Clerk's Stamp

COURT FILE NUMBER	2101-00814
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended
	AND IN THE MATTER OF CALGARY OIL & GAS SYNDICATE GROUP LTD., CALGARY OIL AND GAS INTERCONTINENTAL GROUP LTD. (IN ITS OWN CAPACITY AND IN ITS CAPACITY AS GENERAL PARTNER OF T5 SC OIL AND GAS LIMITED PARTNERSHIP), CALGARY OIL AND SYNDICATE PARTNERS LTD. and PETROWORLD ENERGY LTD.

SUPPLEMENTAL BENCH BRIEF OF THE APPLICANTS,

CALGARY OIL & GAS SYNDICATE GROUP LTD., CALGARY OIL AND GAS INTERCONTINENTAL GROUP LTD. (IN ITS OWN CAPACITY AND IN ITS CAPACITY AS GENERAL PARTNER OF T5 SC OIL AND GAS LIMITED PARTNERSHIP), CALGARY OIL AND SYNDICATE PARTNERS LTD. and PETROWORLD ENERGY LTD.

IN SUPPORT OF AN APPLICATION RETURNABLE MAY 25, 2021, AT 3:00 P.M. BEFORE THE HONOURABLE MR. JUSTICE P.R. JEFFREY

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Matti Lemmens Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9511 Facsimile: (403) 266-1395 Email: MLemmens@blg.com File No. 441112/000020

TABLE OF CONTENTS

I. INTRODUCTION **3**

II. FACTS AND CLARIFICATIONS **4**

II. ISSUES **5**

III. LAW & ARGUMENT **5**

A. The Engagement Agreement Terminated when the Forbearance Agreement was Terminated 5

i. The Parties never intended the Engagement Agreement to survive the end of the Forbearance Agreement 5

ii. Peters Waived the Right to Collect under the Engagement Agreement 7

iii. Peters is Forever Barred from Asserting Any Claims Against the Companies in Relation to the Engagement Agreement 9

B. The Disclaimer Notice Effective Date Order is Necessary to Prevent Uncertainty in the Interim Period between the Claims Process and the date of any Approval Order 10

IV. CONCLUSION **13**

LIST OF AUTHORITIES AND OTHER ATTACHMENTS **14**

I. INTRODUCTION

1. This Brief of Law is submitted on behalf of the Applicants, Calgary Oil & Gas Syndicate Group Ltd. ("**Syndicate Group**"), Calgary Oil and Gas Intercontinental Group Ltd. ("**Intercontinental**") (in its own capacity and in its capacity as general partner of T5 SC Oil and Gas Limited Partnership (the "**Limited Partnership**")), Calgary Oil and Syndicate Partners Ltd. ("**Syndicate Partners**") and Petroworld Energy Ltd. ("**Petroworld**" and, collectively, the "**Applicants**", and together with the Limited Partnership, the "**Companies**"), in support of the Applicants' Application for certain ancillary relief pursuant to the CCAA, including an Order*:*

(a) deeming service of this Application together with all supporting materials to be good and sufficient, and abridging the time for service of said documents, if necessary;

(b) declaring:

(ii) that the Engagement Agreement dated January 14, 2021 between Peters & Co. Limited ("**Peters**") and Triple Five Worldwide Group of Companies (the "**Engagement Agreement**") terminated and, pursuant to the Claims Procedure Order issued by the Court on April 13, 2021 (the "**Claims Procedure Order**"), Peters is forever barred from asserting any claims against the Companies in relation to the Engagement Agreement;

(collectively, the "**Peters Declaration**"); and

(c) extending the effective date of disclaimers that the Companies propose to issue for each Disclaimed Agreement to the Post-Filing Restructuring Claimants, pursuant to s. 32 of the CCAA, such that the effective date of the disclaimer is the date that any Approval Order (as defined in the Creditors' Meeting Order) is granted; and

(d) directing that, in the event that an Approval Order is not granted, the Disclaimer Notices issued by the Companies are void and of no force and effect, and the

Disclaimed Agreements shall be deemed to not have been disclaimed and shall continue in force as if no Disclaimer Notices had been issued; and

(e) such further and other relief as counsel may advise and this Honourable Court may permit.

3. All capitalized terms not otherwise defined in this Brief have the meanings ascribed thereto in the Affidavit sworn on May 19, 2021 by Ryan Martin, the Applicants' corporate representative (the "**Supplemental Martin Affidavit**").[1]

II. FACTS AND CLARIFICATIONS

3. The facts supporting the relief sought in the within Application are more particularly set out in the Supplemental Martin Affidavit.

4. As a clarification to paragraph 25 of the Brief of Law and Argument filed by the Companies on May 17, 2021 (the "**May 17 Brief**"), the figures contained in that paragraph are out of date. Paragraphs 23-25 of the Affidavit of Ryan Martin, filed on May 17, 2021, contain the correct figures for creditor support of the Plan.

5. Further, as stated in the Supplemental Martin Affidavit, paragraph 25 of the Affidavit of Ryan Martin, filed on May 17, 2021 contained a typographical error, and should have read:

> "As such, based upon the Lock-Up Agreements and Exhibit "C", my understanding is that at present, Spartan estimates that **40%** of the currently known Affected Creditors (subject to the Claims Procedure and Late Claims Procedure), representing $5,536,313.00 in value, or 49% of the currently known Affected Claims (subject to the Claims Procedure and Late Claims Procedure), have already committed to supporting the Plan [emphasis added].

[1] Affidavit of Ryan Martin, sworn on May 19, 2021 at para 1 [**Supplemental Martin Affidavit**].

II. ISSUES

6. The Applicants respectfully request that this Honourable Court determine the following issues:

   (a) Should the Court issue the Peters Declaration?

   (b) Should the Court grant the Disclaimer Notice Effective Date Order?

III. LAW & ARGUMENT

A. The Engagement Agreement Terminated when the Forbearance Agreement was Terminated

i. The Parties Never Intended the Engagement Agreement to Survive the End of the Forbearance Agreement

7. The overriding concern in contractual interpretation is "the intent of the parties and the scope of their understanding" in the context of the contract read "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract".[2] The surrounding circumstances of a contract form an objective interpretive aid to determine the meaning of the words the parties used.[3] Relevant circumstances include:

   i. the genesis, aim or purpose of the contract;

   ii. the nature of the relationship created by the contract;

   iii. the nature or custom of the market or industry in which the contract was executed; and

   iv. any other factors which would have affected the way in which the language of the document would have been understood by a reasonable person.[4]

8. The terms of the Engagement Agreement make it clear that the parties never intended for the Engagement Agreement to survive termination of the Forbearance Agreement and

---

[2] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 47 [**TAB 1**].
[3] *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 81 [*IFP Technologies*] [**TAB 2**].
[4] *IFP Technologies* at para 83.

associated Forbearance Sales Process. Both the ordinary and grammatical meaning of the Engagement Agreement and the surrounding circumstances support the conclusion that the parties intended it to terminate in the event of the termination of the Forbearance Agreement and associated Forbearance Sales Process.

9. Section 1 of the Engagement Agreement indicates that, in the event that:

> the Company enters into **any Court supervised / monitored process** to effect a sale of its assets or **consider, in any fashion, a settlement or compromise of amounts owing to creditors,** the Company will make all reasonable efforts for Peters & Co to be **re-engaged** as an advisory or sales agent through such process" [emphasis added].

10. The current proceedings under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**" and the **"CCAA Proceedings**") are a "Court supervised process" to consider "a settlement or compromise of amounts owing to creditors" captured by section 1 of the Engagement Agreement. The requirement that the Companies make "all reasonable efforts" to "re-engage" Peters if an alternate Court supervised process arose is demonstrative of the mutual intent of the parties that the Engagement Agreement would no longer be in effect if the Forbearance Sales Process was halted as a result of the termination of the Forbearance Agreement.

11. When entering into the Engagement Agreement, both Peters and the Companies understood and agreed that:

    (a) the Companies were pursuing the Forbearance Sales Process solely because it was an obligation imposed upon the Companies by Crown Capital, the Companies' primary secured creditor, pursuant to the Forbearance Agreement between the Companies and Crown Capital;[5]

[5] Supplemental Martin Affidavit at para 8.

(b) Peters was retained for the limited purpose of assisting the Companies with the Forbearance Sales Process;[6] and

(c) if the Forbearance Agreement, and thus the Forbearance Sales Process, came to an end as the result of the Companies entering into a process such as the within CCAA Proceedings, the Engagement Agreement would terminate, and the Companies would make all reasonable efforts to re-engage Peters if the CCAA Proceedings proceeded in a manner that called for the involvement of an advisory or sales agent such as Peters.[7]

12. The relationship created between Peters and the Companies as a result of the Engagement Agreement was brief and limited in scope. Peters assisted the Companies with implementing the Forbearance Sales Process during the month of January 2021, until the Forbearance Agreement was terminated by Crown Capital on February 8, 2021,[8] resulting in the halting of the Forbearance Sales Process and the termination of the Engagement Agreement.

ii. Peters Waived the Right to Enforce the Engagement Agreement

13. In the alternative, if the Engagement Agreement was not terminated by the termination of the Forbearance Agreement (which is not admitted but expressly denied), Peters waived the right to collect any fees due under the Engagement Agreement through its subsequent conduct.

14. Waiver occurs where a party has: (1) a full knowledge of its rights, and (2) an unequivocal and conscious intention to abandon them.[9] As stated by Professor G.H.L. Fridman in the *Law of Contract in Canada:*

> If waiver is alleged, however, the original rights and duties of the parties remain unchanged, save that, by virtue of the waiver, insofar as it is

[6] Supplemental Martin Affidavit at para 9.
[7] Supplemental Martin Affidavit, at paras 9, 12.
[8] Supplemental Martin Affidavit at para 11.
[9] *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, [1994] 2 SCR 490, 1994 CarswellAlta 769 at para 20 [**TAB 3**].

> operative and effective, the party acquiescing in the change cannot enforce his original rights to the extent to which they conflict with the change suggested or initiated by the other party and acquiesced in by the former.[10]

15. The principle underlying waiver by conduct is that "a party should not be allowed to resile from a choice when it would be unfair to the other party to do so".[11]

16. Peters is on the service list for the within CCAA Proceeding, and has had notice of all application materials and orders filed in the CCAA Proceeding.[12] Despite having such notice, Peters has not requested payment of any fees, or reserved any rights in relation to the Engagement Agreement.[13] Peters has also not performed or sought to perform any of its obligations pursuant to the Engagement Agreement following the termination of the Forbearance Agreement.[14]

17. One of the purposes of the CCAA Proceeding is to implement an organized and Court-supervised process for resolving the Companies' outstanding debts, and Peters is a sophisticated commercial party that has acted as a financial advisor in many insolvencies. In these circumstances, if Peters was of the view that the Engagement Agreement did not terminate, it was incumbent upon Peters to raise this position with the Companies and the Monitor when the Work Fee under the Engagement Agreement was not paid in February and March of 2021. Peters' decision not to raise any issues with the Companies or the Monitor respecting its rights and obligations under the Engagement Agreement demonstrates Peters' conscious intention to abandon any rights it held under the Engagement Agreement.

18. Further, the Companies and the Monitor have proceeded with their efforts to restructure on the understanding that the Engagement Agreement terminated when the Forbearance Agreement was terminated.[15] Allowing Peters to resile from its choice not to enforce the

---

[10] G.H.L. Fridman, *The Law of Contract in Canada*, (Toronto: Carswell, 2011) at page 549 [**TAB 4**].
[11] *Bradfield v. Royal Sun Alliance Insurance Company of Canada*, 2019 ONCA 800, at para 31 [**TAB 5**].
[12] Supplemental Martin Affidavit at para 15.
[13] Supplemental Martin Affidavit at para 14.
[14] Supplemental Martin Affidavit at paras 13.
[15] Monitor's Fourth Report, at para 46.

Engagement Agreement would be unfair to the Companies, because if Peters now seeks to enforce the Engagement Agreement, it may disrupt and prejudice the Companies' efforts to restructure, including by potentially disrupting the Transaction contemplated by the Definitive Agreement which has already been finalized with Spartan (as these terms are defined in the May 17 Brief).

19. Given the foregoing, if the Engagement Agreement did not terminate upon the termination of the Forbearance Agreement, Peters has nonetheless waived any rights to enforce the Engagement Agreement.

iii. Peters is Forever Barred from Asserting Any Claims Against the Companies in Relation to the Engagement Agreement

20. The Engagement Agreement does not stipulate that any damages will become payable in the event that the Engagement Agreement is terminated as a result of the termination of the Forbearance Agreement, and Peters was paid in full for its work which preceded the termination of the Engagement Agreement.[16] It is therefore the position of the Companies that the termination of the Engagement Agreement did not result in Peters having any claim against the Companies.

21. However, if the termination of the Engagement Agreement did give rise to a claim against the Companies, any claim that Peters may have had is barred by the Claims Procedure Order granted by the Honourable Mr. Justice J. J. Gill on April 13, 2021. Pursuant to that Order, claims which are not received by the Monitor prior to the Claims Bar Date will, unless otherwise ordered by the Court, be forever extinguished and such creditors will be forever barred from making or enforcing claims against the Companies.[17]

22. Peters has failed to assert any claims or reserve any rights in relation to the Engagement Agreement despite having notice of all the application materials and orders filed in the CCAA Proceedings.[18] The termination of the Engagement Agreement occurred on February 8, 2021, prior to the Initial Order being granted on February 11, 2021; therefore,

[16] Supplemental Martin Affidavit at para 10.
[17] Order re: Claims Procedures of the Honourable Mr. Justice J.J. Gill, granted on April 13, 2021, QB File No 2101-00814.
[18] Supplemental Martin Affidavit at para 15.

any claim that Peters may have had arising from the termination of the Engagement Agreement was a pre-filing claim. Pursuant to the Claims Procedure Order, Peters' failure to assert such a claim prior to the Claims Bar Date means that any such claim is forever extinguished and that Peters is forever barred from asserting any such claim against the Companies.

B. The Disclaimer Notice Effective Date Order is Necessary to Prevent Uncertainty in the Interim Period between the Claims Process and the date of any Approval Order

23. The "engine" driving the statutory scheme of the CCAA is the power of a judge to make "any order that [the judge] considers appropriate in the circumstances" under section 11.[19] Section 11 is the basis of a "broad reading of *CCAA* authority" which is constrained only by restrictions set out in the *CCAA* itself and the requirement that an order be "appropriate in the circumstances".[20] Where no CCAA provision confers more specific jurisdiction, section 11 is the provision of "first resort' in anchoring jurisdiction.[21]

24. Among the "fund of discretionary powers" available to courts to make practical orders in CCAA proceedings is the power to extend time periods.[22] Courts have jurisdiction to "extend any prescription, time or limitation period relating to any proceeding for or against the Applicants or related entities that may expire".[23]

25. Under section 32(1) of the *CCAA*, a debtor company may, with the approval of the monitor, disclaim any agreement to which the company is party on the day on which proceedings commence under the Act.[24] Where a disclaimer is not contested by another party to the contract, an agreement is usually officially disclaimed 30 days after a debtor company provides notice to the other parties.[25]

---

[19] *9354-9186 Quebec inc. v Callidus Capital Corp.*, 2020 SCC 10 at para 48 [*Callidus*] [**TAB 6**]; *Companies Creditors' Arrangement Act*,RSC 1985, c C-36 s 11 [*CCAA*] [**TAB 7**].
[20] *Callidus* at para 67 [**TAB 6].**
[21] *Callidus* at para 68 [**TAB 6**].
[22] See, for example, *Cansugar Inc re Option Agreement*, 2005 NBQB 199 at paras 28, 35 [*Cansugar*] [**TAB 8**].
[23] *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*, 2019 ONSC 2222, 2019 CarswellOnt 6071 at para 27 [**TAB 9**].
[24] *CCAA* s 32(1).
[25] *CCAA* s 34(5)(a)

26. Section 32(5) of the *CCAA* explicitly affords courts the discretion to fix a later date of disclaimer where the disclaimer is contested by a party under section 32(2), or granted by a court over the monitor's objections under section 32(3):

> (5) An agreement is disclaimed or resiliated
>
> (a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);
>
> (b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) **or on any later day fixed by the court**; or
>
> (c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice **or on any later day fixed by the court** (emphasis added).[26]

27. The purpose of section 32 of the *CCAA* is to allow a debtor company to disclaim a contract while moving forward with a liquidation plan without further delay and with minimal uncertainty.[27] Section 32 of the *CCAA* must therefore be read in light of the "broad reading of CCAA authority" endorsed by the Supreme Court in *Callidus*.[28]

28. As Watson J. of the Court of Appeal held in *Bellatrix Exploration Ltd (Re),*

> Section 32 should also be read consistently with the applicable canons of interpretation, and accordingly it should be read in harmony with the scheme and not so as to render any other parts of the scheme ineffective.[29]

---

[26] *CCAA* s 32(5)(b),(c)
[27] *Bellatrix Exploration Ltd (Re),* 2021 ABCA 85 at para 64 [*Bellatrix*] [**TAB 10**].
[28] *Callidus* at para 67 [**TAB 6**].
[29] *Bellatrix* at para 64 [**TAB 10**].

29. In light of this broad reading of section 32 of the *CCAA* and the broad powers provided by section 11 of the *CCAA*, a Court has jurisdiction to extend the 30-day period after which contracts are officially disclaimed where it is "appropriate in the circumstances", and not only those circumstances specifically mentioned under section 32(5)(b) and (c).

30. In these circumstances, extending the usual 30-day period is necessary to allow the parties to move forward in the restructuring process while minimizing uncertainty for the Companies, Spartan and creditors alike. The Disclaimed Agreements relate to the provision of services or equipment to the Companies, the uninterrupted provision of which are essential to avoid disruption to the ongoing operations of the Companies.[30] It is contemplated that those services and equipment will be replaced by Spartan in the event that the Definitive Agreement[31] closes upon approval of the Plan.[32]

31. The Disclaimer Notice Effective Date Order was developed in consultation with the Monitor. Without an extension of the 30-day period, the Companies are vulnerable to interruptions in services under the Disclaimed Contracts in the period between the end of the 30-day period and the eventual closing of the transaction planned under the Definitive Agreement (the "**Interim Period**').

32. Uncertainty about these contractual arrangements will distract all parties from the restructuring process and risks negatively affecting the Companies operation and revenues during the Interim Period.

33. In comparison, granting the Disclaimer Notice Effective Date Order will promote certainty for all parties, allow the Companies to ensure safe operations and maximise revenues for the benefit of creditors, while minimizing unproductive distractions away from the completion of the Companies' restructuring process and implementation of the Creditors Meeting Order.[33]

---

[30] Supplemental Martin Affidavit at para 19.
[31] As defined in the Companies' May 17, 2021 Application for a Creditor's Meeting Order, Late Field Claims Order and Stay Extension Order [the "**May 17 Application**")
[32] As defined in the May 17 Application.
[33] Supplemental Martin Affidavit at para 21.

34. Further, granting the Disclaimer Notice Effective Date Order will not prejudice the recipients of the Disclaimer Notices, as such recipients will continue to be fully compensated pursuant to the Disclaimed Agreements for the services or equipment provided during the Interim Period, while also being able to fully assert any Late Filed Claims resulting from the disclaimer of the Disclaimed Agreements utilizing the Late Claims Procedure.

35. As specified in the May 17 Application, the Late Claims Procedure mandated by the Late Filed Claims Order will occur prior to any Creditors' Meeting, allowing the counterparties to the Disclaimed Agreements to participate in the plan approval process. This process has been selected to preserve the ability of Post-Filing Restructuring Claimants to participate in the plan approval process.[34] Early disclaimer of the Disclaimed Agreements supports this process and therefore ensures a fair and reasonable process for the counterparties to the Disclaimed Agreements.

IV. CONCLUSION

36. Accordingly, for the reasons set out above, the Applicants submit that it is necessary and appropriate in the circumstances to grant the requested relief as set forth in the Termination and Date Extension Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20TH DAY OF MAY 2021

BORDEN LADNER GERVAIS LLP

Per: Matti Lemmens
Solicitors for the Applicants, Calgary Oil & Gas Syndicate Group Ltd., Calgary Oil and Gas Intercontinental Group Ltd. ((in its own capacity and in its capacity as general partner of T5 SC Oil and Gas Limited Partnership), Calgary Oil and Syndicate Partners Ltd., and Petroworld Energy Ltd.

[34] May 17 Application at para 11.

LIST OF AUTHORITIES AND OTHER ATTACHMENTS

TAB NO.	DOCUMENT DESCRIPTION
1	*Sattva Capital Corp v Creston Moly Corp,* 2014 SCC 53
2	*IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157
3	*Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, [1994] 2 SCR 490, 1994 CarswellAlta.
4	G.H.L. Fridman, *The Law of Contract in Canada*, (Toronto: Carswell, 2011)
5	*Bradfield v. Royal Sun Alliance Insurance Company of Canada*, 2019 ONCA 800
6	*9354-9186 Quebec inc. v Callidus Capital Corp.*, 2020 SCC 10
7	*Companies Creditors' Arrangement Act*, RSC 1985, c C-36
8	*Cansugar Inc re Option Agreement*, 2005 NBQB 199
9	*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*, 2019 ONSC 2222, 2019 CarswellOnt 6071
10	*Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85

TAB 1

Most Negative Treatment: Check subsequent history and related treatments.

2014 SCC 53, 2014 CSC 53
Supreme Court of Canada

Creston Moly Corp. v. Sattva Capital Corp.

2014 CarswellBC 2267, 2014 CarswellBC 2268, 2014 SCC 53, 2014 CSC 53, [2014] 2 S.C.R. 633, [2014] 9 W.W.R. 427, [2014] B.C.W.L.D. 5218, [2014] B.C.W.L.D. 5219, [2014] B.C.W.L.D. 5230, [2014] B.C.W.L.D. 5255, [2014] S.C.J. No. 53, 242 A.C.W.S. (3d) 266, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 373 D.L.R. (4th) 393, 461 N.R. 335, 59 B.C.L.R. (5th) 1, 614 W.A.C. 1

Sattva Capital Corporation (formerly Sattva Capital Inc.), Appellant and Creston Moly Corporation (formerly Georgia Ventures Inc.), Respondent and Attorney General of British Columbia and BCICAC Foundation, Interveners

McLachlin C.J.C., LeBel, Abella, Rothstein, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 12, 2013
Judgment: August 1, 2014
Docket: 35026

Proceedings: reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 554 W.A.C. 114, 326 B.C.A.C. 114, 2 B.L.R. (5th) 1, 36 B.C.L.R. (5th) 71, 2012 BCCA 329, 2012 CarswellBC 2327, Bennett J.A., Kirkpatrick J.A., Neilson J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2011), 2011 CarswellBC 1124, 2011 BCSC 597, 84 B.L.R. (4th) 102, Armstrong J. (B.C. S.C.); and reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 319 D.L.R. (4th) 219, 2010 BCCA 239, 2010 CarswellBC 1210, 7 B.C.L.R. (5th) 227, Levine J.A., Low J.A., Newbury J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2009), 2009 BCSC 1079, 2009 CarswellBC 2096, Greyell J. (B.C. S.C.)

Counsel: Michael A. Feder, Tammy Shoranick, for Appellant
Darrell W. Roberts, Q.C., David Mitchell, for Respondent
Jonathan Eades, Micah Weintraub, for Intervener, Attorney General of British Columbia
David Wotherspoon, Gavin R. Cameron, for Intervener, BCICAC Foundation

Related Abridgment Classifications
Alternative dispute resolution
IX Appeal from arbitration awards
IX.2 Question of law
Alternative dispute resolution
IX Appeal from arbitration awards
IX.5 Leave to appeal
IX.5.b Miscellaneous
Business associations
IV Powers, rights and liabilities
IV.9 Contracts by corporations
IV.9.e Miscellaneous
Contracts
VII Construction and interpretation
VII.4 Resolving ambiguities
VII.4.c Reasonableness

Headnote

Alternative dispute resolution --- Appeal from arbitration awards — Question of law

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator concluded that stock exchange would have probably valued finder's fee at $0.15 per share under terms of agreement and that SC lost opportunity to sell shares at that value — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Alternative dispute resolution --- Appeal from arbitration awards — Leave to appeal — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but on question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of Agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Unless Court places restrictions in order granting leave, order granting leave is "at large" — Appellants may raise issues on appeal that were not set out in leave application — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Business associations --- Powers, rights and liabilities — Contracts by corporations — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Contracts --- Construction and interpretation — Resolving ambiguities — Reasonableness

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Question de droit

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu que la bourse aurait probablement évalué les honoraires d'intermédiation à 15 cents l'unité en vertu des termes de l'entente et que SC avait perdu l'occasion de vendre les actions à ce prix — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Demande d'autorisation d'appel — Divers

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale » — Appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Associations d'affaires --- Pouvoirs, droits et responsabilités — Contrats signés par la société — Questions diverses

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million $US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

Contrats --- Interprétation — Résolution des ambiguïtés — Caractère raisonnable

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million $US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le cours, selon

la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.
The dispute concerned which date should be used to determine the price of shares and thus the number of shares to which SC was entitled. The arbitrator ruled in favour of SC, and CM sought leave to appeal from the Supreme Court Leave Court, which dismissed the application on the grounds that it did not involve a question of law, but rather mixed fact and law. The Court of Appeal granted CM leave to appeal, holding that it was a question of law. The Supreme Court dismissed the appeal, but the Court of Appeal reversed this decision and found in favour of CM. SC appealed both this decision and the decision of the Court of Appeal Leave Court to the Supreme Court of Canada.
Held: The appeals were allowed.
Per Rothstein J. (McLachlin C.J.C., LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring): The issue of whether the Court of Appeal Leave Court erred in finding a question of law for the purposes of granting leave to appeal was properly before the Court. While the subject of the appeal was important to the parties, the question was not a question of law within the meaning of s. 31 of the Arbitration Act. Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law. Canadian courts, however, have moved away from this historical approach. The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding". Questions of law "questions about what the correct legal test is". Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. The fact that the legal system leaves broad scope to tribunals of first instance to resolve issues of limited application supports treating contractual interpretation as a question of mixed fact and law.
The issue whether the proposed appeal was on a question of law was expressly argued before the Leave Courts of both the Supreme Court and Court of Appeal. There was no reason why SC should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to the Supreme Court of Canada. Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) of the Arbitration Act are met and where the leave court does not exercise its residual discretion to nonetheless deny leave. Even if the Court of Appeal Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the Supreme Court Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion. The Court of Appeal Court erred in holding that the Leave Court's comments on the merits of the appeal were binding on it and on the Supreme Court Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case. A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful. This is true even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal. The fact that the Court of Appeal provided its own reasoning as to why it came to the same conclusion as the Leave Court did not vitiate the error.
The arbitrator's decision that the shares should be priced according to the market price definition gave effect to both the market price definition and the "maximum amount" proviso. The arbitrator's interpretation of the agreement, as reconciled the market price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.
Le litige portait sur la date devant servir à déterminer le prix des actions et, ainsi, le nombre d'actions auxquelles SC avait droit. L'arbitre a tranché en faveur de SC, et CM a déposé une demande d'autorisation d'appel auprès de la Cour suprême, laquelle a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit. CM a obtenu l'autorisation d'appeler de la Cour d'appel, laquelle a estimé qu'il s'agissait d'une question de droit. La Cour suprême a rejeté l'appel, mais la Cour d'appel a infirmé cette décision et a tranché en faveur de CM. SC a formé un pourvoi à l'encontre

de cette décision et de la décision de la formation de la Cour d'appel saisie de la demande d'autorisation d'appel auprès de la Cour suprême du Canada.

Arrêt: Les pourvois ont été accueillis.

Rothstein, J. (McLachlin, J.C.C., LeBel, Abella, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : C'était à bon droit que la Cour était saisie de la question de savoir si la formation de la Cour d'appel a commis une erreur en concluant à la présence d'une question de droit dans le cadre de la demande d'autorisation d'appel. Bien que la question faisant l'objet du pourvoi était importante, il ne s'agissait pas d'une question de droit au sens de l'art. 31 de l'Arbitration Act. Historiquement, la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit. Les tribunaux canadiens, toutefois, ont abandonné cette approche historique. L'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente ». Les questions de droit « concernent la détermination du critère juridique applicable ». Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties. En établissant une distinction entre les questions de droit et les questions mixtes de fait et de droit, on vise principalement à restreindre l'intervention de la juridiction d'appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère au tribunal administratif siégeant en première instance étaye la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

La question de savoir si l'appel proposé soulevait une question de droit a été expressément débattue devant les formations de la Cour suprême et de la Cour d'appel saisies de la demande d'autorisation. Rien n'empêchait SC de soulever cette question en appel, même si elle ne l'a pas mentionnée dans la demande d'autorisation d'appel qu'elle a présentée à la Cour suprême du Canada. L'appel d'une sentence arbitrale n'est donc entendu que si les critères de l'art. 31(2) de l'Arbitration Act sont remplis et que le tribunal saisi de la demande d'autorisation ne refuse pas néanmoins l'autorisation en vertu de son pouvoir discrétionnaire résiduel. Même si la formation de la Cour d'appel saisie de la demande d'autorisation avait défini une question de droit et qu'il avait été satisfait au critère du risque d'erreur judiciaire, elle aurait dû confirmer la décision de la formation de la Cour suprême saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour. La Cour d'appel saisie de l'appel a commis une erreur en concluant que les commentaires sur le bien-fondé de l'appel formulés par la formation de la Cour d'appel saisie de la demande d'autorisation la liaient et liaient également la formation de la Cour suprême saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond; il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli. Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs. Le fait que la Cour d'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur.

La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donnait effet à cette dernière et à la stipulation relative au « plafond ». L'interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

Table of Authorities

Cases considered by *Rothstein J.*:

A.T.A. v. Alberta (Information & Privacy Commissioner) (2011), 339 D.L.R. (4th) 428, 2011 CarswellAlta 2068, 2011 CarswellAlta 2069, 2011 SCC 61, *(*sub nom. *Alberta Teachers' Association v. Information & Privacy Commissioner (Alta.))* 424 N.R. 70, 52 Alta. L.R. (5th) 1, 28 Admin. L.R. (5th) 177, [2012] 2 W.W.R. 434, *(*sub nom. *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association)* [2011] 3 S.C.R. 654, *(*sub nom. *Alberta Teachers' Association v. Information and Privacy Commissioner)* 519 A.R. 1, *(*sub nom. *Alberta Teachers' Association v. Information and Privacy Commissioner)* 539 W.A.C. 1 (S.C.C.) — referred to

C.J.A., Local 579 v. Bradco Construction Ltd. (1993), 12 Admin. L.R. (2d) 165, [1993] 2 S.C.R. 316, 106 Nfld. & P.E.I.R. 140, 334 A.P.R. 140, 93 C.L.L.C. 14,033, 153 N.R. 81, 102 D.L.R. (4th) 402, 1993 CarswellNfld 114, 1993 CarswellNfld 132 (S.C.C.) — referred to

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — considered

41 In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be "sufficiently important", in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

(3) The Question Under Appeal Is Not a Question of Law

(a) When Is Contractual Interpretation a Question of Law?

42 Under s. 31 of the *AA*, the issue upon which leave is sought must be a question of law. For the purpose of identifying the appropriate standard of review or, as is the case here, determining whether the requirements for leave to appeal are met, reviewing courts are regularly required to determine whether an issue decided at first instance is a question of law, fact, or mixed fact and law.

43 Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law (*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63 (Man. C.A.), at para. 20, *per* Steel J.A.; K. Lewison, *The Interpretation of Contracts* (5th ed. 2011 & Supp. 2013), at pp. 173-76; and G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 125-26). This rule originated in England at a time when there were frequent civil jury trials and widespread illiteracy. Under those circumstances, the interpretation of written documents had to be considered questions of law because only the judge could be assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

44 This historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law (*Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945 (U.K. H.L.), at paras. 58 and 82-83; and Lewison, at pp. 173-77). They do this despite the fact that U.K. courts consider the surrounding circumstances, a concept addressed further below, when interpreting a written contract (*Prenn v. Simmonds*, [1971] 3 All E.R. 237 (U.K. H.L.); and *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (U.K. H.L.)).

45 In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (Alta. C.A.) (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84 (Man. C.A.), at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221 (Alta. C.A.), at paras. 11-12; and *Costco Wholesale Canada Ltd. v. R.*, 2012 FCA 160, 431 N.R. 78 (F.C.A.), at para. 34. However, some Canadian courts have abandoned the historical approach and now treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. See for example *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1 (P.E.I. C.A.), at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98 (B.C. C.A.), at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230 (B.C. C.A.), at para. 44; *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81 (Ont. C.A.), at paras. 22-23 (majority reasons, *per* Blair J.A.) and paras. 133-35 (*per* Gillese J.A. in dissent, but not on this point); and *King*, at paras. 20-23.

46 The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of

law and questions of mixed fact and law provided in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 26 and 31-36.

47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

49 As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam Inc*. Questions of law "are questions about what the correct legal test is" (*Southam Inc.*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam Inc.*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

50 With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

51 The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam Inc.* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches

> utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

52 Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

53 Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

54 However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" .... [para. 36]

55 Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

(b) The Role and Nature of the "Surrounding Circumstances"

56 I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).

TAB 2

2017 ABCA 157
Alberta Court of Appeal

IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing

2017 CarswellAlta 1133, 2017 ABCA 157, [2017] 12 W.W.R. 261, [2017] A.W.L.D. 3423, [2017] A.W.L.D. 3424, [2017] A.W.L.D. 3448, [2017] A.W.L.D. 3756, [2017] A.W.L.D. 3757, [2017] A.J. No. 666, 280 A.C.W.S. (3d) 752, 53 Alta. L.R. (6th) 96, 70 B.L.R. (5th) 173

IFP Technologies (Canada) Inc. (Appellant) and EnCana Midstream and Marketing, PanCanadian Resources, EnCana Corporation, EnCana Oil & Gas Developments Ltd., Canadian Forest Oil Ltd. and The Wiser Oil Company (Respondents)

Catherine Fraser C.J.A., Jack Watson, Patricia Rowbotham JJ.A.

Heard: October 16, 2015; November 10, 2015
Judgment: May 26, 2017
Docket: Calgary Appeal 1401-0235-AC

Proceedings: reversing *IFP Technologies (Canada) Inc. v. Encana Midstream and Marketing* (2014), 2014 CarswellAlta 1423, 591 A.R. 202, 2014 ABQB 470, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

Counsel: P. Edwards, R. de Waal, for Appellant
G.N. Stapon, Q.C., L.M. Gill, for Respondents

Related Abridgment Classifications
Contracts
VII Construction and interpretation
VII.4 Resolving ambiguities
VII.4.e Miscellaneous
Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.h Damages for breach
Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.k Miscellaneous

Headnote
Contracts --- Construction and interpretation — Resolving ambiguities — Miscellaneous
Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited to enhanced recovery — Economics of gas development changed, and PCR had to establish economically producing wells on site to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with

existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trial judge held that joint operating agreement did not supersede asset exchange agreement — Trial judge ruled that working interest was not defined in asset exchange agreement — Trail judge found that provision in JOA, stating that working interest was limited to thermal and other enhanced recovery, was not conflict but rather provided definition — Trial judge held that under agreements, I Inc.'s working interest was always limited to thermal and other enhanced recovery methods — I Inc. appealed — Appeal allowed — Trial judge erred in law in failing to recognize that "working interest" was legal term of art with specific meaning in oil and gas industry — Trial judge disregarded in their entirety clear, compelling substantive provisions in AEA relating to 20 per cent of PCR's working interest that PCR conveyed to I Inc. — Trial judge wrongly relied on preamble provision in AEA to trump its substantive textual provisions — This led the trial judge into further errors and, in end, it led him to interpretation of the contract that would have given I Inc. not only interest incompatible with parties' objective intentions but one incompatible with law on working interests in oil and gas industry — Trial judge erred in finding that I Inc. acted unreasonably in withholding its consent to farmout to W Co. I Inc.'s withholding of consent was reasonable in circumstances of this case — Accordingly, PCR breached contract by proceeding as it did.

Natural resources --- Oil and gas — Exploration and operating agreements — Miscellaneous

Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited to enhanced recovery — Economics of gas development changed, and PCR had to establish economically producing wells on site to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trial judge held that agreements did not prohibit and actually contemplated primary production, and did not require PCR to undertake enhanced recovery operations — Trial judge found that I Inc. was unreasonable in withholding its consent to agreement between defendants — Trial judge ruled that I Inc. retained its 20 per cent working interest in thermal and other enhanced recovery at property and did not establish that its working interest was destroyed by primary operations — I Inc. appealed — Appeal allowed — Law is clear that "working interest" in relation to mineral substances in situ is particular kind of property right or interest in land — When owner of minerals in situ leases right to extract these minerals, right to extract is known as "working interest" — "Working interest" constitutes percentage of ownership that owner has to explore, drill and produce minerals from lands in question — Trial judge erred in concluding that because primary production was not expressly prohibited, it followed that reactivating primary production, including through new wells, was permitted without limitation — I Inc.'s working interest remained undivided interest tenant in common equal to 20 per cent of PCR's working interest in site's petroleum and natural gas rights and in PCR miscellaneous interests in site, as both terms were defined in AEA — I Inc.'s withholding of consent was reasonable in circumstances of this case — Accordingly, PCR breached contract by proceeding as it did.

Natural resources --- Oil and gas — Exploration and operating agreements — Damages for breach

Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited to enhanced recovery — Economics of gas development changed, and PCR had to establish economically producing wells on site to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trail judge held that I Inc. was unreasonable in withholding its consent to agreement between defendants — Trial judge ruled that I Inc. retained its 20 per cent working interest in thermal and other enhanced recovery at property and did not establish that its working interest was destroyed by primary operations — Trial judge held that accumulation of errors by I Inc.'s experts was such that valuation based on their evidence could not accepted and that any figure selected for damages would be guess unsupported by method, principle or evidence — Trial judge held that I Inc. was never in position to realize upon its working interest, and there was no chance of thermal development at site within reasonable time of alleged breach of contract — I Inc. appealed — Appeal allowed on other grounds — Despite breach of contract when PCR transferred its interest to W Co., I Inc. merely lost opportunity to

convince PCR that thermal project should be "go" — Realistically, having regard to all relevant considerations and factors, trial judge's conclusion that there was no chance thermal project would be implemented was correct — Therefore, trial judge made no reviewable error in concluding that any award of damages should be discounted by 100 per cent to reflect chance of non-occurrence of thermal project.

The plaintiff I Inc., a research and development company, entered into a deal with the defendant PCR, a Canadian oil and gas partnership, over plans to jointly work on enhanced recovery technology at a property in Alberta ("site"). The deal made between PCR and I Inc. involved a number of agreements. There was a Memorandum of Understanding ("MOU") and a formal Asset Exchange Agreement ("AEA)". Attached to the AEA as schedules were a number of agreements, including a Joint Operating Agreement ("JOA").

I Inc. was granted a 20 per cent working interest in the AEA.The JOA specified that a working interest was limited to enhanced recovery. PCR had to establish economically producing wells on site to prevent the expiry of leases. PCR entered into an agreement with the defendant W Co. for it to act as operator on site, dealing with existing wells and taking over the working interest. I Inc. waived its right of first refusal but refused to consent to the transaction. I Inc. brought an action against the defendants for breach of agreement. The action was dismissed.

The trial judge ruled that "working interest" was not defined in the AEA and that the provision in the JOA stating that working interest was limited to thermal and other enhanced recovery, was not in conflict but rather provided the definition. The trial judge held that under the agreements, I Inc.'s working interest was always limited to thermal and other enhanced recovery methods. I Inc. appealed.

Held: The appeal was allowed.

Per Fraser C.J.A. (Rowbotham J.A. concurring) The term "working interest" has an accepted meaning and usage in the oil and gas industry sector Its interpretation has precedential value, therefore it must be interpreted consistently. While a legal term of art may be modified by the parties to an agreement, that does not permit a trial judge to ignore the meaning attributable to it in the absence of such modification. To do so is tantamount to failing to take into account a key term of a contract or relevant factor or ignoring applicable principles and governing authorities. That is a question of law reviewable for correctness.

In a recent contractual interpretation case, the Supreme Court of Canada clarified that courts ought to "have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract." While the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. An antecedent agreement like the MOU, which was agreed to in writing by both PCR and I Inc., fell within the category of objective evidence of background facts. Netiations preceding the conclusion of the MOU were also relevant to the extent that they shed light on the factual matrix.

The AEA referred to PCR's conveying to I Inc. 20 per cent of PCR's "working interest" in the site. "Working interest", as that term was used in the AEA, had a specific legal meaning. Unfortunately, the trial judge failed to recognize this, then compounded this error by wrongly using the fact that the parties had not expressly defined the meaning of "working interest" in the AEA to disregard, in their entirety, the textually explicit conveyance articles in the AEA.

The fact that the AEA did not expressly define the term "working interest" was irrelevant, since it is a legal term of art. The law is clear that a "working interest" in relation to mineral substances *in situ* is a particular kind of property right or interest in land. When the owner of minerals *in situ* leases the right to extract these minerals, the right to extract is known as a "working interest." Simply stated, "working interest" constitutes the percentage of ownership that an owner has to explore, drill and produce minerals from the lands in question.

The trial judge found that the JOA was determinative of the nature and extent of I Inc.'s working interest in the site. In so finding, however, the trial judge failed to consider surrounding circumstances on the basis the contract was not ambiguous. This interpretive approach constituted a reviewable error of law. Had the surrounding circumstances been taken into account, it would have been apparent that the JOA was not intended to, and did not, limit I Inc.'s working interest in the site.

The incontrovertible facts, as revealed in the supporting documentary evidence, confirmed that PCR and I Inc. agreed, following negotiations between the parties, that I Inc. would receive 20 per cent of PCR's working interest in all development in the site. That agreement, documented in the MOU, did not limit I Inc.'s interest in the site to thermal or enhanced production only. In ignoring this factual matrix, the trial judge also relied on Article 7.3 of the AEA, which provided that the AEA "supercedes all other agreements, documents, writings, and verbal understandings among the Parties relating to the subject matter hereof

and expresses the entire understanding of the Parties with respect to the subject matter hereof." On this basis, the trial judge effectively dismissed the MOU and other surrounding circumstances as irrelevant to the interpretive exercise. In so doing, he erred.

The mere existence of an "entire agreement" provision does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute. Where parties have concluded an agreement and a court is left to sort out the parties' objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear when it is not.

The trial judge failed to recognize that the AEA and the JOA served fundamentally different objectives. The AEA dealt with ownership of the assets. The JOA outlined the terms under which the parties would operate to exploit those assets.

The record was replete with evidence that both PCR and I Inc. considered primary production to be finished at the site. The JOA did not address the terms and conditions under which primary production could be restarted or initiated without I Inc.'s agreement. Consequently, the trial judge erred in concluding that because primary production was not expressly prohibited, it followed that reactivating primary production, including through new wells, was permitted without limitation and in further concluding that W Co. did no more than PCR was entitled to do when it reactivated primary production at the site.

I Inc.'s working interest remained an undivided interest as a tenant in common equal to 20 per cent of PCR's working interest in the site's petroleum and natural gas rights and in the PCR miscellaneous interests in the site, as both terms were defined in the AEA.

The trial judge erred in finding that I Inc. acted unreasonably in withholding its consent to the farmout to W Co. I Inc.'s withholding of consent was reasonable in the circumstances of this case. Accordingly, PCR breached the contract by proceeding as it did.

The JOA did not obligate PCR to implement a thermal project. Corporate priorities, financial circumstances and the economy can all change, but that does not end the analysis. The trial judge failed to consider whether there was nevertheless, at a minimum, a reasonable expectation that PCR would not engage in primary production in a manner that substantially nullified the contractual objectives or caused significant harm. Having regard to the entirety of the contract and the factual matrix, such an expectation was a reasonable one.

Despite the breach of contract when PCR transferred its interest to W Co., I Inc. merely lost an opportunity to convince PCR that a thermal project should be a "go" and an opportunity to agree with PCR on other methods to exploit the minerals at the site. Realistically, having regard to all relevant considerations and factors, the trial judge's conclusion that there was no chance a thermal project would be implemented was correct. Therefore, the trial judge made no reviewable error in concluding that any award of damages should be discounted by 100 per cent to reflect the chance of non-occurrence of a thermal project.

Per Watson J.A. (dissenting): The trial judge's reasons properly accepted that the onus was on PCR to prove consent was unreasonably withheld. It was not a palpable error to find that I Inc.'s rationale for refusing consent was unreasonable because it had the effect of overriding legitimate rights of another party to the same deal. There was no reasonable refusal under the terms of the deal. As a matter of law, I Inc. was in no worse position after the farm-out to W Co. than it was before. PCR was under no obligation to develop the thermal and enhanced recovery potential of the site. I Inc. did not contract for that obligation.

If a reasonable reading of the deal did not support the sort of veto that I Inc. asserted could be based on its reasonable expectations, a veto could not be grounded in reasonable expectations in law. Reasonable expectations of persons involved in a specific industry (industry expectations) may also have a role in assessing whether an ambiguous clause or term of a contract should be given a specific meaning. Such expectations are not subjective. In a sense, reasonable expectations grounded in the practice of the relevant industry may be circumstantial evidence of what would be the likely objective meaning of the clause or term and therefore its case-specific meaning.

The trial judge's finding of that there was no breach of the deal was reasonable.

The appeal should be dismissed.

Table of Authorities

Cases considered by *Catherine Fraser C.J.A.*:

A. Goal of Contractual Interpretation

79 I now turn to a brief overview of the applicable principles of contractual interpretation. The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made through the application of legal principles of interpretation: *Sattva*, *supra* at para 49. To this end, "the exercise is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix": Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012) at 33 [Hall]. Accordingly, disputed contractual terms must be interpreted, not in isolation, but in light of the contract as a whole: *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4 (S.C.C.) at para 64, [2010] 1 S.C.R. 69 (S.C.C.).

1. Requirement to Consider Factual Matrix

80 One aspect of the current law on contractual interpretation engaged by this appeal relates to the relevance of the factual matrix. In *Sattva*, the Supreme Court finally clarified that courts ought to "have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract" (para 46). Why? As the Supreme Court noted, "ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning" (para 47).

81 Considering the surrounding circumstances of a contract does not offend the parol evidence rule. That rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract. However, evidence of surrounding circumstances is not used for this purpose but rather as an *objective* interpretive aid to determine the meaning of the words the parties used: *Sattva*, *supra* at paras 59-61. Therefore, while the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. The goal is to deepen the trial judge's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. This approach is in keeping with Lord Steyn's famous admonition in *R. (on the application of Daly) v. Secretary of State for the Home Department*, [2001] UKHL 26 (Eng. H.L.) at para 28 that "[i]n law context is everything".

82 Thus, in interpreting a contract, a trial judge must consider the relevant surrounding circumstances even in the absence of ambiguity: Hall, *supra* at 24-25; John D. McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 751 [McCamus]; *Bighorn*, *supra* at para 10; *Seven Oaks Inn Partnership v. Directcash Management Inc.*, 2014 SKCA 106 (Sask. C.A.) at para 13, (2014), 446 Sask. R. 89 (Sask. C.A.); *Nexxtep Resources Ltd. v. Talisman Energy Inc.*, 2013 ABCA 40 (Alta. C.A.) at para 31, (2013), 542 A.R. 212 (Alta. C.A.) [*Nexxtep*], citing *Dumbrell v. Regional Group of Cos.*, 2007 ONCA 59 (Ont. C.A.) at para 54, (2007), 85 O.R. (3d) 616 (Ont. C.A.); *Hi-Tech Group Inc. v. Sears Canada Inc.*, 2001 CanLII 24049 at para 23, (2001), 52 O.R. (3d) 97 (Ont. C.A.) [*Hi-Tech*]; *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)*, 2000 NFCA 21 (Nfld. C.A.) at para 10, (2000), 5 C.L.R. (3d) 55 (Nfld. C.A.).

83 Determining what constitute properly surrounding circumstances is a question of fact. As to what is meant by surrounding circumstances, this consists of "objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": *Sattva*, *supra* at para 58. Examples of relevant background facts include: (1) the genesis, aim or purpose of the contract; (2) the nature of the relationship created by the contract; and (3) the nature or custom of the market or industry in which the contract was executed: *Sattva*, *supra* at paras 47-48; *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71 (Man. C.A.) at para 15, (2003), 173 Man. R. (2d) 300 (Man. C.A.); *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 (Man. C.A.) at para 72, (2011), 270 Man. R. (2d) 63 (Man. C.A.); *Ledcor*, *supra* at paras 30, 106. Ultimately, the surrounding circumstances can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": *Sattva*, *supra* at para 58, citing Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 W.L.R. 896 (U.K. H.L.) at 913.

84 All this being so, it will be obvious why the factual matrix, that is surrounding circumstances, of a contract can be critical to understanding the objective intentions of the parties. That is certainly so in interpreting the Contract between PCR and IFP. Of particular relevance on this appeal are the genesis and purpose of the Contract and the relevant background, including the MOU. An antecedent agreement like the MOU, which has been agreed to in writing by both PCR and IFP, falls within the category of objective evidence of background facts.

85 Negotiations preceding the conclusion of the MOU are also relevant to the extent that they shed light on the factual matrix. It is true that evidence of negotiations is not itself admissible as part of the factual matrix: Hall, *supra* at 29; *Keephills Aggregate Co. v. Riverview Properties Inc.*, 2011 ABCA 101 (Alta. C.A.) at para 13, (2011), 44 Alta. L.R. (5th) 264 (Alta. C.A.) [*Keephills*]. Nor generally are prior drafts of an agreement: *Wesbell Networks Inc. (Receiver of) v. Bell Canada*, 2015 ONCA 33 (Ont. C.A.) at para 13, (2015), 248 A.C.W.S. (3d) 820 (Ont. C.A.). However, evidence of negotiations is relevant insofar as that evidence *shows* the factual matrix, for example by helping to explain the genesis and aim of the contract: Hall, *supra* at 30, 80; *Nexxtep*, *supra* at para 32. Moreover, written evidence of those negotiations is far more objective evidence of the parties' intentions than after-the-fact evidence from opposing parties about oral statements made during negotiations.

2. Admissibility of Parol Evidence to Resolve Ambiguity

86 Further, where a contract itself is ambiguous, extrinsic evidence, that is parol evidence, may be admitted to resolve the ambiguity: Hall, *supra* at 59; McCamus, *supra* at 205; *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.*, 1998 ABCA 333 (Alta. C.A.) at para 28, (1998), 223 A.R. 180 (Alta. C.A.) [*Paddon Hughes*]; *Guaranty Properties Ltd. v. Edmonton (City)*, 2000 ABCA 215 (Alta. C.A.) at para 23, 261 AR 376; *Nexxtep*, *supra* at para 20. In the face of ambiguity, the interpretation promoting business efficacy is to be preferred so long as it is supported by the text: *Keephills*, *supra* at para 12; Hall, *supra* at 38-47.

87 Mere difficulty in interpreting a contract is not the same as ambiguity: *Paddon Hughes*, *supra* at para 29. A contract is ambiguous when the words are "reasonably susceptible of more than one meaning": *Hi-Tech*, *supra* at para 18. An ambiguity in the contract also allows courts to consider evidence of the parties' subsequent conduct post-contract: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 (Ont. C.A.) at paras 46, 56, (2016), 404 D.L.R. (4th) 512 (Ont. C.A.); Hall, *supra* at 83-85. But it must be understood that even under this ambiguity exception to the parol evidence rule, there are limitations as to what parol evidence is admissible. In this regard, evidence as to the parties' subjective intentions is generally inadmissible.

3. Interpreting Commercial Contracts

88 Also of particular importance on this appeal, commercial contracts should be interpreted in accordance with sound commercial principles and good business sense: McCamus, *supra* at 763-766. In the absence of evidence of a bad bargain, courts should not interpret a contract in a way that yields an unrealistic or absurd result.

B. Conclusion

89 In the end, contractual interpretation is not an exercise in second guessing what could have been included in a contract while discounting or dismissing relevant terms of a contract and uncontradicted contextual information. It is instead an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context.

VI. Analysis

A. Overview of IFP's Interest in Eyehill Creek

90 Following a careful and comprehensive review of the QB Reasons and all relevant documentation, I have concluded that the Trial Judge erred in concluding that the Contract gave IFP a 20% interest in thermal and enhanced recovery methods only at Eyehill Creek. In my view, the Contract reveals that PCR agreed to transfer, and did transfer, to IFP 20% of PCR's working interest in all the assets held by PCR in Eyehill Creek, including both Crown oil and gas leases and leases that PCR

TAB 3

1994 CarswellAlta 769
Supreme Court of Canada

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.

1994 CarswellAlta 744, 1994 CarswellAlta 769, [1994] 2 S.C.R. 490, [1994] 7 W.W.R. 37, [1994] I.L.R. 1-3077, [1994] A.W.L.D. 658, [1994] S.C.J. No. 59, 115 D.L.R. (4th) 478, 155 A.R. 321, 168 N.R. 381, 20 Alta. L.R. (3d) 296, 23 C.C.L.I. (2d) 161, 48 A.C.W.S. (3d) 1240, 73 W.A.C. 321, J.E. 94-1053, EYB 1994-66952

MARITIME LIFE ASSURANCE COMPANY v. SASKATCHEWAN RIVER BUNGALOWS LTD. and CONNIE DOREEN FIKOWSKI

La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: March 14, 1994
Judgment: June 23, 1994
Docket: Doc. 23194

Counsel: *James D. McCartney* and *Brian E. Leroy*, for appellant.
James S. Peacock, for respondents.

Related Abridgment Classifications
Estoppel
II Estoppel in pais
II.5 Particular classes
II.5.a Corporations
II.5.a.ii Insurance companies
II.5.a.ii.A Cancellation of policy
Insurance
III Contracts of insurance
III.10 Cancellation and termination
III.10.e For non-payment
III.10.e.ii Waiver
Insurance
X Actions on policies
X.3 Relief against forfeiture

Headnote
Estoppel --- Estoppel in pais — Particular classes — Corporations — Insurance companies — Cancellation of policy
Insurance --- Contracts of insurance — Cancellation and termination — For non-payment — Waiver
Insurance --- Actions on policies — Relief against forfeiture
Insurance — Insurance generally — Premium — Non-payment or underpayment of premium — Insurance premium remaining unpaid after grace period expiring — Insurer's letter requesting immediate payment of premium — Later letter stating that policy lapsed — Beneficiary picking up both letters at same time — First letter waiving insurer's right to receive timely payment — Insurer not having to give notice of retraction of waiver because insured not relying on waiver.

Equity — Equitable doctrines — Relief against penalties and forfeitures — Life insurance premium remaining unpaid after grace period expiring — Insurer's letter requesting immediate payment of premium — Beneficiary not picking up letter for several months — Beneficiary waiting further three months before paying premium — Court outlining test for relieving from forfeiture and refusing to relieve because beneficiary's conduct unreasonable — As Alberta Insurance Act not "codifying" whole law of insurance, that Act not "occupying" field of equitable relief. .

Insurance — Insurance generally — Interpretation of legislation — As Alberta Insurance Act not "codifying" whole law of insurance, that Act not "occupying" field of equitable relief.

The insurer issued a policy to the company on the insured's life. The policy provided for a grace period of 31 days for the payment of premiums. If the premium still remained unpaid, the policy automatically lapsed but might be reinstated on proof of the insured's good health. One year the company mailed a cheque to pay the annual premium. The insurer never received the cheque. A month later the insurer sent the company a letter agreeing to accept the premium if it were mailed within two weeks. Two months after that the insurer wrote that the policy was "now technically out of force," and that it would require immediate payment of the premium. The insurer awaited payment for another two months. It then sent the company a notice of policy lapse. The company had closed its business for the winter and picked up its mail infrequently. It thus did not learn of the insurer's letters until over two months after the lapse notice was sent. It searched for the lost premium cheque for three months before it sent the insurer a replacement cheque. The insurer refused the cheque, and refused to reinstate the policy because the insured was terminally ill. When the insured died, the company sued the insurer and claimed, alternatively, for relief against forfeiture. The trial judge rejected the claim, and refused to grant relief against forfeiture because the company's conduct was not reasonable. The Court of Appeal allowed the appeal. It held that the insurer had waived the time requirement for paying the premium, and had failed to give the company reasonable notice that the waiver was withdrawn. The insurer appealed.

Held:

Appealed allowed.

Waiver occurs when one party foregoes reliance on some known right or defect in the other party's performance. Waiver will be found only where the party waiving had full knowledge of its rights and an unequivocal and conscious intention to abandon them. A demand for payment may constitute waiver. The overriding consideration is whether one party communicated a clear intention to waive a right to the other party. Waiver can be retracted on reasonable notice to the other party. However, the notice requirement should not be imposed where the other party does not rely on the waiver. Here the insurer had full knowledge of its rights. Its letter that the policy was "technically out of force" constituted a waiver of its right to receive timely payment. The word "technically" removed all meaning from the expression "out of force." The insurer was willing to continue the policy's coverage upon payment of the premium. It did not mention the insured's health or reinstatement. However, the company was not aware of the insurer's waiver until it received the waiver and lapse notices together, when it picked up its mail. It thus did not rely on the waiver and so the insurer was not required to give notice of its intention to lapse the policy. Even if a reasonable notice requirement were imposed, it would have been met by the company's failure to act for three months after receiving notice. The insurer's waiver was no longer in effect when the company sought to make payment. The policy had lapsed.

The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors for the court to consider are whether the applicant's conduct was reasonable, the gravity of the breaches, and the disparity between the value of the property forfeited and damage caused by the breach. The company's conduct here was not reasonable. It knew that the insured was terminally ill and uninsurable. When it learned that the premium payment was overdue, it waited three months to tender a replacement cheque. As the company's conduct was not reasonable, it was unnecessary to consider the other factors. However, as the *Insurance Act* does not "codify" the whole law of insurance, that Act does not "occupy" the field of equitable relief.

Table of Authorities

Cases considered:

Anguish v. Maritime Life Assurance Co., [1987] 4 W.W.R. 261, 51 Alta. L.R. (2d) 376, 24 C.C.L.I. 194, 77 A.R. 189, [1987] I.L.R. 1-2226 [additional reasons 29 C.C.L.I. 190, [1988] I.L.R. 1-2340, leave to appeal to S.C.C. refused, [1988] 2 S.C.R. vii, [1988] 6 W.W.R. lxviii, 61 Alta. L.R. (2d) lii, 91 A.R. 80, 32 C.C.L.I. xliii, 90 N.R. 319] — *referred to*

Duplisea v. T. Eaton Life Assurance Co., [1980] 1 S.C.R. 144, 26 N.B.R. (2d) 319, 55 A.P.R. 319, 27 N.R. 369, 7 B.L.R. 24, [1979] I.L.R. 1-1104, 99 D.L.R. (3d) 445 — *referred to*

Federal Business Develoment Bank v. Steinbock Development Corp. (1983), 42 A.R. 231 (C.A.) — *applied*

Guillaume v. Stirton (1978), 88 D.L.R. (3d) 191, leave to appeal to S.C.C. refused [1978] 2 S.C.R. vii — *referred to*

15 This appeal raises two issues:

(1) Did Maritime waive its right to compel timely payment in accordance with the terms of the policy?

(2) If there was no waiver, are the respondents entitled to relief against forfeiture under the *Judicature Act*, R.S.A. 1980, c. J-1, s. 10?

IV. ANALYSIS

A. Waiver

16 Maritime's position is that the policy issued to the respondents lapsed after the expiry of the grace period for payment of the 1984 premium. Fikowski Sr.'s death occurred when the policy was not in force and the respondents had no right to benefits under it.

17 The respondents' position is that Maritime, through its conduct, waived its right to compel timely payment under the policy. The respondents further submit that none of Maritime's acts were sufficient to retract its waiver of time and that the policy was still in force at the time of death.

18 Although the parties argued in terms of waiver, Harradence J.A. considered the doctrine of promissory or equitable estoppel. Recent cases have indicated that waiver and promissory estoppel are closely related: see, e.g., *Alan (W.J.) & Co. v. El Nasr Export & Import Co.*, [1972] 2 Q.B. 189 (C.A.), and *Tudale Explorations Ltd. v. Bruce* (1978), 88 D.L.R. (3d) 584 (Ont. Div. Ct.), at p. 587. The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so: S.M. Waddams, *The Law of Contracts* (3rd ed., 1993), p. 418, at para. 606. It is not necessary for the purpose of this appeal to determine how or whether promissory estoppel and waiver should be distinguished. As the parties have chosen to frame their submissions in waiver, only that doctrine need be dealt with.

19 Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell & Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (Alta. C.A.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 [[1991] 4 W.W.R. 673] (waiver of a limitation period). The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

> The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

20 Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

21 As there is little doubt that Maritime had full knowledge of its rights under the respondents' policy, the waiver issue turns entirely on Maritime's intentions. The respondents have identified several factors which, in their view, support a finding that Maritime "clearly and unequivocally" intended to waive its right to timely payment. In particular, the respondents submit that by encouraging policy-holders to pay by mail, by requesting payment of the 1984 premium after the expiry of the policy grace period, by delaying issuance of the February lapse notice, by failing to return the $45 partial payment, and in accepting late payment in 1981, Maritime waived its right to require payment in accordance with the terms of the policy.

TAB 4

THE LAW OF CONTRACT IN CANADA

by

G.H.L. FRIDMAN, Q.C., F.R.S.C.
M.A., B.C.L., LL.M.

of the Ontario Bar, and
of the Middle Temple,
Barrister-at-Law,
Emeritus Professor of Law, University of Western Ontario

Sixth Edition

CARSWELL®

parties, there is a later alteration of an original agreement.[162] Hence, a unilateral variation, even if permitted by the original contract, must be accepted by the other party with full knowledge and consent, and must be made for valid consideration, if it is to be valid.[163] Where waiver is alleged to have occurred, however, the change is for the benefit or convenience of one party only, and the other party is said to acquiesce in such change in the original terms of their contract. In both situations there is a later agreement between the parties affecting their earlier transaction. Where variation is the allegation, such agreement, whether written or oral, is express.[164] Where waiver is alleged, the suggested alteration is, at the most, implicit from what has occurred. Furthermore, where the original agreement has been varied by the later one, then, to the extent to which such variation is operative, the first agreement must now be considered to have been completely changed in respect of the variation in question.[165] If waiver is alleged, however, the original rights and duties of the parties remain unchanged, save that, by virtue of the waiver, insofar as it is operative and effective, the party acquiescing in the change cannot enforce his original rights to the extent to which they conflict with the change suggested or initiated by the other party and acquiesced in by the former.[166] Thus, it is important to differentiate variation of a contract from waiver of rights under a contract.

A contract which varies an earlier agreement will be valid to the extent to which it is itself an enforceable agreement.[167] Thus, there must be consideration (unless the

---

162 This and the next sentence were quoted by Murphy J. in *Gillis v. New Glasgow (Town)* (2008), 269 N.S.R. (2d) 1 at 6-7 (N.S.S.C.); affirmed (2009), 283 N.S.R. (2d) 128 (N.S.C.A.).

163 *Hyslip v. MacLeod Savings & Credit Union Ltd.* (1988), 62 Alta. L.R. (2d) 152 (Alta. Q.B.); *Bartolic v. Canada Safeway Ltd.* (1998), 34 C.C.E.L. (2d) 1 (B.C.S.C.). The cashing of cheques paid by way of instalments did not vary the original contract which was for payment of a lump sum, not for payment in 24 monthly instalments, as alleged by the debtor: *Freeman v. Hurley* (2004), 235 Nfld. & P.E.I.R. 145 (N.L.T.D.). But the manufacturer could change the terms and conditions of a contract with which the manufacturer supplied equipment to a dealer, even though this caused hardship to the dealer, by requiring him to pay C.O.D. instead of allowing credit: *Mann v. Belarus Equipment of Can. Ltd.* (1989), 73 Sask. R. 100 (Sask. C.A.); reversing (1988), 69 Sask. R. 19 (Sask. Q.B.). However, in *BGI Atlantic Inc. v. Canada (Minister of Fisheries & Oceans)* (2002), 215 Nfld. & P.E.I.R. 300 (Nfld. T.D.), the variation of the terms and conditions of appointment of an agent, by prohibiting a statutory agent from acting as defence counsel under an Act by which the agent was appointed to prosecute offenders, was valid even though the law firm in question did not see or know about the notice that made the change.

The first four sentences of this paragraph were quoted by Jewers J. in *Ayotte v. Demery* (2007), 213 Man. R. (2d) 159 at 164 (Man. Q.B.).

164 For an example of a later oral variation of an original written agreement, see *Bau-Und Forschungsgesellschaft Thermoform A.G. v. Paszner* (1988), 22 C.P.R. (3d) 193 (B.C.S.C.); additional reasons at (1989), 25 C.P.R. (3d) 536 (B.C.S.C.); reversed (1991), 37 C.P.R. (3d) 349 (B.C.C.A.). Contrast *Troubridge Towing Co. v. Fletcher Challenge Canada Ltd.* (March 29, 1996), Doc. Vancouver C941993 (B.C.S.C.) oral statements did not vary contract: mere expression of expectation.

165 See, *e.g.*, *Whitford v. T.D. Bank* (1986), 71 N.S.R. (2d) 408 (N.S.T.D.), new chattel mortgage created in place of original one given to the bank, therefore bank could not repossess vehicle under the terms of the original chattel mortgage. This sentence was quoted by Murray J. in *Gillis v. New Glasgow (Town)*, above at 7.

166 This sentence was quoted by McLellan J. in *Ascent Financial Services Ltd. v. Blythman* (2006), 276 Sask. R. 23 at 45 (Sask. Q.B.); affirmed [2008] 5 W.W.R. 638 (Sask. C.A.).

167 Hence a variation would have resulted in illegality, *viz.* evidence of payment of income tax, was not accepted in *Nischk v. Brcic* (1998), 164 Sask. R. 238 (Sask. Q.B.). See Hunter J., *ibid.*, at 210.

TAB 5

Most Negative Treatment: Leave to appeal allowed
Most Recent Leave to appeal allowed: Jeffrey Bradfield v. Royal Sun Alliance Insurance Company of Canada | 2020 CarswellOnt 5669, 2020 CarswellOnt 5670 | (S.C.C., Apr 23, 2020)

2019 ONCA 800
Ontario Court of Appeal

Bradfield v. Royal Sun Alliance Insurance Company of Canada

2019 CarswellOnt 15936, 2019 ONCA 800, [2019] O.J. No. 5047, [2020] I.L.R. I-6194, 148 O.R. (3d) 161, 310 A.C.W.S. (3d) 609, 439 D.L.R. (4th) 115, 53 M.V.R. (7th) 25, 96 C.C.L.I. (5th) 68

Jeffrey Bradfield (Plaintiff / Respondent) and Royal Sun Alliance Insurance Company of Canada (Defendant / Appellant)

Doherty, Harvison Young, J.A. Thorburn JJ.A.

Heard: September 19, 2019
Judgment: October 7, 2019
Docket: CA C65787

Proceedings: reversing *Bradfield v. Royal and Sun Alliance Insurance Company of Canada* (2018), [2019] I.L.R. I-6085, 2018 ONSC 4477, 2018 CarswellOnt 12536, Alexander Sosna J. (Ont. S.C.J.)

Counsel: Derek V. Abreu, Mark A. Borgo, for Appellant
Todd J. McCarthy, Samuel A. Davies, for Respondent

Related Abridgment Classifications
Insurance
XII Automobile insurance
XII.1 General principles
Headnote
Insurance --- Automobile insurance — General principles
D was leading group of motorcyclists including plaintiffs B and L, who pulled into opposite lane of traffic and collided with vehicle driven by C — D died at scene and B, L and C all suffered personal injuries — B did not touch C's vehicle — D was insured by insurance company (RSA) under standard motor vehicle policy with $1 million limit with M2 driver's licence, which prohibited him from operating motorcycle with any alcohol in his bloodstream, and to do so constituted policy violation — In first action brought by C, D's estate and B were found liable for damages; issue of whether RSA was required to provide insurance coverage to D was not determined — In second action, trial judge was asked to determine whether RSA was entitled to take off-coverage position and reduce estate's policy limit from $1 million to $200,000 after learning D had been drinking before accident, contrary to terms of his insurance policy — Trial judge held RSA waived its right to rely on D's policy breach because RSA had taken its off-coverage position too late and held that B was entitled to recover judgment in amount of $800,000 against RSA — RSA appealed — Appeal allowed — Trial judge erred in holding that RSA waived its right to deny coverage to estate of D — Waiver required knowledge of policy breach and RSA had no actual knowledge that D breached policy by consuming alcohol before driving until 2009 — RSA did not have all of material facts from which to determine there was policy breach and therefore knowledge could not be imputed — There was no evidence to support B's assertion that RSA knew of policy breach but chose not to take possession of information, namely D's blood alcohol level within coroner's report — Knowledge requirement was not whether insurer could obtain material facts but whether they did have material facts necessary to enable them to know of policy breach — Finally, there was not written waiver of breach on part of RSA as required by s. 131(1) of Insurance Act — Trial judge also erred in holding that issue of estoppel was moot — RSA was not estopped from

asserting breach of policy, as RSA had no knowledge of breach until 2009 — Moreover, there was no evidence of detrimental reliance, which is essential element of estoppel — Claim was issued in May 2008, statement of defence was filed in March 2009, and evidence as to alcohol consumption came to light in June 2009 — Two weeks after discovering evidence of alcohol consumption, RSA took "off-coverage" position — RSA expended time, effort and money to investigate and defend action until July 2009 — There was no evidence that any of steps taken by RSA to defend case operated to prejudice estate — On contrary, litigation administrator for estate and C's counsel agreed there was no difference in defence of action whether RSA added itself as statutory third party or was defendant in action — Thus, even if B's submission was that prejudice was presumed was correct, that presumption had been rebutted and there was therefore no detrimental reliance in this case.

Table of Authorities

Cases considered by *J.A. Thorburn J.A.*:

Canadian Federation of Students / Fédération canadienne des étudiant(e)s v. Cape Breton University Students' Union (2015), 2015 ONSC 4093, 2015 CarswellOnt 10410 (Ont. S.C.J.) — considered

Economical Insurance Group v. Fleming (2008), 2008 CarswellOnt 26, [2008] I.L.R. I-4673, 57 C.C.L.I. (4th) 246, 89 O.R. (3d) 68 (Ont. S.C.J.) — referred to

Economical Insurance Group v. Fleming (2009), 2009 ONCA 112, 2009 CarswellOnt 523, 69 C.C.L.I. (4th) 185 (Ont. C.A.) — referred to

Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co. (2008), 2008 CarswellOnt 5649, *(*sub nom. *Logel (Litigation administrator of) v. Wawanesa Mutual Insurance Company)* [2008] I.L.R. I-4744, 67 C.C.L.I. (4th) 61, 75 M.V.R. (5th) 37 (Ont. S.C.J.) — considered

Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co. (2009), 2009 ONCA 252, 2009 CarswellOnt 1523, 70 C.C.L.I. (4th) 188, 75 M.V.R. (5th) 43 (Ont. C.A.) — referred to

Rosenblood Estate v. Law Society of Upper Canada (1989), [1989] I.L.R. 1-2416, 37 C.C.L.I. 142, 1989 CarswellOnt 642, [1989] I.L.R. 1-2416 at 9334 (Ont. H.C.) — referred to

Rosenblood Estate v. Law Society of Upper Canada (1992), 16 C.C.L.I. (2d) 226, 1992 CarswellOnt 673 (Ont. C.A.) — referred to

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co. (1994), [1994] 7 W.W.R. 37, 20 Alta. L.R. (3d) 296, 168 N.R. 381, *(*sub nom. *Maritime Life Assurance Co. v. Saskatchewan River Bungalows Ltd.)* [1994] I.L.R. 1-3077, 155 A.R. 321, 73 W.A.C. 321, 115 D.L.R. (4th) 478, 23 C.C.L.I. (2d) 161, 1994 CarswellAlta 744, [1994] 2 S.C.R. 490, 1994 CarswellAlta 769 (S.C.C.) — referred to

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8

s. 131(1) — considered

s. 258 — considered

***J.A. Thorburn J.A.*:**

OVERVIEW

1 This is an appeal by Royal and Sun Alliance Insurance Company of Canada ("RSA") from the trial judge's decision that RSA was responsible to provide insurance coverage to its insured, Steven Devecseri's estate.

2 On May 29, 2006, the plaintiff/respondent Jeffrey Bradfield, Paul Latanski and the late Steven Devecseri were riding their motorcycles. Devecseri was in front. He drove onto the wrong side of the road and collided with Jeremy Caton's automobile. Bradfield did not hit Caton's automobile. Devecseri was killed and Caton was injured.

3 Devecseri was insured by RSA under a standard motor vehicle policy with a $1 million limit. He had an M2 driver's licence, which prohibited him from operating a motorcycle with any alcohol in his bloodstream. To do so, constituted a policy violation.

4 In the first action brought by Caton, Devecseri and Bradfield were found liable for damages resulting from the motor vehicle accident. The issue of whether RSA was required to provide insurance coverage to Devecseri was not determined.

5 In the second action, the trial judge was asked to determine whether RSA was entitled to take an off-coverage position and reduce the estate's policy limit from $1 million to $200,000 after it learned that Devecseri had been drinking before the accident, contrary to the terms of his insurance policy.

6 The trial judge held that RSA waived its right to rely on Devecseri's policy breach because RSA had taken its off-coverage position too late. He held that Bradfield was entitled to recover judgment in the amount of $800,000 against RSA. The trial judge drew his conclusions for the following reasons:

> 1. RSA did not obtain the coroner's report after Devecseri's fatal accident in 2006, which stated that Devecseri had alcohol in his system at the time of death;
>
> 2. Having alcohol in his system was contrary to the terms of Devecseri's M2 licence and his insurance policy;
>
> 3. "[S]ecuring a copy of the Coroner's report would not be a non-mandatory item on a list of suggested areas to investigate";
>
> 4. Knowledge of the policy breach was imputed as of the time the coroner's report was available to RSA in 2006; and
>
> 5. "RSA's failure to take an off-coverage position after June 2006, its defence of the claim in 2008, and continuing until discovery in 2009, amounted to a waiver by conduct of Devecseri's breach. . . . Having found waiver, the issue of estoppel is rendered moot."

7 RSA appeals the trial judge's finding that RSA waived its right to deny coverage.

8 RSA claims that waiver requires actual knowledge of the breach and there was no actual knowledge of the breach in this case. Moreover, there was no clear waiver of the breach in writing as provided in s. 131(1) of the *Insurance Act*, R.S.O. 1990, c. I.8.

9 RSA further claims there can be no estoppel, as there was no knowledge of the breach until 2009 and there is no evidence the defence would have been conducted any differently had RSA taken an off-coverage position in 2006. As such, there was no detrimental reliance.

10 For the reasons that follow, I find that RSA did not waive and is not estopped from denying coverage. The appeal is therefore granted.

BACKGROUND FACTS

11 There is no dispute as to the facts.

RSA's investigation

12 On June 6, 2006, RSA engaged an adjuster to investigate the circumstances surrounding the accident. RSA instructed its adjuster to obtain "any and all information with regard to this accident from the investigating police service and the coroner (death certificate)". According to the adjuster, this form was a "list of non-mandatory, suggested areas to investigate."

13 The adjuster obtained the police report which concluded that "excessive speed was a major contributing factor in the collision" but made no mention of alcohol. The RSA adjuster testified that he believed that if alcohol was involved, it would have been disclosed in the police report.

14 None of the parties obtained a copy of the coroner's report.

15 Before 2009, Bradfield's insurer received hearsay information that drinking was involved in the accident but did not disclose that information to RSA's adjuster.

16 RSA's adjuster interviewed Bradfield and Latanski as part of his investigation. Neither told the adjuster that Devecseri had been drinking before the accident.

The First Trial

17 On May 27, 2008, Caton (the automobile driver) brought a claim for damages against Bradfield, Latanski and Devecseri's estate. RSA filed a Statement of Defence on March 5, 2009.

18 During his examination for discovery on June 24-25, 2009, Latanski advised for the first time that Devecseri and Bradfield were drinking beer shortly before the accident. Bradfield testified that he was at the bar but could not recall if Devecseri was drinking.

19 On July 8, 2009, one year after the claim was brought and two weeks after Latanski's testimony at discovery, RSA advised the parties that it was taking an "off-coverage position" as a result of this disclosure. It did so on the basis that having a blood alcohol level above zero was contrary to Mr. Devecseri's M2 motorcycle licence and a breach of his insurance policy.

20 At no time did RSA provide the estate notice in writing that it was waiving the policy violation, as described in s. 131(1) of the *Insurance Act*.

21 In 2012, the jury awarded Caton $1.8 million: it held Bradfield 10% at fault and Devecseri's estate 90% at fault. Bradfield was indemnified against Devecseri's estate and obtained judgment on his crossclaim against the estate.

22 The issue of whether RSA could deny coverage was deferred.

The Second Trial

23 In the second trial, Bradfield sought a declaration of entitlement to recover judgment against RSA for the remaining $800,000 available in Devecseri's policy ($200,000 had already been paid out) pursuant to s. 258 of the *Insurance Act*. Bradfield took the position that RSA had waived or was estopped from denying Devecseri's estate insurance coverage because Bradfield submitted that:

1. Bradfield obtained judgment on his crossclaim against the estate;

2. RSA knew Devecseri breached the terms of the policy by having a blood alcohol level above zero, contrary to the terms of Devecseri's M2 motorcycle licence and in breach of his insurance policy. Knowing of the breach, RSA chose to defend the claim;

3. RSA's conduct from May 2006 to July 2009 amounted to a waiver of its right to assert a policy breach and deny coverage; and

4. Prejudice is presumed given the three-year delay. In any event, there was prejudice and detrimental reliance such that RSA should be estopped from denying coverage.

24 RSA took the position that it had no knowledge of the breach until 2009, at which point it denied coverage. As such, it did not waive the policy breach. Moreover, there was no prejudice as the litigation administrator for Devecseri's estate and counsel for Caton both testified that the only difference between RSA defending the action and being added as a statutory third party was the style of cause. The litigation steps would not have been any different.

THE TRIAL JUDGE'S DECISION

25 The trial judge awarded Bradfield $800,000 from RSA on the basis that RSA waived its right to rely on a policy breach and was therefore responsible to pay the claim against Devecseri's estate.

26 He held that:

> [58] From a common-sense perspective and in the context of an insurer's investigation of a motor vehicle accident involving a fatality, evidence of alcohol in the deceased's bloodstream — routinely detailed in Coroner's reports — is clearly relevant in determining if a policy breach has taken place.
>
> . . .
>
> [63] Contrary to RSA's submission, I find that evidence *did* exist that Devecseri had alcohol in his bloodstream at the time of death. That evidence was available in a Coroner's report dated August 29, 2006. That report was available for release three years before the 2009 discoveries where Latanski testified that Devecseri was drinking alcohol before the accident. When RSA received the Coroner's report from Caton's counsel in 2009, it unequivocally provided evidence of a policy breach.
>
> [64] The [adjustor] Eddy Report specifically acknowledged RSA's direction to obtain a copy of the Coroner's report. As already reviewed, for reasons not explained, RSA took no steps to obtain a copy of the Coroner's report.
>
> [65] On August 13, 2008, Forbes delivered a notice of intent to defend. In March 2009, he filed a statement of defence and counterclaim, formally stating, as in *Logel*, "we elect to defend". That defence did not set out any reservation of rights letter or proposal of a non-waiver agreement. As held in *Rosenblood* at para 21:
>
> > When a claim is presented to an insurer the facts giving rise to the claim should be investigated. If there is no coverage then the insured [as in the present matter, the Estate] should be told at once and the insurer should have nothing further to do with the claim if it wishes to maintain its off-coverage position. If coverage is questionable the insurer should advise the insured at once and in the absence of a non-waiver agreement or of an adequate reservation of rights letter defends the claim at its risk.
>
> [66] At discovery on June 24-25, 2009, Latanski provided evidence that Devecseri was drinking before the accident. Forbes volunteered to bring a WAGG motion to obtain the Coroner's report. He later declined, finding that he was in a conflict of interest and did not wish to take any steps that could be interpreted as a waiver of rights by RSA, while at the same time being duty-bound to Devecseri — whose Estate he was appointed to defend. Caton's counsel volunteered to obtain the Coroner's report.
>
> [67] As in *Logel*, nearly three years elapsed from Eddy's investigation to when RSA announced it was taking an off-coverage position, added itself as a statutory third-party, and instructed Forbes to remove himself from the record.

27 In short, the trial judge imputed knowledge of the breach to RSA on the basis that the evidence was available to RSA, had it obtained the coroner's report. Having decided to defend, RSA waived its right to rely on the breach of policy to deny coverage.

ANALYSIS AND CONCLUSION

The Issues

28 The issues on this appeal are whether the trial judge erred in holding that:

1. RSA waived its right to deny coverage to Devecseri's estate; and

2. The issue of estoppel was moot.

29 The central issue is what constitutes knowledge, which is a prerequisite for a finding of both waiver and estoppel. Determination of the appropriate legal test is a legal issue for which the standard of review is correctness.

Waiver by Conduct

30 Waiver and promissory estoppel are closely related: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.), at para. 18.

31 The principle underlying both doctrines is that a party should not be allowed to resile from a choice when it would be unfair to the other party to do so. Both require "knowledge" of the policy breach: *Economical Insurance Group v. Fleming* (2008), 89 O.R. (3d) 68 (Ont. S.C.J.), at para. 31, aff'd 2009 ONCA 112, 69 C.C.L.I. (4th) 185 (Ont. C.A.), and *Rosenblood Estate v. Law Society of Upper Canada* (1989), 37 C.C.L.I. 142 (Ont. H.C.) at para. 53, aff'd (1992), 16 C.C.L.I. (2d) 226 (Ont. C.A.).

32 Waiver will be found where:

> "the party waiving had (1) full knowledge of the deficiency that might be relied upon; and (2) the unequivocal and conscious intention to relinquish the right to rely on the contract or obligation. The creation of such a stringent test reflects the fact that no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration": *Saskatchewan River Bungalows*, at para. 20, and *Economical Insurance Group*, at para. 31.

33 Knowledge can be inferred from conduct, but "that conduct must give evidence of an unequivocal intention to abandon rights known to the party waiving the right": *Canadian Federation of Students / Fédération canadienne des étudiant(e)s v. Cape Breton University Students' Union*, 2015 ONSC 4093 (Ont. S.C.J.), at para. 129.

34 In *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co.*, the insurer elected to defend the claim after receiving the accident report and the pathology report for a single car collision leading to a death: [2008] I.L.R. I-4744 (Ont. S.C.J.), aff'd 2009 ONCA 252, 70 C.C.L.I. (4th) 188 (Ont. C.A.). Those reports contained the evidence of the status of the insured's licence and her physical condition. In *Logel*, the trial judge concluded at para. 21:

> "that upon receipt they must have had knowledge of the facts including the status of Ms. Logel's licence and her physical condition, which gave rise to the exclusion of coverage. If they did not appreciate the significance of these facts they should have, before they elected to defend." [Emphasis added.]

35 In *Logel*, all facts necessary to establish knowledge were within the possession of the insurer. The insurer simply did not appreciate the significance of the facts before it elected to defend. In the face of this information, the court held that the insurer waived the breach by obtaining all the necessary information to enable it to be aware of a policy breach and deciding to defend the claim.

36 In this case, RSA knew Devecseri had an M2 licence and it was a breach of the policy to consume any alcohol before driving.

37 However, it is agreed that RSA had no actual knowledge that Devecseri breached the policy by consuming alcohol before driving until 2009.

38 Second, unlike *Logel*, knowledge of a policy breach could not be imputed, as RSA did not have all of the material facts from which to determine there was a policy breach. This was not a case where RSA failed to appreciate the significance of information; it did not have information that Devecseri had been drinking and had thereby breached the terms of the policy.

39 Third, there is no evidence to support Bradfield's assertion that RSA knew of the policy breach but chose not to take possession of the information. No legal authority was proffered to support Bradfield's assertion that an insurer must obtain the coroner's report. It is also agreed that, although information as to the blood alcohol content was in the coroner's report, there is no evidence that RSA knew that information was contained in the coroner's report and knowing that, chose not to get the coroner's report. On the contrary, had RSA obtained the report, it would not have expended monies conducting further investigation and defending the claim.

40 Lastly, there was no written waiver of the breach on the part of RSA, as required by s. 131(1) of the *Insurance Act*, to demonstrate a clear intention to waive the policy breach.

41 For these reasons, it was not correct to conclude that RSA waived its right to refuse coverage for breach of the terms of the insurance policy.

Estoppel

42 The essential elements of estoppel are that:

1. As in the case of waiver, the insurer must have knowledge of the facts that support a lack of coverage; and

2. Unlike waiver, there must be "a course of conduct by the insurer upon which the insured relied to its detriment." *Rosenblood Estate*, at p. 18.

43 In *Rosenblood Estate*, a credit union claimed its solicitor was dishonest, resulting in losses to the credit union. The credit union sued the solicitor, who was insured by the Law Society. The Law Society retained counsel to defend the claim against the solicitor. Two years later, the Law Society advised the estate that it was denying coverage on the grounds that the loss was caused by dishonesty, which was excluded from coverage, and that the insured solicitor was in breach of the policy by failing to give timely notice of possible claims.

44 The court in *Rosenblood* held that the insurer was estopped from denying coverage, as the insurer had all of the relevant facts necessary to decide whether to defend the fraud claim but nonetheless elected to defend the claim.

45 The insurer in *Rosenblood* should have appreciated the significance of the information in its possession that constituted a policy violation. Despite this information, it elected to defend the claim. The insured relied to its detriment on the insurer's agreement to defend the claim. As such, the insurer was estopped from relying on a policy breach and was required to defend the claim.

46 In this case, the trial judge did not address the issue of estoppel, as he found that RSA had waived its right to rely on the policy breach.

47 I find RSA is not estopped from asserting a breach of the policy, as, for the reasons set out above, RSA had no knowledge of the breach until 2009.

48 Moreover, there was no evidence of detrimental reliance. The claim was issued in May 2008, the statement of defence was filed in March 2009, and the evidence as to alcohol consumption came to light in June 2009. Two weeks after discovering the evidence of alcohol consumption, RSA took an "off-coverage" position.

49 RSA expended time, effort and money to investigate and defend the action until July 2009. There is no evidence that any of the steps taken by RSA to defend the case operated to prejudice the estate. On the contrary, the litigation administrator for the estate and Caton's counsel agreed there was no difference in the defence of the action whether RSA added itself as a statutory third party or was a defendant in the action. Thus, even if Bradfield's submission is that prejudice is presumed was correct, that presumption has been rebutted and I find no detrimental reliance in this case.

50 For these reasons, I find RSA is not estopped from asserting a policy breach.

SUMMARY OF CONCLUSIONS

51 Knowledge is established where the insurer has actual knowledge of the material facts constituting a policy breach, whether or not the insurer appreciates the significance of those facts to its obligation to defend.

52 In this case, RSA did not have actual knowledge of the policy breach that entitled RSA to deny coverage until June 2009.

53 Nor can knowledge be imputed, as RSA was not in possession of any evidence that Devecseri had been drinking before the accident until it received Latanski's evidence. The knowledge requirement is not whether the insurer *could* obtain the material facts but whether they *did* have the material facts necessary to enable them to know of the policy breach.

54 RSA expressed no clear intention to forego the exercise of the right to deny coverage.

55 In any event, there is no prejudice to the insured in this case, as the only evidence at trial was even if RSA had invoked the policy breach earlier, the defence would not have been any different.

56 Although information confirming the policy breach could have been obtained through further investigation, RSA did not have the information until 2009. Counsel for Bradfield offered no legal authority for the proposition that an insurer is required to investigate every reasonable possibility that a policy was breached.

57 For these reasons, RSA did not waive its right to rely on the policy breach nor was it estopped from relying on the breach. The appeal is therefore granted and the decision is set aside.

58 Costs to RSA in the amount of $15, 000 as agreed by the parties. In view of the result, trial costs are reversed.

***Doherty J.A.*:**

I agree.

***Harvison Young J.A.*:**

I agree.

Appeal allowed.

TAB 6

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

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

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

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

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

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

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

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

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.
Neil A. Peden, for Appellants / Interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Geneviève Cloutier, Clifton P. Prophet, for Respondent, Callidus Capital Corporation
Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.e Miscellaneous

Headnote

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

Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.

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

Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.

The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances, given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from s. 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple,

un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

Le financement temporaire est un outil souple qui peut revêtir différentes formes, et le financement d'un litige par un tiers peut constituer l'une de ces formes. Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le mieux placé pour répondre. En l'espèce, il n'y avait aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs, le juge surveillant a estimé que l'AFL était juste et raisonnable. Bien que le juge surveillant n'ait pas examiné à fond chacun des facteurs énoncés à l'art. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, cela ne constituait pas une erreur en soi. Il était manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Le juge surveillant a eu raison de conclure que l'AFL ne constituait pas un plan d'arrangement puisqu'il ne proposait aucune transaction visant les droits des créanciers. La charge super-prioritaire qu'il a accordée au prêteur ne convertissait pas l'AFL en plan d'arrangement en subordonnant les droits des créanciers. Par conséquent, il n'a pas commis d'erreur dans l'exercice de sa discrétion, aucune intervention n'était justifiée et l'ordonnance du juge surveillant devrait être rétablie.

Table of Authorities

Cases considered by *Wagner C.J.C., Moldaver J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — referred to

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — referred to

Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) (2018), 2018 QCCS 1040, 2018 CarswellQue 1923 (C.S. Que.) — referred to

BA Energy Inc., Re (2010), 2010 ABQB 507, 2010 CarswellAlta 1598, 70 C.B.R. (5th) 24 (Alta. Q.B.) — referred to

Blackburn Developments Ltd., Re (2011), 2011 BCSC 1671, 2011 CarswellBC 3291, 27 B.C.L.R. (5th) 199 (B.C. S.C.) — referred to

Boutiques San Francisco inc., Re (2003), 2003 CarswellQue 13882 (C.S. Que.) — referred to

Bridging Finance Inc. v. Béton Brunet 2001 inc. (2017), 2017 CarswellQue 328, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.) — referred to

Canada Trustco Mortgage Co. v. R. (2005), 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, *(*sub nom. *Canada Trustco Mortgage Co. v. Canada)* 2005 D.T.C. 5523 (Eng.), *(*sub nom. *Hypothèques Trustco Canada v. Canada)* 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, *(*sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.)* 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 61 B.C.L.R. (4th) 334, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — referred to

release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

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

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

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

IV. Issues

37 These appeals raise two issues:

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

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

V. Analysis

A. Preliminary Considerations

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

(1) The Evolving Nature of CCAA Proceedings

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

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

Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

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

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

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

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

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

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R.

150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

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

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

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

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

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

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran,

at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

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

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

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

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

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

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

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

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

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

57 Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are

sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at N§149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.), at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at N§45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TAB 7

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

Most Recently Cited in: EncoreFX Inc. (Re) , 2021 BCSC 750, 2021 CarswellBC 1260 | (B.C. S.C., Mar 30, 2021)

R.S.C. 1985, c. C-36, s. 11

s 11. General power of court

Currency

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

Amendment History
1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

Currency
Federal English Statutes reflect amendments current to April 28, 2021
Federal English Regulations are current to Gazette Vol. 155:8 (April 14, 2021)

End of Document

TAB 8

2005 NBBR 199, 2005 NBQB 199
New Brunswick Court of Queen's Bench

Cansugar Inc., Re

2005 CarswellNB 308, 2005 CarswellNB 873, 2005 NBBR 199, 2005 NBQB 199, [2005] N.B.J. No. 227, [2005] N.B.J. No. 277, 140 A.C.W.S. (3d) 391, 288 N.B.R. (2d) 374, 6 B.L.R. (4th) 133, 751 A.P.R. 374

In The Matter Of The Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as Amended

In the Matter of the Application of Cansugar Inc., a body corporate

Cansugar Inc. (Applicant) and Her Majesty the Queen in Right of the Province of New Brunswick as Represented by the Minister of Business New Brunswick (Respondent)

Glennie J.

Heard: April 4, 7, 2005
Judgment: April 7, 2005
Docket: S/M/96/03

Counsel: R. Gary Fallon, Q.C., for Cansugar Inc.
Richard A. Williams, Nathalie H. LeBlanc, for Minister of Business New Brunswick

Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.h Miscellaneous
Real property
III Sale of land
III.5 Option contracts
III.5.b Exercise of option
III.5.b.iii Contractual requirements
III.5.b.iii.A Certainty of terms

Headnote
Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous issues
Company was granted relief from creditors by court order — Company negotiated asset purchase agreement with third party creditor — Purchase agreement was to include expansions to refinery undertaken in previous year by company — Provincial government informed company that its expansions had encroached on adjacent Crown land — To avoid default on company's asset purchase agreement, company and government negotiated option agreement which would allow company to purchase two parcels of Crown land — Company failed to exercise purchase option within contracted time frame — Company brought application to extend time period to exercise purchase option — Application granted — Court granted company additional one year to fulfill option — If extension of time period was not granted, company's asset purchase agreement would be at risk — Potential prejudice to company and its creditors was greater than that to government if time period were extended — Option agreement specifically stated that court had jurisdiction to extend time to exercise option — Court must possess fund of discretionary powers arising from its inherent jurisdiction to make orders based practicality.
Sale of land --- Option contracts — Exercise of option — Contractual requirements — Certainty of terms

Company was granted relief from creditors by court order — Company negotiated asset purchase agreement with third party creditor — Purchase agreement was to include expansions to refinery undertaken in previous year by company — Provincial government informed company that its expansions had encroached on adjacent Crown land — To avoid default on company's asset purchase agreement, company and government negotiated option agreement, which would allow company to purchase two parcels of Crown land — Company failed to exercise purchase option within contracted time frame — Company brought application to extend time period to exercise purchase option — Application granted — Court granted company additional one year to fulfill option — If extension of time period was not granted, company's asset purchase agreement would be at risk — Potential prejudice to company and its creditors was greater than that to government if time period were extended — Option agreement specifically stated that court had jurisdiction to extend time to exercise option — Court must possess fund of discretionary powers arising from its inherent jurisdiction to make orders based practicality.

Table of Authorities

Cases considered by *Glennie J.*:

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 72 O.T.C. 99, 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) — considered

Gauntlet Energy Corp., Re (2003), 36 B.L.R. (3d) 250, 45 C.B.R. (4th) 47, [2004] 4 W.W.R. 373, 5 P.P.S.A.C. (3d) 236, 20 Alta. L.R. (4th) 314, 336 A.R. 302, 2003 ABQB 718, 2003 CarswellAlta 1209 (Alta. Q.B.) — considered

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 63 Alta. L.R. (2d) 361, 92 A.R. 81, 72 C.B.R. (N.S.) 1, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — considered

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) — referred to

Richtree Inc., Re (2005), 2005 CarswellOnt 255, 7 C.B.R. (5th) 294, 74 O.R. (3d) 174 (Ont. S.C.J. [Commercial List]) — referred to

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

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

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

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142 (Ont. C.A.) — considered

T. Eaton Co., Re (1999), 1999 CarswellOnt 3542, 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]) — referred to

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — considered

Statutes considered:

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(4) — considered

s. 11(6) — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 92 ¶ 5 — referred to

s. 92 ¶ 13 — referred to

***Glennie J.* (orally):**

1 On April 7, 2005, I allowed the Application of Cansugar Inc. ("Cansugar") for an Order extending the time period within which it may exercise an option contained in an option to purchase granted to it by the Province of New Brunswick as represented by the Minister of Business New Brunswick (the "Minister") on July 9, 2004. The option related to certain land in the McAllister Industrial Park, Saint John. These are the reasons for my ruling.

Background

2 On December 8, 2003, Cansugar was granted protection by an order of this Court (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

3 In December, 2004, a Plan of Arrangement which provided for the sale of the Cansugar facility in the McAllister Industrial Park, Saint John, was approved by the creditors to whom the Plan of Arrangement applied and was submitted to this Court for approval by way of a Sanction Order. Hearings in this regard have been held from time to time but a Sanction Order has not, as yet, been issued by this Court.

4 Cansugar has entered into an Asset Purchase Agreement with First Excelsior Holdings Limited ("First Excelsior") for the sale of its assets in the McAllister Industrial Park. The transaction is scheduled to close on April 22, 2005. The purchaser of Cansugar's assets has until April 11, 2005 to complete its due diligence pursuant to the Asset Purchase Agreement.

5 In the fall of 2003, Cansugar commenced a major expansion to its refinery and in the process encroached upon adjacent vacant land in the McAllister Industrial Park owned by the Minister. According to the Minister, the encroachment took place without his permission, knowledge or consent. The Cansugar facility is located on land identified as PID #55150932. The Minister's land is identified as PID #55163703.

6 It should be noted that there had been negotiations between Cansugar and an employee of Saint John Industrial Parks Ltd., agent for the Minister, with respect to the McAllister Industrial Park, to purchase the Minister's land between April and October of 2003, however those negotiations failed, apparently because Cansugar was not prepared at that time to accept the asking price for the Minister's land.

7 According to the Minister, the encroachments on the Province's land by Cansugar include the encroachment of a building 10 meters on one end and 17 meters on the other including the obstruction of a joint utility easement; encroachment of a fence by its full length of 26.84 meters and an encroachment of a railway spur.

8 When it became apparent to this Court that the encroachment problem might impair the ability of Cansugar to successfully complete the sale of its assets to a third party, the Minister through his legal counsel was asked by this Court and the Court Monitor to enter into negotiations with Cansugar to resolve the encroachment problem. It should be noted that the Minister, through his legal counsel, has been involved in all of the hearings held with respect to Cansugar's request for a Sanction Order for its Plan of Arrangement because the Minister is the guarantor of certain of Cansugar's indebtedness to a Canadian Chartered Bank.

9 The Minister and Cansugar then entered into negotiations to provide a mechanism to resolve the encroachment problem in conjunction with the resolution of the debt restructuring objectives of Cansugar and as a result the Minister and Cansugar entered into an Option to Purchase Agreement dated as of July 9, 2004 (the "Option Agreement").

10 The Option Agreement gave Cansugar an irrevocable option to purchase two parcels of land from the Province identified as PID #55163703 and PID # 55163711 for the purchase price of $106,000 plus HST.

11 The Option Agreement contains the following provisions:

> 2(a) The creation of any interest or estate in the Property and the exercise of this option by the company is contingent upon compliance to the satisfaction of the Vendor with the following conditions precedent by and at the expense of the Purchaser within 180 days of the signing of this agreement unless agreed otherwise by the parties in accordance with

section 8 or unless ordered by the Court pursuant to the Court's authority under the *Companies Creditors Arrangement Act*, otherwise this agreement is null and void:

(i) Acceptance by the creditors of Purchaser of a Plan of Arrangement for the restructuring of the finances of the Purchaser under the *Companies Creditors Arrangement Act*;

(ii) Elimination of all safety hazards and pollution hazards which may create hazards to persons or the environment or which may impact on other lands owned by the Vendor or expose the Province of New Brunswick to third party liability and approval by all Governmental authorities and agencies of all remedial actions to eliminate the pollution and hazards;

(iii) Relocation to a new reasonable location of the utility easement which has been obstructed by the construction of the building on the Property by the Purchaser;

(iv) Reasonable compliance with the restrictive covenants contained in a conveyance from the Vendor to the Purchaser dated the 2nd day of December 2002 and registered in the Saint John Registry Office on the 6th day of December, 2002 as Number 15522445.

(b) The parties specifically agree that no interest or estate, legal or equitable, in the Property is created or confered on the Purchaser until there is compliance with these conditions precedent and acceptance by the Vendor of that compliance in accordance with section 2(c) herein.

(c) Upon compliance with the conditions precedent the Vendor shall provide the Purchaser with a written confirmation of the satisfactory compliance with the conditions precedent ("Certificate of Compliance") after which time an interest in land in the Purchaser may in the normal course be created and the Purchaser shall be free to exercise this option. The parties further agree that the delivery of the Certificate of Compliance to the Purchaser is also a condition precedent to the creation of any interest in the land and the exercise of the easement.

3(a) If prior to the exercise of this option there is any outstanding work or deficiency which arises from any action from the Purchaser which is related to the compliance with the conditions precedent to the creation of the interest in land and the exercise of the option then the Vendor may at its sole discretion undertake to repair or correct any deficiency and add the cost of the repair or rectification to the amount due on the exercise of the option and if the Purchaser fails to pay the cost of any of these remedial actions then the Vendor may terminate this option in which case the Purchaser shall forfeit all deposits.

(b) The Parties agree to keep each other fully informed of the progress of all actions taken in respect to compliance with the conditions precedent and to cooperate one with the other in the spirit of good faith negotiations, to achieve compliance with the conditions precedent.

12 The Option Agreement also contains the following recital:

WHERAS the parties are desirous of resolving the outstanding issues between them in respect to the real property matters identified herein.

13 It is acknowledged by Counsel for the Minister that the Option Agreement was drafted primarily by legal counsel for the Minister.

14 Cansugar did not exercise it's option to purchase within the requisite time period and now seeks an order extending the date that it may exercise the option for a further period of one year.

15 The Minister argues that this Court lacks the statutory jurisdiction to make an order extending the time period to exercise the Option Agreement based on the fact that Section 2(a) of the Option Agreement has expired. In other words, the Court can not revive an expired contract.

16 The Minister also asserts that the Court has no specific statutory authority to delve into private contractual matters dealing with the Management and Sale of Public Lands belonging to the Province, as defined by Section 92(5) of the *Constitution Act*, 1867, or the field of Property and Civil Rights in the Province, as defined by Section 92(13) of the *Constitution Act*, 1867.

17 The Minister argues that using the Court's general jurisdiction provided under Section 11 of the CCAA to revive an expired contract dealing specifically with Public Land, without clear statutory authority in this regard, would be unconstitutional.

Analysis

18 Pursuant to the CCAA, Courts are vested with a statutory authority and an inherent residual jurisdiction resulting from the equitable nature of Superior Courts. See: *Skeena Cellulose Inc., Re* (2003), 13 B.C.L.R. (4th) 236 (B.C. C.A.).

19 The CCAA deals with the Court's jurisdiction to make an order other than on an initial application at Section 11(4) which, along with Section 11(1), provides as follows:

> 11(1) Notwithstanding anything in the *Bankruptcy and Insolvency Act or the Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
>
> . . . . .
>
> (4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

20 Section 11(6) of the CCAA provides as follows:

> 11 (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

21 The purpose of Section 11 of the CCAA is to provide the Court with a discretionary power to restrain conduct or actions against a debtor company in order for the debtor company to continue with the operation of its business during the restructuring period. See: *Richtree Inc., Re*, 2005 CarswellOnt 255 (Ont. S.C.J. [Commercial List]).

22 Courts have exercised their discretion under Section 11 of the CCAA against third parties in certain limited circumstances.

23 In *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.), the Court prohibited a third party from exercising its power under a contractual agreement which would effectively terminate the agreement.

24 In *Gauntlet Energy Corp., Re*, 2003 CarswellAlta 1209 (Alta. Q.B.), Justice Kent based his reasoning on the reasons given by Justice Forsyth at paragraph 376 of the *Norcen* case, *supra*, who stated the following:

> ... I am of the opinion that s. 11 of the C.C.A.A. can validly be used to interfere with some other contractual relationships in circumstances which threaten a company's existence. I add, however, that in my judgment, such interference in the interest of fairness to all parties would be effective only for a relatively short period of time.

25 Courts have also interfered with parties' contractual rights to arbitrate their disputes, allowed debtor companies to unilaterally repudiate contracts and forced third parties to agree to the assignment of existing contracts. See: *Smoky River Coal Ltd., Re*, [1999] A.J. No. 676 (Alta. C.A.); *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]); *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]), additional reasons (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List])).

26 In *Playdium Entertainment*, *supra*, the Applicants sought an order to force a third party to consent to the assignment of an agreement. Justice Spence discusses the provisions of Section 11(4) of the CCAA as follows at ¶ 26:

> 26 Section 11(4) of the CCAA, in subsections (a) (b) and (c), provides only for orders of a negative injunctive effect until otherwise ordered by the court, in respect of proceedings against the company, i.e. in this case, Playdium. However, the order sought is in effect to require Famous Players to be bound by an assignment of their agreement to New Playdium. It is not readily apparent how such an order could be made under s. 11(4) (a)(b) or (c) of the CCAA and no other section of the Act has been mentioned as relevant.

27 Justice Spence approved an assignment by concluding as follows at ¶ 42:

> 42 Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

28 In the case at bar, I am inclined to rely on the Court's inherent jurisdiction coupled with the express power granted to this Court to extend the option time period as provided for in Section 2(a) of the Option Agreement.

29 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), Justice Blair stated at page 315:

> The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in *Dylex Ltd.*, supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.

30 Recently, in *Stelco Inc., Re* [2005 CarswellOnt 1188 (Ont. C.A.)] 2005 CanLII 8671, the Ontario Court of Appeal concluded that Section 11 of the CCAA did not provide the authority for a court to interfere with the composition of the board of directors of a company by removing members of a corporate board.

31 R.A. Blair, J.A. writes at ¶ 41, 42 and 44:

> [41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 33, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21 is articulated in E.A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) as follows:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at page 262.

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff, supra*, at para 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts.

32 And at ¶ 51:

[51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation.

These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power — which the courts are disinclined to exercise in any event — except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

33 With respect to inherent jurisdiction, Justice Blair writes in *Stelco* at ¶ 32 to 38:

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786 (Sup. Ct.) at para. 11. See also, *Re Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.), at p. 320; *Re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act; see *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div.) [Commercial List]), *Royal Oak Mines Inc. (Re)* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); and *Westar Mining Ltd. (Re)* (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

[34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the

judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

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

[35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament of the Legislature has acted. As Farley J. noted in *Royal Oak Mines, supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, [1976] 2 S.C.R. 475 (S.C.C.) at 480; *Richtree Inc. (Re)*, [2005] O.J. No. 251 (Sup. Ct.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run; along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335 (B.C.C.A.), (2003) 43 C.B. R. (4th) 187 at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA.... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", *supra*, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital jurisdical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however — difficult as it may be to draw — between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose". Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding.

34 With respect to Section 11 discretion, Justice Blair opined that:

[39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, although the s. 11 discretion in spite of

its considerable breadth and flexibility — does not permit the exercise of such a power in and of itself, there may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA.

35 In my view, to the extent that the jurisdiction to extend an option period is not specifically expressed in Section 11 of the CCAA, the granting of such an extension may be said to be an exercise by this Court of its inherent jurisdiction and in particular by virtue of the authority granted to this Court by Section 2(c) of the Option Agreement. In order to accomplish the goal of facilitating the restructuring of a debtor company, the Court must have a fund of discretionary powers arising from its inherent jurisdiction to make orders not only to do justice between the parties or other affected persons, but also to do what practicality demands: *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]).

36 In *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.), at pp. 247-248, Justice Tysoe writes:

> In deciding whether to exercise its inherent jurisdiction the Court should weight the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

37 Counsel for the Minister states that there is little doubt that the Courts inherent jurisdiction extends in CCAA proceedings as to permit the Court, in appropriate circumstances, to make orders against third parties where their actions would potentially prejudice the success of a plan.

38 Counsel for the Minister argues however that use of inherent jurisdiction to create standing for a party who is clearly not mentioned on a contract or to enable the Court to breath life into an expired contract are not appropriate uses of the Court's inherent jurisdiction.

39 In my opinion, if an extension of the time period to exercise its option pursuant to the Option Agreement is not granted, the success of Cansugar's Plan of Arrangement would be prejudiced.

40 With respect to the expired contract argument advanced by Counsel for the Minister, there is no provision in the Option Agreement which provides that a Court Application for an extension of time must be made within the initial 80 day time period.

41 With respect to the Minister's assertion that this Court has no specific statutory authority to delve into private contractual matters dealing with the management and sale of public land belonging to the Province and that to revive an expired contract dealing specifically with public land and without clear statutory authority in this regard would be unconstitutional, I am of the respectful view that the Minister specifically gave this Court the authority to extend the time period within which the option could be exercised by Cansugar by virtue of Section 2(a) of the Option Agreement.

42 In the case at bar, the Option to Purchase, which was drafted primarily by legal Counsel acting on behalf of the Minister, is linked to Cansugar's court proceedings under the CCAA. There is a specific provision in Section 2(a) of the Option Agreement that the time period within which it can be exercised by Cansugar could be extended by order of the Court pursuant to the Courts authority under the CCAA. As well, one of the conditions precedent is the acceptance by Cansugar's creditors of a Plan of Arrangement under the CCAA. In this regard, since it was the intention of the Minister and Cansugar to link the Option Agreement to the CCAA and Cansugar's Plan of Arrangement bearing in mind that the Option was granted to Cansugar to resolve the encroachment problem at the request of the Court acting pursuant to the CCAA, the extension of time granted to Cansugar to exercise the option is contingent upon a Sanction Order being issued by the Court with respect to Cansugar's Plan of Arrangement. In other words, in the event a Sanction Order is not issued by this Court for Cansugar's Plan of Arrangement, the extension of time to March 31, 2006 is rescinded and is no longer available to Cansugar or a Receiver or a Trustee in Bankruptcy of Cansugar.

43 On weighing the interest of Cansugar and its creditors directly affected by Cansugar's Plan of Arrangement against any prejudice to the Minister in granting an extension, I am of the view that the prejudice to Cansugar and its affected creditors is greater than any prejudice to the Minister. Because of the encroachment problem, the Minister would appear to not be able to sell the land to another party. The Option Agreement was entered into by the Minister and Cansugar to resolve the "*outstanding issues between them*" in respect to the real property matters identified in the Option Agreement.

44 If the Minister had intended that any application to this Court for an extension of time would have to be made before the expiration of the initial 180 day option period, the Option Agreement would have said so.

45 With respect to the one year time period that I have allowed for the option to be exercised by Cansugar, I have taken into consideration the fact that some of the conditions precedent will take time to complete. I have also taken into consideration the Court Monitor's recommendation in this regard. He recommended a minimum one year extension. I have also taken into consideration the fact that the draftsperson of the Option Agreement has more than adequately protected the Minister with respect to the conditions precedent contained in Section 2(a)(ii)(iii) and (iv). These conditions precedent must be complied with "*to the satisfaction*" of the Minister before Cansugar can exercise its option to purchase. As well, there are the Minister's rights in Section 3(a) of the Option Agreement.

46 In its brief, Cansugar states that it was the expectation of Cansugar and the Minister that the option would be exercised upon the conclusion of the CCAA proceeding. I have granted a one year extension on the basis of Cansugar's representation that it will take time to complete the conditions precedent contained in Section 2 of the Option Agreement and in the Minister's recommendation in this regard. It is understood that Cansugar will continue to diligently satisfy the conditions precedent in a timely manner. The Province is at liberty to ask this Court to review the extension of time in the event Cansugar is not diligently proceeding in a timely manner to fulfill the conditions precedent.

Conclusion and Disposition

47 In the result, the Application of Cansugar Inc. for an order extending the time period written which it may exercise the option to purchase contained in the Option Agreement granted to it by the Province of New Brunswick is allowed.

48 An order will issue extending the time period within which Cansugar Inc. may exercise the option to purchase to March 31, 2006 subject to a sanction order with respect to Cansugar's Plan of Arrangement being issued by this Court and contingent upon Cansugar proceeding diligently in a timely manner to fulfill the conditions precedent. A ruling on the assignment issue is deferred.

Application granted.

TAB 9

2019 ONSC 2222
Ontario Superior Court of Justice

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

2019 CarswellOnt 6071, 2019 ONSC 2222, 146 O.R. (3d) 124, 305 A.C.W.S. (3d) 243, 69 C.B.R. (6th) 87

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 JTI-Macdonald Corp.

And In The Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

And In The Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.

McEwen J.

Heard: April 4, 2019
Judgment: April 23, 2019
Docket: CV-19-615862-00CL, CV-19-616077-00CL, CV-19-616779-00CL

Counsel: Robert I. Thornton, Leanne M. Williams, Rebecca L. Kennedy, for Applicant, JTI-Macdonald Corp.
Deborah Glendinning, Marc Wasserman, John MacDonald, for Imperial Tobacco
Paul Steep, James Gage, Heather Meredith, for Rothmans, Benson & Hedges
Avram Fishman, Mark E. Meland, Harvey Chaiton, George Benchetrit, for Quebec Class Action Plaintiffs, Conseil Québécois sur la tabac et la santé and Jean-Yves Blais and Cécilia Létourneau
Jacqueline Wall, Shahana Kar, Edmund Huang, for Her Majesty The Queen In Right of Ontario
Massimo Starnino, Lily Harmer, for Her Majesty The Queen In Right of Alberta and Newfoundland & Labrador
Jeffrey Leon, Michael Eizenga, Sean Zweig, for Consortium Provinces
Sheila Block, Scott Bommof, Adam Slavens, for Receiver of JTIM-MacDonald Corp. and JTIM Canada LCC
Patrick Flaherty, Bryan Mcleese, Justin Safayeni, Brian Gover, for RJ Reynolds Tobacco Co. and RJ Reynolds Tobacco International
David Byers, Maria Konyukhova, for British American Tobacco p.l.c., B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited
Clifton Prophet, for Philip Morris International Inc.
Steven Weisz, Amanda McInnis, for Grand River Enterprises Six Nations Ltd.
Ari Kaplan, for former Genstar US Retiree Group Committee
Wael Rostom, for Bank of Nova Scotia
Jay Swartz, Natasha MacParland, for Monitor (FTI)
Pam Huff, Linc Rogers, Chris Burr, for Deloitte Restructuring Inc., Monitor of JTIM MacDonald Inc.
Shayne Kukulowicz, Jane Dietrich, for Monitor of Rothmans, Benson & Hedges
Jonathan Lisus, Matthew P. Gottlieb, Andrew Winton, for Hon. Warren K. Winkler, in his capacity as Interim Tobacco Claimant Coordinator
Evatt Merchant, Q.C., for certain class action proceedings

Related Abridgment Classifications
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.e Proceedings subject to stay

XIX.2.e.vi Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous

Applicants J Corp., I Ltd., and R Inc. filed for protection pursuant to provisions of Companies' Creditors Arrangement Act (CCAA) — Timing of CCAA applications was triggered by judgment of Quebec Court of Appeal that largely upheld earlier trial decision and awarded approximately $13.5 billion to Quebec class action plaintiffs — In addition to that action, there were significant number of on-going proceedings against applicants including government-initiated litigation and other class actions — Initial Orders obtained by applicants in March 2019 granted applicants protection from creditors on interim basis and allowed for any interested party to apply to vary or amend Initial Order — J Corp. and R Inc. brought motion for orders permitting filing of Supreme Court of Canada (SCC) leave applications, but suspending all further proceedings before SCC; I Ltd. brought motion for stay of all proceedings by and against applicants and stay of any applicable limitation periods — Motions granted in part — Section 11 of CCAA provided jurisdiction to Ontario court to stay any and all actions including those before Quebec Court of Appeal and any future SCC leave application — Approach proposed by I Ltd. was fair, reasonable and sensible — I Ltd.'s approach provided for temporary pause that did not amend or usurp provisions of Supreme Court Act or Code of Civil Procedure — Further, I Ltd.'s Initial Order supported concept of deference that Ontario court must have to appeal courts by stipulating that Ontario Superior Court requested aid and recognition of those courts with respect to Initial Order — Order was granted staying any and all current proceedings by or against applicants and related entities, and staying any applicable limitation periods — Motions with respect to SCC leave applications were dismissed.

Table of Authorities

Cases considered by *McEwen J.*:

Air Canada, Re (2003), 2003 CarswellOnt 9109, 28 C.B.R. (5th) 52 (Ont. S.C.J. [Commercial List]) — considered

Mujagic v. Kamps (2015), 2015 ONCA 360, 2015 CarswellOnt 7272, 125 O.R. (3d) 715, 73 C.P.C. (7th) 229, 335 O.A.C. 195, 50 C.C.L.I. (5th) 54 (Ont. C.A.) — considered

Muscletech Research & Development Inc., Re (2006), 2006 CarswellOnt 3632 (Ont. S.C.J.) — referred to

OpenHydro Technology Canada Ltd. (Re) (2018), 2018 NSSC 283, 2018 CarswellNS 861, 65 C.B.R. (6th) 133 (N.S. S.C.) — considered

Scaffold Connection Corp., Re (2000), 2000 CarswellAlta 60, 15 C.B.R. (4th) 289, 2 C.L.R. (3d) 117, 79 Alta. L.R. (3d) 144, [2000] 7 W.W.R. 516, 2000 ABQB 35 (Alta. Q.B.) — referred to

ScoZinc Ltd., Re (2009), 2009 NSSC 162, 2009 CarswellNS 281, 277 N.S.R. (2d) 246, 882 A.P.R. 246, 55 C.B.R. (5th) 200 (N.S. S.C.) — referred to

U.S. Steel Canada Inc., Re (2016), 2016 ONCA 662, 2016 CarswellOnt 14104, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450, 61 B.L.R. (5th) 1 (Ont. C.A.) — considered

Statutes considered:

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

s. 11 — considered

Code de procédure civile, RLRQ, c. C-25.01

en général — referred to

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

Generally — referred to

s. 11 — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(1)(b) [en. 2005, c. 47, s. 128] — considered

s. 11.02(1)(c) [en. 2005, c. 47, s. 128] — considered

Supreme Court Act, R.S.C. 1985, c. S-26

Generally — referred to

s. 58(1) — considered

s. 58(1)(a) — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

***McEwen J.*:**

OVERVIEW

1 JTI-Macdonald Corp. ("JTIM"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited ("Imperial"), and Rothmans, Benson & Hedges Inc. ("RBH") (collectively "the Applicants") nave filed for protection pursuant to the provisions of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "CCAA") seeking a resolution of the multiple, significant litigation claims that have been made against them.

2 The timing of the CCAA Applications was triggered as a result of the judgment of the Quebec Court of Appeal (the "QCCA") released March 1, 2019. That decision largely upheld the earlier trial decision and awarded approximately $13.5 billion to the Quebec Class Action Plaintiffs (the "Quebec Plaintiffs"). In addition to this action there are a significant number of ongoing proceedings against the three Applicants including government-initiated litigation and other class actions.

3 The three Initial Orders obtained by the Applicants in March 2019 granted the Applicants protection from their creditors on an interim basis and allowed for any interested party to apply to this court to vary or amend the Initial Order.

4 The parties attended before me on April 4 and 5, 2019 at the come-back hearing to deal with several issues. The parties were able to agree on certain orders and deferred other issues to be dealt with on a later date, if necessary.

5 These reasons deal solely with the terms of the Initial Orders that affect ongoing or new proceedings by or against the Applicants. In particular, these reasons also deal with any leave applications that the Applicants might make to the Supreme Court of Canada (the "SCC Leave Applications").

POSITIONS OF THE APPLICANTS

6 JTIM and RBH seek to obtain orders permitting them to file SCC Leave Applications but suspending all further proceedings before the SCC. JTIM and RBH essentially submit that it is in the best interests of all stakeholders, including the Applicants and the Quebec Plaintiffs, to preserve the status quo by allowing them to file their SCC Leave Applications but allow for no further steps. They claim this would afford all stakeholders an opportunity to try to resolve all of the outstanding litigation as against the Applicants.

7 Imperial does not seek leave to file an SCC Leave Application. Imperial states that it does not intend to pursue a SCC Leave Application unless it must do so to preserve its rights against the possibility that the CCAA proceeding fails. It seeks a stay of all proceedings by and against the Applicants along with a stay of any applicable limitation periods. Imperial submits that its proposal effects the best balance between all stakeholders and would entirely preserve the status quo without giving any particular stakeholder an advantage. This would allow all stakeholders to attempt to globally resolve all of the litigation claims. Imperial submits that a blanket stay has the best opportunity of achieving that goal.

8 Imperial's position is supported by the provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan (the "Consortium"), as well as the provinces of Alberta and Newfoundland. These provinces

currently have actions underway to recover expended health care costs. Imperial is further supported by the law firm Merchant LLP, which has commenced a number of class action proceedings against the Applicants and others.

9 The relevant wording set out in the Initial Orders that the Applicants urge upon me to adopt is as follows:

- The JTIM Initial Order, at para. 20, states:

> [20] This court orders that, notwithstanding anything to the contrary in this Order, [JTIM] is authorized to continue, and the applicable Other Defendants are not stayed from continuing, to contest the Quebec Class Actions during the Stay Period (the "Further Quebec Class Action proceedings"), including without limitation by way of an application for leave to appeal to the Supreme Court of Canada and an appeal on the merits to the Supreme Court of Canada if leave is granted. Nothing in this Order shall prevent any Person from responding to the Further Quebec Class Action Proceedings, provided that during the Stay Period this paragraph does not without further order of this Court, permit the Applicant to post security or grant any security interest, or permit any Person to seek security from the Applicant in relation to the Further Quebec Class Action Proceedings.

- The RBH Initial Order, at para. 20, states:

> [20] This court orders that, notwithstanding anything to the contrary in this Order, [Rothmans] is authorized to serve and file an application for leave to appeal the Quebec Appellate Decision to the Supreme Court of Canada, but no further step or proceeding shall be taken by the Applicant or any other Person in respect of such application without further order of this Court

- The Imperial Initial Order, at paras. 18-20, states:

> [18] This court orders that until and including April 11, 2019, or such later date as mis Court may order (me "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), including but not limited to any Pending Litigation and any other Proceeding in relation to any other Tobacco Claim, shall be commenced, continued or take place against or in respect of the Applicants ... except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way or directed to take place against or in respect of any of the Applicants ... are hereby stayed and suspended pending further Order of this Court....
>
> [19] This court orders that, during the Stay Period, no Proceeding in Canada that relates in any way to a Tobacco Claim or to the Applicants ... including the Pending Litigation, shall be commenced, continued or take place ... except with me written consent of the Applicants and the Monitor, or with leave of this Court, and any and all such Proceedings currently underway or directed to take place ... are hereby stayed and suspended pending further Order of this Court.
>
> [20] This court orders that, to the extent any prescription, time or limitation period relating to any Proceeding against or in respect of the Applicants, the ITCAN Subsidiaries or any member of the BAT Group that is stayed pursuant to this Order may expire, the term of such prescription, time or limitation period shall hereby be deemed to be extended by a period equal to the Stay Period.

THE QUEBEC PLAINTIFFS' POSITION

10 The Quebec Plaintiffs firstly submit that this court does not have jurisdiction to amend the relevant provisions of the *Supreme Court Act,* R.S.C. 1985, c. S-26 or the *Code of Civil Procedure,* CQLR c. C-25.01. The Quebec Plaintiffs therefore argue that I specifically do not have jurisdiction to determine what steps are to be taken in an SCC Leave Application nor do I have jurisdiction to stay the effect of the QCCA decision. The Quebec Plaintiffs further state that the inherent power of the CCAA court granted pursuant to s. 11, as per its wording, only supersedes the provisions of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 or the *Winding-up and Restructuring Act,* R.S.C. 1985, c. W-11.

11 The Quebec Plaintiffs therefore submit that if the Applicants wish to commence an SCC Leave Application they are free to do so but they must abide by whatever conditions that are imposed upon them by the QCCA or the SCC. The Quebec Plaintiffs seek an order that if any of the Applicants seek to file an SCC Leave Application that the CCAA proceedings ought to be immediately and automatically terminated. Alternatively, the stay of proceedings provided for in the JTIM Initial Order and the RBH Initial Order be partially lifted to allow the Quebec Plaintiffs to participate in any SCC Leave Application and seek the imposition of any conditions that the QCCA or the SCC deem appropriate.

12 The Quebec Plaintiffs seek the same relief against Imperial notwithstanding the different relief sought by Imperial.

13 The position of the Quebec Plaintiffs is supported by Her Majesty the Queen in Right of Ontario ("Ontario"), which also has a claim to recover expended health care costs.

ANALYSIS

14 For the reasons below I am satisfied that I have jurisdiction to deal with the QCCA proceeding. I am further persuaded that the proposal put forth by Imperial, as generally set out in paras. 18-20 of its Initial Order noted above, is the most sensible at this time and should be incorporated into all three Initial Orders.

Jurisdiction.

15 The parties agree that there are no cases directly on point with respect to the issue of whether s. 11 of the CCAA provides this court with jurisdiction to stay the effect of the QCCA decision and subsequently any SCC Leave Application. The parties provided the court, however, with case law that they submit is analogous and relevant This will be reviewed below.

16 A good starting point concerning the issue of jurisdiction involves the wording of s. 11 and s. 11.02(2)(b) of the CCAA. These sections provide this court with broad jurisdiction. They read as follows:

> **General power of court**
>
> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act,* if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances. [Emphasis added]
>
> 11.02(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceeding taken or that might be taken in respect of the 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 company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company. [Emphasis added.]

17 As can be seen from the above, the broad jurisdiction of this court to "make any order that it considers appropriate in the circumstances" includes restraining further proceedings in "any action, suit or proceeding" against the Applicants.

18 This is consistent with the purpose of the CCAA, which is well set out in the decision in *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450 (Ont. C.A.), wherein the Court of Appeal noted that:

> [47] There is no dispute about the purpose of the *CCAA*. It describes itself as "An Act to facilitate compromises and arrangements between companies and their creditors". Its purpose is to avoid the devastating social and economic effects of commercial bankruptcies. It permits the debtor to continue to carry on business and allows me court to preserve the status quo while "attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all": *Century Services,* at para. 77....
>
> [49] The *CCAA* achieves its goals through a summary procedure for the compromise or arrangement of creditors' claims against the company. It was described in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 36, as:
>
> > a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders.

19 The above-noted purpose, in my respectful view, provides this court with jurisdiction to deal with proceedings other than those that simply arise before the Ontario Superior Court of Justice. The CCAA legislation is remedial in nature. In order to allow for the proper restructuring of debtor companies, or in this case settlement of multiple significant lawsuits, it would be undesirable to restrict the discretion of this court to matters at the Superior Court level. It would lead to a chaotic situation where only proceedings before the Superior Court and/or other provincial trial courts were stayed but proceedings that had reached the appeal courts were allowed to proceed. This would significantly hamper the stated purpose of the CCAA, which is to attempt to negotiate a compromised plan of arrangement.

20 A similar conclusion was reached by Farley J. in the decision *Air Canada, Re* (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J. [Commercial List]). Although he was dealing with motions brought by Federal Regulators, who argued that this court did not have inherent jurisdiction to impose a stay upon them, I believe his words are instructive wherein he held [at para. 12]:

> Indeed there are no such restrictive words on proceedings nor are there any words which denote that the jurisdiction to grant a stay is only to deal with economic, financial, business or commercial matters. I would note that Parliament has had ample opportunity over the past two decades to amend section 11(3)(b) and (c) in the way urged on me by the Regulators if it felt that desirable; that could have been done in the 1992 and 1997 amendments pursuant to the five year review procedure. Amendments were made at those times in various areas; however, it appears that Parliament recognized that, with respect to the types of applicants which could apply for restructuring protection under the CCAA, it was undesirable to restrict the direction of the court to deal with matters which involve delicate balancing of various interests with a view to ensuring that productive resources were utilized to the maximum degree for the overall benefit to Canada's social and economic values. Of course that discretion is not without restraint - rather that discretion is to be judicially exercised according to the circumstances applicable in any particular case. [Emphasis added.]

21 Farley J., in the above passage, recognized the broad jurisdiction of this court in any particular case, subject to the proper exercise of judicial discretion. Once again, this recognizes the useful purposes of the CCAA in attempting to allow stakeholders to negotiate a compromise. It bears noting that one of the aspects of proper judicial discretion includes the fact that any stay of proceedings in these Applications would be without prejudice to any party's right to bring a motion to lift the stay. This focuses the stakeholders on bona fide negotiations and allows this court the discretion to terminate the stay if need be.

22 I acknowledge that I have adopted the view that the aforementioned provisions of s. 11 provide me jurisdiction to stay any and all actions including those before the QCCA and any future SCC Leave Application. I respectfully conclude that such an outcome is contemplated by the CCAA to allow for a successful global resolution without benefiting one stakeholder over the other. Otherwise, as noted, chaotic situations could develop.

23 Accordingly, the approach proposed by Imperial is fair, reasonable and sensible and one that this court has jurisdiction to make. It provides for a temporary pause that does not amend or usurp the provisions of the *Supreme Court Act* or the *Code of Civil Procedure*. Further, para. 61 of Imperial's Initial Order also supports the concept of deference that this court must have

to the appeal courts by stipulating that the Ontario Superior Court requests the aid and recognition of those courts with respect to the Initial Order.

24 Last, I believe that such an outcome is contemplated by s. 58(1) of the *Supreme Court Act,* which provides as follows:

> **Time periods for appeals**
>
> 58(1) Subject to this Act or any other Act of Parliament, the following provisions with respect to time periods apply to proceedings in appeals:
>
> (a) in the case of an appeal for which leave to appeal is required, the notice of application for leave to appeal and all materials necessary for the application shall be served on all other parties to the case and filed with the Registrar of the Court within sixty days after the date of the judgment appealed from; [Emphasis added.]

25 Section 58(1) appears to be broad enough to include the jurisdiction of the CCAA to stay the QCCA proceeding and any further SCC Leave Applications at this time. Given the above and the broad jurisdiction conferred upon this court by s. 11, it is my view that the *Supreme Court Act* does not oust this court's jurisdiction that is conferred upon it by the CCAA.

26 I should note that the Quebec Plaintiffs rely on a number of decisions to support its position that I do not have jurisdiction. Primarily, they rely upon the decision of the Ontario Court of Appeal in *Mujagic v. Kamps*, 2015 ONCA 360, 125 O.R. (3d) 715 (Ont. C.A.) and the decision of the Supreme Court of Nova Scotia in *OpenHydro Technology Canada Ltd. (Re)*, 2018 NSSC 283, 65 C.B.R. (6th) 133 (N.S. S.C.). In my view, however, these cases are distinguishable given the broad nature of the authority conferred upon this court by the CCAA and the significant nature of the undertaking that is being pursued by all stakeholders to attempt a global resolution of the multiple, significant claims against the Applicants. Also, *OpenHydro* deals with existing *in rem* proceedings solely within the jurisdiction of the Federal Court

27 I also accept Imperial's submission that I have jurisdiction to extend any prescription, time or limitation period relating to any proceeding for or against the Applicants or related entities that may expire. Such provisions are common in CCAA proceedings and have been granted in Initial Orders in a number of decisions: *Muscletech Research & Development Inc., Re* [2006 CarswellOnt 3632 (Ont. S.C.J.)], 2006 CanLII 20084, at para. 5; *ScoZinc Ltd., Re*, 2009 NSSC 162, 277 N.S.R. (2d) 246 (N.S. S.C.) (Claims Officer), at para. 5; and *Scaffold Connection Corp., Re*, 2000 ABQB 35, 79 Alta. L.R. (3d) 144 (Alta. Q.B.), at para. 26. In my view, this result is sensible and desirable. Since all proceedings and future proceedings, including those brought by or against the Applicants, are stayed, the interests of all stakeholders are protected.

28 No party took the position at the motion that I did not have the jurisdiction to stay an existing or pending action and accordingly extend the limitation period. Specifically, neither JTIM nor RBH took issue with Imperial's submissions in this regard. In any event, if I was to grant the relief they sought, I would be in a similar position where I would have to stay the limitation period concerning the Quebec Plaintiffs' ability to respond to the SCC Leave Application.

Implementing the Stay

29 In accepting that the orders proposed by Imperial ought to go in all three Applications I am convinced that this would best preserve the status quo as it existed at the time of the filings and provide for the level playing field needed to attempt a resolution of all claims.

30 The proposal put forth by JTIM and RBH would alter the status quo in their favour. If they were allowed to file SCC Leave Applications and then obtain a stay it would be to the prejudice of the Quebec Plaintiffs. These Applicants would be allowed to formally present all of their grounds for appeal, including the alleged flaws in the reasoning of the QCCA, without permitting the Quebec Plaintiffs to reply. This not only would affect the status quo but add an impediment to resolution. It would distract these Applicants from the resolution process they claim is so important by focusing their attention on the merits of their appeal from a five-member decision of the QCCA.

31 Further, it is not only the relationship between the Applicants and the Quebec Plaintiffs that must be taken into consideration. If I was to partially lift the stay to allow the Quebec Plaintiffs to respond and therefore allow the SCC Leave Application to proceed in earnest, as requested by the Quebec Plaintiffs in their alternative relief, this would tilt the playing field in favour of the Quebec Plaintiffs as against the other stakeholders who have had their actions stayed. Not only would this allow the Quebec Plaintiffs to move further ahead and closer to resolution when the other actions are stayed, but it would further allow the Quebec Plaintiffs to seek farther conditions from the QCCA or SCC concerning the SCC Leave Application.

32 Approximately $1 billion has already been deposited in Quebec subsequent to the trial decision in order that the Applicants could pursue appeals to the QCCA. Any further, similar orders would be detrimental to other stakeholders who seek a fair process with the CCAA proceedings. These other stakeholders include the provinces who have significant actions concerning the health recovery costs and the other class actions. In fact, two of the provinces' claims - Ontario and New Brunswick - are edging towards trial. This does not seem fair as it would allow the Quebec Plaintiffs a benefit not available to other plaintiffs.

33 Furthermore, if I was to partially lift the stay as requested by the Quebec Plaintiffs so that the SCC Leave Application and a subsequent potential appeal could proceed it would undermine the CCAA proceeding. It would allow for a significant parallel proceeding to commence. Not only would this create a shift in the level playing field as noted above, it would no doubt greatly distract the Applicants and the Quebec Plaintiffs from the important purposes of the CCAA. Enormous resources would be diverted to the litigation. This would cause delay and lessen the chances of achieving a global resolution.

34 The CCAA case law clearly establishes the significant need to preserve the status quo between all stakeholders to preserve a level playing field and maximize the chances of obtaining resolution.

35 Last, I note that the Quebec Plaintiffs also submitted that the "well-documented reprehensible behaviour" set out in the trial decision and QCCA decision should also be taken into consideration on this motion. I reviewed the relevant portions of the aforementioned decisions. No doubt significant criticism was leveled in various portions of the judgments. In my view, however, insofar as the CCAA process is concerned, the past behaviour of the Applicants should not be allowed to undermine attempts to reach a global resolution to the benefit of all stakeholders.

DISPOSITION

36 The motions of JTIM, RBH and the Quebec Plaintiffs with respect to the SCC Leave Application are dismissed.

37 An order shall go staying any and all current proceedings by or against the Applicants and related entities and prohibiting the commencement of any further proceedings by or against them except with the leave of this court. It is further ordered that, to the extent of any prescription, time or limitation period relating to any proceeding against the Applicants that is stayed pursuant to this order may expire, the term of such prescription, time or limitation period shall thereby be deemed to be extended by a period equal to the Stay Period.

Motions granted in part.

TAB 10

2021 ABCA 85
Alberta Court of Appeal

Bellatrix Exploration Ltd (Re)

2021 CarswellAlta 508, 2021 ABCA 85, [2021] A.W.L.D. 1678

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

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

BP Canada Energy Group ULC (Applicant) and National Bank of Canada (Respondent) and Bellatrix Exploration Ltd. (Respondent)

Jack Watson J.A.

Heard: February 17, 2021
Judgment: March 5, 2021
Docket: Calgary Appeal 2101-0011-AC

Counsel: H.A. Gorman, Q.C., G. Benediktsson, for Applicant
K.J. Bourassa, J.W. Reid, for Respondent, National Bank of Canada
R.J. Chadwick, C. Descours, for Respondent, Bellatrix Exploration Ltd.
J.G.A Kruger, Q.C., for PricewaterhouseCoopers Inc. in its capacity as Court appointed Monitor of Bellatrix Exploration Ltd.

Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.C Leave by judge

Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge
Bankrupt company and applicant corporation were involved in subject proceeding — Applicant corporation was unsuccessful in application for relief, including lifting stay of proceedings and equitable relief — Corporation claimed that application judge erred in areas of obligation and set-off rights — Corporation also claimed that eligible financial contract (EFC) was not properly defined — Corporation moved for leave to appeal from lower court judgment — Motion dismissed — Corporation's submissions lacked arguable merit — Corporation did not cite authority for its proposition on disclaimer issue — Motion judge did not err in assessment of EFC issue — Outcome was of greater significance to company than to corporation — There was no larger issue for practice raised by subject proceeding.

Table of Authorities
Cases considered by *Jack Watson J.A.*:

Androscoggin Energy LLC, Re (2005), 2005 CarswellOnt 412, 8 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Arrangement relatif à Gestion Éric Savard inc. (2019), 2019 QCCA 1434, 2019 CarswellQue 7641 (C.A. Que.) — referred to

Arrangement relatif à Nemaska Lithium inc. (2020), 2020 QCCA 1488, 2020 CarswellQue 11925 (C.A. Que.) — referred to

BMO Nesbitt Burns Inc. v. Bellatrix Exploration Ltd. (2020), 2020 ABCA 264, 2020 CarswellAlta 1262, 81 C.B.R. (6th) 161 (Alta. C.A.) — referred to

Bellatrix Exploration Ltd (Re) (2020), 2020 ABQB 809, 2020 CarswellAlta 2545, 86 C.B.R. (6th) 191 (Alta. Q.B.) — referred to

Bellatrix Exploration Ltd v. BP Canada Energy Group ULC (2020), 2020 ABCA 178, 2020 CarswellAlta 807, 79 C.B.R. (6th) 205 (Alta. C.A.) — referred to

Bellatrix Exploration Ltd., Re (2020), 2020 CarswellAlta 350, 77 C.B.R. (6th) 230 (Alta. Q.B.) — referred to

Blue Range Resource Corp., Re (1999), 1999 CarswellAlta 809, 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — referred to

Brian Shenker v. Nemaska Lithium Inc., et al. (2021), 2021 CarswellQue 424 (S.C.C.) — referred to

Canada (Minister of Citizenship and Immigration) v. Vavilov (2019), 2019 SCC 65, 2019 CSC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884, 59 Admin. L.R. (6th) 1, 441 D.L.R. (4th) 1, 69 Imm. L.R. (4th) 1 (S.C.C.) — referred to

Canada Trustco Mortgage Co. v. R. (2005), 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, *(*sub nom. *Canada Trustco Mortgage Co. v. Canada)* 2005 D.T.C. 5523 (Eng.), *(*sub nom. *Hypothèques Trustco Canada v. Canada)* 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, *(*sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.)* 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

Canada v. Canada North Group Inc. (2019), 2019 ABCA 314, 2019 CarswellAlta 1815, 72 C.B.R. (6th) 161, 437 D.L.R. (4th) 122, 93 Alta. L.R. (6th) 29, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, *(*sub nom. *The Queen v. Canada North Group Inc.)* 2019 D.T.C. 5111 (Alta. C.A.) — referred to

Cantore v. Nemaska Lithium Inc. (2020), 2020 QCCA 1333, 2020 CarswellQue 10609 (C.A. Que.) — referred to

Citibank Canada v. Confederation Life Insurance Co. (1996), 42 C.B.R. (3d) 288, *(*sub nom. *Citibank Canada v. Confederation Life Insurance Co. (Liquidation))* 15 O.T.C. 26, 1996 CarswellOnt 3219 (Ont. Gen. Div.) — referred to

DePuy International Ltd., et al. v. Theodore Wilson, et al. (2020), 2020 CarswellBC 2092, 2020 CarswellBC 2093 (S.C.C.) — referred to

Fischer v. IG Investment Management Ltd. (2013), 2013 SCC 69, 2013 CarswellOnt 17258, 2013 CarswellOnt 17259, 45 C.P.C. (7th) 227, 366 D.L.R. (4th) 1, 312 O.A.C. 128, 482 N.R. 80, *(*sub nom. *AIC Limited v. Fischer)* [2013] 3 S.C.R. 949 (S.C.C.) — referred to

Food & Drug Administration v. Brown & Williamson Tobacco Corp. (2000), 529 U.S. 120 (U.S. Sup. Ct.) — referred to

Geophysical Service Inc. v. EnCana Corp. (2017), 2017 ABCA 125, 2017 CarswellAlta 732, 51 Alta. L.R. (6th) 259, [2017] 9 W.W.R. 55, 149 C.P.R. (4th) 1 (Alta. C.A.) — referred to

Geophysical Service Incorporated v. EnCana Corporation, et al. (2017), 2017 CarswellAlta 2545, 2017 CarswellAlta 2546 (S.C.C.) — referred to

Jindal Iron & Steel Co. v. Islamic Solidarity Shipping Co. Jordan Inc. (2004), [2004] UKHL 49, [2005] 1 W.L.R. 1363, [2005] 1 All E.R. 175, [2005] 1 All E.R. (Comm) 1, [2005] 1 Lloyd's Rep. 57, [2004] 2 C.L.C. 1172, 2005 A.M.C. 1, 148 S.J.L.B. 1405 (U.K. H.L.) — referred to

Keatley Surveying Ltd. v. Teranet Inc. (2019), 2019 SCC 43, 2019 CSC 43, 2019 CarswellOnt 15110, 2019 CarswellOnt 15111, 5 R.P.R. (6th) 1, 437 D.L.R. (4th) 567, 169 C.P.R. (4th) 1 (S.C.C.) — referred to

League Assets Corp., Re (2016), 2016 BCSC 2262, 2016 CarswellBC 3412, 42 C.B.R. (6th) 217 (B.C. S.C.) — referred to

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. (2016), 2016 SCC 37, 2016 CSC 37, 2016 CarswellAlta 1699, 2016 CarswellAlta 1700, [2016] 10 W.W.R. 419, 54 B.L.R. (5th) 1, 59 C.C.L.I. (5th) 173, 56 C.L.R. (4th) 1, 487 N.R. 1, [2016] I.L.R. I-5917, 404 D.L.R. (4th) 258, [2016] 2 S.C.R. 23, 19 Admin. L.R. (6th) 1 (S.C.C.) — referred to

Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta. C.A.) — referred to

Merck Frosst Canada Ltd. v. Canada (Health) (2012), 2012 SCC 3, 2012 CarswellNat 148, 2012 CarswellNat 149, (sub nom. *Merck Frosst Canada Ltd. v. Canada (Minister of Health))* 426 N.R. 200, [2012] 1 S.C.R. 23, 342 D.L.R. (4th) 257, 99 C.P.R. (4th) 65 (S.C.C.) — referred to

NAV Canada c. Wilmington Trust Co. (2006), 2006 SCC 24, 2006 CarswellQue 4890, 2006 CarswellQue 4891, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc., (Bankrupt), Re)* 349 N.R. 1, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.)* 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc. (Bankrupt), Re)* 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re)* 269 D.L.R. (4th) 79, (sub nom. *Canada 3000 Inc., Re)* [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66 (S.C.C.) — referred to

Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150 (S.C.C.) — considered

PricewaterhouseCoopers Inc v. Perpetual Energy Inc (2021), 2021 ABCA 16, 2021 CarswellAlta 119, 86 C.B.R. (6th) 9 (Alta. C.A.) — referred to

R. c. Bois (2004), 2004 SCC 6, 2004 CarswellQue 138, 2004 CarswellQue 139, (sub nom. *R. v. Daoust)* 180 C.C.C. (3d) 449, (sub nom. *R. v. Daoust)* 235 D.L.R. (4th) 216, 18 C.R. (6th) 57, (sub nom. *R. v. Daoust)* 316 N.R. 203, [2004] 1 S.C.R. 217 (S.C.C.) — referred to

R. v. Canada North Group Inc. (2019), 2019 CarswellAlta 2506 (S.C.C.) — referred to

R. v. Loxdale (1758), 97 E.R. 394, 1 Burr. 445 (Eng. K.B.) — referred to

R. v. Mac (2002), 2002 SCC 24, 2002 CarswellOnt 821, 2002 CarswellOnt 822, 50 C.R. (5th) 50, 163 C.C.C. (3d) 1, 287 N.R. 75, 159 O.A.C. 33, [2002] 1 S.C.R. 856 (S.C.C.) — referred to

R. v. Quesnelle (2014), 2014 SCC 46, 2014 CSC 46, 2014 CarswellOnt 9195, 2014 CarswellOnt 9196, 11 C.R. (7th) 221, 460 N.R. 27, 320 O.A.C. 38, 375 D.L.R. (4th) 71, 312 C.C.C. (3d) 187, [2014] 2 S.C.R. 390, 314 C.R.R. (2d) 283, 129 O.R. (3d) 640 (note) (S.C.C.) — referred to

R. v. T.J.M. (2021), 2021 SCC 6, 2021 CSC 6, 2021 CarswellAlta 165, 2021 CarswellAlta 166, 453 D.L.R. (4th) 94, 69 C.R. (7th) 1 (S.C.C.) — referred to

Repsol Canada Energy Partnership v. Delphi Energy Corp (2020), 2020 ABCA 364, 2020 CarswellAlta 1855 (Alta. C.A.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 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. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — referred to

Rollingson Racing Stables Ltd v. Horse Racing Alberta (2020), 2020 ABCA 419, 2020 CarswellAlta 2207 (Alta. C.A.) — referred to

Rollingson Racing Stables Ltd v. Horse Racing Alberta (2021), 2021 CarswellAlta 295 (S.C.C.) — referred to

Schreiber v. Canada (Attorney General) (2002), 2002 SCC 62, 2002 CarswellOnt 2921, 2002 CarswellOnt 2922, 167 C.C.C. (3d) 51, (sub nom. *Schreiber v. Federal Republic of Germany)* 216 D.L.R. (4th) 513, 22 C.P.C. (5th) 207, 61 O.R. (3d) 160 (note), 292 N.R. 250, [2002] 3 S.C.R. 269, 164 O.A.C. 354, 61 O.R. (3d) 160, 2002 CSC 62 (S.C.C.) — referred to

TW Logistics Ltd. v. Essex County Council (2021), [2021] UKSC 4 (U.K. S.C.) — referred to

Victor Cantore v. Nemaska Lithium Inc. (2020), 2020 CarswellQue 14120 (S.C.C.) — referred to

Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District (2021), 2021 SCC 7, 2021 CSC 7, 2021 CarswellBC 265, 2021 CarswellBC 266, [2021] 2 W.W.R. 193, 9 M.P.L.R. (6th) 1, 44 B.C.L.R. (6th) 215, 454 D.L.R. (4th) 1, 12 B.L.R. (6th) 1 (S.C.C.) — referred to

Wilson v. DePuy International Ltd. (2019), 2019 BCCA 440, 2019 CarswellBC 3554, 31 B.C.L.R. (6th) 215 (B.C. C.A.) — referred to

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — considered

Statutes considered:

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

Generally — referred to

judicial interpretation a contributor to inconsistency, an undesirable thing: see Ledcorat para 39; see also the concurring reasons of Brown J in *Wastech* at paras 117-122.

60 More specifically to this case, I consider it noteworthy that Bellatrix suggests that there were other EFC creditors of Bellatrix, and that they had elected to provide for specific security remedies in their cases. Bellatrix said it would be at least ironic if BPC ended up with a better level of security than their EFC creditors who acted on their securities and accepted disclaimers from Bellatrix. Needless to say, as noted for the National Bank, other creditors had also chosen to establish security rights from the outset. The submissions of BPC about s 32(9)(a) having established a security interest for BPC is unsupportable on this record.

61 As noted above, BPC's submissions as to s 32(9) of the CCAA go past whether the disclaimer by Bellatrix was ineffective under the section due to the GasEDI Agreement being an EFC. BPC would have me grant leave to argue to a panel of this Court that the ineligibility of Bellatrix and its Monitor to make an effective disclaimer under the *CCAA* means that Bellatrix was obliged to *continue to be bound* by the terms of the GasEDI Agreement. On this premise, even if Bellatrix was in no position to deliver gas under the GasEDI Agreement, the gain or profit that BPC would have acquired by Bellatrix continuing to deliver under the GasEDI Agreement would notionally continue to grow and to grow in a form of a constructive trust over the assets of Bellatrix collected by the Monitor.

62 BPC cites no authority for this extraordinary (and multifaceted) proposition which is fundamentally based on legal fictions. The case of *Re: League Assets Corp* cited by BPC is quite distinguishable and does not go anywhere near that far.

63 Section 32 of the CCAA should be read in light of the objectives, context, intent and policies of Parliament (which objectives, context, intent and policies are described in *Callidus Capital*): see Rizzo & Rizzo Shoes Ltd (Re) [1998] 1 SCR 27 at para 21, saying that the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see also Canada Trustco Mortgage Co. v Canada 2005 SCC 54 para 10, [2005] 2 SCR 601, cited in Callidus Capitalat para 60 and in Orphan Well Association v Grant Thornton Ltd 2019 SCC 5 at para 88, [2019] 1 SCR 150.

64 Section 32 should also be read consistently with the applicable canons of interpretation, including that the provision is part of a larger scheme across several pieces of legislation, and accordingly it should be read in harmony with the scheme and not so as to render any other parts of the scheme ineffective. This canon of interpretation also dates back to Lord Mansfield in R v Loxdale(1758) 1 Burr 445 at p 447 where he said:

> Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and explanatory of each other.

This was lately cited by the UKSC in ***T W Logistics Ltd v Essex County Council and another***, [2021] UKSC 4 at para 75; see likewise ***Food and Drug Administration et al. v. Brown & Williamson Tobacco Corp. et al***., 529 U.S. 120 (2000) where O'Connor J pointed to the need to see a statutory system as "as a symmetrical and coherent regulatory scheme".

65 Similarly, Antonin Scalia and Bryan Garner wrote in *Reading Law: The Interpretation of Legal Texts* (2012) at p. 180:

> The imperative of harmony among provisions is more categorical than most canons of construction because it is invariably true that intelligent drafters do not contradict themselves . . . Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously".

See also ***Geophysical Service Inc v EnCana Corporation***, 2017 ABCA 125 at para 38, [2017] 9 WWR 55, leave denied [2017] SCCA No 260 (QL) (SCC No 37634).

66 Rather than serving the objectives of the *CCAA*, BPC's thesis would undermine the operation of the statute. A court should not look with eagle eyes for technicalities that would frustrate key parts of legislation: see eg Rollingson Racing Stable Ltd v Horse Racing Alberta 2020 ABCA 419 at para 30, [2020] AJ No 1272 (QL), under motion to SCC [2021] SCCA No