group enterprises typically with a significant cross-border element. Frequently, relative to the whole enterprise, the Canadian component is small. From the viewpoint of efficiency and speed, both of which are important features of a restructuring, an applicant may be of the view that the Canadian operations do not merit a CCAA filing other than a section 18.6 request. In addressing whether to grant relief pursuant to section 18.6, the Court should, amongst other things, consider the interests of stakeholders in this country and the impact, if any, that may result from the relief requested. This would include benefits and prejudice such as any juridical advantage that may be compromised[9] These issues should be addressed by an applicant in its materials. Assuming there are benefits, the existence of prejudice does not necessarily mean that the order will be refused but it is important that these facts at least be considered, and if appropriate, certain protections should be incorporated into the order granted.

19 By way of example, in this case, the Court raised certain issues with the Applicants and they readily and appropriately in my view, filed additional affidavit evidence and included other provisions in the proposed order. The Court was concerned with the treatment that might be afforded Canadian unsecured creditors and particularly employees and trade creditors. Lear Canada had total current assets of approximately $60US million as at May 31, 2009 which included approximately $20US million in cash. Its total assets amounted to approximately $115US million. Total current liabilities as at the same time period amounted to about $75US million. In addition, pension and other post-retirement benefit obligations were stated to amount to about $170US million. There were also intercompany accounts of approximately $190US million in favour of Lear Canada for total liabilities of about $55US million. Counsel for the Applicants advised that significant pre-petition payments had been made to suppliers and that the intention is for Lear Canada to continue to carry on business.

20 In the additional evidence filed, the Applicants indicated that they had not yet sought approval of DIP financing arrangements but that under the proposed arrangement, the Canadian Applicants would not be borrowers or guarantors. In addition, the term sheet agreed to between the Applicants and the senior credit facility lenders provided that the Canadian Applicants had agreed to pay all general unsecured claims in full as they become due. Additionally, the Applicants had obtained an order in the U.S. proceedings authorizing them to pay and honour certain pre-petition claims for wages, salaries, bonuses and other compensation and it is the intention of the Applicants to continue to pay all wages and compensation due and to be due to Canadian employees. The Applicants are up to date on all current and special payments associated with the Canadian pension plans and will continue to make these payments going forward. Provisions reflecting this evidence were incorporated into the Court order.

21 The Canadian Applicants were not to make any advances or transfers of funds except to pay for goods and services in the ordinary course of business and in accordance with existing practices and similarly were not to grant security over or encumber or release their property. They also were to pay current service and special payments with respect to the Canadian pensions. The order further provided that in the event of inconsistencies between it and the terms of the Chapter 11 orders, the provisions of my order were to govern.

22 The order includes a stay of proceedings against the Applicants and their property, a recognition of various orders and an administration charge and a directors' charge. The order also includes the usual come back provision in which any person affected may move to rescind or vary the order on at least 7 days' notice.

23 Where one jurisdiction has an ancillary role, the Court in the ancillary jurisdiction should be provided with information on an on going basis and be kept apprised of developments in respect of the debtors' reorganization efforts in the foreign jurisdiction. In addition, stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.[10] In this case, RSM Richter Inc. as Information Officer intends to be a watchdog and monitor developments in the U.S. proceedings and keep this Court informed. This Court supports its request to be added to the service list in the Chapter 11 proceeding and any request for standing before the U.S. Bankruptcy Court for the Southern District of New York that the Information Officer may make. In this regard, this Court seeks the aid and assistance of that Court.

*Application granted.*

Footnotes

1 (2003), 43 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]), at 285.

2 (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]).

3 See for example, Professor J.S. Ziegel's article "Corporate Groups and Canada-U.S. Cross-Border Insolvencies: Contrasting Judicial Visions", (2001) 35 C.B.L.J. 459.

  

4 It should be noted that a voluntary filing under Chapter 11 does not require an applicant to be insolvent and a partnership is eligible to apply for relief as well.

5 (2001), 26 C.B.R. (4th) 45 (Ont. S.C.J. [Commercial List]).

6 (2009), 51 C.B.R. (5th) 82 (Ont. S.C.J.).

7 Supra, note 5 at para. 8.

8 Ibid, at para. 3.

9 See *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907 (S.C.C.).

10 See *Babcock & Wilcox Canada Ltd., Re*, supra, note 2 at para. 21.

**End of Document**

# Tab 3

2010 ONSC 1846
Ontario Superior Court of Justice [Commercial List]

Grant Forest Products Inc., Re

2010 CarswellOnt 2445, 2010 ONSC 1846, 67 C.B.R. (5th) 258

# 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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

C. Campbell J.

Heard: February 1, 8, 2010
Judgment: March 30, 2010
Docket: CV-09-8247-00CL

Counsel: Sean Dunphy, Kathy Mah for Monitor
Daniel Dowdall, Jane O'Dietrich for Applicants, Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant U.S. Holdings GP
Kevin McElcheran for Toronto-Dominion Bank, Agent for First Lien Lenders
Fred Myers, Joe Pasquariello for Bank of New York Mellon, Agent for SLL
Sheryl Seigel for Georgia-Pacific LLC
Richard Swan for Peter Grant Sr.
Aubrey Kauffman for Independent Directors of Grant Forest Products Inc.

Subject: Insolvency; Corporate and Commercial

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous**

Applicants, being GFP Inc., its parent company, its Canadian subsidiaries, G U.S., and its related entities, obtained protection under Companies' Creditors Arrangement Act (CCAA) — Applicants had two levels of primary secured debt owed to FLL and SLL — GFP Inc. and G U.S. were in default under FLL agreement, and G U.S. was in default under SLL agreement — Applicants engaged financial advisor to advise on options to address debt position and locate investors or sell business, and marketing process was created — Bid of GP LLC, purchaser, was accepted and purchase and sale agreement was finalized — GFP Inc. et al. brought application to seek approval of sale and vesting order to complete transfer of control to purchaser — SLL opposed approval of transaction — Application granted — Once

process put in place by Court Order for sale of assets of failing business, process should be honoured excepting extraordinary circumstances — Numerous parties participated over number of months in complex process designed to achieve not only maximum value of assets of business, but to ensure its survival as going concern for benefit of many stakeholders — To permit invitation to reopen process not only would have destroyed integrity of process, but likely would have doomed transaction that had been achieved.

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court**

Applicants, being GFP Inc., its parent company, its Canadian subsidiaries, and G U.S. and its related entities, obtained protection under Companies' Creditors Arrangement Act (CCAA) when stay of proceedings was granted — Applicants had two levels of primary secured debt owed to FLL and SLL — GFP Inc. and G U.S. were in default under FLL agreement, and G U.S. was in default under SLL agreement — Applicants engaged financial advisor to advise on options to address debt position and locate investors or sell business, marketing process was created — Bid of GP LLC was accepted and purchase and sale agreement was finalized — Transaction required that security granted in favour of FLL and SLL be released and discharged upon closing of transaction — FLL's position was that only way transaction could be accomplished at proposed price was by creating tax benefits arising from proposed structure that would include transfer of G U.S. interests as partnership interests, rather than direct transfer of assets of G U.S. — FLL brought motion to add additional applicants — Motion granted — SLL opposed motion to add applicants and approve sale on basis that such relief would have had effect of mandatory order against U.S. parties which would extinguish U.S. security over U.S. realty and personalty — Issues raised by SLL were inextricably linked to restructuring of applicants and completion of transaction and as such were appropriate for consideration by Court — Transaction would not have been possible without tax advantages that were available as result of transaction form — Submissions that entire transaction was flawed because it resulted in transfer of some assets in U.S. without sale process envisaged in U.S. Bankruptcy Code, would have been triumph of form over substance — Relief sought was not merely device to sell U.S. assets from Canada, it was unified transaction, each element of which was necessary and integral to its success, it was Canadian process.

## Table of Authorities

**Cases considered by *C. Campbell J.*:**

*Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

*Metcalfe & Mansfield Alternative Investments, Re* (January 5, 2010), Doc. 09-16709 (U.S. Bankr. S.D. N.Y.) — considered

*Morguard Investments Ltd. v. De Savoye* (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — followed

*Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — considered

*Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

  

*Tiger Brand Knitting Co., Re* (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — considered

**Statutes considered:**

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

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

Chapter 11 — referred to

Chapter 15 — considered

s. 363 — referred to

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

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194
Generally — referred to

APPLICATION by insolvent seeking approval to complete transfer of control to purchaser; MOTION by creditor to add applicants.

***C. Campbell J.*:**

**Reasons for Decision**

1 This Application seeks approval of the Sale transaction and a Vesting Order to complete the transfer of the control of the business of Grant Forest Products Inc. to the purchaser Georgia-Pacific. The transaction is the culmination of the marketing process under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended ("CCAA"), authorized by an order of this Court dated June 25, 2009.

2 Approval of the transaction is opposed by the Second Lien Lenders ("SLL")[1] under an Inter-Creditor Agreement (the "ICA") of which Grant Forest is a party, on the basis that this Court does not have jurisdiction to, in effect, convey real property assets located in the United States.

3 An adjournment of the approval motion sought by the largest shareholder of Grant Forest, seeking time for improvement of expressions of interest by others into bids, was not granted. Consideration of the issues raised on this motion requires analysis of the many similarities and few differences between the restructuring and insolvency processes in Canada

  

and the United States in cross-border transactions.

4 For reasons that follow, I am satisfied that this Court does have jurisdiction and it is appropriate to approve this complicated transaction. In order to deal with the objections raised, it is necessary to outline the transaction in some detail, the particulars of which are summarized in the Sixth Report of the Monitor.

5 Grant Forest Products Inc. ("GFP"), an Ontario company, and certain of its subsidiaries are privately owned corporations carrying on an Oriented Strand Board manufacturing business from facilities located in Canada and the United States. The most common uses of the companies' products are sheathing in the walls, floors and roofs in the construction of buildings and residential housing.

6 Two GFP mills are located in Ontario, one in Alberta (50% with Footner Forest Products) and two in the counties of Allendale and Clarendon in South Carolina.

7 The U.S. mills are owned indirectly through one of the Applicants, being the Grant Partnership registered in the state of Delaware. At present, due to decreased demand, only one Ontario mill and the Allendale mill in South Carolina are operating.

8 The Applicants, being the parent GFP, its Canadian subsidiaries Grant Alberta Inc. and Grant Forest Product Sales Inc., together with Grant U.S. holdings GP ("Grant U.S. Partnership") and its related entities, obtained protection under the CCAA on June 25, 2009, when a stay of proceedings was granted and Ernst and Young Inc. ("E&Y") was appointed Monitor. The Order also approved the continuation of the engagement of a chief restructuring advisor.

9 The Applicants have two levels of primary secured debt. The total debt obligations are comprised of the following facilities:

*First Lien Creditor Agreement*

10 As at May 31, 2009, the First Lien Lenders ("FLL")[2] were owed the principal amount of $399 million plus accrued interest of approximately $5.3 million pursuant to a credit agreement dated October 26, 2005 and amended March 21, 2007. An additional $8.7 million was owed to one or more of the FLL pursuant to interest rate swap agreements the liability of which was secured to the FLL Agent.

*Second Lien Creditor Agreement*

11 The bank of New York Mellon ("BNY") as successor is the Agent for the SLL, to whom as of May 31, 2009 was owed the principal amount of approximately $150 million plus accrued interest of approximately $42 million pursuant to a credit agreement dated as of March 21, 2007 as amended as of April 30, 2009. GFP and the Grant U.S. Partnership are the borrowers under the FLL Agreement with all related entities as guarantors of the FLL indebtedness. The Grant U.S.

 

Partnership is the borrower under the SLL Agreement with all related entities as guarantors of the SLL debt.

12 GFP and the Grant U.S. Partnership are in default under the FLL Agreement and the Grant U.S. Partnership is in default under the SLL Agreement. Both the FLL and SLL Agents hold various security in Canada over each of their respective property and assets.

*Inter-Creditor Agreement*

13 The Applicants together with the entities related to the Grant U.S. Partnership, the FLL and SLL are parties to an Agreement dated March 21, 2007, which among other things deals with the relationship between the FLL security and the SLL security. Both the FLL and the SLL rely on this Agreement in respect of the issue as between them, which affects priority over assets.

*The Marketing Process*

14 Prior to the filing that gave rise to the initial order, the Applicants had engaged a financial advisor and an investment banking firm to advise on capital and strategic options to address the Applicants' debt position and liquidity needs and to locate investors or sell the business. While this process did not result in a transaction that could be implemented, the Applicants were of the view that the business could be sold as a going concern or they could sponsor a plan of arrangement to be consummated in CCAA proceedings. The Initial Order, which has not been objected to since being granted on June 25, 2009, contained a six page elaborate "Investment Offering Protocol" to provide interested parties with the opportunity to offer to purchase the business and operations in whole or in part as a going concern or to offer to sponsor a plan of arrangement of the Applicants or any of them.

15 The three phases of the marketing process are described in detail in paragraphs 35 to 47 of the Sixth Report of the Monitor. The process, which commenced in July 2009, involved contact with 91 potentially interested parties, narrowed to 13 who responded with expressions of interest, with eight parties invited to phase Two to conduct further due diligence.

16 At this phase, the interested parties were provided access to the Applicants' facilities, advised of the bid process and had until August 30, 2009 to submit revised proposals. This was subsequently extended to September 11, 2009 in order to accommodate due diligence requirements, plant tour schedules and management meetings with the eight interested parties who were to submit revised proposals on or before September 11, 2009.

17 As reported by the Monitor, two of the bids were inferior by their terms or consideration and three were within a similar range. As a result of due diligence items and closing conditions which risked the completion of the transaction, revised bids were extended to October 2, 2009 for the three interested parties.

18 As of October 16, 2009, 66 2/3% of the FLL debt and the Independent Directors Committee voted in favour of the selection of the Georgia-Pacific bid, one of the world's leading manufacturers and marketers of tissue, packaging, paper pulp and building products, to proceed to Phase Three.

19 As reported in the Fifth Report of the Monitor dated November 26, 2009, SLL who were prepared to agree to certain confidentiality provisions were apprised on October 15 of the status of the marketing process.

20 An exclusivity agreement was reached with Georgia-Pacific on October 20, 2009, which required the Applicants to refrain from seeking bids, responding to or negotiating with any party other than Georgia-Pacific with respect to the items included in the bid of Georgia-Pacific during a period of exclusivity which extended through a series of extensions to January 8, 2010, when the parties finalized a purchase and sale agreement that is in the material filed with the Court.

21 I accept the conclusion of the Monitor as set out in paragraph 56 of the Sixth Report:

> 56. It is the Monitor's view that the Marketing Process included a structured, fair, wide and effective canvassing of the market as demonstrated by the following:
>
> a. contact by the Investment Offering Advisor of 91 interested parties comprising both financial and strategic parties located in North America, South America, Europe and Asia;
>
> b. the execution of 32 NDAs by interested parties who were then granted access to review the Data Room and the subsequent submission of 13 EOIs at the end of *Phase I*;
>
> c. the EOIs of eight interested parties that were invited to participate in *Phase II* provided a value range which was market derived and tested, and as such, supported the conclusion that the consideration included in Georgia Pacific's bid reflected fair value;
>
> d. of the eight interested parties that were invited to *Phase II*, five submitted improved bids in respect of consideration and/or closing conditions at the close of *Phase II* and of the three interested parties that were invited through to *Phase IIb*, each party again improved its bid in terms of consideration and/or closing conditions at the end of *Phase IIb*.
>
> e. the selection of Georgia Pacific to negotiate a PSA was based on a thorough analysis of all of the financial and commercial terms presented in all of the bids, was recommended by the Monitor and the CRA and was approved by the First Lien Lenders Steering Committee and the Independent Directors Committee; and
>
> f. the Second Lien Lenders were consulted, and their views and questions were taken into account in the final selection of Georgia Pacific.

22 This approval motion was originally returnable on February 1, 2010; it was adjourned to allow the parties to respond to two additional motions. The first, brought on behalf of the FLL, seeks to add as "Additional Applicants" the U.S. entities directly related to the Grant U.S. Partnership, "Grant NewCo LLC" and various Georgia-Pacific Canadian and U.S. entities.

23 The second motion, on behalf of the SLL, was to adjourn or dismiss the Approval Vesting motion on the basis that this Court did not have jurisdiction to deal with the assets in the United States that are the subject of the transaction and such assets would have to be dealt with under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

  

24 On February 1 and on the adjourned date of February 8, counsel for Peter Grant Senior sought a further adjournment to enable consideration of a recently received "offer." In its Seventh Report the Monitor reported on receipt of a letter which expressed interest in the Applicants' assets by a new "bidder." In its Report, the Monitor advised that in its opinion, the expression of interest could be considered as no more than that and reported that it did not comply with the Investment Offering Protocol.

25 Counsel for the SLL sought and was granted access to the correspondence but Mr. Grant was not, due to his involvement in a bid as per the terms of the Investment Offering Protocol.

26 On February 5, with knowledge of the position taken by the SLL and the specifics of the Georgia-Pacific agreement, another expression of interest was received by the Monitor and brought to the attention of the Court. This expression of interest from a previous "bidder" whose bid was rejected, sought to amend its previous position to accommodate the concern that the SLL had with respect to the Georgia-Pacific agreement.

27 The Court ruled that both of these expressions were no more than invitations to negotiate. In neither case by their terms were they intended to create binding obligations until definitive agreements were reached.

28 The Applicants and those parties supporting the Georgia-Pacific agreement urged that the integrity of the process would be compromised if further consideration were given to nothing more than expressions of interest.

29 It is now well established in insolvency law in Canada that once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances.

30 In *Tiger Brand Knitting Co., Re*, [2005] O.J. No. 1259 (Ont. S.C.J.), I noted at para. 31 that integrity of "process is integral to the administration of statutes such as the BIA and CCAA."

31 The leading case in Ontario, which confirms the importance of integrity of process, is *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), a decision of the Court of Appeal for Ontario. At issue was the power of the Court to review a decision of a receiver to approve one offer over another for the sale of an airline as a going concern. In reinforcing the importance of integrity of process, the Court quoted from Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at p. 92 adopted the following:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

32 In this case, numerous parties participated over a number of months in a complex process designed to achieve not only maximum value of the assets of the business, but to ensure its survival as a going concern for the benefit of many of the stakeholders.

33 I am satisfied that to permit an "invitation" to reopen that process not only would destroy the integrity of the process, but would likely doom the transaction that has been achieved.

*Motion to Add Applicants*

34 The motion brought by the FLL Agent to add additional applicants was supported by the original Applicants, the purchasers and the Monitor, and opposed by the SLL as part of the objection to jurisdiction of this Court. The purpose of adding Additional Applicants was said to be necessary to make the transaction effective.

35 The transaction with Georgia-Pacific contemplates the transfer of certain assets that are on terms as set out in the Agreement between GFP and related Canadian entities, and to the Canadian purchaser (a Georgia-Pacific subsidiary) with the claims of any person against such transferred assets attaching to the net proceeds received from the sale of such transferred assets.

36 Additionally, the transaction contemplates that the partnership interests in Grant U.S. Partnership will be surrendered and cancelled. Grant U.S. Partnership will issue new partnership interests to the Georgia-Pacific U.S. purchaser vehicle and the additional purchaser.

37 The aggregate consideration being paid by the Canadian purchaser for the transferred assets and the U.S. purchasers for the Grant U.S. Partnership interests is $403 million, subject to adjustment.

38 Through the U.S. purchasers' acquisition of the purchasers' partnership interests, the U.S. purchasers will acquire Grant U.S. Partnership, Southeast, Clarendon, Allendale, U.S. Sales, Newco. It is urged that through this structure the Applicants will maximize the value of their assets.

39 The agreement and transaction require that the security previously granted by the applicable U.S. applicants (the "Additional Applicants") in favour of the FLL and SLL and the indebtedness and liability of the applicable Additional Applicants to them and the Lenders under the FLL Agreement and the SLL Agreement be released and discharged upon closing of the transaction.

40 The position of the FLL, supported by the Applicants and the Monitor, is that the only way in which the transaction can be accomplished with the price that the FLL and the Applicants are prepared to accept is with the proposed structure that would include a transfer of the Grant U.S. Partnership interests as partnership interests, rather than a direct transfer of the assets of Grant U.S. Partnership.

41 The FLL, the Applicant and the Purchasers urge that without the tax benefit that arises from the proposed structure, the Agreement of Purchase and Sale with Georgia-Pacific would not have been completed.

*Position of SLL*

42 The position of the SLL, both in opposing the motion to add Additional Applicants and opposing Approval of the Sale, is that the relief sought is overly broad, inappropriate and would have the effect of mandatory orders against U.S. parties which would extinguish U.S. security over U.S. realty and personalty. The effect of the extinguishment is to absolve FLL of all forms of liability when it is neither a CCAA debtor nor an officer of this Court.

43 It is urged that there is no jurisdiction on which the FLL can seek an unlimited judicial release. The FLL cannot add the SLL as a party for any purpose that is to seek avoiding prior scrutiny in the U.S. courts of the merits of its actions and of the U.S. affiliates of the Original Applicants and the SLL.[3]

44 The SLL Agent asserts that the effect of the Application is to ask this Court, in the guise of a motion in a CCAA proceeding concerning Canadian debtors, to allow it on behalf of U.S. FLL to sue U.S. defendants for a final declaration of right and a mandatory injunction under the Inter-Creditor Agreement that is governed by U.S. law and U.S. choice of forum.

45 This is said to occur without delivering any originating process or meeting tests for the exercise of jurisdiction of this Court over U.S. parties concerning U.S. property. SLL submits that the FLL failed to provide any of the legal and procedural safeguards required by the Rules of Civil Procedure to any foreign or proposed defendant.

46 It is further urged that the ICA specifically provides the FLL with rights only upon the sale of assets under section 363 of the U.S. bankruptcy code. Therefore, it is submitted, a motion in a CCAA proceeding by the Original Applicants is not an appropriate forum for the resolution of the interpretation of a contract between the U.S. non-parties that is to be decided under U.S. law.

47 The SLL also complain that engaging the term "center of main interest" with respect to the U.S. affiliates is not a relevant question for this Court. Rather, it is a transparent attempt to pre-empt a U.S. court from making a determination required under the U.S. Bankruptcy Code, which may affect the standard of review afforded by the U.S. court upon any recognition proceedings that the original Applicants may choose to bring before the U.S. court in the future.

48 Finally, it is suggested that what the FLL Agent seeks is contrary to the principles of comity and the common law principle that a court should decide only matters properly before it and necessary to its own decision.

49 The evidence before the Court is that on completion of the transaction, there will be a shortfall to the FLL on their debt and likely no recovery by the SLL on their debt. The SLL suggest that a separate auction sale of the U.S. mills might achieve a better price for these assets. There is no evidence before the Court to back up this assertion.

***Inter-Creditor Agreement***

  

50 The ICA, which was entered into as of March 21, 2007, binds the GFP group of companies, including Grant U.S. Partnership as well as the FLL and the SLL. The FLL and the SLL rely on the Agreement in support of their respective positions.

51 The stated purpose of the Agreement was to induce the FLL to consent to GFP incurring the second lien obligations and to induce the FLL to extend credit for the benefit of GFP.

52 By its terms and the definition of "bankruptcy code" in the ICA, the parties recognized that the Canadian statutes, being the CCAA and the BIA, as well as the U.S. Bankruptcy Code, might apply.

53 Counsel for the SLL relies on clause 9.10 of the ICA definition of "Applicable Law," which provides: "this agreement and the rights and obligations of the parties hereunder shall be governed by, and shall be construed and enforced in accordance with, the laws of the state of New York."

54 Accordingly, it is argued on behalf of the SLL that this Court should not have regard to any issues as between the FLL and SLL, but rather leave those to be litigated as between those parties in the State of New York.

55 The position of the FLL is that a Court having jurisdiction over insolvency of a Canadian entity might well be required to have regard to the ICA in dealing with legitimate and appropriate insolvency remedies in Canada. In this regard, counsel notes that clause 9.7 of the ICA identifies New York as a "non-exclusive" venue for disputes involving the Agreement.

56 The position of the Applicants and those supporting the ICA is that this Court is being asked to consider and approve a restructuring transaction in a process that has been overseen by this Court, and which includes, *inter alia*, a comprehensive marketing process involving an Ontario Court-appointed officer. This process has always expressly included the Applicants and their subsidiaries and the business that the integrated corporate group operated in North America from headquarters situated in Ontario.

57 The Applicants submit it is appropriate for this Court to deal with issues raised under the ICA between the FLL and SLL, where that is incidental to approval of this Canadian restructuring transaction.

58 I am satisfied that the issues raised by the SLL are inextricably linked to the restructuring of the Applicants and the completion of the transaction and as such are appropriate for consideration by this Court.

59 I am satisfied that, by operation of the Credit Agreement and ICA, the FLL are entitled to exercise their remedies, which they propose to do in this motion by adding the Additional Applicants as CCAA Applicants. They may then release their security over the assets to be transferred in connection with the exercise of their remedies and by doing so, the security

  

of the SLL over the Transferred Assets is automatically and simultaneously released.

60 I am satisfied that the transaction, whereby Canadian assets are transferred to a Canadian Georgia-Pacific subsidiary and the assets of the essentially GFP-owned partnership interests in Grant U.S. Partnership are transferred to a newly created U.S. partnership by Georgia-Pacific, would not have been possible without the tax advantages that are available as a result of the form of this transaction.

61 To suggest, as does the submission of the SLL, that the entire transaction is flawed because the effect is a transfer of some assets in the United States without the sale process envisaged in section 363 of the U.S. Bankruptcy Code, would be a triumph of form over substance.

62 I accept that the effect of the transaction may indirectly be a transfer of U.S. real property assets and the release of a security over them of the SLL. The effect of the transaction is such that the claims of local creditors of the business of the U.S. mills remain unaffected. The Court was not apprised of any ordinary creditor other than the SLL that would be so affected.

*Comity and U.S. Chapter 15*

63 Counsel for the SLL Agent objected to the use by the Applicants of the term COMI (being Center Of Main Interest) in respect of this CCAA Application.

64 I accept that the term COMI has only been formally recognized in amendments to the CCAA, which came into effect in September 2009 after the filing of this Application. The term has gained recognition in the last few years as cross-border insolvencies have increased, particularly with the use of flexibility of the CCAA.

65 Comity, as expressed by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*4, is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Comity balances "international duty and convenience" with "the rights of (a nation's) own citizens... who are under the protection of its laws."5

66 Without in any way intending to intrude on the law of another jurisdiction, it is appropriate to have a look at the plain wording of the ICA.

67 It is to be noted that there is no evidence put forward by the SLL Agent to suggest that the position of the FLL in respect of the ICA is incorrect. The only response from the SLL Agent is that the matter is not for this Court.

68 The suggestion by the SLL is that the effect of the Order sought is to vest title in U.S. assets. The FLL assert that all that is being done is the enforcement of their secured creditor remedies and release of their security, which under the ICA has the effect of releasing the security of the SLL.

69 The FLL submit that Section 3.1 of the ICA recognizes the broad remedies available to the FLL to enforce their security, using all the remedies of a secured creditor under the Bankruptcy Laws of the U.S. including the CCAA, without consultation with the SLL. The submission is further that the SLL are bound by any determination made by the FLL to release its security. The SLL is to provide written confirmation on the FLL becomes the agent of the SLL for that purpose.

70 The relevant sections of the ICA are set out in Appendix A hereto. As noted above, the position of the FLL is that they are exercising contractual remedies under the ICA.

71 For the SLL, the argument is that this Court should not interfere with the obligation of the FLL to commence proceedings in the appropriate jurisdiction (New York) to enforce its obligations against the SLL. Neither the SLL nor the FLL has commenced New York actions.

72 I am satisfied that this Court does have jurisdiction to provide the relief requested, which is the product of the marketing process that was not only approved by this Court, but not objected to by any party when it was initiated.[6]

73 I do not accept the submission on behalf of the SLL that "the proposed CCAA proceedings for the U.S. Affiliates are not proper CCAA proceedings at all, but are merely proposed as a mechanism for Canadian vesting of U.S. assets."

74 The relief sought is not merely a device to sell U.S. assets from Canada. This is a unified transaction, each element of which is necessary and integral to its success. It is properly a Canadian process.

75 There are many instances in which Canadian courts have granted vesting orders in relation to assets situated in the United States. Some of the orders are referred to in the factum of the FLL, including *Re Maax Corporation et al.*,[7] *Re Madill Equipment Canada*,[8] *Re ROL Manufacturing (Canada) Ltd.*,[9] *Re Biltrite Rubber Inc.*[10] and *Re Pope and Talbot, Inc. et. al.*[11]

76 Decisions on both sides of the border have recognized that the United States and Canada have a special relationship that allows bankruptcy and insolvency matters to proceed with relative ease when assets lie in both territories. As the U.S. Bankruptcy Court for the Southern District of New York acknowledged in ABCP's *Metcalfe & Mansfield Alternative Investments, Re* [, Doc. 09-16709 (U.S. Bankr. S.D. N.Y. January 5, 2010)]12 both systems are rooted in the common law and share similar principles and procedures. Bankruptcy proceedings in the United States acknowledge international proceedings and work alongside, rather than over, foreign matters. Chapter 15 of the U.S. Bankruptcy Code exemplifies this in its foreign bankruptcy proceedings: "the court should be guided by principles of comity and cooperation with foreign courts."13

77 In the cross-border case of *Muscletech Research & Development Inc., Re*,14 COMI was found to be in Canada despite factors indicating the U.S. would also be a suitable jurisdiction. Particularly, most of the creditors were located in the U.S., as was the revenue stream. Most of the major decisions regarding the company were made in Canada, its directors and officers were located in Ontario, banking was done in Ontario, etc. Justice Farley noted the positive relationship between Canada and the U.S. and credited this relationship to the adherence to comity and common principles. Judge Rakoff, presiding over the Chapter 15 proceedings, agreed with Farley J.'s endorsement, specifically noting that the factors outlined in the Canadian endorsement persuaded him over the factors in favour of U.S. COMI. Farley J. noted at paragraph 4 of his endorsement, and Judge Rankoff implicitly agreed, that "the courts of Canada and the U.S. have long enjoyed a firm and ongoing relationship

based on comity and commonalities of principles as to, *inter alia*, bankruptcy and insolvency."

78 As noted by counsel for the SLL at paragraph 44 of their factum:

> Courts routinely enforce Canadian judgments in banluptcy, respecting our similar common law traditions including our respect for comity and restraint. In enforcing the decision of this Honourable Court in Metcalfe & Mansfield Alternative Investments et al., ("ABCP") the US Bankruptcy Court for the Southern District of New York, wrote:
>
> > The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportnity to be heard in a manner consistent with standards of U.S. due process. u.s. federal courts have repeatedly granted comity to Canadian proceedings. United Feature Syndicate, *Inc. v. Miler Features Syndicate*, Inc., 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) ("There is no question that bankruptcy proceedings in Canada-a sister common law jurisdiction with procedures akin to our own-are entitled to comity under appropriate circumstances.") (internal quotation marks and citations omitted); Tradewell, *Inc. v. American Sensors Elecs.*, Inc., No. 96 Civ. 2474(DAB), 1997 WL 423075, at *l n.3 (S.D.N.Y. 1997) ("It is well-settled in actions commenced in New York that judgments of the Canadian courts are to be given effect under principles of comity.") (internal quotation marks and citation omitted); Cornjeldv. Investors Overseas Servs., Ltd., 47*l* F. Supp. 1255, l259 (S.D.N.V. 1979) ("The fact that the foreign country involved is Canada is significant. It is wellsettled in New York that the judgments of the Canadian courts are to be given effect under principles of comity. Trustees in bankruptcy appointed by Canadian courts have been recognized in actions commenced in the United States. More importantly, Canada is a sister common law jurisdiction with procedures akin to our own, and thus there need be no concern over the adequacy of the procedural safeguards of Canadian proceedings.") (internal quotation marks and citations omitted)15

79 *MAAX Corporation* (*MAAX*) provides some assistance on the U.S. treatment to CCAA proceedings in asset sales. The salient elements in *MAAX* included the fact that the sale was conducted prior to entering CCAA protection, only the Canadian entity ultimately sought protection under the Act and no concurrent U.S. proceedings were initiated at first. The MAAX companies operated extensively in the U.S. and internationally, and were eventually brought into the U.S. via Chapter 15. The Canadian court approved the move into the U.S. and granted the sale. While there were some operating companies based almost solely in the U.S. (opening bank accounts to qualify under the CCAA, as was done in the present case), the U.S. Bankruptcy Court looked at the entity as a whole and granted the petition.[16] The American court approved of a flexible approach to the U.S. asset sale, allowing it to go forward without a competitive bidding process, stalking horse or auction.

80 One of the essential features of the orders sought is the requirement that recognition be sought and obtained in the U.S. Bankruptcy Court, pursuant to Chapter 15 of that Code, of the Orders sought in this Court, including the adding of Additional Applicants.

81 I am satisfied that if there is a valid objection by the SLL, it is appropriately made in the U.S. Bankruptcy Court at a hearing to recognize this Order. I do not accept the proposition that this Court, by making the Order sought, would usurp a determinative review by the U.S. Court should it be found necessary.

82 Given the purpose and flexibility of the CCAA process, it is consistent with the jurisdiction of this Court to add the Additional Applicants for the appropriate purpose of facilitating and implementing the entire transaction, which is approved.

*Conclusion*

83 For the foregoing reasons, I am satisfied:

1. That it is not appropriate to re-open the Marketing Process;

2. That this Court does have jurisdiction to consider a sale transaction that incidentally does affect assets of a Canadian company in the United States;

3. That in all the circumstances it is appropriate to approve the proposed transaction.

## Appendix A

**Applicable Provisions of the Inter-Creditor Agreement**

***Section 3.1***

Until the Discharge of First Lien Obligations has occurred, whether or not any Insolvency or Liquidation Proceeding has been commenced by or against the Company or any other Grantor, subject to Section 3.1(a)(1), the First Lien Collateral Agent and the other First Lien Claimholders shall have the right to enforce rights, exercise remedies (including set-off and the right to credit bid their debt) and make determinations regarding the release, disposition, or restrictions with respect to the Collateral without any consultation with or the consent of the Second Lien Collateral Agent or any other Second Lien Claimholder...

***Section 5.1 (a)***

If in connection with the exercise of the First Lien Collateral Agent's remedies in respect of the Collateral provided for in Section 3.1, the First Lien Collateral Agent, for itself or on behalf of any of the other First Lien Claimholders, releases any of its Liens on any part of the Collateral or releases any Grantor from its obligations under its guaranty of the First Lien Obligations in connection with the sale of the stock, or substantially all the assets, of such Grantor, then the Liens, if any, of the Second Lien Collateral Agent, for itself or for the benefit of the Second Lien Claimholders, on such Collateral, and the obligations of such Grantor under its guaranty of the Second Lien Obligations, shall be automatically, unconditionally and simultaneously released...

...The Second Lien Collateral Agent, for itself or on behalf of any such Second Lien Claimholders, promptly shall execute and deliver to the First Lien Collateral Agent or such Grantor such termination statements, releases and other documents as the First Lien Collateral Agent or such Grantor may request to effectively confirm such release.

***Section 5.1 (c)***

Until the Discharge of First Lien Obligations occurs, the Second Lien Collateral Agent, for itself and on behalf of the Second Lien Claimholders, hereby irrevocably constitutes and appoints the First Lien Collateral Agent and any officer or agent of the First Lien Collateral Agent, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Second Lien Collateral Agent or such holder or in the First Lien Collateral Agent's own name, from time to time in the First Lien Collateral Agent's discretion, for the purpose of carrying out the terms of this Section 5.1, to take any and all appropriate action and to execute any and all documents and instruments which may be necessary to accomplish the purposes of this Section 5.1 , including any endorsements or other instruments of transfer or release.

*Order accordingly.*

Footnotes

[1] The appearing party on this motion is the Agent for the Second Lien Lenders, also referred to in the materials as Second Lien Creditors, hereinafter SLL.

  

2 Like the Second Lien Lenders, the First Lien Lenders appeared formally by their Agent, were sometimes referred to as the First Lien Creditors and will be hereinafter referred to as the FLL.

3 It is to be noted that there is no existing U.S. action of which the Court was made aware by either the SLL or the FLL.

4 [1990] 3 S.C.R. 1077 (S.C.C.) at 1096

5 Ibid.

6 Supplemental Initial Order, at paragraphs 8 and 24, Motion Record of the First Lien Lenders' Agent, at pages 10 and 18

7 *Re Maax Corporation*, unreported, Orders of the Superior Court of Quebec, TD Supplementary Brief of Authorities, Tabs 1a-c; Order by the US Bankruptcy Court for the District of Delaware Granting Recognition and Related Relief, TD Supplementary Brief of Authorities, Tab 1d.

8 *Re Madill Equipment Canada*, Case No. 08-41426, Distribution and Vesting Orders of the Supreme Court of British Columbia; Order of the US Bankruptcy Court (Western District of Washington at Tacoma) Granting Motion Authorizing Sale of Assets, TD Supplementary Brief of Authorities, Tab 2.

9 *Re. ROL Manufacturing (Canada) Ltd., et al.*, unreported, Order of the Quebec Superior Court (Commercial Division) Approving the Sale of the PSH Division, TD Supplementary Brief of Authorities, Tab 3a; Order of the US Bankruptcy Court, Southwestern District of Ohio, Authorizing and Approving Sale of PSH Division, TD Supplemental Brief of Authorities, Tab 3c.

10 *Re Biltrite Rubber Inc.*, Case No. 09-31423 (MAW), Sale Approval and Vesting Order and Distribution Order of the Ontario Superior Court of Justice, TD Supplemental Brief of Authorities, Tabs 4a-b; Order of the US Bankruptcy Court for the Northern District of Ohio Western Division Enforcing the Orders of the Ontario Court, TD Supplementary Brief of Authorities, Tab 4c.

11 *Re. Pope and Talbot, Inc. et al.*, Case No. 08-11933 (CSS), Orders of the US Bankruptcy Court for the District of Delaware, TD Supplementary Brief of Authorities, Tab 5.

12 United States Bankruptcy Court, Case No. 09-16709, January 5, 2010, Martin Glenn J.

13 *Metcalfe* at 18

14 (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) (*Muscletech*), titled *Re RSM Richter Inc. v. Aguilar*, 2006 U.S. Dist. LEXIS 57595 (S.D.N.Y.) (*Re RSM Richter*)

15 See footnote 12, *supra*.

16 *In re MAAX Corp., et al.*, No. 08-11443 (Bankr. D. Del. Aug. 6, 2008)

End of Document

# Tab 4

2000 CarswellOnt 704
Ontario Superior Court of Justice [Commercial List]

Babcock & Wilcox Canada Ltd., Re

2000 CarswellOnt 704, [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75

# In the Matter of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of Babcock & Wilcox Canada Ltd.

Farley J.

Heard: February 25, 2000
Judgment: February 25, 2000
Docket: 00-CL-3667

Counsel: *Derrick Tay*, for Babcock & Wilcox Canada Ltd.
*Paul Macdonald*, for Citibank North America Inc., Lenders under the Post-Petition Credit Agreement.

Subject: Corporate and Commercial; Insolvency

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## Headnote

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

Solvent corporation applied for interim order under s. 18.6 of Companies' Creditors Arrangement Act for stay of actions and enforcements against corporation in respect of asbestos tort claims — Application granted — Application was to be reviewed in light of doctrine of comity, inherent jurisdiction, and aspect of liberal interpretation of Act generally — Proceedings commenced by corporation's parent corporation in United States and other United States related corporations for protection under c. 11 of United States Bankruptcy Code in connection with mass asbestos tort claims constituted foreign proceeding for purposes of s. 18.6 of Act — Insolvency of debtor in foreign proceeding was not condition precedent for proceeding to be foreign proceeding under definition of s. 18.6 of Act — Corporation was entitled to avail itself of provisions of s. 18.6 of Act — Relief requested was not of nature contrary to provisions of Act — Recourse may be had to s. 18.6 of Act in case of solvent debtor — Chapter 11 proceedings in United States were intended to resolve mass asbestos-related tort claims that seriously threatened long-term viability of corporation's parent — Corporation was significant participant in overall international operation and interdependence existed between corporation and its parent as to facilities and services — Bankruptcy Code, 11 U.S.C. 1982, c. 11 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.6.

**Table of Authorities**

**Cases considered by *Farley J.*:**

*Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407, 29 C.P.C. (3d) 65 (Ont. Gen. Div.) — applied

*ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]) — applied

*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

*Hunt v. T & N plc* (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 37 B.C.A.C. 161, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 60 W.A.C. 161, (sub nom. *Hunt v. T&N plc)* [1993] 4 S.C.R. 289, (sub nom. *Hunt v. T&N plc)* 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 161 N.R. 81 (S.C.C.) — referred to

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

*Loewen Group Inc. v. Continental Insurance Co. of Canada* (1997), 48 C.C.L.I. (2d) 119, 44 B.C.L.R. (3d) 387 (B.C. S.C.) — considered

*Microbiz Corp. v. Classic Software Systems Inc.* (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.) — referred to

*Morguard Investments Ltd. v. De Savoye* (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077 (S.C.C.) — applied

*Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.) — considered

*Pacific National Lease Holding Corp. v. Sun Life Trust Co.*, 34 C.B.R. (3d) 4, 10 B.C.L.R. (3d) 62, [1995] 10 W.W.R. 714, (sub nom. *Pacific National Lease Holding Corp., Re)* 62 B.C.A.C. 151, (sub nom. *Pacific National Lease Holding Corp., Re)* 103 W.A.C. 151 (B.C. C.A.) — referred to

*Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218, 23 C.P.C. (4th) 300, 227 A.R. 308, [1999] 4 W.W.R. 443 (Alta. Q.B.) — considered

*Taylor v. Dow Corning Australia Pty. Ltd.* (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.) — referred to

*Tradewell Inc. v. American Sensors & Electronics Inc.* (U.S. S.D. N.Y. 1997)

*Westar Mining Ltd., Re*, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) — referred to

**Statutes considered:**

  

*Bankruptcy Amendment Code*, (U.S.), 1994
Generally — considered

*Bankruptcy Code*, 11 U.S.C. 1982
Chapter 11 — considered

s. 524(g) — considered

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
Pt XIII [en. 1997, c. 12, s. 118] — referred to

s. 267 "debtor" [en. 1997, c. 12, s. 118] — considered

ss. 267-275 [en. 1997, c. 12, s. 118] — referred to

*Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the*, S.C. 1997, c. 12
Generally — referred to

*Business Corporations Act*, R.S.O. 1990, c. B.16
Generally — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
s. 2 "debtor company" — considered

s. 3 — considered

s. 4 — considered

s. 5 — considered

s. 17 — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 18.6(1) "foreign proceeding" [en. 1997, c. 12, s. 125] — considered

s. 18.6(2) [en. 1997, c. 12, s. 125] — considered

s. 18.6(3) [en. 1997, c. 12, s. 125] — considered

s. 18.6(4) [en. 1997, c. 12, s. 125] — considered

s. 18.6(8) [en. 1997, c. 12, s. 125] — considered

APPLICATION by solvent corporation for interim order under s. 18.6 of *Companies' Creditors Arrangement Act.*

***Farley J.*:**

1 I have had the opportunity to reflect on this matter which involves an aspect of the recent amendments to the insolvency legislation of Canada, which amendments have not yet been otherwise dealt with as to their substance. The applicant, Babcock & Wilcox Canada Ltd. ("BW Canada"), a solvent company, has applied for an interim order under s. 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA"):

> (a) that the proceedings commenced by BW Canada's parent U.S. corporation and certain other U.S. related corporations (collectively "BWUS") for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with mass asbestos claims before the U.S. Bankruptcy Court be recognized as a "foreign proceeding" for the purposes of s. 18.6;
>
> (b) that BW Canada be declared a company which is entitled to avail itself of the provisions of s. 18.6;
>
> (c) that there be a stay against suits and enforcements until May 1, 2000 (or such later date as the Court may order) as to asbestos related proceedings against BW Canada, its property and its directors;
>
> (d) that BW Canada be authorized to guarantee the obligations of its parent to the DIP Lender (debtor in possession lender) and grant security therefor in favour of the DIP Lender; and
>
> (e) and for other ancillary relief.

2 In Chapter 11 proceedings under the U.S. Bankruptcy Code, the U.S. Bankruptcy Court in New Orleans issued a temporary restraining order on February 22, 2000 wherein it was noted that BW Canada may be subject to actions in Canada similar to the U.S. asbestos claims. U.S. Bankruptcy Court Judge Brown's temporary restraining order was directed against certain named U.S. resident plaintiffs in the asbestos litigation:

> . . . and towards all plaintiffs and potential plaintiffs in Other Derivative Actions, that they are hereby restrained further prosecuting Pending Actions or further prosecuting or commencing Other Derivative Actions against Non-Debtor Affiliates, until the Court decides whether to grant the Debtors' request for a preliminary injunction.

Judge Brown further requested the aid and assistance of the Canadian courts in carrying out the U.S. Bankruptcy Court's orders. The "Non-Debtor Affiliates" would include BW Canada.

3 Under the 1994 amendments to the U.S. Bankruptcy Code, the concept of the establishment of a trust sufficient to meet the court determined liability for a mass torts situations was introduced. I am advised that after many years of successfully resolving the overwhelming majority of claims against it on an individual basis by settlement on terms BWUS considered reasonable, BWUS has determined, as a result of a spike in claims with escalating demands when it was expecting a decrease in claims, that it is appropriate to resort to the mass tort trust concept. Hence its application earlier this week to Judge Brown with a view to eventually working out a global process, including incorporating any Canadian claims. This would be done in conjunction with its joint pool of insurance which covers both BWUS and BW Canada. Chapter 11 proceedings do not require an applicant thereunder to be insolvent; thus BWUS was able to make an application with a view towards the 1994 amendments (including s. 524(g)). This subsection would permit the U.S. Bankruptcy Court on confirmation of a plan of reorganization under Chapter 11 with a view towards rehabilitation in the sense of avoiding insolvency in a mass torts situation to:

> . . . enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claims or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust.

 

4 In 1997, ss. 267-275 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA") and s. 18.6 of the CCAA were enacted to address the rising number of international insolvencies ("1997 Amendments"). The 1997 Amendments were introduced after a lengthy consultation process with the insolvency profession and others. Previous to the 1997 Amendments, Canadian courts essentially would rely on the evolving common law principles of comity which permitted the Canadian court to recognize and enforce in Canada the judicial acts of other jurisdictions.

5 La Forest J in *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.), at p. 269 described the principle of comity as:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws . . .

6 In *ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]), at pp. 302-3 I noted the following:

> Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p.411:
>
> > The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra.* The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:
> >
> > > Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given has power over the litigants, the judgments of its courts should be respected.* (emphasis added in original)
>
> *Morguard Investments* was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign

  

> Comity and cooperation are increasingly important in the bankruptcy context. *As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination there would be multiple proceedings, inconsistent judgments and general uncertainty.*
>
> . . . *I find that common sense dictates that these matters would be best dealt with by one court, and in the interest of promoting international comity it seems the forum for this case is in the U.S. Bankruptcy Court.* Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiff's attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding . . . (emphasis added)

11 The CCAA as remedial legislation should be given a liberal interpretation to facilitate its objectives. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 320; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

12 David Tobin, the Director General, Corporate Governance Branch, Department of Industry in testifying before the Standing Committee on Industry regarding Bill C-5, An Act to amend the BIA, the CCAA and the Income Tax Act, stated at 1600:

> Provisions in Bill C-5 attempt to actually codify, which has always been the practice in Canada. They include the Court recognition of foreign representatives; Court authority to make orders to facilitate and coordinate international insolvencies; provisions that would make it clear that foreign representatives are allowed to commence proceedings in Canada, as per Canadian rules - however, they clarify that foreign stays of proceedings are not applicable but a foreign representative can apply to a court for a stay in Canada; and Canadian creditors and assets are protected by the bankruptcy and insolvency rules.

The philosophy of the practice in international matters relating to the CCAA is set forth in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.), at p. 167 where Blair J. stated:

> The Olympia & York re-organization involves proceedings in three different jurisdictions: Canada, the United States and the United Kingdom. Insolvency disputes with international overtones and involving property and assets in a multiplicity of jurisdictions are becoming increasingly frequent. Often there are differences in legal concepts - sometimes substantive, sometimes procedural - between the jurisdictions. The Courts of the various jurisdictions should seek to cooperate amongst themselves, in my view, in facilitating the trans-border resolution of such disputes as a whole, where that can be done in a fashion consistent with their own fundamental principles of jurisprudence. The interests of international cooperation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less.

Blair J. then proceeded to invoke inherent jurisdiction to implement the Protocol between the U.S. Bankruptcy Court and the Ontario Court. See also my endorsement of December 20, 1995, in *Everfresh Beverages Inc.* where I observed: "I would think that this Protocol demonstrates the 'essence of comity' between the Courts of Canada and the United States of America." *Everfresh* was an example of the effective and efficient use of the Cross-Border Insolvency Concordat, adopted by the Council of the International Bar Association on May 31, 1996 (after being adopted by its Section on Business Law Council on September 17, 1995), which Concordat deals with, inter alia, principal administration of a debtor's reorganization and ancillary jurisdiction. See also the UNCITRAL Model Law on Cross-Border Insolvency.

13 Thus it seems to me that this application by BW Canada should be reviewed in light of (i) the doctrine of comity as analyzed in *Morguard, Arrowmaster* and *ATL, supra*, in regard to its international aspects; (ii) inherent jurisdiction; (iii) the aspect of the liberal interpretation of the CCAA generally; and (iv) the assistance and codification of the 1997 Amendments.

"Foreign proceeding" is defined in s. 18.6(1) as:

> In this section,
>
> > "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally; . . .

Certainly a U.S. Chapter 11 proceeding would fit this definition subject to the question of "debtor". It is important to note that the definition of "foreign proceeding" in s. 18.6 of the CCAA contains no specific requirement that the debtor be insolvent. In contrast, the BIA defines a "debtor" in the context of a foreign proceeding (Part XIII of the BIA) as follows:

> s. 267 In this Part,
>
> > "debtor" means an *insolvent person* who has property in Canada, a *bankrupt* who has property in Canada or a *person who has the status of a bankrupt* under foreign law in a foreign proceeding and has property in Canada; . . . (emphasis added)

I think it a fair observation that the BIA is a rather defined code which goes into extensive detail. This should be contrasted with the CCAA which is a very short general statute which has been utilized to give flexibility to meet what might be described as the peculiar and unusual situation circumstances. A general categorization (which of course is never completely accurate) is that the BIA may be seen as being used for more run of the mill cases whereas the CCAA may be seen as facilitating the more unique or complicated cases. Certainly the CCAA provides the flexibility to deal with the thornier questions. Thus I do not think it unusual that the draftees of the 1997 Amendments would have it in their minds that the provisions of the CCAA dealing with foreign proceedings should continue to reflect this broader and more flexible approach in keeping with the general provisions of the CCAA, in contrast with the corresponding provisions under the BIA. In particular, it would appear to me to be a reasonably plain reading interpretation of s. 18.6 that recourse may be had to s. 18.6 of the CCAA in the case of a solvent debtor. Thus I would conclude that the aspect of insolvency is not a condition precedent vis-a-vis the "debtor" in the foreign proceedings (here the Chapter 11 proceedings) for the proceedings in Louisiana to be a foreign proceeding under the definition of s. 18.6. I therefore declare that those proceedings are to be recognized as a "foreign proceeding" for the purposes of s. 18.6 of the CCAA.

14 It appears to me that my conclusion above is reinforced by an analysis of s. 18.6(2) which deals with concurrent filings by a debtor under the CCAA in Canada and corresponding bankruptcy or insolvency legislation in a foreign jurisdiction. This is not the situation here, but it would be applicable in the *Loewen* case. That subsection deals with the coordination of proceedings as to a "debtor company" initiated pursuant to the CCAA and the foreign legislation.

> s. 18.6(2). The court may, in respect of a *debtor company*, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a coordination of proceedings under the Act with any foreign proceeding. (emphasis added)

  

15 The definition of "debtor company" is found in the general definition section of the CCAA, namely s. 2 and that definition incorporates the concept of insolvency. Section 18.6(2) refers to a "debtor company" since only a "debtor company" can file under the CCAA to propose a compromise with its unsecured or secured creditors: ss. 3, 4 and 5 CCAA. See also s. 18.6(8) which deals with currency concessions "[w]here a compromise or arrangement is proposed in respect of a debtor company . . . ". I note that "debtor company" is not otherwise referred to in s. 18.6; however "debtor" is referred to in both definitions under s. 18.6(1).

16 However, s. 18.6(4) provides a basis pursuant to which a company such as BW Canada, a solvent corporation, may seek judicial assistance and protection in connection with a foreign proceeding. Unlike s. 18.6(2), s. 18.6(4) does not contemplate a full filing under the CCAA. Rather s. 18.6(4) may be utilized to deal with situations where, notwithstanding that a full filing is not being made under the CCAA, ancillary relief is required in connection with a foreign proceeding.

> s. 18.6(4) Nothing in this section prevents the court, on the application of a foreign representative or *any other interested persons*, from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act. (emphasis added)

BW Canada would fit within "any interested person" to bring the subject application to apply the principles of comity and cooperation. It would not appear to me that the relief requested is of a nature contrary to the provisions of the CCAA.

17 Additionally there is s. 18.6(3) whereby once it has been established that there is a foreign proceeding within the meaning of s. 18.6(1) (as I have concluded there is), then this court is given broad powers and wide latitude, all of which is consistent with the general judicial analysis of the CCAA overall, to make any order it thinks appropriate in the circumstances.

> s. 18.6(3) An order of the court under this Section may be made on such terms and conditions as the court considers appropriate in the circumstances.

This subsection reinforces the view expressed previously that the 1997 Amendments contemplated that it would be inappropriate to pigeonhole or otherwise constrain the interpretation of s. 18.6 since it would be not only impracticable but also impossible to contemplate the myriad of circumstances arising under a wide variety of foreign legislation which deal generally and essentially with bankruptcy and insolvency but not exclusively so. Thus, the Court was entrusted to exercise its discretion, but of course in a judicial manner.

18 Even aside from that, I note that the Courts of this country have utilized inherent jurisdiction to fill in any gaps in the legislation and to promote the objectives of the CCAA. Where there is a gap which requires bridging, then the question to be considered is what will be the most practical common sense approach to establishing the connection between the parts of the legislation so as to reach a just and reasonable solution. See *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), at pp. 93-4; *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C. C.A.), at p. 2; *Lehndorff General Partner Ltd.* at p. 30.

19 The Chapter 11 proceedings are intended to resolve the mass asbestos related tort claims which seriously threaten the long term viability of BWUS and its subsidiaries including BW Canada. BW Canada is a significant participant in the overall Babcock & Wilcox international organization. From the record before me it appears reasonably clear that there is an interdependence between BWUS and BW Canada as to facilities and services. In addition there is the fundamental element of financial and business stability. This interdependence has been increased by the financial assistance given by the BW Canada

  

guarantee of BWUS' obligations.

20 To date the overwhelming thrust of the asbestos related litigation has been focussed in the U.S. In contradistinction BW Canada has not in essence been involved in asbestos litigation to date. The 1994 amendments to the U.S. Bankruptcy Code have provided a specific regime which is designed to deal with the mass tort claims (which number in the hundreds of thousands of claims in the U.S.) which appear to be endemic in the U.S. litigation arena involving asbestos related claims as well as other types of mass torts. This Court's assistance however is being sought to stay asbestos related claims against BW Canada with a view to this stay facilitating an environment in which a global solution may be worked out within the context of the Chapter 11 proceedings trust.

21 In my view, s. 18.6(3) and (4) permit BW Canada to apply to this Court for such a stay and other appropriate relief. Relying upon the existing law on the recognition of foreign insolvency orders and proceedings, the principles and practicalities discussed and illustrated in the Cross-Border Insolvency Concordat and the UNCITRAL Model Law on Cross-Border Insolvencies and inherent jurisdiction, all as discussed above, I would think that the following may be of assistance in advancing guidelines as to how s. 18.6 should be applied. I do not intend the factors listed below to be exclusive or exhaustive but merely an initial attempt to provide guidance:

(a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.

(b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.

(c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside.

(d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

(e) The role of the court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the court's nexus to that enterprise; in considering the appropriate level of its involvement, the court would consider:

(i) the location of the debtor's principal operations, undertaking and assets;

(ii) the location of the debtor's stakeholders;

(iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;

(iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;

(v) such other factors as may be appropriate in the instant circumstances.

(f) Where one jurisdiction has an ancillary role,

(i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;

(ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

(g) As effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into the court to review the granted order with a view, if thought desirable, to rescind or vary the granted order or to obtain any other appropriate relief in the circumstances.

22 Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and

enforcement as requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the Globe & Mail (National Edition) and the National Post. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate "comeback" clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

23 I am satisfied that it is appropriate in these circumstances to grant an order in the form of the revised draft (a copy of which is attached to these reasons for the easy reference of others who may be interested in this area of s. 18.6 of the CCAA).

24 Order to issue accordingly.

*Application granted.*

**Appendix**

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE FARLEY — FRIDAY, THE 25{ TH} DAY OF FEBRUARY, 2000

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

INITIAL ORDER

*THIS MOTION* made by the Applicant Babcock & Wilcox Canada Ltd. for an Order substantially in the form attached to the Application Record herein was heard this day, at 393 University Avenue, Toronto, Ontario.

*ON READING* the Notice of Application, the Affidavit of Victor J. Manica sworn February 23, 2000 (the "Manica Affidavit"), and on notice to the counsel appearing, and upon being advised that no other person who might be interested in these proceedings was served with the Notice of Application herein.

SERVICE

1. *THIS COURT ORDERS* that the time for service of the Notice of Application and the Affidavit in support of this Application be and it is hereby abridged such that the Application is properly returnable today, and, further, that any

 

requirement for service of the Notice of Application and of the Application Record upon any interested party, other than the parties herein mentioned, is hereby dispensed with.

RECOGNITION OF THE U.S. PROCEEDINGS

2. *THIS COURT ORDERS AND DECLARES* that the proceedings commenced by the Applicant's United States corporate parent and certain other related corporations in the United States for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with asbestos claims before the U.S. Bankruptcy Court (the "U.S. Proceedings") be and hereby is recognized as a "foreign proceeding" for purposes of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, (the "CCAA").

APPLICATION

3. *THIS COURT ORDERS AND DECLARES* that the Applicant is a company which is entitled to relief pursuant to s. 18.6 of the CCAA.

PROTECTION FROM ASBESTOS PROCEEDINGS

4. *THIS COURT ORDERS* that until and including May 1, 2000, or such later date as the Court may order (the "Stay Period"), no suit, action, enforcement process, extra-judicial proceeding or other proceeding relating to, arising out of or in any way connected to damages or loss suffered, directly or indirectly, from asbestos, asbestos contamination or asbestos related diseases ("Asbestos Proceedings") against or in respect of the Applicant, its directors or any property of the Applicant, wheresoever located, and whether held by the Applicant in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise shall be commenced, and any Asbestos Proceedings against or in respect of the Applicant, its directors or the Applicant's Property already commenced be and are hereby stayed and suspended.

5. *THIS COURT ORDERS* that during the Stay Period, the right of any person, firm, corporation, governmental authority or other entity to assert, enforce or exercise any right, option or remedy arising by law, by virtue of any agreement or by any other means, as a result of the making or filing of these proceedings, the U.S. Proceedings or any allegation made in these proceedings or the U.S. Proceedings be and is hereby restrained.

DIP FINANCING

6. *THIS COURT ORDERS* that the Applicant is hereby authorized and empowered to guarantee the obligations of its parent, The Babcock & Wilcox Company, to Citibank, N.A., as Administrative Agent, the Lenders, the Swing Loan Lender, and Issuing Banks (as those terms are defined in the Post-Petition Credit Agreement (the "Credit Agreement")) dated as of February 22, 2000 (collectively, the "DIP Lender"), and to grant security (the "DIP Lender's Security") for such guarantee substantially on the terms and conditions set forth in the Credit Agreement.

7. *THIS COURT ORDERS* that the obligations of the Applicant pursuant to the Credit Agreement, the DIP Lender's Security and all the documents delivered pursuant thereto constitute legal, valid and binding obligations of the Applicant enforceable against it in accordance with the terms thereof, and the payments made and security granted by the Applicant pursuant to such documents do not constitute fraudulent preferences, or other challengeable or reviewable transactions under any applicable law.

8. *THIS COURT ORDERS* that the DIP Lender's Security shall be deemed to be valid and effective notwithstanding any

negative covenants, prohibitions or other similar provisions with respect to incurring debt or the creation of liens or security contained in any existing agreement between the Applicant and any lender and that, notwithstanding any provision to the contrary in such agreements,

(a) the execution, delivery, perfection or registration of the DIP Lender's Security shall not create or be deemed to constitute a breach by the Applicant of any agreement to which it is a party, and

(b) the DIP Lender shall have no liability to any person whatsoever as a result of any breach of any agreement caused by or resulting from the Applicant entering into the Credit Agreement, the DIP Lender's Security or other document delivered pursuant thereto.

REPORT AND EXTENSION OF STAY

9. As part of any application by the Applicant for an extension of the Stay Period:

(a) the Applicant shall appoint Victor J. Manica, or such other senior officer as it deems appropriate from time to time, as an information officer (the "Information Officer");

(b) the Information Officer shall deliver to the Court a report at least once every three months outlining the status of the U.S. Proceeding, the development of any process for dealing with asbestos claims and such other information as the Information Officer believes to be material (the "Information Reports"); and

(c) the Applicant and the Information Officer shall incur no liability or obligation as a result of the appointment of the Information Officer or the fulfilment of the duties of the Information Officer in carrying out the provisions of this Order and no action or other proceedings shall be commenced against the Applicant or Information Officer as an result of or relating in any way to the appointment of the Information Officer or the fulfilment of the duties of the Information Officer, except with prior leave of this Court and upon further order securing the solicitor and his own client costs of the Information Officer and the Applicant in connection with any such action or proceeding.

SERVICE AND NOTICE

10. *THIS COURT ORDERS* that the Applicant shall, within fifteen (15) business days of the date of entry of this Order, publish a notice of this Order in substantially the form attached as Schedule "A" hereto on two separate days in the Globe & Mail (National Edition) and the National Post.

11. *THIS COURT ORDERS* that the Applicant be at liberty to serve this Order, any other orders in these proceedings, all other proceedings, notices and documents by prepaid ordinary mail, courier, personal delivery or electronic transmission to any interested party at their addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

MISCELLANEOUS

12. *THIS COURT ORDERS* that notwithstanding anything else contained herein, the Applicant may, by written consent of its counsel of record herein, agree to waive any of the protections provided to it herein.

13. *THIS COURT ORDERS* that the Applicant may, from time to time, apply to this Court for directions in the discharge of its powers and duties hereunder or in respect of the proper execution of this Order.

14. *THIS COURT ORDERS* that, notwithstanding any other provision of this Order, any interested person may apply to this Court to vary or rescind this order or seek other relief upon 10 days' notice to the Applicant and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

15. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province and any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

**Schedule "A"**

NOTICE

RE: IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (the "CCAA")

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

*PLEASE TAKE NOTICE* that this notice is being published pursuant to an Order of the Superior Court of Justice of Ontario made February 25, 2000. The corporate parent of Babcock & Wilcox Canada Ltd. and certain other affiliated corporations in the United States have filed for protection in the United States under Chapter 11 of the Bankruptcy Code to seek, as the result of recent, sharp increases in the cost of settling asbestos claims which have seriously threatened the Babcock & Wilcox Enterprise's long term health, protection from mass asbestos claims to which they are or may become subject. Babcock & Wilcox Canada Ltd. itself has not filed under Chapter 11 but has sought and obtained an interim order under Section 18.6 of the CCAA affording it a stay against asbestos claims in Canada. Further application may be made to the Court by Babcock & Wilcox Canada Ltd. to ensure fair and equal access for Canadians with asbestos claims against Babcock & Wilcox Canada Ltd. to the process established in the United States. Representations may also be made by parties who would prefer to pursue their remedies in Canada.

Persons who wish to be a party to the Canadian proceedings or to receive a copy of the order or any further information should contact counsel for Babcock & Wilcox Canada Ltd., Derrick C. Tay at Meighen Demers (Telephone (416) 340-6032 and Fax (416) 977-5239).

DATED this day of, 2000 at Toronto, Canada

Tabular or graphic material set at this point is not displayable.

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# Tab 5

2009 CarswellOnt 5454
Ontario Superior Court of Justice [Commercial List]

Straumur-Burdaras Investment Bank hf., Re

2009 CarswellOnt 5454, 180 A.C.W.S. (2d) 777, 57 C.B.R. (5th) 256

# IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., 1985, c. B-3, AS AMENDED

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

AND IN THE MATTER OF the foreign proceedings of Straumur-Burdaras Investment Bank hf., represented by Assistant Hörður Felix Harðarson (Applicant)

C. Campbell J.

Heard: July 17, 2009
Judgment: August 11, 2009
Docket: CV-09-8275-00CL

Counsel: Chris Burr for Applicant

Subject: Insolvency; International

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Miscellaneous**

Bank was insolvent Iceland-incorporated commercial bank headquartered in Iceland and operating in northern and central Europe — Bank was undergoing process before Icelandic court that included broad stay of proceedings with respect to its assets — Bank brought application for recognition of Icelandic insolvency proceedings in Canada as "foreign proceeding" for purposes of s. 18.6 of Companies' Creditors Arrangement Act ("CCAA") and Part XIII of Bankruptcy and Insolvency Act ("BIA"), and for recognition of assistant in Icelandic proceedings as "foreign representative" under CCAA and BIA — Application granted — Foreign proceeding could be recognized based on common law principles or by way of statutory recognition — Icelandic proceedings were not strictly bankruptcy proceedings under Icelandic law because they involved restructuring rather than liquidation — Icelandic "assistant" came within definition of "foreign representative" and Icelandic proceedings met test of "foreign proceedings" under CCAA and BIA — Bank was not excluded from definition of debtor company under CCAA because it was not "bank" within Canadian statutes — Recognition was appropriate — If bank's assets in Canada were not dealt with under

Icelandic regime, bank could have been prevented from facilitating internationally coordinated plan of reorganization and assets would have been exposed to creditors not bound by that regime.

**Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — Foreign bankruptcies**

Bank was insolvent Iceland-incorporated commercial bank headquartered in Iceland and operating in northern and central Europe — Bank was undergoing process before Icelandic court that included broad stay of proceedings with respect to its assets — Bank brought application for recognition of Icelandic insolvency proceedings in Canada as "foreign proceeding" for purposes of s. 18.6 of Companies' Creditors Arrangement Act ("CCAA") and Part XIII of Bankruptcy and Insolvency Act ("BIA"), and for recognition of assistant in Icelandic proceedings as "foreign representative" under CCAA and BIA — Application granted — Foreign proceeding could be recognized based on common law principles or by way of statutory recognition — Icelandic proceedings were not strictly bankruptcy proceedings under Icelandic law because they involved restructuring rather than liquidation — Icelandic "assistant" came within definition of "foreign representative" and Icelandic proceedings met test of "foreign proceedings" under CCAA and BIA — Bank was not excluded from definition of debtor company under CCAA because it was not "bank" within Canadian statutes — Recognition was appropriate — If bank's assets in Canada were not dealt with under Icelandic regime, bank could have been prevented from facilitating internationally coordinated plan of reorganization and assets would have been exposed to creditors not bound by that regime.

**Table of Authorities**

**Cases considered by *C. Campbell J.*:**

*Babcock & Wilcox Canada Ltd., Re* (2000), 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) — considered

*Cavell Insurance Co., Re* (2006), 80 O.R. (3d) 500, [2006] I.L.R. I-4510, 39 C.C.L.I. (4th) 159, 212 O.A.C. 48, 30 C.P.C. (6th) 1, 2006 CarswellOnt 3070, 25 C.B.R. (5th) 7, 269 D.L.R. (4th) 679 (Ont. C.A.) — referred to

*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* (2001), 2001 SCC 90, 2001 CarswellNat 2816, 2001 CarswellNat 2817, [2001] 3 S.C.R. 907, 30 C.B.R. (4th) 6, 280 N.R. 1, 207 D.L.R. (4th) 577 (S.C.C.) — considered

*Lear Canada, Re* (2009), 2009 CarswellOnt 4232, 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — followed

*Morguard Investments Ltd. v. De Savoye* (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — considered

*Roberts v. Picture Butte Municipal Hospital* (1998), [1999] 4 W.W.R. 443, 1998 CarswellAlta 646, 227 A.R. 308, 23 C.P.C. (4th) 300, 64 Alta. L.R. (3d) 218 (Alta. Q.B.) — referred to

**Statutes considered:**

*Bank Act*, S.C. 1991, c. 46
Generally — referred to

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

Pt. XIII — referred to

s. 268 — referred to

s. 271 — referred to

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

s. 2 "debtor company" — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

*Trust and Loan Companies Act*, S.C. 1991, c. 45
Generally — referred to

APPLICATION by foreign insolvent bank for recognition of Icelandic proceedings under *Bankruptcy and Insolvency Act* and *Companies' Creditors Arrangement Act*.

***C. Campbell J.*:**

1 Straumur-Burdaras Investment Bank hf. ("the Applicant" or "Straumur") is an insolvent Iceland-incorporated commercial bank headquartered in Reykjavik, Iceland, undergoing a process before the Icelandic District Court that includes a broad stay of proceedings with respect to its assets and undertaking.

2 The Applicant requests that this Court recognize its Icelandic insolvency proceedings in Canada in order for it to conduct an internationally coordinated plan of reorganization without its assets being exposed to what it terms opportunistic claimants.

3 The relief sought is recognition of the Icelandic Proceedings as a "foreign proceeding" for the purposes of s. 18.6 of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended ("CCAA") and Part XIII of the *Bankruptcy And Insolvency Act*, R.S.C., 1985, c. B-3, as amended ("BIA") and for recognition of the Applicant Hörour Felix Haroarson as an Assistant in the Icelandic Proceedings as a "foreign representative" under the above statutes.

4 The Applicant Straumur does not do business in Canada as an entity licensed under the *Bank Act*. It is an investment bank with operations in the Northern and Central European Countries.

5 When this matter first came on before my colleague B. Conway J., she asked a number of questions that have now been satisfactorily answered, as this recognition application is unopposed.

6 There are no creditors of Straumur in Canada. Straumur's only assets in Canada are (a) equity shares in a New Brunswick corporation MLTH Holdings Inc.; and (b) receivables for loans made to three Canadian borrowers, the value of which assets as at March 19, 2009 was approximately Cdn$78.85 million, against which there were no registered security interests.

7 On the material filed, I am satisfied that given the extraordinary financial crisis that hit Iceland in the fall of 2008, an Emergency Act (no. 125/2008) of the Parliament of Iceland set in motion the process that led to an Order under the Icelandic Bankruptcy Act for a moratorium on payments by Straumur.

8 The moratorium prevents Straumur from making any payments or assuming any financial conditions imposed by Icelandic regulatory authorities or Court Order.

9 On May 11, 2009, the Icelandic Court appointed a Winding Up board to deal with establishing a process to adjudicate creditor claims made against Straumur. The Icelandic Proceedings have been automatically recognized and enforced in the European Union, Iceland, Norway and Liechtenstein as a financial undertaking's winding up proceeding.

10 In addition, relief is being sought consistent with the relief requested in this Application in the United States Bankruptcy Court for the Southern District of New York and the Grand Court of the Cayman Islands.

11 I am satisfied on the material that a managed workout plan for Straumur is underway with authorities, including the Applicant Haroarson, operating pursuant to the recently enacted statute in Iceland and is subject to creditor and Court approval.

12 The anticipated process is similar to that which would be permissible under the CCAA or BIA in Canada, depending on particular circumstances. The question is whether and to what extent it is appropriate to recognize and give effect to the Icelandic Proceedings and grant a stay of proceedings in Canada.

13 There are two bases on which a Canadian Court will recognize a foreign proceeding.

14 The first, based on common law principles, recognizes the need to have predictability, efficiency, order and fairness in cross-border insolvencies, as long as there is a "real and substantial connection" between the foreign jurisdiction and the proceedings sought to be recognized.

15 The decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.) describes the considerations to be employed in establishing the "real and substantial connection." *Roberts v. Picture Butte Municipal Hospital* (1998), 23 C.P.C. (4th) 300 (Alta. Q.B.) at p. 20 and *Cavell Insurance Co., Re* (2006), 269 D.L.R.

(4th) 679 (Ont. C.A.) at paragraph 38, particularly in an insolvency context.

16 The second basis is by way of statutory recognition of a foreign proceeding. The decision of Farley J. in this Court in *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) describes the statutory process.

17 Section 18.6 of the CCAA enacted in 1997 provides the statutory regime for recognition of a "foreign proceeding" being a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally.

18 Similar recognition is provided for under ss. 268 and 271 of the BIA. The decision of the Supreme Court of Canada in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, 30 C.B.R. (4th) 6 (S.C.C.) dealt with the balance as between international coordination of bankruptcies and recognition of foreign proceedings and application of a domestic maritime claim (to *in rem* entitlement.)

19 The recognition issue arises here since the Icelandic Proceedings are strictly not bankruptcy proceedings under Icelandic law (which proceedings are limited to liquidation), but specific Icelandic Parliamentary legislation to put in place a trustee over the assets and affairs of the debtor to enable a restructuring rather than a liquidation.

20 The statutory authority to grant relief under s. 18.6 of the CCAA was recently reviewed by my colleague Pepall J. in *Lear Canada, Re* [2009 CarswellOnt 4232 (Ont. S.C.J. [Commercial List])] (unreported July 14, 2009), which I adopt for this disposition. Similar reasoning applies to recognition of foreign procedures under the BIA.

21 From my review of the Icelandic process, I am satisfied that the Icelandic "Assistant" -the Applicant Haroarson - comes within the definition of "foreign representative" and the Icelandic Proceedings meet the test of "foreign proceedings" under the CCAA and BIA.

22 Since Straumur is not a "bank" within applicable Canadian statutes such as the *Bank Act*, or a "company" to which the *Trust & Loan Companies Act* applies, it is not excluded from the definition of "debtor company" under the CCAA.

23 Even if Straumur were excluded from the definition, recognition of the "debtor" within the BIA (the CCAA does not have such a term), the Icelandic Proceedings under the "foreign proceeding" definition would suffice.

24 As the decisions of Farley J. in *Babcock, supra* and Pepall J in *Lear Canada, supra* elaborate, the CCAA and in particular s. 18.6 are intended to give "flexibility to meet what might be described as peculiar and unusual circumstances."

25 I am further satisfied on these facts that recognition is appropriate, since if the Straumur assets in Canada are not dealt with under the Icelandic regime, Straumur may be prevented from facilitating an internationally coordinated plan of reorganization and some of its assets would be exposed to creditors not bound by that regime.

26 Given the stay of proceedings in place in the European Union and sought in the United States, I am satisfied that the recognition and stay sought in the Order of this Court is appropriate and is granted.

*Application granted.*

**End of Document**

# Tab 6

2009 CarswellOnt 8079
Ontario Superior Court of Justice

Zayed v. Cook

2009 CarswellOnt 8079, 183 A.C.W.S. (3d) 328, 62 C.B.R. (5th) 114

# R. J. ZAYED OF CARLSON, CASPERS, VANDENBURGH & LINDQUIST (Applicant) v. TREVOR G. COOK, PATRICK J. KILEY, CROWN FOREX, LLC, UNIVERSAL BROKERAGE FX AND UNIVERSAL BROKERAGE FX DIVERSIFIED, OXFORD GLOBAL PARTNERS, LLC., OXFORD GLOBAL ADVISORS, LLC, UBS DIVERSIFIED FX ADVISORS, LLC, UNIVERSAL BROKERAGE FX GROWTH L.P., UBS DIVERSIFIED FX GROWTH L.P., UNIVERSAL BROKERAGE FX MANAGEMENT, LLC, UBS DIVERSIFIED FX MANAGEMENT, LLC AND UBS DIVERSIFIED GROWTH LLC., BASEL GROUP, LLC., MARKET SHOT, LLC., PFG COIN AND BULLION OXFORD FX GROWTH L.P., OXFORD DEVELOPERS, S.A., OXFORD GLOBAL MANAGED FUTURES FUND, L.P., OXFORD GLOBAL FX, LLC., CLIFFORD BERG AND ELLEN BERG (Respondents)

Cumming J.

Heard: December 21, 2009
Judgment: December 23, 2009
Docket: 09-8512-CL

Counsel: John J. Chapman for Applicant
No one for Respondents

Subject: Insolvency; International

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — Foreign bankruptcies**

Recognition of receiver in Canada — Company, located in America, believed to engaged in large ponzi scheme — Untied States Securities and Exchange Commission obtained ex parte order freezing assets and appointing receiver — Commission believed company had assets in Canada — American receiver brought ex parte application for order recognizing American action, and for appointment as foreign representative as per s. 269 and 270 of Bankruptcy and Insolvency Act — Application granted — Obvious interest existed in aiding foreign receiver — Receivership arising out

of U.S. security violation constituted foreign proceeding — Although order dealt with preservation, liquidation for creditors was ultimate aim of proceeding — Company was insolvent due to nature of ponzi scheme — Recognition of order prevented parallel proceedings in Canada.

**Table of Authorities**

**Cases considered by *Cumming J.*:**

*Stanford International Bank Ltd., Re* (2009), 2009 CarswellQue 9211, 2009 QCCS 4106 (Que. Bktcy.) — considered

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
s. 268(1) "foreign proceeding" — considered

s. 269 — considered

s. 270 — considered

*Courts of Justice Act*, R.S.O. 1990, c. C.43
Generally — referred to

APPLICATION by American receiver for order recognizing American bankruptcy proceedings, and for appointment as foreign representative.

***Cumming J.*:**

1 The Applicant R.J. Zayed (the "U.S. Receiver") seeks an *ex parte* order recognizing as a "foreign proceeding" the action in the United States District Court for the District of Minnesota, 09-SC-333 and the Receivership Order in that proceeding and recognizing the appointment of R. J. Zayed as a foreign representative in that proceeding under ss. 269 and 270 of the *Bankruptcy and Insolvency Act* (*"BIA"*)

2 In November, 2009 the Untied States Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") brought proceedings in Minnesota alleging that the Defendants Cook and Kiley (Respondents in this proceeding), through various corporate entities, had engaged in a massive ponzi scheme raising more than $190 million from primarily American investors..

3 The U.S.Court on an *ex parte* motion froze the assets of the Respondents and through two essentially identical

receivership orders appointed the Applicant as the U.S. Receiver over all the assets of the Respondents.

4 The U.S. Receiver seeks the assistance of the Canadian courts as there are believed to be assets of the Respondents located in Canada. The U.S. Receiver seeks to take possession and preserve those assets for the benefit of creditor investors through an eventual liquidation of assets and distribution to creditors.

5 There is an obvious interest in the courts of both the U.S. and Canada in giving recognition and assistance to receivers appointed by courts at the request of securities regulatory and enforcement bodies in alleged mass investor frauds.

6 Sections 269 and 270 of the *Bankruptcy and Insolvency Act* ("*BIA*") provide for an application for recognition of a foreign proceeding and an order extending that recognition. Section 268 (1) defines "foreign proceeding" to mean

> A judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

7 The filed materials comply with the requirements of ss. 269 and 270. The only query raised by the Applicant as a possible issue is whether a receivership which arises out of an application related to U. S. securities violations can be considered as a "foreign proceeding " within the meaning of s. 268 (1) of the *BIA*.

8 In *Stanford International Bank Ltd., Re* [2009 CarswellQue 9211 (Que. Bktcy.)], No.500-11-036045-090 in the Quebec Superior Court (Commercial Chamber), September 11, 2009, the U. S. receiver had no explicit power to liquidate and distribute assets amongst creditors. However, Auclair, J.S.C. in oral reasons held that the receiver had control over the assets of the Stanford corporate group and his powers were of the nature of those exercised by a trustee in bankruptcy or liquidator in insolvency, interim receivership or restructuring. As such, the proceedings were held to be proceedings initiated abroad which conform to the definition of "foreign proceeding" provided in s. 268(1) of the *BIA*.

9 However, Lewison J. of the English High Court of Justice (Chancery Division Companies Court) in *Re: Stanford International* Case Nos. 13338 and 13959, July 3, 2009 at para.84 (iv) held that the U.S. proceeding under consideration was not a "foreign proceeding" within the meaning of U.K. legislation which provided a definition of "foreign proceeding" similar to that seen in s. 268(1) of the *BIA*, on the basis, *inter alia*, that the powers conferred on and duties imposed on the Receiver "were duties to gather in and preserve assets, not to liquidate or distribute them."

10 Although the initial focus of the receivership in the situation at hand is on asset preservation this is simply the first stage of a process that will eventually lead to liquidation for the benefit of creditors. Under the U.S. Receivership Order there is a stay of proceedings and the Receiver has the right to file under Chapter 11 and to become the debtor in possession. Although the Receivership Order on its face does not provide for a liquidation, as a practical matter as receiverships unfold in ponzi schemes and assets are recovered, distribution schemes will be put forward by the receiver so as to return funds to the investors, with court approval. It is in the nature of a ponzi scheme that the fraudster is massively insolvent because he has made promises to investors that cannot possibly be honoured. The Receivership Order is simply the first step to maximize creditor recovery which will ultimately encompass a liquidation of the debtor's assets and a distribution to creditors.

11 In my view, and I so find, giving a purposive interpretation to the definition of "foreign proceeding" in s. 268 (1) of the *BIA*, an Order recognizing the U.S. proceeding in the matter at hand as a "foreign proceeding", and that the Applicant is a foreign representative in respect of that foreign proceeding, is properly to be given under ss. 269 and 270 of the *BIA*.

12 Recognition of the foreign proceeding obviates the need for parallel receivership proceedings at additional expense with an Ontario receiver being appointed under the provisions of the *Courts of Justice Act.*

13 I have signed the requisite Order that accords with the reasons in this Endorsement.

*Application granted.*

# Tab 7

2011 BCSC 552
British Columbia Supreme Court

Probe Resources Ltd., Re

2011 CarswellBC 1043, 2011 BCSC 552, [2011] B.C.W.L.D. 4720, [2011] B.C.W.L.D. 4721, [2011] B.C.W.L.D. 4722, 202 A.C.W.S. (3d) 74, 79 C.B.R. (5th) 148

## In Bankruptcy and Insolvency

In the Matter of the Companies' Creditors Arrangement Act Part IV Cross-Border Insolvencies R.S.C. 1985, C. C-36, as amended

In the Matter of Probe Resources Ltd. (Petitioner)

S. Fitzpatrick J.

Heard: March 31, 2011
Oral reasons: March 31, 2011
Docket: Vancouver S112111

Counsel: P.J. Reardon for Petitioner

Subject: Insolvency

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court**

Company was subject to cease trade order — Company operated through four wholly owned subsidiaries, all incorporated in United States — Restructuring officer was appointed and company and subsidiaries began proceedings in American court — Company brought application to recognize cross-border proceedings — Application granted — Company was foreign representative of itself and subsidiaries as required by s. 45 of Companies' Creditors Arrangement Act — It was clear that restructuring proceedings in U.S. were foreign proceeding as required by s. 45 of Act — Although not all documents required by Act had been filed to recognize proceedings, court was entitled to exercise discretion to rely on copies of court documents and affidavit evidence — American proceedings were foreign main proceedings — Centre of main interest of company and subsidiaries was United States — Company and subsidiaries operated in Texas and Louisiana — All company's business operations were through U.S. subsidiaries — Financial statements indicated all of group's revenues were derived in U.S. and that all operating assets were located in U.S. — Only nominal assets were located in Canada; other than administration and organization matters, all activities were in the U.S. — Company had little connection to British Columbia outside its incorporation — Third parties would expect that U.S. law would govern — Approval given for recognition of certain orders in American courts, and for

board of company to issue new common shares in accordance with restructuring plan — Recognition of U.S. proceedings was necessary to ensure fair and efficient administration of insolvency proceeding — No prejudice to any Canadian interests .

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

Company was subject to cease trade order — Company operated through four wholly owned subsidiaries, all incorporated in United States — Restructuring officer was appointed and company and subsidiaries began proceedings in American court — Company brought application to recognize cross-border proceedings — Application granted — Company was foreign representative of itself and subsidiaries as required by s. 45 of Companies' Creditors Arrangement Act — It was clear that restructuring proceedings in U.S. were foreign proceeding as required by s. 45 of Act — Although not all documents required by Act had been filed to recognize proceedings, court was entitled to exercise discretion to rely on copies of court documents and affidavit evidence — American proceedings were foreign main proceedings — Centre of main interest of company and subsidiaries was United States — Company and subsidiaries operated in Texas and Louisiana — All company's business operations were through U.S. subsidiaries — Financial statements indicated all of group's revenues were derived in U.S. and that all operating assets were located in U.S. — Only nominal assets were located in Canada; other than administration and organization matters, all activities were in the U.S. — Company had little connection to British Columbia outside its incorporation — Third parties would expect that U.S. law would govern — Approval given for recognition of certain orders in American courts, and for board of company to issue new common shares in accordance with restructuring plan — Recognition of U.S. proceedings was necessary to ensure fair and efficient administration of insolvency proceeding — No prejudice to any Canadian interests.

**Table of Authorities**

**Cases considered by *S. Fitzpatrick J.*:**

*Babcock & Wilcox Canada Ltd., Re* (2000), 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) — considered

*Loewen Group Inc., Re* (2001), 22 B.L.R. (3d) 134, 2001 CarswellOnt 4910, 32 C.B.R. (4th) 54 (Ont. S.C.J. [Commercial List]) — referred to

*Xerium Technologies Inc., Re* (2010), 2010 CarswellOnt 7712, 2010 ONSC 3974, 71 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) — considered

**Statutes considered:**

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

Chapter 11 — considered

*Business Corporations Act*, S.B.C. 2002, c. 57
Generally — referred to

*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

Pt. IV — referred to

s. 6(2) — considered

s. 44 — considered

s. 45(1) "foreign non-main proceeding" — considered

s. 45(1) "foreign representative" — considered

s. 45(2) — considered

s. 46 — considered

s. 46(1) — considered

s. 46(2) — considered

s. 46(2)(a) — considered

s. 46(2)(b) — considered

s. 46(2)(c) — considered

s. 46(3) — referred to

s. 46(4) — considered

s. 47(2) — considered

s. 48(1) — considered

s. 48(2) — considered

s. 49 — considered

s. 49(1) — considered

s. 53(b) — considered

APPLICATION by company involved in restructring proceedings for recognition of cross-border proceedings, pursuant to *Companies' Creditors Arrangement Act*.

***S. Fitzpatrick J.*:**

1 This is an application pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), and, specifically Part IV entitled "Cross-Border Insolvencies", to recognize certain cross-border insolvency proceedings relating to the petitioner, Probe Resources Ltd. ("Probe Canada").

  

2 By way of background, Probe Canada is a British Columbia corporation incorporated pursuant to the *Business Corporations Act*, S.B.C. 2002, c.57 (the "*BCA*"). Its registered office is located in Vancouver, British Columbia. It is listed as a public company on the TSX Venture Exchange. As at December 10, 2010, Probe Canada had approximately 106 million issued and outstanding common shares. At present, Probe Canada is subject to a cease trade order issued by securities regulators.

3 Probe Canada operates through four wholly owned subsidiaries, all of which are incorporated in the U.S. Its business operations include oil and natural gas exploration and production. I am advised that those subsidiaries operate businesses near the Gulf of Mexico in Texas and Louisiana. None of the business operations take place in Canada.

4 The impetus behind the restructuring proceedings, discussed in more detail below, arises from the secured debt owing by Probe Canada and its U.S. subsidiaries in the amount of approximately $27 million.

5 In November 2010, Mr. T. Coy Gallatin was engaged by the board of Probe Canada to become the chief restructuring officer of Probe Canada and its subsidiaries. Mr. Gallatin is a resident of Texas. Shortly after Mr. Gallatin's appointment, on November 16, 2010, the Probe U.S. subsidiaries commenced proceedings in the United States Bankruptcy Court for the Southern District of Texas Houston Division (the "U.S. Bankruptcy Court") pursuant to Chapter 11 of the *United States Bankruptcy Code*. The Chapter 11 proceedings of Probe Canada followed shortly thereafter, on December 10, 2010. I understand that joint administration of the bankruptcy cases for all five companies has been ordered by the U.S. Bankruptcy Court.

6 It appears that the Chapter 11 proceedings have progressed at a fairly rapid rate. Various orders have been granted in those proceedings approving the disclosure requirements relating to the joint plan of arrangement that was proposed, and approving the voting procedures so that the stakeholders could consider the plan. On March 18, 2011, Probe Canada and its subsidiaries confirmed to the U.S. Bankruptcy Court that the plan had been approved by the requisite majorities of the classes of creditors. Ultimately, on March 21, 2011, the Honourable Judge Karen Brown of the U.S. Bankruptcy Court granted an order confirming the joint plan as presented by Probe Canada and its U.S. subsidiaries.

7 The provisions of the *CCAA* relating to cross-border insolvencies that Probe Canada seeks to rely on have been in place for many years now. They were recently amended in late 2009 to, in large part, adopt the *United Nations Commission on International Trade Law* ("*UNCITRAL*") Model Law on cross-border insolvencies. I am advised by Mr. Reardon, counsel for the applicant, that there has been little judicial consideration of these new provisions.

8 The application is brought specifically under s. 46(1), which provides:

> A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

9 The first question is whether or not the requirement of there being a "foreign representative" has been met. Section

 

45(1) defines a "foreign representative" as:

> ... a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to
>
> (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
>
> (b) act as a representative in respect of the foreign proceeding.

10 I have been referred to Judge Brown's order in the U.S. Bankruptcy Court on March 21, 2011, which specifically authorizes Probe Canada to act as a foreign representative on behalf of itself and the U.S. subsidiaries in any judicial or other proceeding held in a foreign country. Accordingly, I am satisfied that Probe Canada stands before the Court today as a foreign representative as that term is defined in the *CCAA*.

11 The next question is whether there is a "foreign proceeding". Section 45(1) defines a foreign proceeding as meaning:

> ... a judicial or an administrative proceeding ... in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

12 It is clear in this case that the foreign proceedings are those under Chapter 11 of the *United States Bankruptcy Code*. I am satisfied that those proceedings were commenced in the U.S. Bankruptcy Court by Probe Canada and its U.S. subsidiaries, as I have earlier described. Proceedings under the *United States Bankruptcy Code* are well known in this Court and in other superior courts across Canada, and I do not believe that there is any controversy that those proceedings would constitute a foreign proceeding in this Court.

13 The *CCAA* provides that the foreign representation must submit certain documents in its application materials to prove both the existence of the foreign proceeding and also the foreign representative's authority to act as such. Subsections 46(2)(a) and (b) of the *CCAA* provide that an application must be accompanied by a certified copy of the instrument that both commences the foreign proceeding and that authorizes the foreign representative to act. In the alternative, the foreign representation must provide a certificate from the foreign court affirming the existence of the foreign proceedings and affirming the foreign representative's authority to act. Lastly, s. 46(2)(c) provides that the foreign representative must provide a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative. These documents may be accepted by the Court as evidence without further proof: s. 46(3).

14 In this case, certified copies of those U.S. Bankruptcy Court documents have not been provided. Nor has the U.S. Bankruptcy Court provided a certificate as required. Appended to Mr. Gallatin's affidavit are simply copies of the various court documents.

15 Counsel for Probe Canada made submissions regarding the manner of proof provided. Counsel for Probe Canada has referred me to s. 46(4) of the *CCAA* which provides that the Court may, in the absence of those documents, accept any other evidence of the existence of the foreign proceeding and the foreign representative's authority that it considers appropriate. I

 

am satisfied on the basis of the affidavit evidence and copies of documents provided that the necessary evidentiary basis has been brought before this Court to establish both the commencement of the foreign proceeding and the authority of the foreign representative.

16 I would say, however, as a matter of practice, that s. 46(2) is clear in the sense of dictating the ideal evidence that should be brought before courts on these types of proceedings: the certified copies, or the certificate from the foreign court. In respect of future applications, however, it is my view that there must be some basis upon which courts would resort to s. 46(4) in considering a potential alternate form of proof of those matters. For example, I would have expected and will expect in future cases that if certified copies or court certificates are not available, there will be some reasonable explanation provided by the moving party as to why those are not available and why the alternate form of proof should be accepted.

17 Accepting that the evidentiary basis under s. 46 of the *CCAA* has been met, the next question to be considered is whether this is a "foreign main proceeding" or a "foreign non-main proceeding", as those terms as defined in s. 45. This determination is important in two respects. Firstly, the *CCAA* dictates under s. 47(2) that the Court shall specify in the order whether it is one or the other, i.e., either a main proceeding or a foreign non-main proceeding. Secondly, that finding is not necessarily determinative of what relief might be granted by the Court under Part IV of the *CCAA*, but it does dictate whether certain provisions are mandatory or, alternatively, within the discretion of the Court.

18 Section 45(1) of the *CCAA* defines a "foreign main proceeding" as "a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests." This definition derives in large part from the *UNCITRAL* Model Law and is known colloquially before this Court and other courts around the world as establishing where the "COMI" is.

19 Section 45(2) of the *CCAA* provides that:

> For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

The registered office of Probe Canada is in British Columbia. Nevertheless, counsel for Probe Canada takes the position that the COMI of Probe Canada is in fact in the U.S. and that the recognition order should be granted by the Court on that basis.

20 As I said earlier, the 2009 amendments have been sparsely considered by Canadian courts to date. In particular, the definition of "foreign main proceeding" has received little judicial attention in Canada.

21 I have been referred by Probe Canada's counsel to Dr. Janis P. Sarra's text, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at 295-296. There, Professor Sarra states that the *UNCITRAL Legislative Guide on Insolvency Law* defines centre of main interest as "the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties." Professor Sarra also states that the presumption that the centre of main interest is the registered office of the debtor company can be rebutted if there are factors which, viewed objectively by third parties, would lead to the conclusion that the centre of main interest is other than at the location of the registered office.

22 I also note the statement in Kevin P. McElcheran's text, *Commercial Insolvency in Canada*, 2nd ed., (Markham, Ont: LexisNexis Inc., 2011), at 376:

> Case law decided under other statutes based on the Model Law, such as the European Union *Insolvency Proceedings Regulation* [footnote omitted] and Chapter 15 of the U.S. *Bankruptcy Code*, provide guidance to Canadian courts in interpreting the meaning of COMI. European Union and American precedents suggest that COMI will be determined by reference to criteria that are objective and ascertainable by third parties. Such relevant factors include:
>
> (1) the location of headquarters;
>
> (2) the location of those who manage the debtor's business;
>
> (3) the location of primary assets and operations, and
>
> (4) the location of majority of creditors.
>
> In deciding whether the debtor has proven that its COMI is in the jurisdiction of the foreign proceeding, Canadian courts, as the U.S. courts have done, may consider the connections between the debtor and the foreign jurisdiction comprehensively in order to give effect to the legitimate expectations of the debtor's constituents as to which substantive laws will apply to their relationship with the debtor.

23 In *Xerium Technologies Inc., Re*, 2010 ONSC 3974 (Ont. S.C.J. [Commercial List]), Justice Campbell referenced an earlier recognition order that he had granted under Part IV of the *CCAA*. In that case, the applicant was Xerium, a Delaware company which had various direct and indirect subsidiaries, including one in Canada. The Delaware Chapter 11 proceedings were recognized in Ontario as a foreign main proceeding. Among other things, Justice Campbell noted that Xerium and its subsidiaries operated a highly integrated business and were managed centrally from the United States.

24 In this case, Mr. Gallatin has provided certain evidence in support of his contention that the U.S. is the COMI of Probe Canada and its subsidiaries. Probe Canada and its subsidiaries operate within Texas and Louisiana near the Gulf of Mexico. All of Probe Canada's business operations are through the U.S. subsidiaries. I was referred to consolidated financial statements of Probe Canada and its subsidiaries which indicate that all of the group's revenues are derived in the U.S. and that all of the operating assets are located in the U.S. Only nominal assets are located in Canada. All of the operations of Probe Canada, other than administration and organization matters, are in the U.S.

25 During counsel's submission, it was not apparent what the connection to British Columbia was, apart from Probe Canada's incorporation under the *BCA*. Although there was no evidence on these matters, I am prepared to accept the submissions of Mr. Reardon on these points. There does not appear to be any physical presence of Probe Canada in British Columbia, or in Canada. I was advised that the registered office of Probe Canada is in fact Mr. Reardon's law offices. Only one of the directors resides in British Columbia. I was not, unfortunately, advised as to where other directors might be located. Finally, I was also advised that the Chief Executive Officer and Chairman of Probe Canada, who was terminated shortly after the appointment of Mr. Gallatin, resided in Texas.

26 Mr. Gallatin also gave evidence that the operations of this group in the Gulf of Mexico are heavily regulated, particularly by the United States Bureau of Ocean Energy Management, Regulation and Enforcement.

27 Mr. Gallatin in his affidavit states, quite presumptively in my opinion, that he believes that the centre of main interest of Probe Canada is in the U.S. Mr. Reardon quite properly pointed out that the decision on that matter is within the Court's bailiwick and not Mr. Gallatin's.

28 In any event, I do agree with Mr. Gallatin. I conclude that, in all of the circumstances, the centre of main interest, or COMI, of Probe Canada and its subsidiaries is in the U.S. and that the Chapter 11 proceedings should be recognized on that basis. Looking objectively at the factors present in this case, I conclude that the legitimate expectations of third parties dealing with the group would consider that U.S. law would govern. These are the stakeholders who stand to be materially affected by the restructuring proceedings in the U.S. Accordingly, I find that the presumption in s. 45(2) of the *CCAA* has been rebutted in respect of Probe Canada.

29 Having concluded that the U.S. proceedings are a foreign main proceeding, ss. 48(1) and (2) of the *CCAA* dictate that I must make certain orders staying or prohibiting certain proceedings or dealing with the debtor company's assets:

> **Order relating to recognition of a foreign main proceeding**
>
> 48 (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.
>
> **Scope of order**
>
> (2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

30 The terms of the order proposed by Probe Canada are consistent with these provisions. I note that the proposed order is also consistent with the same type of terms contained in British Columbia's model *CCAA* initial order and therefore it complies with s. 48(2).

31 Even if I had concluded that the U.S. bankruptcy proceedings were not a foreign main proceeding, but a "foreign non-main proceeding", this Court has the jurisdiction to consider a recognition order. A "foreign non-main proceeding" is defined as a foreign proceeding other than a foreign main proceeding. If, for example, the COMI of Probe Canada and its subsidiaries was other than the U.S., the Court may exercise its discretion to essentially order the same relief in appropriate circumstances. Section 49(1)(a) provides:

  

**Other orders**

49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

32 If necessary, and if the U.S. proceedings were a "foreign non-main proceeding", I would have considered the same relief relating to a "foreign main proceeding" to be appropriate in these circumstances. Probe Canada seeks the relief relating to the stays of proceedings in order to allow the U.S. proceedings to be finalized in an orderly fashion. There are substantial factors connecting Probe Canada and its subsidiaries to the U.S. as noted above. To that extent, these provisions would be necessary for the protection of Probe Canada and its subsidiaries' property, and the interests of their creditor or creditors, whether in the U.S., Canada or elsewhere.

33 Probe Canada also seeks various ancillary orders pursuant to s. 49 of the *CCAA* which it says are appropriate in this case.

34 Probe Canada is seeking specific recognition of various court orders of Judge Brown granted in the U.S. bankruptcy proceedings, and orders allowing implementation of those orders, as follows:

(a) Order Approving Joint Disclosure Statement regarding Joint Chapter 11 Plan of Reorganization of Probe Canada and the U.S. Subsidiaries made March 1, 2011; and

(b) Amended Order approving:

(i) the Confirmation Hearing Notice, the contents of the Solicitation Package, and the manner of mailing and service of the Solicitation Package and Confirmation Hearing Notice;

(ii) the procedures for voting and tabulation of ballots;

(iii) the form of ballot; and

(iv) the procedures for allowing claims for voting purposes only made March 1, 2011; and

(c) Order confirming Joint Chapter 11 Plan and Reorganization of Probe Canada and the U.S. Subsidiaries made March 21, 2011. (By this order, Judge Brown confirmed that all requirements under the *United States Bankruptcy Code* had been met, that the joint plan was fair and reasonable, that the requisite number and value of claims had approved the joint plan and that the joint plan was to be implemented. This order has been filed with the U.S. Bankruptcy Court but has not yet been signed by Judge Brown.)

35 Mr. Reardon has referred me to the plan that has been approved by the U.S. Bankruptcy Court. I will briefly summarize the provisions in that plan. Basically, they provide for new common shares of Probe Canada to be issued to various classes of creditors whose claims are to be impaired by the plan. There are three classes of creditors whose claims will be impaired:

1. the senior secured creditor, who, as I said earlier, is owed in excess of $27 million;

2. certain creditors whose claims arise from a debt restructuring agreement (I am advised that these are essentially akin to administrative charges); and

3. the general creditors.

36 Under the joint plan, the senior secured creditor is to receive 90% of the new common stock and the class of debt restructuring creditors are to receive 10%. In essence, the majority of the new shares will be held by those two parties, and the existing shareholders of Probe Canada are to hold no more than 3% of the shares in the reorganized company.

37 The general creditors, which are the third class of creditors, are to receive a *pro rata* share of distributions from recoveries under certain avoidance actions available to restructured companies in the U.S.

38 Consistent with the requirement under s. 46(2)(c) of the *CCAA*, Mr. Gallatin states that a Canadian creditor, Cypress Acquisitions Ltd., just recently, on March 21, 2011, filed a notice of civil claim in this Court against Probe Canada, seeking recovery of approximately $70,600. I am advised that the general creditors under the joint plan in the U.S. include Cypress Acquisitions Ltd. In fact, I am advised by Mr. Reardon that the Chapter 11 proceedings in the U.S. have included all of the Canadian creditors of either Probe Canada or any of its subsidiaries and that those proceedings were equally available to the Canadian creditors, including Cypress Acquisitions Ltd.

39 The further ancillary relief sought by Probe Canada relates to the manner in which the new common shares are to be issued towards effecting the restructuring of the shareholdings in Probe Canada. Probe Canada seeks an order allowing its board of directors to take certain steps to effect the transactions. Those steps would include:

- Firstly, continuing Probe Canada under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44;
- Secondly, changing the name of Probe Canada to a name identified by the board; and,
- Thirdly, consolidating the common shares of Probe Canada in a ratio determined by the board, all pursuant to duly passed resolutions of the board.

All of these matters are consistent with the joint plan of arrangement as approved by the U.S. Bankruptcy Court on March 21, 2011.

40 The jurisdiction to grant such ancillary relief is found in s. 6(2) of the *CCAA*:

  

> If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

The applicability of that provision in the context of cross-border proceedings follows from s. 48(2) of the *CCAA*, which provides that an order under Part IV must be consistent with any order that may be made under the *CCAA*. Accordingly, to the extent that this Court may have granted this relief in other types proceedings under the *CCAA*, that relief is equally available in the context of recognition proceedings such as this one. I also note that to the extent that this provision allows the Court to override what might be requirements under provincial legislation in that respect (for example, under the *BCA*), the paramountcy doctrine might be invoked under the *CCAA*: see *Loewen Group Inc., Re* (2001), 32 C.B.R. (4th) 54 (Ont. S.C.J. [Commercial List]).

41 In conclusion, I am satisfied that I have the jurisdiction under Part IV of the *CCAA* to grant the order sought. In my view, a recognition order such as is sought here is consistent with the purpose of Part IV the *CCAA*, as articulated in s. 44:

> **Purpose**
>
> 44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (b) greater legal certainty for trade and investment;
>
> (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
>
> (d) the protection and the maximization of the value of debtor company's property; and
>
> (e) the rescue of financially troubled businesses to protect investment and preserve employment.

42 In *Xerium*, at para. 27, Justice Campbell quotes certain factors from *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), which may be considered in a recognition application. In *Xerium*, the Court was considering recognition of the final order of a U.S. Bankruptcy court approving a plan, having earlier granted an order recognizing the foreign proceeding and the authority of the foreign representative. Similar factors are at play here. The Probe companies are a highly integrated business that is managed centrally from the U.S. The confirmation of the U.S. proceedings and the joint plan is sought in accordance with standard and well-established procedures and practices from the U.S. Bankruptcy Court. Probe Canada is a full participant in those proceedings. Recognition of the U.S. proceedings is necessary to ensure that there is a fair and efficient administration of this insolvency proceeding. This is a situation where there is no prejudice to Canadian interests. Canadian creditors have had, and will enjoy, full rights of participation, along with the U.S. creditors, in those proceedings.

43 Mr. Reardon, I have one point on your draft form of order that I wish to address with you, unless you wish to take me through the order in some detail.

44

  

MR. REARDON: I'm happy to, My Lady. I was going to say the only thing that I would suggest is — I can't say it's out of the ordinary but what caused me a little concern — is the service of the material, which is at para. 12, page 5. All Part IV says about the obligation of the foreign representative is that it will advertise twice. We've asked for one advertisement. These advertisements are fairly expensive. It doesn't say anything else about serving anybody. Now, all of the creditors, of course, pursuant to the orders made in the U.S. have received notice of the U.S. bankruptcy proceeding, and so I have asked in the order that we comply with s. 53, which is placing at least one ad in either of the national papers but that there be no other necessity of notification, but then ask for an order about how to effect service if we have to, and I had in mind, particularly with para. 13, serving the one company that has started the action.

45

THE COURT: Well, I think that would certainly be the minimum, to serve Cypress Acquisitions Ltd. without delay. Section 53(b) of the *CCAA* requires that the foreign representation must publish once a week for two consecutive weeks, unless otherwise directed by the courts. In light of the lateness of the recognition proceeding, I am going to make you comply with publication for two consecutive weeks, and you can choose between the *Globe* or the *Post* in addition to, as I have said, serving Cypress Acquisitions Ltd.

46 I also wish to address the filing of this order in the U.S. Bankruptcy Court. What happens typically in these U.S. proceedings, of course, is that there is an internet portal through which interested parties can look at documents. I do not know if it is the same here as what has happened in cases where I was involved, but in my experience what typically happens is that the debtors retain an entity to post all of the court documents and allow people access to those documents over the internet. You have to sign up and then you get access to all of these documents, because there is typically a myriad of these documents that are filed and it is an ongoing process. So I am going to order that if there is such a posting of the documents in the U.S. proceedings, that this order be similarly posted. I do not know whether that can arise directly or whether you have to file this order with the U.S. Bankruptcy Court in the first place. I am assuming that you are going to file this in the Chapter 11 proceedings in any event.

47

MR. REARDON: That will be up to counsel in the U.S. I will deliver the order to them and they will do, I guess, what they're supposed to do with it. I don't know, but certainly if you order that we post it, if this service exists, then that's easy. I mean, I will deliver it to them. I'm not sure we can order that it be filed in the Chapter 11 proceeding.

48

THE COURT: I do not know the answer to that either. What I am saying is that if there is this type of a process where you can post documents so that the public is aware of it, I am also ordering that it happen.

49

THE COURT: Regarding para. 6 of the draft order, I find it a bit odd that this Court would be asked to declare that "[t]he U.S. Court has the jurisdiction to determine, compromise or otherwise affect the interests of claimants, including creditors and shareholders of Probe Canada, against Probe Canada". The U.S. Bankruptcy Court's order approving the joint plan on March 21, 2010 specifically finds that that court has jurisdiction under the *United States Bankruptcy Code* in that respect. The order sought from this Court is simply to recognize the taking of that jurisdiction by the U.S. Bankruptcy Court and to grant ancillary relief to allow an orderly implementation of that approval order in Canada on

  

the basis of comity. I do not see that it is necessary or desirable for this Court to make declarations on matters not within the purview of these recognition proceedings. It seems to me that it is implicit from this Court recognizing the U.S. orders that have been granted that the taking of that jurisdiction is to be recognized and enforced in Canada. I do not frankly think you need this provision.

50 Accordingly, the order sought is approved with the changes as discussed above.

*Application granted.*

**End of Document**

# Tab 8

2012 ONSC 2994
Ontario Superior Court of Justice [Commercial List]

Lightsquared LP, Re

2012 CarswellOnt 8614, 2012 ONSC 2994, 219 A.C.W.S. (3d) 23, 92 C.B.R. (5th) 321

# In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended Application of Lightsquared LP under Section 46 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended

In the Matter of Certain Proceedings Taken in the United States Bankruptcy Court with Respect to Lightsquared Inc., Lightsquared Investors Holdings Inc., One Dot Four Corp., One Dot Six Corp. Skyterra Rollup LLC, Skyterra Rollup Sub LLC, Skyterra Investors LLC, Tmi Communications Delaware, Limited Partnership, Lightsquared GP Inc., Lightsquared LP, ATC Technologies LLC, Lightsquared Corp., Lightsquared Finance Co., Lightsquared Network LLC, Lightsquared Inc., of Virginia, Lightsquared Subsidiary LLC, Lightsquared Bermuda Ltd., Skyterra Holdings (Canada) Inc., Skyterra (Canada) Inc. and One Dot Six TVCC Corp. (Collectively, the "Chapter 11 Debtors") (Applicants)

Morawetz J.

Heard: May 18, 2012
Judgment: May 18, 2012
Docket: CV-12-9719-00CL

Counsel: Shayne Kukulowicz, Jane Dietrich for Lightsquared LP
Brian Empey for Proposed Information Officer, Alvarez and Marsal Inc.

Subject: Insolvency; International

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

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

Recognition of foreign proceedings — Related companies with some assets in Ontario entered bankruptcy protection in United States of America — Interim order was granted in Ontario putting stay of proceedings in place — Proposed foreign representative brought motion for various forms of relief including recognition of U.S. proceedings as foreign main proceedings — Motion granted — Foreign proceedings were considered foreign main proceedings, and required relief granted under Companies Creditors' Arrangement Act as set out in interim order — Foreign representative recognized as such, however, if matter were altered in American proceedings review could be necessary — When presumption in 45(2) of Companies' Creditors Arrangement Act is not operative, factors to consider in determining debtor's centre of interest should be that location is ascertainable to creditors, is where principle actors can be found, and

is where management of debtor takes place — Certain orders granted by U.S. court recognized — Proposed information officer appointed.

**Table of Authorities**

**Cases considered by *Morawetz J.*:**

*Lear Canada, Re* (2009), 2009 CarswellOnt 4232, 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — referred to

*Massachusetts Elephant & Castle Group Inc., Re* (2011), 81 C.B.R. (5th) 102, 2011 CarswellOnt 6610, 2011 ONSC 4201 (Ont. S.C.J.) — considered

**Statutes considered:**

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

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

Pt. IV — referred to

ss. 44-49 — referred to

s. 45 — pursuant to

s. 45(1) "foreign main proceeding" — considered

s. 45(2) — considered

s. 46(1) — considered

s. 47(1) — considered

s. 47(2) — considered

s. 48(1) — considered

s. 49 — pursuant to

s. 49(1) — considered

s. 50 — considered

MOTION by proposed foreign representative for various forms of relief pursuant to *Companies' Creditors Arrangement Act*.

***Morawetz J.*:**

1 On May 14, 2012, Lightsquared LP ("LSLP" or the "Applicant") and various of its affiliates (collectively, the "Chapter 11 Debtors") commenced voluntary reorganization proceedings (the "Chapter 11 Proceedings") in the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court") by each filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

2 The Chapter 11 Debtors have certain material assets in other jurisdictions, including Ontario and indicated at an interim hearing held on May 15, 2012 that they would be seeking an order from the U.S. Court authorizing LSLP to act as the Foreign Representative of the Chapter 11 Debtors, in any judicial or other proceeding, including these proceedings (the "Foreign Representative Order").

3 At the conclusion of the interim hearing of May 15, 2012, I granted the Interim Initial Order to provide for a stay of proceedings and other ancillary relief. A full hearing was scheduled for May 18, 2012.

4 At the hearing on May 18, 2012, the record demonstrated that LSLP had been authorized to act as Foreign Representative by order of The Honorable Shelley C. Chapman dated May 15, 2012. This authority was granted on an interim basis pending a final hearing scheduled for June 11, 2012.

5 LSLP brought this application pursuant to ss. 44-49 of the *Companies' Creditors Arrangement Act* ("CCAA"), seeking the following orders:

(a) an Initial Recognition Order, *inter alia*:

(i) declaring that LSLP is a "foreign representative" pursuant to s. 45 of the CCAA;

(ii) declaring that the Chapter 11 Proceeding is recognized as a "foreign main proceeding" under the CCAA; and

(iii) granting a stay of proceedings against the Chapter 11 Debtors; and

(b) a "Supplemental Order" pursuant to s. 49 of the CCAA, *inter alia*:

(i) recognizing in Canada and enforcing certain orders of the U.S. Court made in the Chapter 11 Proceedings;

(ii) appointing Alvarez and Marsal Canada Inc. ("A&M") as the Information Officer in respect of this proceeding (in such capacity, the "Information Officer");

(iii) staying any claims against or in respect of the Chapter 11 Debtors, the business and property of the Chapter 11 Debtors and the Directors and Officers of the Chapter 11 Debtors;

(iv) restraining the right of any person or entity to, among other things, discontinue or terminate any supply of products or services to Chapter 11 Debtors;

(v) granting a super priority charge up to the maximum amount of $200,000, over the Chapter 11 Debtors' property, in favour of the Information Officer and its counsel, as security for their professional fees and disbursements incurred in respect of these proceedings (the "Administration Charge").

6 Counsel to LSLP submitted that this relief was required in order to:

(i) alleviate any potential harm to the Chapter 11 Debtors or their Canadian assets during the interim period;

(ii) ensure the protection of the Chapter 11 Debtors' Canadian assets during the course of the Chapter 11 Proceedings; and

(iii) ensure that this court and the Canadian stakeholders are kept properly informed of the Chapter 11 Proceedings.

7 The Chapter 11 Debtors are in the process of building a fourth generation long-term evolution open wireless broadband network that incorporates satellite coverage throughout North America and offers users, wherever they may be located, the speed, value and reliability of universal connectivity.

8 The Chapter 11 Debtors consist of approximately 20 entities. All but four of these entities have their head office or headquarter location in the United States.

9 Two of the Chapter 11 Debtors are incorporated pursuant to the laws of Ontario, being SkyTerra Holdings (Canada) Inc. ("SkyTerra Holdings") and SkyTerra (Canada) Inc. ("SkyTerra Canada"). One of the Chapter 11 Debtors is incorporated pursuant to the laws of Nova Scotia, being Lightsquared Corp. "LC" and together with SkyTerra Holdings and SkyTerra Canada, the "Canadian Debtors"). Each of the Canadian Debtors is a wholly-owned subsidiary, directly or indirectly, of the Applicant.

10 Other than the Canadian Debtors and Lightsquared Bermuda Ltd., all of the Chapter 11 Debtors are incorporated pursuant to the laws of the United States.

11 The operations of the Canadian Debtors were summarized by LSLP as follows:

(a) SkyTerra Canada: this entity was created to hold certain regulated assets which, by law, are required to be held by Canadian corporations. SkyTerra Canada holds primarily three categories of assets: (i) the MSAT — 1 satellite; (ii) certain Industry Canada licences; (iii) contracts with the Applicant's affiliates and third parties. SkyTerra Canada has no third party customers or employees at the present time and is wholly dependent on the Applicant for the funding of its operations;

(b) SkyTerra Holdings: this entity has no employees or operational functions. Its sole function is to hold shares of SkyTerra Canada; and

(c) LC: this entity was created for the purposes of providing mobile satellite services to customers located in

> Canada based on products and services that were developed by the Chapter 11 Debtors for the United States market. LC holds certain Industry Canada licences and authorizations as well as certain ground-related assets. LC employs approximately 43 non-union employees out of its offices in Ottawa, Ontario. LC is wholly dependent on the Applicant for all or substantially all of the funding of its operations.

12 Counsel to LSLP also submitted that the Chapter 11 Debtors, including the Canadian Debtors, are managed in the United States as an integrated group from a corporate, strategic and management perspective. In particular:

> (a) corporate and other major decision-making occurs from the consolidated offices in New York, New York and Ruston, Virginia;
>
> (b) all of the senior executives of the Chapter 11 Debtors, including the Canadian Debtors, are residents of the United States;
>
> (c) the majority of the management of the Chapter 11 Debtors, including the Canadian Debtors, is shared;
>
> (d) the majority of employee administration, human resource functions, marketing and communication decisions are made, and related functions taken, on behalf of all of the Chapter 11 Debtors, including the Canadian Debtors, in the United States;
>
> (e) the Chapter 11 Debtors, including the Canadian Debtors, also share a cash-management system that is overseen by employees of the United States-based Chapter 11 Debtors and located primarily in the United States; and
>
> (f) other functions shared between the Chapter 11 Debtors, including the Canadian Debtors, and primarily managed from the United States include, pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions.

13 Counsel further submits that the Canadian Debtors are wholly dependent on the Applicant and other members of the Chapter 11 Debtors located in the United States for all or substantially all of their funding requirements.

14 Further, the Canadian Debtors have guaranteed the credit facilities which were extended to LSLP as borrower and such guarantee is allegedly secured by a priority interest on the assets of the Canadian Debtors. As such, counsel submits that the majority of the creditors of the Chapter 11 Debtors are also common.

15 The Interim Initial Order granted on May 15, 2012, reflected an exercise of both statutory jurisdiction and the court's inherent juridical discretion. In arriving at the decision to grant interim relief, I was satisfied that it was appropriate to provide such relief in order to alleviate any potential harm to the Chapter 11 Debtors or their Canadian assets during the interim period.

16 The issue for consideration on this motion is whether the court should recognize the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to the CCAA and grant the Initial Recognition Order sought by the Applicant and, if so, whether the court should also grant the Supplemental Order under s. 49 of the CCAA to (i) recognize and enforce in Canada certain orders of the U.S. Court made in the Chapter 11 Proceedings; (ii) appoint A&M as Information Officer in respect of these proceedings; and (iii) grant an Administration Charge over the Chapter 11 Debtors' property.

  

17 Section 46 (1) of the CCAA provides that a "foreign representative" may apply to the court for recognition of a "foreign proceeding" in respect of which he or she is a "foreign representative".

18 Court proceedings under Chapter 11 of the Bankruptcy Code have consistently been found to be "foreign proceedings" for the purposes of the CCAA. In this respect, see *Massachusetts Elephant & Castle Group Inc., Re* (2011), 81 C.B.R. (5th) 102 (Ont. S.C.J.) and *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

19 I accept that the Chapter 11 Proceedings are "foreign proceedings" for the purposes of the CCAA and that LSLP is a "foreign representative".

20 However, it is noted that the status of LSLP as a foreign representative is subject to further consideration by the U.S. Court on June 11, 2012. If, for whatever reason, the status of LSLP is altered by the U.S. Court, it follows that this issue will have to be reviewed by this court.

21 LSLP submits that the Chapter 11 Proceedings should be declared a "foreign main proceeding". Under s. 47 (1) of the CCAA, it is necessary under s. 47 (2) to determine whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding".

22 Section 45 (1) of the CCAA defines a "foreign main proceeding" as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests".

23 Section 45 (2) of the CCAA provides that for the purposes of Part IV of the CCAA, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests ("COMI").

24 In this case, the registered offices of the Canadian Debtors are in Canada. Counsel to the Applicant submits, however, that the COMI of the Canadian Debtors is not in the location of the registered offices.

25 In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, in my view, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests. The factors are:

(i) the location is readily ascertainable by creditors;
(ii) the location is one in which the debtor's principal assets or operations are found; and
(iii) the location is where the management of the debtor takes place.

26 In most cases, these factors will all point to a single jurisdiction as the centre of main interests. In some cases, there may be conflicts among the factors, requiring a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

27 When the court determines that there is proof contrary to the presumption in s. 45 (2), the court should, in my view, consider these factors in determining the location of the debtor's centre of main interests.

28 The above analysis is consistent with preliminary commentary in the Report of UNCITRAL Working Group V (Insolvency Law) of its 41st Session (New York, 30 April — 4 May, 2012) (Working Paper AICN.9/742, paragraph 52. In my view, this approach provides an appropriate framework for the COMI analysis and is intended to be a refinement of the views I previously expressed in *Massachusetts Elephant & Castle Group Inc., Re, supra.*

29 Part IV of the CCAA does not specifically take into account corporate groups. It is therefore necessary to consider the COMI issue on an entity-by-entity basis.

30 In this case, the foreign proceeding was filed in the United States and based on the facts summarized at [11] — [14], LSLP submits that the COMI of each of the Canadian Debtors is in the United States.

31 After considering these facts and the factors set out in [25] and [26], I am persuaded that the COMI of the Canadian Debtors is in the United States. It follows, therefore, that in this case, the "foreign proceeding" is a "foreign main proceeding".

32 Having recognized the "foreign proceeding" as a "foreign main proceeding", subsection 48 (1) of the CCAA requires the court to grant certain enumerated relief subject to any terms and conditions it considers appropriate. This relief is set out in the Initial Recognition Order, which relief is granted in the form submitted.

33 Additionally, s. 50 of the CCAA provides the court with the jurisdiction to make any order under Part IV of the CCAA on the terms and conditions it considers appropriate in the circumstances.

34 The final issue to consider is whether the court should grant the Supplemental Order sought by the Applicant under s. 49 of the CCAA and (i) recognize and enforce in Canada certain orders of the U.S. Court made in the Chapter 11 Proceedings; (ii) appoint A&M as Information Officer in respect of these proceedings; and (iii) grant an Administration Charge over the Chapter 11 Debtors' property.

35 If an order recognizing the "foreign proceedings" has been made (foreign main or foreign non-main), subsection 49 (1) of the CCAA provides the authority for the court, if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, to make any order that it considers appropriate.

36 In this case, the Applicant is requesting recognition of the first day orders granted in the U.S. Court. Based on the record, I am satisfied that it is appropriate to recognize these orders.

37 Additionally, I am satisfied that the appointment of A&M as Information Officer will help to facilitate these proceedings and the dissemination of information concerning the Chapter 11 Proceedings and this relief is appropriate on the terms set forth in the draft order. The proposed order also provides that the Information Officer be entitled to the benefit of an Administration Charge, which charge shall not exceed an aggregate amount of $200,000, as security for their professional fees and disbursements. I am satisfied that the inclusion of this Administration Charge in the draft order is appropriate.

38 The ancillary relief requested in the draft order is also appropriate in the circumstances.

39 Accordingly, the Supplemental Order is granted in the form presented. The Supplemental Order contains copies of the first day orders granted in the U.S. Court.

40 Finally, on an ongoing basis, it would be appreciated if counsel would, in addition to filing the required paper record, also file an electronic copy by way of a USB key directly with the Commercial List Office.

*Motion granted.*

**End of Document**

# Tab 9

2012 BCSC 1565
British Columbia Supreme Court [In Chambers]

Digital Domain Media Group Inc., Re

2012 CarswellBC 3210, 2012 BCSC 1565, [2013] B.C.W.L.D. 919, 223 A.C.W.S. (3d) 16, 95 C.B.R. (5th) 318

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

And In the Matter of certain proceedings taken in the United States Bankruptcy Court for the District of Delaware with respect to the companies listed on Schedule "A" hereto, (the "Debtors") Application of Digital Domain Media Group, Inc. under Part IV of the Companies' Creditors Arrangement Act (Cross-Border Insolvencies), Petitioner

Fitzpatrick J.

Heard: September 18, 2012
Judgment: September 18, 2012
Docket: Vancouver S126501

Counsel: D. Grieve, D. Ward, E. Morris for Petitioner
D. Grassgreen, J. Rosell (United States Counsel) for Petitioner
P. Rubin for Tenor Opportunity Master Fund, Ltd., others
C. Brousson for Comvest Capital II, LP
C. Ramsay, J. Dietrich for Searchlight Capital LP/VFX Holdings LLC
M. Buttery for Third Party, Proposal Information Officer, Alvarez & Marsal Canada Inc.

Subject: Insolvency

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

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

Recognition of foreign proceeding — Petitioner American debtor was parent company of Canadian company and thirteen American companies (together, "corporate group") — Corporate group filed under Chapter 11 of United States Bankruptcy Code and obtained foreign representation order and interim financing orders detailing debtor-in-possession (DIP) financing facility — Debtor brought petition for order recognizing Chapter 11 proceedings and for ancillary relief — Petition granted — Chapter 11 proceeding was "foreign proceeding" as defined in s. 45(1) of Companies' Creditors Arrangement Act ("CCAA") — Debtor was "foreign representative" for purposes of CCAA — Chapter 11 proceedings were "foreign main proceeding" in accordance with CCAA — Centre of main interest of entire corporate group, including Canadian company, was United States of America ("USA") — Debtor was highly-integrated corporate group centrally managed out of USA — Ancillary orders were granted, as they were appropriate to make — Coordinated

approach was appropriate in these circumstances.

**Table of Authorities**

**Cases considered by *Fitzpatrick J.*:**

*Allied Systems Holdings Inc., Re* (2012), 2012 ONSC 4343 (Ont. S.C.J. [Commercial List]) — referred to

*Angiotech Pharmaceuticals Inc., Re* (2011), 2011 BCSC 115, 2011 CarswellBC 124, 76 C.B.R. (5th) 317 (B.C. S.C. [In Chambers]) — followed

*Lightsquared LP, Re* (2012), 2012 ONSC 2994, 2012 CarswellOnt 8614, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]) — considered

*Massachusetts Elephant & Castle Group Inc., Re* (2011), 81 C.B.R. (5th) 102, 2011 CarswellOnt 6610, 2011 ONSC 4201 (Ont. S.C.J.) — considered

**Statutes considered:**

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

Chapter 11 — referred to

s. 1505 — referred to

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

Pt. IV — referred to

s. 44 — referred to

s. 45(1) "foreign proceeding" — considered

s. 45(2) — considered

s. 47(1) — referred to

s. 47(2) — considered

s. 48(1)(a)-48(1)(d) — referred to

s. 49 — considered

s. 52(1) — considered

s. 52(3) — considered

PETITION by parent company debtor for order recognizing bankruptcy proceedings in United States of America, and ancillary relief.

*Fitzpatrick J.*:

**I. Introduction**

1 The petitioner, Digital Domain Media Group, Inc. ("Digital Domain"), brings this proceeding under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the *"CCAA")* seeking an order recognizing certain proceedings underway in the United States in respect of Digital Domain and several of its subsidiaries. Other ancillary relief is also sought.

2 Digital Domain is the parent company of an extensive corporate group consisting of fourteen companies. The corporate group specializes in computer-generated imagery, animation and visual effects for major motion picture studios and advertisers. Thirteen members of the group are American corporations which are incorporated in either Florida, California or Delaware. All of those corporations conduct business in the United States.

3 The British Columbia connection to this group is the fourteenth corporation, Digital Domain Productions (Vancouver) Ltd. ("Digital Vancouver"). Digital Vancouver's operations are an integral part of the overall business of the corporate group. As I understand it, a substantial portion of the corporate group's operations are conducted through Digital Vancouver, presumably because of the tax advantages that are available in this jurisdiction.

4 The corporate group as a whole has approximately 765 employees. That number arises even after a substantial reduction in the number of employees after certain recent downsizing of operations. Digital Vancouver operates from leased premises in the Vancouver area and now has approximately 260 employees.

5 There are various secured creditors of the corporate group. Firstly, a syndicate of first secured note holders is owed approximately US$75 million. Secondly, Comvest Capital II, LP is a subordinated secured creditor who is owed approximately US$8 million.

6 The evidence as to the background of this matter is contained in the affidavit of Michael Katzenstein, the current Chief Restructuring Officer of the corporate group. In late August 2012, he was appointed as Interim Chief Operating Officer of the Debtors. Mr. Katzenstein sets out in detail the difficult circumstances in which the Digital Domain group finds itself. Essentially, cash flow appears to have recently dried up, which in turn has led to defaults under various lending agreements.

7 The exigent financial circumstances of the Digital Domain group led to a filing under Chapter 11 of the United States *Bankruptcy Code* on September 11, 2012 in the United States Bankruptcy Court for the District of Delaware. The following day, the Honourable Brendan Shannon granted relief pursuant to Chapter 11, and in particular, he granted various First Day Orders, the details of which I will outline below.

## II. Background

8 This matter is quite urgent. The reasons for the urgency are, for the most part, set out in paragraph 70 of Mr. Katzenstein's affidavit. In summary, it appears that the movie studios which use the services of the Digital Domain group have expressed significant concern about the financial circumstances of the corporate group and accordingly, the corporate group's ability to deliver the goods and services that are to be provided to the studios in respect of ongoing productions. The movie studios have made repeated demands for immediate assurances that the corporate group can make the required deliveries. There was considerable concern under those circumstances that if action was not taken very quickly, the lifeblood or the core business of the Digital Domain group would disappear, leaving no enterprise value whatsoever.

9 Accordingly, the Digital Domain group has moved very quickly to seek relief, and Judge Shannon recently did grant the various First Day Orders. Those First Day Orders include a Foreign Representative Order appointing the parent company, Digital Domain, as a foreign representative with the authorization to seek recognition of the Chapter 11 proceedings, to request that the Canadian court lend assistance in protecting the property of the corporate group, and to seek any other appropriate relief.

10 Other First Day Orders include: a Cash Management Order to permit the management of the cash within the group, and allow intercompany advances; an Interim Pre-Petition Wages Order to allow for the payment of wages to employees so as to ensure they continue working, thereby preserving the value of their work; an Insurance Order to allow payment of ongoing insurance; and a Critical Vendor Order to allow payments to certain critical vendors.

11 Interim Financing Orders were also granted. Those orders detail a debtor-in-possession ("DIP") financing facility, as approved by Judge Shannon. Following some initial orders in relation to the DIP facility, the third order authorizes a DIP facility up to a maximum of US$20 million, although only approximately US$11.8 million has been made available on an interim basis. Only approximately US$6 million has been advanced by the DIP lenders on an interim basis until things are more certain in respect of both the Chapter 11 proceedings and these proceedings. The Interim Financing Orders provide for a charge on the United States assets in respect of the DIP financing.

12 The final First Day Order for which recognition is now sought is a Bid Procedures Order. This order speaks to the urgency with which the United States proceedings were brought, and also presumably to the basis upon which this application is brought. By this order, an asset purchase agreement dated September 11, 2012 between the corporate group and a stalking-horse bidder, VFX Holdings LLC, was approved. It is intended that a sale of the corporate group's assets be completed in an extremely quick manner.

13 So that it is apparent just how urgent these matters are, I will review the intended procedures in some detail. That there is urgency in completing a sale has been accepted by the American court. There is to be a hearing by September 20, 2012 that is intended to confirm the bid procedures and allow for any creditor to object to those bid procedures. I am advised by counsel for the proposed Information Officer, Alvarez & Marsal Canada Inc., that there appears to be one party who wishes to weigh in on that procedure, although it is not clear if it will object to the proposed process. An auction is also intended to be held on September 21, 2012 to consider the bids. Finally, it is intended that there will be an application on September 24, 2012 before the United States Bankruptcy Court to consider approval of a sale. Assuming that approval is granted, it is intended that the sale will close that very day on September 24. As I already stated, the rapidity with which this is intended to

  

happen is illustrative of the fact that the various stakeholders here are extremely concerned about the relationship between the corporate group and the movie studios, and that the business of the group may disappear unless things are regularized very quickly.

14 A further hearing within the United States proceedings is scheduled for October 1, 2012, at which date the court will consider confirming certain matters relating to the DIP financing. That will obviously be driven to some extent by whether a sale completes on September 24. I am advised, however, that even if a sale closes, the DIP financing will be required in order to deal with the remaining assets in the corporate group.

## III. Discussion

### *A. Order recognizing the U.S. proceeding*

#### *(i) Is the U.S. proceeding a "foreign proceeding"?*

15 The first issue relates to the recognition order being sought under Part IV of the *CCAA*. The first question is whether this is a "foreign proceeding". Chapter 11 proceedings under the United States *Bankruptcy Code* are well known to this Court and other Canadian courts. There is no mystery in that respect, and I think it is well taken that a Chapter 11 proceeding is a "foreign proceeding" as defined in s. 45(1) of the *CCAA*.

#### *(ii) Is Digital Domain a "foreign representative"?*

16 The second issue is whether Digital Domain is a "foreign representative". "Foreign representative" is also a defined term under s. 45(1) of the *CCAA*. In that respect, the petitioner's counsel has referred me to the order authorizing Digital Domain to act as foreign representative pursuant to s. 1505 of the United States *Bankruptcy Code*. As earlier stated, Judge Shannon's order dated September 12, 2012 specifically authorizes Digital Domain to act as a "foreign representative" for the purposes that I earlier stated.

17 Accordingly, I am satisfied that Digital Domain is a "foreign representative" for the purposes of the *CCAA*.

#### *(iii) Is the U.S. proceeding a "foreign main proceeding"?*

18 If the court is satisfied that this is a foreign proceeding and that the applicant is a foreign representative, it is then required to make an order recognizing the foreign proceeding under s. 47(1). Section 47(2) provides that the court must specify in the order whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding". Both of those are defined terms, again found in s. 45(1) of the *CCAA*. In addition, s. 45(2) of the *CCAA* provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interest.

19 The registered offices of all thirteen American members of the corporate group are situated in the United States. Therefore, the presumption in s. 45(2) of the *CCAA* would deem their centres of main interest ("COMI") to be in the United States, which would in turn dictate a finding, subject to any other evidence, that it is a "foreign main proceeding". I am

satisfied that the COMI of each of the thirteen American corporate group members is located in the United States.

20 The more difficult issue relates to Digital Vancouver, which I am advised has its registered office in British Columbia. Subsection 45(2) of *CCAA* deems its COMI to be Canada, subject to that presumption being rebutted by other evidence.

21 A number of Canadian authorities have addressed this issue. In *Angiotech Pharmaceuticals Inc., Re*, 2011 BCSC 115 (B.C. S.C. [In Chambers]) at para. 7, Mr. Justice Walker outlined various factors that are to be considered:

> [7] The factors considered by the courts in Canada that are relevant to the centre of main interest issue are:
>
> (a) the location where corporate decisions are made;
>
> (b) the location of employee administrations, including human resource functions;
>
> (c) the location of the company's marketing and communication functions;
>
> (d) whether the enterprise is managed on a consolidated basis;
>
> (e) the extent of integration of an enterprise's international operations;
>
> (f) the centre of an enterprise's corporate, banking, strategic and management functions;
>
> (g) the existence of shared management within entities and in an organization;
>
> (h) the location where cash management and accounting functions are overseen;
>
> (i) the location where pricing decisions and new business development initiatives are created; and
>
> (j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

22 In *Massachusetts Elephant & Castle Group Inc., Re*, 2011 ONSC 4201 (Ont. S.C.J.), Mr. Justice Morawetz, at para. 26, recognized the *Angiotech* factors as above, and also identified what he considered to be the most significant factors:

> [30] However, it seems to me, in interpreting COMI, the following factors are usually significant:
>
> (a) the location of the debtor's headquarters or head office functions or nerve centre;
>
> (b) the location of the debtor's management; and
>
> (c) the location which significant creditors recognize as being the centre of the company's operations.

23 Mr. Justice Morawetz had further opportunity to revisit the issue on two other occasions. In *Lightsquared LP, Re*, 2012 ONSC 2994 (Ont. S.C.J. [Commercial List]), he indicated that the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's COMI:

> [25] In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, in my view, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests. The factors are:
>
> (i) the location is readily ascertainable by creditors;
>
> (ii) the location is one in which the debtor's principal assets or operations are found; and
>
> (iii) the location is where the management of the debtor takes place.

See also *Allied Systems Holdings Inc., Re*, 2012 ONSC 4343 (Ont. S.C.J. [Commercial List]) at para. 7.

24 Clearly, a determination of this issue will depend on the particular circumstances and facts of each case.

25 Counsel for Digital Domain identified a variety of factors which he says support a finding that the COMI for not only the United States Debtors, but also Digital Vancouver, is in the United States. I will summarize those briefly:

> (1) The corporate group is a very integrated group, and the nerve centre of the group's digital production business is in California, which is a location readily ascertainable by creditors.
>
> (2) The principal assets of the group are the movie projects that produce 90% of the revenue for the group. These projects emanate from and are managed and operated from the United States It appears to be the case that a significant portion of the work on those movie projects is conducted in Vancouver.
>
> (3) The management of the entire group takes place in the United States. All operational, strategic and legal decision-making, marketing, communications, cash-management functions, bidding, sales and pricing, payroll, and accounting oversight of the business are conducted from the group's California headquarters.
>
> (4) All of the directors and officers and all members of senior management of the Debtors are located and reside in the United States. I am advised that Mr. Katzenstein, the CRO, is from New York and is now the sole director of Digital Vancouver here in British Columbia.
>
> (5) General counsel for all of the Debtors are situated in the U.S.
>
> (6) Digital Vancouver personnel, including production crews and support staff, are required to report directly to senior management in California. A number of managerial or executive-level employees of Digital Domain Productions, Inc. ("Digital Productions") in the United States provide temporary production and/or administrative services on behalf of Digital Vancouver.
>
> (7) Digital Vancouver's accounts receivable and collections efforts are managed in California.
>
> (8) All proprietary technology, systems and processes used by Digital Vancouver are owned by and fully integrated with Digital Productions.
>
> (9) All of Digital Vancouver's production projects are developed and documented by employees in California. Digital Vancouver has no authorization or infrastructure to engage in any marketing or sales, or to solicit, create or submit bids.

26 In summary, this highly-integrated corporate group is centrally managed out of the United States. The main connection to this jurisdiction is that Digital Vancouver's registered office is in Vancouver. There are also assets, of course, in Vancouver. There are some cash accounts that are owned and managed in Vancouver by Digital Vancouver. In addition, there are other assets, such as desks and chairs and technology equipment. As a member of the corporate group, however, Digital Vancouver has guaranteed the secured debt that I have earlier outlined in these reasons. Accordingly, those assets are tied into the financing which is done on a group-wide basis, and which is coordinated with the assets in the United States.

27 I would also add that the proposed Information Officer has commented on the COMI issue in its first report dated September 17, 2012. It identifies the same factors as did Digital Domain in support of a finding that the COMI of the entire corporate group is in the United States.

28 In the above circumstances, I conclude that the COMI of the entire corporate group, including Digital Vancouver, is in the United States. The fact that Vancouver is the location of Digital Vancouver's registered office is not conclusive, particularly in light of the other factors which point to the United States: its management functions take place in the United States; its operations are, to a large extent, conducted in the United States; and any creditor dealing with Digital Vancouver would, I think, gravitate to the United States connections.

29 I find that the United States Chapter 11 proceedings are a "foreign main proceeding" in accordance with the *CCAA*. Having made that determination, s. 48 of the *CCAA* dictates that I shall make certain orders staying proceedings as are set out in subparagraphs (a) through (d) of that section. Accordingly, the first order sought is granted.

***B. Order for ancillary relief***

30 The petitioner also seeks a second order for various ancillary relief. Section 49 of the *CCAA* provides that if a recognition order is made, the court may make any order that it considers appropriate if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors.

31 The ancillary relief sought by Digital Domain includes: an order appointing Alvarez & Marsal Canada Inc. as the Information Officer, and providing the powers and duties flowing from that appointment; an order granting a broader stay of proceedings; an order recognizing the various First Day Orders granted by Judge Shannon which I have earlier outlined in these reasons; and finally, an order granting a charge in favour of the DIP lenders over the property and assets in Canada to secure the obligations of the Debtors under what has been called the Interim Financing Orders. These are, of course, the same DIP lenders approved in the Chapter 11 proceedings.

32 With respect to the proposed Information Officer, counsel for Digital Domain refers to ss. 52(1) and (3) of the *CCAA*, which provide that the court shall cooperate with the foreign representative and foreign court. That cooperation may be by means of the appointment of such a person. The proposed role of Alvarez & Marsal Canada Inc. is to provide information to not only this court, but to other creditors and stakeholders as may be appropriate. To some extent, this role is similar to the role of a monitor in *CCAA* proceedings.

33 In this case, I am satisfied that the appointment of Alvarez & Marsal Canada Inc. as the Information Officer is

  

appropriate, and that the accompanying provisions relating to the Information Officer in the proposed draft order are also appropriate.

34 The order sought also includes a broader stay of proceedings, and there are various provisions in this draft order which are not dissimilar to what might be found in a typical initial order granted in *CCAA* proceedings. Counsel have taken me through those provisions, and they appear to essentially track the wording found in the British Columbia model initial order that has been published by our court for the purpose of *CCAA* proceedings. I am satisfied that those provisions are appropriate in this case.

35 The other aspect of the ancillary relief sought is an order recognizing the First Day Orders. I have already found that the COMI for the entire corporate group, since it is highly integrated, is in the United States. It is clear that the parties need to move and — more to the point — move quickly. It is in the interest of all stakeholders that there be a coordinated approach in terms of dealing with this matter so as to preserve value for the stakeholders. Accordingly, having reviewed Mr. Katzenstein's affidavit in detail in terms of the various orders that were granted and the reasons for those orders, I am satisfied that recognition of those First Day Orders is appropriate.

36 The fourth and final ancillary relief sought is an order recognizing the charge in favour of the DIP lenders and also allowing that charge over the assets in Canada. It is clear, and not unusually so, that the DIP lending in this case is an integral part of these proceedings. The charge has been granted by the United States court, and the DIP financing and charge was seen as an essential factor so as to allow these proceedings to move very quickly and with the confidence of the creditors. The financing has provided, and will provide, sufficient cash flow to allow continued operations, which again is critical in maintaining enterprise value by allaying the concerns expressed by the movie studios.

37 I am satisfied that a coordinated approach is appropriate in these circumstances. I would also note that a significant portion of the funding is required by Digital Vancouver, who, as I said, represents a significant portion of the overall operations of the Digital Domain group.

38 As mentioned earlier in these reasons, the Canadian assets are in play in these proceedings, given the guarantee of the existing secured debt by Digital Vancouver and the charge over those assets in support of that guarantee.

39 Accordingly, I am satisfied that the DIP charge as proposed in the order is appropriate at this time.

## IV. Disposition

40 I am satisfied that both orders sought today are appropriate and are consistent with the stated purpose of Part IV of the *CCAA*, as set out in s. 44, in terms of promoting cooperation between the courts in cross-border insolvencies, preserving value for all stakeholders, wherever located, and providing for a fair and efficient administration of these estates.

**Schedule "A"**

**Debtors**

Digital Domain Media Group, Inc.

Digital Domain

DDH Land Holdings, LLC

Digital Domain Institute, Inc.

Digital Domain Stereo Group, Inc.

DDH Land Holdings II, LLC

Digital Domain International, Inc.

Tradition Studios, Inc.

Digital Domain Tactical, Inc.

Digital Domain Productions, Inc.

Mothership Media, Inc.

D2 Software, Inc.

Digital Domain Productions (Vancouver) Ltd.

Tembo Productions, Inc.

*Petition granted.*

**End of Document**



 

# Tab 10

2011 ONSC 4136
Ontario Superior Court of Justice [Commercial List]

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.

2011 CarswellOnt 5867, 2011 ONSC 4136, 204 A.C.W.S. (3d) 543, 80 C.B.R. (5th) 259

# General Electric Canada Real Estate Financing Holding Company and General Electric Capital Canada Holdings Company (Applicants) and Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, Rahim Bhaloo and Meyers Norris Penny Limited in its capacity as Receiver and Trustee in Bankruptcy of the Estates of 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited and 2007383 Ontario Inc. (Respondents)

D.M. Brown J.

Heard: June 27, 2011
Judgment: June 30, 2011***
Docket: CV-11-9169-00CL

Proceedings: leave to appeal refused *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 CarswellOnt 8054, 2011 ONSC 4704 (Ont. Div. Ct.)

Counsel: C. Prophet, N. Kluge for Receiver
L. Brzezinski, D. Magisano, G. Kim for Applicants
T. Pinos for Respondents, Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, Rahim Bhaloo
S. Mitra for Proposed Receiver, Albert Gelman Inc.
R. Macklin for 2068308 Ontario Inc.

Subject: Insolvency; Corporate and Commercial

## Headnote

### Bankruptcy and insolvency --- Receivers — Appointment

Bankrupt companies operated retirement residences managed by respondent L Inc. — Respondent 729 Ltd. was shareholder in bankrupt companies — 729 Ltd. had ownership interest in R residences — R residences were sold at profit — Applicant trustee in bankruptcy had concerns about accuracy and completeness of information it received concerning bankrupt companies, 729 Ltd., L Inc., and R residences — Trustee believed 729 Ltd. and L Inc. were debtors of bankrupt companies — Trustee brought motion for order appointing investigative receiver over L Inc. and 729 Ltd. — Motion was granted in part — Investigative receiver was appointed over 729 Ltd. — There were serious concerns about accuracy of information 729 Ltd. provided — There was serious question to be tried as to whether payments made by bankrupt companies to 729 Ltd. were preferences under s. 95 of Bankruptcy and Insolvency Act — Receiver was to look into transactions between bankrupt companies and 729 Ltd., to ascertain 729 Ltd.'s interest in proceeds of R residences, and to ascertain state of disbursement of proceeds of sale — Investigative receiver was not appointed over L Inc. — There may have been contract-based reason for payments to and from bankrupt companies and L Inc. — There was insufficient evidence regarding L Inc. and its affairs and inconsistencies.

## Table of Authorities

### Cases considered by *D.M. Brown J.*:

*Anderson v. Hunking* (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — followed

*Century Services Inc. v. New World Engineering Corp.* (July 28, 2006), Doc. 06-CL-6558 (Ont. S.C.J.) — considered

*Loblaw Brands Ltd. v. Thornton* (2009), 2009 CarswellOnt 1588, 78 C.P.C. (6th) 189 (Ont. S.C.J.) — considered

*Pandya v. Simpson* (November 17, 2005), Doc. 05-CL-6159 (Ont. Gen. Div.) — considered

*RJR-MacDonald Inc. v Canada (Attorney General)* (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

*Stroh v. Millers Cove Resources Inc.* (1995), 1995 CarswellOnt 3551 (Ont. Gen. Div. [Commercial List]) — considered

*Stroh v. Millers Cove Resources Inc.* (1995), 85 O.A.C. 26, 1995 CarswellOnt 275 (Ont. Div. Ct.) — considered

*WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.* (2009), 2009 CarswellOnt 6182, 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]) — considered

### Statutes considered:

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

s. 163 — referred to

*Business Corporations Act*, R.S.O. 1990, c. B.16
s. 248 — considered

*Courts of Justice Act*, R.S.O. 1990, c. C.43
s. 101 — considered

MOTION by trustee in bankruptcy to appoint investigative receiver.

***D.M. Brown J.*:**

**I. Motion to appoint an investigative receiver**

1 MNP Ltd., formerly Meyers Norris Penny Limited ("MNP"), is the Trustee in Bankruptcy of 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited, and 2007383 Ontario Inc. (the "Bankrupt Companies"). The Bankrupt Companies were part of a group of related companies which invested in and operated retirement homes (the "Liberty Group").

2 MNP seeks an Order appointing Albert Gelman Inc. as receiver with full powers of investigation and monitoring in relation to the respondents, Liberty Assisted Living Inc. ("Liberty Assisted") and 729285 Ontario Limited ("729285"), pursuant to Section 101 of the *Courts of Justice Act*, and section 248 of the Ontario *Business Corporations Act* ("*OBCA*"), but without power or obligation to take possession and control of the property, assets and undertakings of Liberty Assisted or 729285, and with the power to assign 729285 into bankruptcy. MNP argues that the Court should grant the relief requested because it has not received satisfactory answers to its inquiries regarding various transactions and relationships among the Liberty Group entities and investors.

3 The applicants, General Electric Canada Real Estate Financing Holding Company and General Electric Capital Canada Holdings Company ("GE"), support the Trustee's motion.

4 The Respondents, Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, and Rahim Bhaloo, whom I will periodically refer to as the "Liberty Group Respondents", oppose the Trustee's motion, contending that the Trustee is seeking extraordinary receivership orders against a corporation which has no loan or security agreements with the applicants. 729285 submits there is no factual or legal basis for the relief sought, and that the motion represents an unwarranted and inappropriate attempt by the Trustee to reach far beyond the scope of its powers, and to unjustifiably attack these respondents personally and in their business.

5 2068308 Ontario Inc. submits that no order should be made freezing the balance of the Royalton Proceeds presently held in trust at Cassels Brock LLP.

6 For the reasons set out below, I grant the motion, in part.

**II. Background Facts**

***A. The Liberty Group***

7 The Bankrupt Companies operated three retirement residences in Toronto and Windsor - Beach Arms, Liberty Place, and La Chaumière. Each Bankrupt Company was owned by a separate company, which in turn was owned by the Beach Group Limited, who in turn held its interests in trust for a group of investor co-owners.

8 The respondent, Liberty Assisted Living Inc., is the management company that until recently managed those three

retirement residences. Gregory Goutis is the Chief Financial Officer of Liberty Assisted.

9 729285 Ontario Limited is a company related to Liberty Assisted. 729285 is a shareholder of the Beach Group Limited which holds all the shares of the Bankrupt Respondents.

10 Amir Kassam and Rahim Bhaloo are officers and directors of the Bankrupt Companies, Liberty Assisted, and 729285.

11 729982 Ontario Limited ("729982") is the family holding company of Kassam.

12 In addition to the Bankrupt Companies, Liberty Assisted also manages two other retirement residences in Quebec, Château Royal and Château Dollard.

***B. Default by the Bankrupt Companies***

13 General Electric Canada Real Estate Financing Holding Company and General Electric Capital Canada Holdings Company are the secured lenders of the Bankrupt Companies, and as at April 6, 2011, were owed the sum of $19,399,225.00. GE had purchased the loan and attendant security from Column Financial on June 25, 2008.

14 As a result of a series of defaults under its security, GE secured the appointment of MNP as Receiver of the Bankrupt Companies on March 10, 2011, with the power to assign them into bankruptcy. The defaults included the failure of the Bankrupt Companies to provide quarterly financial statements as required by the terms of the mortgages securing the loans. On March 21, 2011, a further order was made extending the receivership to another numbered company involved in the operation of one of the residences and terminating the management agreement between the residences and Liberty Assisted.

15 The Receiver assigned the Bankrupt Companies into bankruptcy on March 15, 2011. The Receiver is now the Trustee in Bankruptcy.

16 The Trustee contends that the Bankrupt Companies were insolvent during the period from January 1, 2010, and March 11, 2011 (the "Insolvency Period"). The Companies dispute that, but only to the extent that the period of insolvency might have been a few months shorter.

17 During the Insolvency Period the Bankrupt Companies were seriously in arrears of the payment of realty taxes, and GE paid tax arrears to the relevant municipalities in January, 2011. By early this year some of the Bankrupt Companies were in arrears in paying their employees' salaries.

***C. Efforts by Trustee to obtain information about the transactions***

18 This Court has made several orders requiring the Bankrupt Companies and others in the Liberty Group to provide financial information to the Trustee. On April 14, 2011, Mesbur J. ordered Messrs. Goutis, Bhallo and Kassam to submit to *BIA* section 163 examinations and required Liberty Assisted and 729285 to deliver various financial records to the Trustee. On April 21 I ordered Liberty Assisted and 729285 to deliver to the Trustee copies of their unaudited 2008 and 2009 financial statements. To date the Trustee has obtained evidence regarding activities involving the Bankrupt Companies in the following stages:

(a) Affidavits sworn April 7, 2011 by Bhaloo and Goutis;

(b) Affidavit of Goutis sworn April 13, 2011;

(c) Examinations of Kassam, Bhaloo, and Goutis on April 20 and 21, 2011;

(d) Answers to undertakings arising out the April 21 Examinations;

(e) Affidavit of Goutis sworn May 19, 2011;

(f) Examination of Goutis on May 27, 2011;

(g) Answers to undertakings arising out of the May 27 Examination; and,

(h) Affidavit of Bhaloo sworn June 23, 2011.

***D. Financial relationship between 729285 and the Bankrupt Companies***

19 As mentioned, Beach Group is the sole shareholder of the Bankrupt Companies. 729285 is the single largest shareholder and co-owner of Beach Group, owning 40 of the 123 units (a 33% interest). Kassam is a director of Beach Group, 729285 and the Bankrupt Companies.

20 In 2007, the Bankrupt Companies refinanced their loan of approximately $17,000,000.00 with Column Financial. Approximately $2,500,000.00 of the loan was distributed to the shareholders/co-owners, including 729285, as an equity takeout proportionate to their co-ownership interest in the Bankrupt Companies. The Trustee presumes that 729285 received $825,000.00 of this equity payout. According to the Trustee, that amount was not used to refinance existing encumbrances or to reinvest into the Bankrupt Companies.

21 It is the position of the Trustee that between January 2010 and March 11, 2011, the Bankrupt Companies were insolvent. In its Second Report dated April 25, 2011 the Trustee reported on the intercompany payments from the Bankrupt Companies to 729285 during that Insolvency Period. The amounts reported, subject to later adjustment, were as follows:

(i) Beach Arms paid a minimum of $145,600.00 to 729285;

(ii) La Chaumière paid a minimum of $633,313.22 to 729285; and,

(iii) Liberty Place paid a minimum of $97,177.84 to 729285.

  

22 In its Second Report the Trustee stated:

> In the circumstances and on the basis of all the information provided thus far, the Trustee believes that preference actions or action in relation to under-value transactions (in the nature of fraudulent preference or fraudulent conveyance proceedings) should be initiated in relation to payments from the Bankrupt Residences to 729285 and Liberty Assisted during the period from January 1, 2010 to March 11, 2011, at a minimum.

23 Mr. Goutis swore an affidavit dated April 13, 2011, in which he set out the work he had performed to ascertain the intercompany indebtedness as between 729285 and the Bankrupt Companies. He was cross-examined on his work product on May 27. During the course of his cross-examination he admitted that as at the date of bankrupty:

(i) 729285 owed Beach Arms $218,656.00;[1]

(ii) 729285 owed Liberty Place $35,270.00;[2] and,

(iii) La Chaumière owed 729285 the sum of $38,700.00.[3]

24 According to the Trustee, during the Insolvency Period the Bankrupt Companies paid a total of $876,170.97 to 729285 and presently 729285 is a net debtor of the Bankrupt Companies in the amount of $215,926.00, or in the amount of $602,870.25 — the Trustee stated that the evidence of Goutis varied on this point.

25 729285 submitted that the Liberty Group of companies were operated on the basis that the companies transferred funds amongst themselves to meet expenses as they arose. As a result, during the Insolvency Period the Bankrupt Companies, 729285, Liberty Assisted, and 729982 transferred funds from and to each other. Funds were also transferred to and from these entities and Chateau Dollard and Chateau Royale, two retirement residences in Quebec of which Kassam is the director and to which Liberty Assisted provided management services. In its Second Report the Trustee commented on the "complex and apparently random use of corporate vehicles in connection with the Liberty Group and the operation of the Bankrupt Residences".

26 729285 states that when one examines the state of accounts of the Bankrupt Companies during the Insolvency Period in respect of all the other related companies, the Bankrupt Companies are net debtors of the remaining Liberty Group of companies.

***E. Financial relationship between Liberty Assisted and the Bankrupt Companies***

27 Liberty Assisted was the manager of the Bankrupt Companies which paid it management fees. Amir Kassam is the officer and director of Liberty Assisted and is also the officer and director of the Bankrupt Companies.

28 According to the Trustee, during the Insolvency Period, the following payments were made to Liberty Assisted by the individual Bankrupt Respondents:

(i) Beach Arms paid Liberty Assisted $371,452.00;

(ii) La Chaumière paid Liberty Assisted $1,466,427.05; and,

(iii) Liberty Place paid Liberty Assisted $289,440.00.

29 The Trustee states that Liberty Assisted presently is a debtor of the Bankrupt Companies in the following amounts:

(i) Liberty Assisted owes Beach Arms $308,512.93;

(ii) Liberty Assisted owes La Chaumière $1,288,893.59; and

(iii) Liberty Assisted owes Liberty Place $175,522.58.

***F. The Royalton Residences***

*F.1 Ownership structure*

30 729285 had an ownership interest in three retirement residences located in Kanata, Kingston, and London, Ontario, known in these proceedings as the "Royalton Residences". Given the centrality of the Royalton Residences to the relief sought on this motion, let me describe their ownership structure in some detail.

31 Each of the three Royalton Residences was established as a limited partnership. The general partner for each limited partnership was owned 50% by the Maestro Group and 50% by a corporation — one for each residence — which the parties have referred to as the Royalton Companies. The ownership of each of the Royalton Companies was identical: an entity known as the Coram Group owned 50% of each Royalton Company, and 729285 owned the remaining 50%.

32 In sum, 729285 indirectly owned a 25% interest in each of the three Royalton Residences.

33 Whether 729285 held those ownership interests on its own behalf or in trust on behalf of other investors is a key issue on this motion. 729285 asserts that it held the interests only as a trustee for other investors; the Trustee takes the position that matters are not so clear cut and require further investigation.

*F.2 Proceeds of sale of the Royalton Residences*

34 Why this issue matters is that recently the Royalton Residences were sold and generated significant sales proceeds. The Royalton Residences located in Kanata and Kingston were sold on April 28, 2011, for $89,700,000.00. The balance of the closing funds after deducting amounts required to discharge encumbrances and legal fees (the "Royalton Proceeds") were transferred to the trust accounts of Cassels Brock LLP, counsel for 729285 and Liberty Assisted.

35 The Royalton Residence located in London, Ontario was sold to the Maestro Group for the net amount of $1.00.

36 The Trustee takes the position that a court appointed receiver would be entitled, in law, to a minimum of 25% of net Royalton Proceeds. 729285 contends that its only claim to those proceeds is as trustee for other investors.

*F.3 Procedural history following the sale of the Royalton Residences*

37 On April 26, 2011, MNP sought the appointment of a Receiver over 729285 and Liberty Assisted. Those Respondents opposed the motion and sought an adjournment.

38 On April 26, 2011, the Mesbur J. ordered, as a term of the adjournment, that 729285 and 729982 not sell, transfer, encumber, or otherwise deal in any manner with any beneficial interest up to a value of $3 million either of them may currently have or in the future may acquire in any of the Royalton Residences, including their interest in the Royalton Proceeds, pending further order of this Court.

39 Royalton Kanata and Royalton Kingston were sold on April 28, 2011.

40 On or about April 28, 2011, Gowlings inquired of Cassels Brock regarding compliance with the Order of Mesbur J. In a letter dated May 12, 2011, Cassels Brock delivered a letter asserting the following:

> [729]285 confirms that it does not have any beneficial interest in the Royaltons nor does it have any beneficial interest in the proceeds from the sale of any of the Royaltons.
>
> 729982 confirms that it does not have any beneficial interest in the Royaltons nor does it have any beneficial interest in the proceeds from the sale of any of the Royaltons.

41 On May 27, 2011, Goutis, the CFO of the Liberty Group, was cross-examined on his affidavits. Goutis confirmed that the Royalton Proceeds were being held in trust at Cassels Brock.

42 On the same day, Gowlings sent a letter to Cassels Brock claiming an interest in the Royalton Proceeds on behalf of the Trustee and requesting ten days' notice prior to any distribution of the Royalton Proceeds.

43 Around June 8, 2011, Cassels Brock LLP requested an adjournment of this motion without confirming or undertaking that they would not distribute the Royalton Proceeds in the interim. On June 14 the motion came before me, and I adjourned it on the following basis:

> The respondents seek an adjournment; the Tee/Receiver strongly opposes.

> The Royalton net sale proceeds have been released from Cassels Brock trust account. As a result the main issue is whether the Tee/Receiver has a claim for interim relief in the nature of the appointment of an investigator/receiver which would facilitate a tracing of those funds. The respondents want an opportunity to respond to their undertakings.
>
> After balancing the respective interests, I adjourn the motion to my list on Monday, June 27/11 on the following terms:
>
> ...

I then gave directions regarding the treatment of advisements and refusals made by the Liberty Group Respondents on various examinations which, in the result, disappeared as a problem because the Liberty Group Respondents answered most of the advisements and refusals.

44 In fact not all of the Royalton Proceeds had been disbursed from the Cassels Brock trust account. This became apparent when on June 21 the Liberty Group respondents provided their answers to undertakings and advisements from the examination of Goutis conducted on May 27, 2011. Those answers revealed that $931,212.97 of the Royalton Proceeds remained held in trust for the Kingston and Kanata Royalton Companies.

45 The parties re-attended before me on June 23 at which time I made the following endorsement:

> I order that Cassels Brock shall not disperse any remaining net sale proceeds from the Royalton transactions until my further order. Counsel advise that the hearing shall proceed, as scheduled, in 4 days on Monday, June 27, 2011. The issue of the funds held by Cassels Brock can be addressed at that time.

**III. Concerns of the Trustee**

46 The Trustee has expressed concerns about the accuracy and completeness of certain of the information it has received concerning the Bankrupt Companies, 729285, Liberty Assisted, and other persons and entities involved with the Liberty Group, and in particular the Royalton Residences. The Trustee regards the evidence obtained to date as incomplete, incorrect, conflicting, or otherwise unclear with respect to a number of aspects of this proceeding, in particular:

> (a) The ownership interests in the Royalton Residences;
>
> (b) The nature of the investments by 729285 into the Royalton Residences;
>
> (c) The adequacy of the documentation produced to establish that 729285 held its interest in the Royalton Residences in trust; and,
>
> (d) The disbursement of the Royalton Proceeds.

The Trustee seeks the appointment of an investigative receiver in order to obtain correct and complete information on all of these issues to allow it to evaluate whether the Bankrupt Companies have creditor or preference claims to any of the Royalton Proceeds.

47 By way of a general response the Liberty Group Respondents take the position that the scope of the allegations made by GE and the Trustee about inter-company transfers involving the Bankrupt Companies have shrunk significantly since this

application was started. Although in its Preliminary Report dated March 30, 2011 the Trustee identified certain transactions involving Liberty Assisted and 729285 which it "believes required further investigation", the Trustee expressed no view as to the propriety or otherwise of the transfers identified. (It did make comment, however, in its Second Report, as noted above.)

48 When GE then commenced this application it alleged that the assets of the Bankrupt Companies had been "stripped" and asserted that $5 million had been transferred out of the accounts of the Bankrupt Companies.

49 The Liberty Group Respondents then delivered two affidavits to respond in a preliminary fashion to the allegations of GE. In one affidavit Mr. Goutis deposed that contrary to the numbers in the Trustee's preliminary report: (i) the amounts paid into the La Chaumière account in fact exceeded payments out of the La Chaumière account; (ii) an amount in excess of $495,000.00 was paid by Liberty Assisted and 729285 for the payroll of Liberty Place and Beach Arms for a period in 2010, which amount was still owing by Liberty Place and Beach Arms to Liberty Assisted Living and 729285 Ontario Limited; (iii) other amounts were paid by entities in the Liberty Group and by directors and officers of the Liberty Group for expenses of the Bankrupt Companies which have not been repaid; and, (iv) the remaining transfers from Liberty Place and Beach Arms to other Liberty entities were in the course of being reviewed and being reconciled.

50 The Liberty Group Respondents state that further analysis of the inter-company accounts confirmed the incompleteness and inaccuracy of the amounts identified in the Trustee's Preliminary Report: (i) the report failed to identify substantial payments into Liberty Place and Beach Arms from non-bankrupt Liberty entities; and (ii) when one totalled the inter-company transfers to and from the Bankrupt Companies and the remaining entities in the Liberty Group, the end result was that the Bankrupt Companies owed the Liberty Group amounts in excess of $250,000.00. This takes into account the payroll amounts previously identified as owing by Mr. Goutis, and unpaid management fees owing to Liberty Assisted.

51 The Liberty Group Respondents also submit that the Trustee has no factual basis for its allegation that 729285 is entitled to proceeds from the sale of the Royalton Kingston and Royalton Kanata residences and that the evidence only supports the conclusion that 729285 has no beneficial interest in the proceeds of those sales.

### *A. Ownership Interests in the Royalton Residences*

#### *A.1 Concerns of Trustee*

52 In his April 13 affidavit Mr. Goutis deposed: "Neither Mr. Kassam nor Mr. Bhaloo own shares, directly or indirectly, in the Royalton companies."

53 Amir Kassam provided answers to undertakings given on his April 21, 2011 examination. One answer concerned "The Royalton Projects" (the "April 21 Royalton Undertaking Answer"). The undertaking answer stated, in part:

> Each Royalton company is held 50% by or for investors associated with the Coram group, the identities of which are unknown to Mr. Bhaloo, Mr. Kassam and Mr. Goutis. The other 50% of each Royalton company is held for a group of investors assembled by Mr. Kassam and Mr. Bhaloo ("Liberty Royalton investors"). Each investor invested varying amounts which were used as 50% of the equity contributed by each Royalton company in connection with the development of each Royalton retirement residence. The other 50% of the equity contributed by each Royalton company

  

was provided by the Coram investors. In other words, Liberty Royalton investors accounted for 25% of the equity contributed to each Royalton limited partnership.

The funds of each Liberty Royalton investor was to be paid to 729285 Ontario Inc., who then disbursed the funds as equity to each Royalton company as required.

The names of each of the Liberty Royalton investors and their total investments to date are as follows:

There then followed the names of some 24 investors who invested $3.889 million through 729285 into the Royalton projects. The undertaking answer concluded:

None of the money contributed to the Royalton properties came directly or indirectly from the Liberty Group.[4] We take "contribution" to mean investment or advance by way of debt or equity. As was disclosed on the examinations, Liberty Assisted Living made certain payments on behalf of one or more of the Royalton residences, which were reimbursed.

54 The *BIA* section 163 examination of Mr. Goutis continued on May 27. As a result of directions which I gave on June 14, responses to advisements and refusals taken on that examination were delivered to the Trustee on June 21. One question taken under advisement for which an answer was provided concerned the production of documents evidencing the investment of funds in and through 729285 by the investors in the Royalton projects; if no such documents existed, the precise terms of the trust were to be described. The response stated, in part:

The Terms and Conditions for the investors makes clear that Liberty held 50% of the investment in the Royaltons in trust for the investors. *The remaining 50% was held in trust for 870898 Ontario Inc., 842501 Ontario Inc., and 870865 Ontario Inc.* Please see trust declarations, attached, for each of the Royalton projects.

(emphasis added)

55 On this motion 870898 Ontario Inc., 842501 Ontario Inc., and 87065 Ontario Inc. were referred to as the "800 Series Companies". Kassam and Goutis are closely involved in the 800 Series Companies: Kassam is an officer and the sole director of 870898 Ontario Inc.; Kassam is an officer, and Goutis is an officer and director, of 842501 Ontario Limited; and, Goutis is an officer and the sole director of 870865 Ontario Limited.

56 The Trustee has expressed concerns about the inconsistent evidence provided about the ownership interests in the Royalton Residences - and the corresponding entitlement to the Royalton Proceeds - particularly the disclosure on June 21 that previously unknown 800 Series Corporations in which Kassam and Goutis are involved received 50% of the interest in the Royalton Proceeds held by 729285. Those companies were not disclosed as investor beneficiaries in the April 21 Royalton Undertaking Answer. It is the Trustee's position that accurate information is crucial to understanding the entitlement, if any, of the Bankrupt Companies as creditors and/or preference claimants to the Royalton Proceeds.

*A.2 Position of the Liberty Group Respondents*

57 The Liberty Group Respondents submitted that 729285 did not own any beneficial interest in the Royalton projects. It held 50% of its interest in the projects in trust for numerous individual and corporate investors assembled by Liberty for the purposes of investing in the Royalton projects. The remaining 50% interest was held by 729285 in trust for three companies pursuant to the terms of Declarations of Trust which have been produced. These Respondents argued that there was no

evidence before the court to support the suggestion that 729285 had any entitlement to any proceeds from the sale of the Royalton retirement residences.

***B. Investments by 729285 into the Royalton Residences***

*B.1 Concerns of the Trustee*

58 The Liberty Group Respondents take the position that 729285 held its interest in the Royalton Companies in trust for unrelated investors. In the April 21 Royalton Undertaking Answer the investments by 729285 in the Royalton Residences were described as equity contributions.

59 The 729285 financial statements from 2008 described the investment in the Royalton Residences as a "project in progress" equity asset. In the 2009 financial statements, the Royalton Residences investment had been reallocated to be a "loan receivable" debt investment.

60 Mr. Goutis was asked about this inconsistency on his May 27 section 136 examination.:

> Q. 889: ...But then somehow in 2009 on the GL — I know you changed the designation of the accounts — that equity is now a loan receivable. So what's the basis for that?
>
> A. Yeah, but what I'm saying is if you look in the GL, the actual account numbers never change.
>
> . . .
>
> Q. 891: I get that. But why did you make that change though?
>
> A. I was adding it up. I probably popped it into AR instead of moving it up top.
>
> . . .
>
> Q. 895: And what caused you to make this re-characterization?
>
> A. Well, that was just me typing it in.

The Trustee does not regard this answer as a principled explanation for the change in the financial statement description of the 729285 interest in the Royalton Residences from equity to debt. The Trustee is concerned that disbursements of the Royalton Proceeds by 729285 to the investors may have been improper in light of the conflicting information about the status of the investment by 729285 in the Royalton Residences.

61 The Trustee also has expressed a concern that funds provided to 729285 by the Bankrupt Companies, as part of the inter-company flow of funds within the Liberty Group, may have ultimately flowed to some or all of the Royalton Residences. The Trustee states that at the present time it does not possess information about how the funds received from the Bankrupt Companies were disbursed by 729285.

*B.2 Position of the Liberty Group Respondents*

62 In response the Liberty Group respondents stated that Mr. Goutis fully explained the alleged change in the asset profile in his May 19th affidavit. There was no change in the assets disclosed by 729285, merely a change in how those assets were allocated to accounts as between the years 2008 and 2009. The Liberty Group submitted that 729285 produced its general ledger listings which confirmed the lack of substantial change with respect to its assets as between 2008 and 2009.

63 The Liberty Group Respondents also submitted that the evidence showed that assertions in the Trustee's April 25 Report and the questions asked on the examinations suggesting that money from the Liberty Group of companies, including the Bankrupt Companies, may have found their way into one or more of the Royalton projects were not true.

64 The evidence of Mr. Goutis was that Liberty Assisted earned substantial management and leasing fees for services performed for the Royalton Kingston and Royalton London projects. While from time to time Liberty would pay incidental expenses associated with the Royalton projects, it sought and received reimbursement from the appropriate Royalton projects for these services.

***C. Sufficiency of Trust Documentation regarding investments through 729285 into the Royalton Companies***

*C.1 Concerns of the Trustee*

65 729285 produced documents relating to investments made through it by arm's-length investors in the Royalton Residences. Two basic documents were produced: (i) the Terms and Conditions of Investment Pool Number 1, and (ii) the Investment Commitment for Liberty Fund Number 1.

66 Under the Investment Commitment an investor agreed to make a stipulated investment in one of the Royalton Residences and undertook to make the investment cheque payable to "729285 Ontario Limited, in Trust". The Investment Commitment stated that the investor and Liberty would be bound by the terms and conditions set out in the Terms and Conditions of Investment. That document recited the three Royalton Residences and, as well, a property in Peterborough on which Liberty proposed "to undertake similar projects in partnership with the Project Partner". In section 3 of the Terms and Conditions Liberty agreed and acknowledged "that it shall hold fifty percent (50%) of its ownership interest in each of the Projects in trust for the Investors". (As noted above, Liberty — i.e. 729285 — held an indirect 25% interest in each Royalton Residence.)

67 Some of the Investment Commitments produced by 729285 were signed by the individual investors; some were not. Some were dated; others were not. 729285 also produced a large number of cheques from investors to it.

68 Most of the cheques from investors are dated in 2007 or 2008. The Trustee observed that the interest of Liberty in the Peterborough Project was not acquired until November 13, 2009. From this the Trustee argued that the Terms and Conditions must post-date the investments in the Royalton Residences through 729285 (which appear to have occurred in 2007 and

  

2008), raising a question as to whether the purported investor trusts were properly settled. That said, from Declarations of Trust concerning the interests of the 800 Series of Companies in the Royalton Residences, it appears that the interests of 729285 in those residences dated back to 2005 and 2006.

69 As noted, in section 3 of the Terms and Conditions Liberty agreed to hold 50% of its ownership interest in each of the Royalton Projects in trust for the investors. In his June 21 undertaking answers Mr. Goutis revealed for the first time that:

> The Terms and Conditions for the investors makes clear that Liberty held 50% of the investment in the Royaltons in trust for the investors. *The remaining 50% was held in trust for 870898 Ontario Inc., 842501 Ontario Inc., and 870865 Ontario Inc.* Please see trust declarations, attached, for each of the Royalton projects.
>
> (emphasis added)

70 The Liberty Group Respondents produced three Declarations of Trust — one for each Royalton Residence - to support that statement. The Declarations were dated in 2005 and 2006. Under each 729285 was named as the Trustee. Each declaration recited that 729285 owned certain common shares in each of the Royalton Companies (i.e. the level of ownership in which Coram held the other 50%) and that it had acquired half of those shares "as bare trustee and nominee for" one of the 800 Series Companies. The same beneficial interest of each of the 800 Series Companies in the trust shares was recorded in each Declaration of Trust: 50% for 870898 Ontario Limited; 45% for 842501 Ontario Limited; and 5% for 870865 Ontario Limited. Section 3 of each Declaration of Trust provided:

> The Beneficiaries have, as of and from the Effective Date, owned and continued to own the Trust Shares beneficially in the manner set out in paragraph 2 above, which beneficial ownership includes all rights, obligations, losses and liabilities arising or emanating from the Trust Shares.

71 As was revealed by the Liberty Group Respondents in the June 21 answers to advisements given on the May 27 examination of Mr. Goutis, from the net Royalton Proceeds payments were made on May 26 to the three 800 Series Companies: (i) $1.5 million to 870898 Ontario; (ii) $1.35 million to 842501 Ontario and, (iii) $150,000 to 870865 Ontario.

*C.2 Position of the Liberty Group Respondents*

72 The Liberty Group Respondents submitted that the trust documentation they disclosed clearly showed that 729285 did not have any beneficial interest in the Royalton Residences or any entitlement to the Royalton Proceeds.

***D. Disbursement of Royalton Proceeds***

*D. 1 Concerns of the Trustee*

73 On his May 27 Examination Mr. Goutis testified that Cassels was holding the net Royalton Proceeds in its trust account. Later that day Trustee's counsel wrote to Cassels requesting an undertaking that the Royalton Proceeds held in trust by Cassels not be disbursed without 10 days' prior notice being provided to the Trustee. Gowlings received no response to that letter.

74 On the morning of June 14, 2011 Cassels sent Gowlings an e-mail stating: "I am advised that the Royalton proceeds have all been disbursed". As mentioned above, I included that apparent state of affairs in my endorsement of June 14.

75 That information provided by Cassels was not accurate.

76 On June 21, 2011, in answers to advisements, the Trustee was informed that, contrary to the June 14, 2011 email, "there remains the sum of $931,212.97 held in trust for Royalton Retirement Residence Inc. and Royalton Retirement Residence (Kanata) Inc. Additional fees payable are being satisfied out of these funds."

77 Those answers to advisements also stated that $1.5 million of the Royalton Proceeds had been paid to 1424800 Ontario Inc. The Liberty Group Respondents had not previously identified 142800 as a beneficiary of any trust in respect of the Royalton Residences, or to otherwise be entitled to any of the Royalton Proceeds. A corporate search conducted by the Trustee revealed that Mr. Bhaloo was the sole director of 142 and the company had been dissolved in 2007 for non-payment of taxes.

*D.2 Concerns of GE*

78 Amir Kassam is an officer and director of all the Bankrupt Respondents and is an officer and director of 729285, Liberty Assisted, and 729282.

79 On June 18, 2007, Amir Kassam provided to Column Financial, in support of the Bankrupt Respondents' application for a loan, a Certification of Borrower/Principal Financial Statement which included Kassam's Net Assets which were shown to total $26.010 million. Kassam also signed three indemnities in support of each loan to the Bankrupt Respondents.

80 On his cross-examination conducted April 21, 2001, Kassam admitted that he did not own $23.4 million of his reported net assets, but stated the assets were owned by 729282, of which he was not a shareholder. His explained was that he was trying to secure a mortgage so he was presenting the best picture he could by including his family's assets.

81 On April 28, 2011, GE's counsel corresponded with Kassam's counsel referring to the answers given on cross-examination, and advised that GE was taking the position that Kassam had obtained the financing from Column Financial under false pretences and that Kassam, accordingly, was responsible in law for the full indebtedness owed to GE, being $19,806,137.14.

82 On his cross-examination Kassam indicated that the Kassam family company, 729982, owned a $5 million interest in the Royalton Residences as of the date of his 2007 net worth statement and continued to own that interest.

  

83 729982 owns shares of 729285 and would thereby be entitled to share in any of the Royalton Proceeds in which 729285 had a beneficial interest.

*D.2 Position of the Liberty Group Respondents*

84 Mr. Bhaloo sought to address the concerns of the Trustee regarding the disbursement of the Royalton Proceeds in his June 23 affidavit in which he deposed that:

> (a) "The 1.5 million paid to [142] was done so at the direction of [the 800 Series Companies] out of proceeds to which they were entitled for use in other projects".
>
> (b) He was "unaware that 142 had been dissolved"; and,
>
> (c) He "did not realize that counsel and the court could take 'disbursed' [as stated in the June 14 Cassels email to Gowlings] to mean 'paid out of Cassels Brock' when in fact what had happened was that some of the Royalton Proceeds had been transferred from one trust account at Cassels Brock into another.

85 Mr. Bhaloo deposed that of the $931,212.97 remaining in the Cassels Brock trust account, Coram was entitled to $333,226.09, and most of the balance was earmarked to pay legal accounts rendered by Cassels Brock. (Coram already had received $4.5 million from the Royalton Proceeds on May 26, 2011.) Mr. Bhaloo reiterated that 729285 "has no beneficial interest in the proceeds of the Royalton sales and received none of the proceeds."

86 The Trustee stated that it was not aware of any documentary evidence offered by the Liberty Group Respondents to support Mr. Bhaloo's assertion that the $1.5 million paid to the dissolved company, 1424800, was done so at the direction of the 800 Series Companies "out of proceeds to which they were entitled for use in other projects." The Trustee also observed that this assertion was inconsistent with the evidence given by Mr. Bhaloo on his April 21 Examination that he was not a director of any company with an investment interest in the Royalton Residences. The Trustee further noted that Mr. Bhaloo's explanation did not address the issue of how funds could be disbursed to a dissolved corporation.

87 The Trustee takes the position that this apparent confusion over the dispersal of the Royalton Proceeds, together with the late appearance of the 800 Series Companies and 1424800 as recipients of Royalton Proceeds, requires a better understanding before any potential claim of the Bankrupt Companies to the Royalton Proceeds could be evaluated and quantified.

## IV. Legal principles governing the appointment of investigative receivers

88 Last year, in his decision in *Anderson v. Hunking*,5 Strathy J. comprehensively summarized the principles concerning the appointment of a receiver. I can do no better than to reproduce his summary in its entirety:

> 15 Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:
>
> (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);
>
> (b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the

 

appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);
(c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Limited v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Gen. Div.);
(d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. S.C.J.);
(e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;
(i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
(ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused, and "irreparable" refers to the nature of the harm suffered rather than its magnitude - evidence of irreparable harm must be clear and not speculative: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);
(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience": See *1754765 Ontario Inc. v. 2069380 Ontario Inc.* (2008), 49 C.B.R. (5th) 214 at paras. 7 and 11, [2008] O.J. No. 5172 (S.C.);
(f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (S.C.J.).

16 The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a *Mareva* injunction, an exception to the general principle that our courts do not grant execution before judgment. As Salhany L.J.S.C. observed in *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)*, above, at para. 6:

[T]here is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy. ... [referring also to *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205 (C.A.)].

89 In that case Strathy J. declined to appoint a receiver, concluding that the plaintiffs had not demonstrated a strong case that the defendant had misappropriated certain funds, that other defendants might be liable to the plaintiff, and that the plaintiff enjoyed some existing protection by reason of the registration of a certificate of pending litigation against property.

90 Counsel drew my attention to several cases where this Court had appointed a receiver, in part for the purposes of investigating the affairs of a company or reviewing certain transactions. In one such case, *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*,6 Pepall J. described some of the key principles applicable to the appointment of a receiver:

37 As noted by the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, as a superior court of general jurisdiction, the Superior Court has all of the powers that are necessary to do justice between the parties. Specifically, the jurisdiction to appoint a receiver and manager is found in section 101 of the *Courts of Justice Act*. It provides that a receiver may be appointed where it appears to a judge to be just or convenient to do so. The order may include such terms as are considered just. A receiver has been appointed over companies in circumstances where they are intricately involved with companies already in receivership and where it was just and convenient to do so: *Ed Mirvish Enterprises Limited and I King West Inc. v. Stinson Hospitality Inc. et al.* That said, the appointment of a receiver is an extraordinary remedy which should be granted sparingly: *O.W. Waste Inc. v. EX-L Sweeping and Flushing Ltd.*

In that case Pepall J. appointed a receiver of all the rights of an entity to certain contracts in order to break a deadlock

amongst stakeholders and thereby facilitate the work of another receiver in realizing on a resort development.

91 In *Stroh v. Millers Cove Resources Inc.*7 , Farley J. appointed a receiver in the context of an oppression proceeding under section 248 of the *OBCA* on the basis that evidence existed of self-dealing transactions by the major shareholder of a company, of which the Board members were not aware, and that the appointment of a receiver was necessary to protect the interests of the minority shareholders: "A continuation of the pattern of self-dealing without adequate shareholder protection cannot continue to be tolerated."8 The Divisional Court upheld the appointment stating:

> 7 On the basis of our review of the evidence and the submissions made by counsel, we are not persuaded that he was wrong to appoint a receiver. We can find no error in principle or any injustice to a party. *We do not consider the remedy to be as drastic as suggested by counsel for the appellants in the circumstances of this case. In the first place, the company is not an operating company and the impact of the receivership will not be the same as it would be if it was engaged in active business. In the second place, the main thrust of the order is to make sure, as far as it will be possible to do so, that the assets of the company and the various arrangements can be fully examined and considered so that future actions can be then planned.* This should not, in our view, be any matter that Mr. Keady or his colleagues should fear based on the submissions that they made to us in this hearing.
> (emphasis added)

92 Finally, in *Loblaw Brands Ltd. v. Thornton*,9 I appointed an investigatory receiver holding:

> 14 An interim receiver may be appointed under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, in cases where the plaintiff can demonstrate a strong case that the defendant has engaged in fraud and that without the appointment of a receiver the plaintiff's right to recovery would be in serious jeopardy...
> 15 This court has appointed receivers whose main function was to monitor and investigate the assets and affairs of a defendant: *Century Services Inc. v. New World Engineering Corporation* (unreported decision of Morawetz J., July 28, 2006; File 06-CL-6558); *Udayan Pandya v. Courtney Wallis Simpson* (unreported decision of Ground J., November 17, 2005; File 05-CL-6159). In his endorsement in *Century Services* Morawetz J. concluded that the plaintiff had satisfied the test for injunctive relief set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) and that the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation can be undertaken".
> 16 In my endorsement of March 6, 2009, I found that Loblaw had demonstrated a very strong *prima facie* case of fraud against Paul Thornton. The evidence filed by Loblaw on this motion only reinforces the strength of its case. Given the huge disparity between the amount of money that Loblaw has discovered was diverted to IBL and the value of the known assets of the defendants, as well as the failure of Paul Thornton to respond to these proceedings, I am satisfied that without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized. The balance of convenience overwhelmingly favours granting the appointment of a receiver.

## V. Analysis

### *A. Motion to appoint investigative receiver over 729285*

93 As Strathy J. observed in *Anderson v. Hunking* , *supra.*, in deciding whether to appoint a receiver the court must have regard to all the circumstances of the case. Let me consider first the request of the Trustee to appoint an investigative receiver over 729285.

94 The Trustee alleges that it has preference or debt claims against 729285 and that an investigative receiver is required for two basic reasons: (i) to review the financial records of 729285 in respect of transactions the Bankrupt Companies had with it, and (ii) to gain a clearer, more accurate understanding about whether 729285 enjoys any beneficial interest in the Royalton Proceeds which could be available to satisfy any claim by the Trustee against 729285.

 

95 Turning first to consider the strength of the Trustee's case against 729285, the Trustee has established that as of the date of bankruptcy two of the Bankrupt Companies, Beach Arms and Liberty Place, were creditors of 729285 and that during the preceding year all three Bankrupt Companies had made numerous payments to 729285. The Trustee points to section 95(1)(b) of the *BIA* to argue that such payments had the effect of giving 729285 preference over other creditors — realty taxes and wages were in arrears — thereby rendering such payments void against the Trustee as preferences.

96 In response the Liberty Group Respondents took the position that any presumption of a preferential intention under *BIA* section 95 was rebutted by extensive evidence to the contrary — i.e. that the Bankrupt Companies had made such payments as ordinary course transactions.[10] The Trustee took issue with the availability of such a defence, pointing to the following portion of the transcript of the examination of Mr. Bhaloo as showing there was nothing "ordinary course" about the way in which intercompany transactions were made between 729285 and the Bankrupt Companies:

> Q. 271: Liberty. Why then start 729285 for that?
>
> A. I don't know what the rationale was, to be honest. I can tell you that in trying to make ends meet, monies were flowing from — you know, these companies were needing funds. So we would advance monies to cover items, and that's why you have transfers —
>
> Q. 281: Well, it went all around the group of companies. I think we can safely assume that, right?
>
> A. Yes.
>
> Q. 219: Absolutely.
>
> A. It needed cash. People needed to get paid and whoever had money would, you know, try to make ends meet.
>
> Q. 220: I'm going to borrow a phrase I used with Mr. Kassam. You borrowed from Peter to pay Paul frequently?
>
> A. Yes.
>
> Q. 221. And vice versa at times?
>
> A. Yes. We always advanced — yes.

97 The Liberty Group Respondents further argued that the evidence provided by Mr. Goutis that no monies passing from the Bankrupt Companies to 729285 ever found their way into investments in the Royalton Projects stands uncontradicted, thereby removing any basis to appoint a receiver to preserve some notional entitlement on the part of the Bankrupt Companies to any of the Royalton Proceeds.

98 I think the simple answer to these arguments by the Liberty Group Respondents is that their own failure to provide straight answers to simple questions raises serious concerns about the accuracy of any information which they have provided, in their affidavits or on section 163 examinations, about the flows of money between the Bankrupt Companies and 729285, as well as the use the latter company made of those funds.

99 There is no doubt that monies flowed around the Liberty Group of companies on a regular basis. There is no doubt that in the year prior to the date of bankruptcy the Bankrupt Companies made payments to a non-arm's length company, 729285. A strong case exists that some of those payments were made at times when the Bankrupt Companies were insolvent, although

  

the Liberty Group Respondents dispute that the insolvent period reached back to January 1, 2010. There is evidence that such inter-company payments were made at times when the Bankrupt Companies were not paying other creditors, such as municipalities to whom they owed taxes. Certainly the evidence demonstrates the existence of a serious question to be tried that such payments constituted preferences under section 95 of the *BIA*.

100 To accept the Liberty Group Respondents' assertion that they have provided full explanations about these transactions as ones occurring in the ordinary course would require accepting the reliability of the evidence they have proffered about the affairs of 729285 and the other Liberty Group of companies. However, I do not accept that such information necessarily is reliable. In their first batch of undertaking responses the Liberty Group Respondents purported to provide a complete list of investors in the Royalton Companies for whom 729285 was acting as trustee. Then, following my order of June 14 putting in place a mechanism to require the answering of questions taken under advisement or refusals, it turns out that four additional "investors" existed for whom 729285 acted as trustee — the three 800 Series Companies and the dissolved company, 1424800 Ontario Inc., paid as the nominee of one of the 800 Series Companies. All these companies were linked to the principals of the Bankrupt Companies.

101 As this information was slowly trickling out, under the pressure of orders of this court, the Royalton Proceeds were dissipating, with $4.5 million flowing out to those four related companies on May 26 and June 6, 2011. Whether those payments infringed the April 26 order of Mesbur J. is not a matter I need to decide and would require a better understanding of the actual facts. Suffice it to say that the non-disclosure of such related-party recipients — one of which was dissolved! — until after the funds had been disbursed raises more questions than answers.

102 Further, the Liberty Group Respondents were less than candid with me when on June 14 they informed me that the Royalton net sales proceeds had been released from Cassels Brock. That representation to the court was incorrect. I do not accept Mr. Bahloo's explanation in his June 23 affidavit that he "did not realize that counsel and the court could take 'disbursed' to mean 'paid out of Cassels Brock'. That statement makes no sense whatsoever.

103 In sum, what tips the scales in the circumstances of this case is the combination of (i) the inconsistent information put forth by the Liberty Group Respondents during *BIA* section 163 examinations about the affairs of 729285, including its role in investments in the Royalton Residences, (ii) the incremental manner in which they disclosed information about what was actually happening to the Royalton Proceeds, *after* those proceeds had been disbursed to companies in which the principals of the Bankrupt Companies have an interest, and (iii) the misrepresentations made to me about the true state of the Royalton Proceeds held in the Cassels Brock trust accounts. Those factors point to the need to allow an independent third party (a) to look into the transactions which took place between the Bankrupt Companies and 729285, (b) to ascertain the true state of 729285's interest in any of the Royalton Proceeds — whether they were in trust for others or whether the company enjoyed a beneficial interest in them — and, (c) to figure out the true state of affairs regarding those to whom the Royalton Proceeds were paid. Where a party has provided inconsistent information on *BIA* section 163 examinations and then misrepresents matters to the court, it is very difficult for that party to argue that the factors of irreparable harm and balance of convenience should be decided in its favour.

104 Accordingly, I grant the Trustee's motion to appoint an investigative receiver into the affairs of 729285.

***B. Motion to appoint an investigative receiver over Liberty Assisted Living***

  

105 I do not grant the Trustee's motion to appoint an investigative receiver over Liberty Assisted Living for two reasons. First, the evidence disclosed that Liberty Assisted acted as manager for the Bankrupt Companies. Accordingly some contract-based reason for the payments to and from the Bankrupt Companies might exist. Second, apart from placing before me evidence about the flows of money between Liberty Assisted and the Bankrupt Companies, the Trustee really focused its evidentiary attention on the affairs of 729285 and the confusion surrounding the Royalton Proceeds, not on Liberty Assisted. Whereas the Trustee adduced evidence about the Liberty Group Respondents providing inconsistent information about the affairs of 729285 and misstatements to the court about what was happening with the Royalton Proceeds, no similar evidence was placed before me about Liberty Assisted. Consequently, I am not satisfied on the evidence adduced that the Trustee has satisfied the *RJR-MacDonald Inc. v. Canada (Attorney General)*[1994 CarswellQue 120 (S.C.C.)] criteria in respect of its request to appoint an investigative receiver over Liberty Assisted.

## VI. Conclusion

106 By way of summary, I grant the motion of the Trustee to appoint Albert Gelman Inc. as the investigative receiver, without security, into the affairs of 729285 Ontario Limited. I dismiss the motion of the Trustee to appoint such a receiver over Liberty Assisted Living Inc., but without prejudice to its right to re-apply for such relief on better evidence.

107 At the hearing Trustee's counsel provided me with a draft form of order. Mr. Pinos had not seen it before, so I afforded him an opportunity following the hearing to review it and email me his comments, which he did. Mr. Prophet then responded by email stating that the differences between the parties about the form of order were so significant that an attendance before me would be required.

108 I am out of town on vacation for the next three weeks. I will resume sitting on July 25. I therefore propose to provide the following guidance to counsel for drafting the appropriate order:

1/ The order shall refer to 729285 Ontario Limited by its corporate name, not by the term "debtor";

2/ The term of appointment of Albert Gelman Inc. shall be for 120 days. The receiver shall report to the court about its investigation prior to the expiry of its term of appointment. Its appointment is quite focused — to monitor and to obtain information about the affairs of 729285. Given that focused mandate, I see no need to make the appointment an indefinite one;

3/ The language of appointment must reflect the investigative and monitoring nature of the receiver's role. The receiver must have full access to, and control over, all the books, records, and business documents of 729285, but must exercise that access and control in such a way that the company can continue to carry on its business with minimal interference;

4/ While the powers enumerated in paragraphs 6(a), (b) and (c) of the Trustee's draft order are reasonable, the receiver shall not have the power to file an assignment in bankruptcy on behalf of 729285;

5/ I do not accept the comments made by Mr. Pinos about paragraphs 7 and 8 of the draft order. I regard those provisions as necessarily incidental to the receiver's investigative role;

6/ Draft paragraph 10 is reasonable. I do not accept Mr. Pinos' submission that access by the receiver should be limited to business hours;

7/ I reject Mr. Pinos' criticism of draft paragraph 11. I regard it as a necessary provision to ensure that the receiver obtains the information it has been appointed to secure;

8/ I accept Mr. Pinos' criticism of paragraph 13. It risks intruding into solicitor-client privileged communications. That said, as the client 729285 is entitled to such information and must produce it;

9/ I accept Mr. Pinos' criticism of paragraphs 15, 16, 18, and 19. They should be deleted;

10/ I do not accept the revision proposed by Mr. Pinos to paragraph 20. The proposed language is consistent with that contained in the Commercial List Model Receiver Order;

11/ I do not accept Mr. Pinos' criticism of paragraphs 21 through to 25. Although the receiver is not a possessory receiver, it is entitled to the same charge to secure its fees and disbursements as a standard receiver; and,

12/ I accept Mr. Pinos' criticism of paragraph 27.

I trust with these directions the parties can settle the form of the order.

109 If they cannot, then by next Wednesday, July 6, 2011, they shall email me their proposed forms of order, together with reasons supporting their versions. The attachments containing the proposed orders must be in Word format, not in PDF. I will review the orders and inform counsel of the final form. I strongly encourage counsel to attempt to settle the order without resorting to further submissions.

110 One additional paragraph should be included in the order. At the present time the sum of $931,212.97 from the Royalton Proceeds remains held in the trust accounts of Cassels Brock. That amount is close to the Trustee's current understanding of the amount of potential preference and debt claims it may have against 729285. In view of the inconsistent information provided by the Liberty Group Respondents about those entitled to the Royalton Proceeds, and its misrepresentation to me about whether all funds had been disbursed, I order that Cassels Brock not disburse or otherwise deal with such remaining Royalton Proceeds until further order of this court following the report of the receiver which I have directed.

## VII. Costs

111 I would encourage the parties to try to settle the costs of this motion. If they cannot, the Trustee and GE may serve and file with my office written cost submissions, together with a Bill of Costs, by July 13, 2011. The Liberty Group Respondents may serve and file with my office responding written cost submissions by July 22, 2011. The costs submissions shall not exceed four pages in length, excluding the Bill of Costs.

*Motion granted in part.*

Footnotes

* Additional reasons at *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 ONSC 4136, 2011 CarswellOnt 10375 (Ont. S.C.J. [Commercial List]).

** Leave to appeal refused *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 CarswellOnt 8054, 2011 ONSC 4704 (Ont. Div. Ct.).

1 Transcript, May 27 examination of Goutis, Q. 649.

2 *Ibid.*, QQ. 663-664.

  

3 *Ibid.*, Q. 660.

4 In his April 13 affidavit Mr. Goutis had deposed: "I can categorically state that from January 2010 to the end of March 2011 no money was transferred from any of the bankrupt or non-bankrupt retirement residences, or Liberty Assisted Living or 729285 to any of the Royalton residences, directly or indirectly.

5 2010 ONSC 4008 (Ont. S.C.J.).

6 (Ont. S.C.J. [Commercial List])

7 1995 CarswellOnt 3551 (Ont. Gen. Div. [Commercial List]) ; affirmed (1995), 85 O.A.C. 26 (Ont. Div. Ct.).

8 *Ibid.*, Gen. Div., para. 9.

9 (Ont. S.C.J.) .

10 Roderick Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Press, 2009), p. 195.

**End of Document**

# Tab 11

2009 CarswellOnt 1588
Ontario Superior Court of Justice

Loblaw Brands Ltd. v. Thornton

2009 CarswellOnt 1588, [2009] O.J. No. 1228, 176 A.C.W.S. (3d) 141, 78 C.P.C. (6th) 189

# Loblaw Brands Limited v. Paul Thornton, Christopher Thornton, TD Bank Financial Group and TD Canada Trust

D.M. Brown J.

Heard: March 20, 2009
Judgment: March 23, 2009
Docket: CV-09-373422

Counsel: J. Patterson, M. Ward for Plaintiff / Moving Party

Subject: Civil Practice and Procedure; Property; Insolvency

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## Headnote

**Civil practice and procedure --- Pre-trial procedures — Miscellaneous**

Appointment of interim receiver — Plaintiff terminated defendant T's employment as it concluded T had misused his authority over program under which plaintiff received rebate payments from packaging suppliers and had defrauded plaintiff — Plaintiff's investigations disclosed that T had directed suppliers to make rebate payments to his related entity, IBL, instead of to plaintiff — Plaintiff claimed that its investigations indicated T had diverted $4.2 million from plaintiff's suppliers to IBL — Plaintiff brought motion for order appointing investigatory receiver of property of T and IBL for purpose of locating, investigating and monitoring property — Motion granted — Interim receiver could be appointed under s. 101 of Courts of Justice Act where plaintiff demonstrated strong case that defendant engaged in fraud and that without appointment of receiver plaintiff's right to recovery would be in serious jeopardy — Given huge disparity between amount of money plaintiff had discovered was diverted to IBL and value of known assets of defendants, as well as failure of T to respond to these proceedings, plaintiff's right to recovery would be seriously jeopardized without appointment of receiver — Balance of convenience favoured appointment of receiver — Powers of entry granted to investigative receiver in respect of residential premises should be no greater than those found in standard Anton Piller orders — Terms of appointment included power to request entry into specified residences similar to powers found in referenced paragraphs of model Commercial List Anton Piller order, with certain modifications.

**Judges and courts --- Jurisdiction — Superior courts — Jurisdiction under specific statute**

Appointment of interim receiver — Plaintiff terminated defendant T's employment as it concluded T had misused his authority over program under which plaintiff received rebate payments from packaging suppliers and had defrauded

plaintiff — Plaintiff's investigations disclosed that T had directed suppliers to make rebate payments to his related entity, IBL, instead of to plaintiff — Plaintiff claimed that its investigations indicated T had diverted $4.2 million from plaintiff's suppliers to IBL — Plaintiff brought motion for order appointing investigatory receiver of property of T and IBL for purpose of locating, investigating and monitoring property — Motion granted — Interim receiver could be appointed under s. 101 of Courts of Justice Act where plaintiff demonstrated strong case that defendant engaged in fraud and that without appointment of receiver plaintiff's right to recovery would be in serious jeopardy — Given huge disparity between amount of money plaintiff had discovered was diverted to IBL and value of known assets of defendants, as well as failure of T to respond to these proceedings, plaintiff's right to recovery would be seriously jeopardized without appointment of receiver — Balance of convenience favoured appointment of receiver — Powers of entry granted to investigative receiver in respect of residential premises should be no greater than those found in standard Anton Piller orders — Terms of appointment included power to request entry into specified residences similar to powers found in referenced paragraphs of model Commercial List Anton Piller order, with certain modifications.

**Table of Authorities**

**Cases considered by *D.M. Brown J.*:**

*Celanese Canada Inc. v. Murray Demolition Corp.* (2006), 215 O.A.C. 266, 2006 CarswellOnt 4623, 2006 CarswellOnt 4624, 2006 SCC 36, 50 C.P.R. (4th) 241, 269 D.L.R. (4th) 193, 30 C.P.C. (6th) 193, 352 N.R. 1, [2006] 2 S.C.R. 189 (S.C.C.) — followed

*Century Services Inc. v. New World Engineering Corp.* (July 28, 2006), Doc. 06-CL-6558 (Ont. S.C.J.) — considered

*Pandya v. Simpson* (November 17, 2005), Doc. 05-CL-6159 (Ont. Gen. Div.) — referred to

*RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

*Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.* (1987), 1987 CarswellOnt 383, 16 C.P.C. (2d) 130 (Ont. H.C.) — considered

**Statutes considered:**

*Courts of Justice Act*, R.S.O. 1990, c. C.43
s. 101 — referred to

MOTION by plaintiff for order appointing investigatory receiver over property of defendant and his related entity for purpose of locating, investigating and monitoring such property.

***D.M. Brown J.*:**

 

## I. Motion for Appointment of Investigatory Receiver

1 Loblaw Brands Limited seeks an order appointing an investigatory receiver over the property of Paul Thornton and his related entity, IBL, for the purpose of locating, investigating and monitoring such Property.

## II. Background

2 Paul Thornton worked in the packaging department of Loblaw from April, 2001, until February 12, 2009, when Loblaw terminated his employment. Loblaw did so because it concluded Mr. Thornton had misused his authority over a program under which Loblaw received rebate payments from packaging suppliers and thereby had defrauded Loblaw of substantial sums of money. Loblaw's investigations disclosed that Mr. Thornton had directed suppliers to make rebate payments to his related entity, IBL, instead of to Loblaw.

3 Loblaw first came before me on March 2, 2009 seeking a *Norwich Pharmacal* order, which I granted. At that time Loblaw's investigations had identified misappropriations by Mr. Thornton of at least $2.1 million.

4 On March 6, 2009, I granted Loblaw a *Mareva* injunction in respect of the assets of Mr. Thornton and IBL, and certificates of pending litigation against Mr. Thornton's residence on Zinnia Place, Mississauga, and a cottage on the Lake of Bays, both registered in the name of his son, Christopher Thornton.

5 Loblaw then served my orders on Paul and Christopher Thornton and, as well as notices of examination under Rule 39.03. Paul Thornton did not show up for his scheduled March 11 examination. A similar notice was served on Christopher Thornton, and he was examined on March 12.

6 On the March 16 attendance to continue my orders Paul Thornton did not appear, but counsel for his son advised, by letter, that Christopher Thornton did not oppose the continuation of the orders.

7 In the affidavit filed in support of the present motion the Loblaw representative deposed that, based on investigations conducted since March 2, Loblaw had determined that Paul Thornton had diverted $4.2 million from Loblaw's suppliers to his entity, IBL. However, the current balance in IBL's bank account stands at only $43,706.63, and that of Mr. Thornton's at $5,756.69.

8 The examination to date of the IBL bank account has revealed transfers out of slightly over $900,000 in respect of payments to car dealerships, for the purchase a cottage, to pay for a mortgage and home improvements, as well as transfers to Christopher Thornton ($250,000.00).

9 Execution of the *Norwich Pharmacal* order identified several accounts in the name of Volha Pranovich, Mr. Thornton's common law spouse, over which Mr. Thornton had signing authority. Current balances in those accounts amount only to $39,000.00. As well, Loblaw's investigation has disclosed four cars (2005-2008 model years) registered in the name of Christopher Thornton, as well as one in the name of Volha Pranovich.

10 Loblaw's representative deposed that without the appointment of a receiver, Loblaw's right to recovery would be seriously jeopardized because (i) the amounts found in the accounts of IBL and Mr. Thornton are miniscule in comparison to the $4.2 million identified as diverted to IBL, and (ii) Mr. Thornton failed to attend his examination and has not responded to the court proceedings.

11 Loblaw seeks the appointment of Mr. Ted Baskerville, of LAC Limited, operating as Navigant Consulting, as interim receiver of the assets of Paul Thornton and IBL. LAC has filed its consent to act as receiver, and Mr. Baskerville's CV discloses that he is well qualified to act as receiver in the circumstances of this case.

12 Loblaw has filed a further undertaking as to damages.

13 Although properly served, neither Paul Thornton, Christopher Thornton, nor Volha Pranovich appeared on the return of this motion.

## III. Analysis

### *A. Appointment of an investigatory receiver*

14 An interim receiver may be appointed under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, in cases where the plaintiff can demonstrate a strong case that the defendant has engaged in fraud and that without the appointment of a receiver the plaintiff's right to recovery would be in serious jeopardy: Robert van Kessel, *Interim Receivers and Monitors*, p. 45; *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.*, [1987] O.J. No. 2315 (Ont. H.C.), at para. 6.

15 This court has appointed receivers whose main function was to monitor and investigate the assets and affairs of a defendant: *Century Services Inc. v. New World Engineering Corp.* (July 28, 2006), Doc. 06-CL-6558 (Ont. S.C.J.), (unreported decision of Morawetz J.); *Pandya v. Simpson* (November 17, 2005), Doc. 05-CL-6159 (Ont. Gen. Div.), (unreported decision of Ground J.). In his endorsement in *Century Services* Morawetz J. concluded that the plaintiff had satisfied the test for injunctive relief set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) and that the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation can be undertaken".

16 In my endorsement of March 6, 2009, I found that Loblaw had demonstrated a very strong *prima facie* case of fraud against Paul Thornton. The evidence filed by Loblaw on this motion only reinforces the strength of its case. Given the huge disparity between the amount of money that Loblaw has discovered was diverted to IBL and the value of the known assets of the defendants, as well as the failure of Paul Thornton to respond to these proceedings, I am satisfied that without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized. The balance of convenience overwhelmingly favours granting the appointment of a receiver.

17 I therefore appoint LAC as Receiver, without security, over all the assets and properties of Paul Thornton and IBL, and over all assets and properties that can be traced from any account of IBL through and to whatever form, person or entity, and any related documents, records or other property of every nature and kind whatsoever, and wherever situate, including all proceeds thereof. The purpose of the appointment is to locate, investigate, and monitor such Property and to secure access for the Receiver to such books, records, documents and information the Receiver considers necessary to conduct an investigation of transfers of funds by or from Paul Thornton or IBL, or their banks or trust accounts, to the other defendants or other persons.

***B. Terms of the appointment***

18 Loblaw submitted a draft order drawn largely from the form of receivership order commonly used in cases on the Toronto Region Commercial List. While most of the proposed terms are reasonable and appropriate, I have concerns about one — the power of the Receiver to enter residential premises.

19 Although the order sought would empower the Receiver "to act at once in respect of the Property", the thrust of the order is not to preserve and manage the Property of Paul Thornton and IBL, but to give the Receiver investigatory powers so that it can trace and locate property of Paul Thornton and IBL and, as well, review information collected in order to ascertain what happened to the money diverted to IBL.

20 To that end Loblaw seeks to obtain for the Receiver two significant powers:

> (a) First, Loblaw asks for an order authorizing the receiver to enter the Muskoka cottage and Paul Thornton's residence at Zinnia Place; and,
>
> (b) Loblaw also requests an order under which the persons at those two premises must allow entry to the Receiver, and up to two other individuals, to the premises in order to locate and determine the existence of Property. Those persons would be required to answer any questions posed by the Receiver about the Property and any other materials relevant to the Property.

21 The second power of entry resembles that found in *Anton Piller* orders; the first, however, goes beyond the language of the standard *Anton Piller* order — i.e. the defendants shall permit entry into premises — to, in effect, authorize the Receiver to enter residential premises. Often receivers are appointed in circumstances where the defendant debtor, in security documents, has agreed that the plaintiff creditor can appoint a receiver who can enter into the defendant's premises to realize on the security. In other cases the need to continue a business as a going concern justifies authorizing the receiver to enter into, and take control of, business premises. That is not this case. Here Loblaw seeks an order that would allow the Receiver to enter into residential premises for investigative purposes, albeit on 24 hours notice. In *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189 (S.C.C.), the Supreme Court of Canada observed that *Anton Piller* orders, unlike search warrants, do not authorize forcible entry, but expose the target to contempt proceedings unless permission to enter is given: para. 28. I think that the powers of entry granted to an investigative receiver in respect of residential premises should be no greater than those found in standard *Anton Piller* orders.

22 For these reasons I am not prepared to grant the Receiver the powers of entry as described in paragraphs 7(f) and (g) of the draft order. I am satisfied that it would be just and convenient in the circumstances to grant the Receiver powers to

 

request entry into the two residential premises similar to the powers found in the following paragraphs of the model Commercial List *Anton Piller* order: paras. 2, 5, 6, 7, 8, 9 (with the reference to the Independent Supervising Solicitor changed to the Receiver), and 12. Those provisions should be modified so as to require Paul Thornton, Christopher Thornton, or Volha Pranovich, to attend the premises along with the Receiver for the purpose of assisting the Receiver in determining the existence of and locating the Property and to cooperate with the Receiver by identifying and answering questions with respect to the Property and any other material matters relevant to the Property.

23 I grant Loblaw's request for an order abridging the time for service of this motion, as well as its request to add Volha Pranovich as a defendant to this action.

24 An order shall go in accordance with the draft filed, subject to the modifications that I have directed in paragraph 21 above.

*Motion granted.*

**End of Document**