Court File No.: CV-11-9283-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS, INC.

BRIEF OF AUTHORITIES OF UNIQUE BROADBAND SYSTEMS, INC. (Returnable 13 June 2012)

Dated: 7 June 2012

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
Suite 1600, 1 First Canadian Place
100 King Street West
Toronto ON M5X 1G5

Alexander MacFarlane (LSUC No. 28133Q)
E. Patrick Shea (LSUC No. 39655K)
Tel: (416) 369-4631 / (416) 369-7399
Fax: (416) 862-7661

Solicitors for the Applicant

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TAB

TAB 1

Case Name:

Canwest Global Communications Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended AND IN THE MATTER OF a proposed plan of compromise or arrangement of Canwest Global Communications Corp. and the other applicants listed on Schedule "A"

[Editor's note: Schedule A was not attached to the copy received from the Court and therefore is not included in the judgment.]

[2009] O.J. No. 5379

61 C.B.R. (5th) 200

2009 CarswellOnt 7882

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

Heard: December 8, 2009.
Judgment: December 15, 2009.

(52 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the

relevant merits favoured the position of the CMI Entities on the lift stay motion.

Application by the CCAA applicants and the "CMI entities" for an order declaring that the relief sought by the "GS parties" was subject to the stay of proceedings granted on Oct. 6, 2009. Cross-motion by GS Parties for an order lifting the stay so they could pursue their motion challenging pre-filing conduct of the CMI entities, etc. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors supported the position of the CMI Entities. In essence, the GS Parties' motion sought to undo the transfer of the CW Investments Co. shares from 441 to CMI or to require CMI to perform and not disclaim the shareholders agreement as though the shares had not been transferred.

HELD: GS Parties' motions dismissed, save for a portion dealing with para. 59 of the initial order on consent; CMI Entities' motion granted with the exception of a strike portion, which was moot. The first issue was caught by the stay of proceedings and the second was properly addressed if and when CMI sought to disclaim the shareholders agreement. The substance of the GS Parties' motion was a "proceeding" subject to the stay under para. 15 of the initial order prohibiting the commencement of all proceedings against or in respect of the CMI Entitites, or affecting the CMI business or property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI business or the CMI property" which was stayed under para. 16 of the initial order. The substance and subject matter of the motion were certainly encompassed by the stay. The real question was whether the stay ought to be lifted in this case. If the stay were lifted, the prejudice to CMI would be great and the proceedings contemp lated by the GS Parties would be extraordinarily disruptive. The GS Parties were in no worse position than any other stakeholder who was precluded from relying on rights that arise upon an insolvency default. The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion. The onus to lift the stay was on the moving party. The stay was performing the essential function of keeping stakeholders at bay in order to give CMI Entities a reasonable opportunity to develop a restructuring plan.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 32, s. 11.02

Counsel:

Lyndon Barnes, Alex Cobb and Shawn Irving for the CMI Entities.

Alan Mark and Alan Merskey for the Special Committee of the Board of Directors of Canwest.

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick for the Ad Hoc Committee of Noteholders.

K. McElcheran and G. Gray for GS Parties.

Hugh O'Reilly and Amanda Darrach for Canwest Retirees and the Canadian Media Guild.

Hilary Clarke for Senior Secured Lenders to LP Entities.

Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;
(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;
(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;
(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with

policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting

the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

(a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
(b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
(c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
(d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
(e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Re Canadian Airlines Corp.*[1] which support the lifting of a stay

are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 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 proceedings 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.
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
> (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
> (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.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Re Stelco Inc*[3] and the key element of the CCAA process: *Re Canadian Airlines Corp.*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Re Lehndorff General Partner Ltd.*[5], the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed. ... The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the

court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[14] and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the

stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or
(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.
- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.
- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior written consent of one of the GS Parties[16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd.*[17]:

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

44 Similarly, in *Norcen Energy Resources Ltd.*[19], one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> "The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an

> enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts."

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may -- on notice given in the prescribed form and manner to the other parties to the agreement and the monitor -- disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

S.E. PEPALL J.

cp/e/qlrds/qljxr/qlced/qlaxw/qlcas

1 (2000), 19 C.B.R. (4th) 1.

2 [1990] B.C.J. No. 2384 (C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.

4 (2000), 19 C.B.R. (4th) 1.

5 (1993), 17 C.B.R. (3d) 24.

6 Ibid, at p. 32.

7 Supra, note 2

8 (1992) 14 C.B.R. (3d) 303.

9 R.S.O. 1990, c. C.43.

10 Supra, note 6 at paras. 24 and 25.

11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 5 C.B.R. (5th) 92 at para. 37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1.

TAB 2

Case Name:

Canwest Global Communications Corp. (Re)

IN THE MATTER OF Section 11 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 Canwest Global Communications Corp. and other applicants
AND IN THE MATTER OF a plan of compromise or arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest Canada Inc.

[2010] O.J. No. 3075

2010 ONSC 3530

85 C.C.P.B. 127

2010 CarswellOnt 5225

Court File No. CV-09-8396-00CL, CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

July 19, 2010.

(44 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application by a creditor of companies subject to protection under the Companies' Creditors Arrangement Act for an order that the stays imposed as a result of the protection did not apply to its action, or for an order to lift the stays, dismissed -- Stays applied to the action -- With one minor exception the Court would not lift the stays to allow the action to proceed.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Application by a creditor of companies subject to protection under the Companies' Creditors Arrangement Act for an order that the stays imposed as a result of the protection did not apply to its action, or for an order to lift the stays, dismissed -- Stays applied to the action -- With one minor exception the Court would not lift the stays to allow the action to proceed.

Civil litigation -- Civil procedure -- Disposition without trial -- Stay of action -- Removal of stay -- Application by a creditor of companies subject to protection under the Companies' Creditors Arrangement Act for an order that the stays imposed as a result of the protection did not apply to its action, or for an order to lift the stays, dismissed -- Stays applied to the action -- With one minor

exception the Court would not lift the stays to allow the action to proceed.

Application by Gluskin Sheff and Associates for an order that stays in favour of the Canwest companies did not apply to its action, or for an order to lift the stays. The Canwest companies were granted protection under the Companies' Creditors Arrangement Act pursuant to two orders. As a result of these orders the companies were protected by broad stays of proceedings which precluded actions against them. In spite of the stays Gluskin, an investment management firm, issued a Statement of Claim for payment for services in the amount of $849,648 rendered pursuant to an Investment Management Agreement or for damages on a quantum meruit basis. The action was commenced against two of the companies in their capacities as administrators of certain registered pension plans.

HELD: Application dismissed. The stays, which were extremely broad, applied to this action. A stay that was imposed under the Act was to be interpreted broadly and in accordance with the objective of providing debtors with the best possible chance of affecting a successful restructuring and ensuring that the creditors were treated fairly. The stays would not be lifted. There was no statutory test under the Act that governed the lifting of a stay. The stay provisions in orders under the Act were discretionary and were to be applied as to support the legislative purpose of the Act. Consideration of the balance of convenience, the relative prejudice to the parties and the merits of the action did not favour Gluskin. The objectives of the Act would not be met by lifting the stays. Allowing the action to proceed would be prejudicial to the restructuring and unfair to others. An exception was made for the action to proceed with respect to $30,000 claimed for post-filing services rendered by Gluskin pursuant to the Act.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.2

Ontario Rules of Civil Procedure, Rule 9.01(1)

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 22(b)

Counsel:

Lyndon Barnes, Alex Cobb and T. Klinck for the Applicant CMI Entities and LP Entities.

D.V. MacDonald for the Administrative Agent of the Senior Secured Lenders Syndicate.

L. Willis for the Ad Hoc Committee of CMI Entities Senior Subordinated Noteholders.

Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

J. Moher for CIBC Asset-Based Lending Inc.

H. Daley for Gluskin Sheff & Associates.

REASONS FOR DECISION

S.E. PEPALL J.:--

Introduction

1 On October 6, 2009 and January 8, 2010, initial Companies' Creditors Arrangement Act[1] orders were granted to the CMI Entities including Canwest Media Inc. ("CMI") and the LP Entities including Canwest Publishing Inc. ("CPI") (the "Applicants") respectively. The CMI Entities, which hold interests in television stations and channels, and the LP Entities, which hold interests in newspaper publishing and digital and online media operations, are being restructured separately. As a result of the initial CCAA orders, the Applicants are protected by broad stays of proceedings which preclude the taking or maintaining of proceedings against or in respect of them or affecting their business or property. Notice of the orders was widely disseminated. In spite of the stays, on January 20, 2010, Gluskin Sheff and Associates Inc. ("GSA"), an investment management firm, issued a statement of claim for payment for services rendered pursuant to an Investment Management Agreement ("IMA") or for damages on a quantum meruit basis against CMI and CPI in their capacities as administrators of certain registered pension plans.

2 By notice of motion dated April 20, 2010 and made returnable June 16, 2010, GSA seeks a declaration that the stays of proceedings in my October 6, 2009 and January 8, 2010 initial orders do not apply to its action. Alternatively, it asks for leave to lift the stays.

Facts

(a) The Pension Plans

3 Canwest Media Works Inc., now known as CMI, and Canwest Media Works Publications Inc., now known as CPI, (the "Canwest Parties") are the sponsors and administrators of numerous defined benefit and defined contribution pension plans. In accordance with applicable pension benefit standards legislation, a pension trust fund was established for each pension plan.

4 As administrator, the relevant CMI or CPI Entity is required to oversee all pension plan and fund administration matters. The administrator is responsible for investing the assets of the pension fund in a reasonable and prudent manner and in the manner prescribed by the applicable statute and regulations.

5 The Canwest Parties appointed RBC Dexia Investor Services Trust (the "Custodian") as the custodian of each pension fund. The Canwest Parties and the Custodian entered into a Master Trust Agreement dated August 10, 2007 to establish a trust for the purposes of co-mingling a portion of the assets of all of the plans under a consolidated investment structure. That Agreement provides that the Custodian holds title to all assets comprising the Master Trust fund but does so only in accordance with the instructions of CMI or CPI or investment managers appointed by them. Compensation of the Custodian constituted a charge upon the Master Trust Fund and was to be paid out of the Fund unless paid by the Canwest Parties.

6 As sponsor, the Applicants are responsible for funding the various plans in accordance with their terms and the relevant legislation. Fifteen of the seventeen plans in issue are defined benefit plans. The sponsor is ultimately responsible for ensuring that the defined benefit plans are fully funded.

(b) The Investment Management Agreement

7 In March, 2006, GSA entered into the Investment Management Agreement ("IMA") with Canwest Media Works Inc. "on behalf of certain pension funds listed in schedule I" and Canwest Mediaworks Publications Inc. "on behalf of certain pension funds listed in schedule II." Both companies are referred to as the Corporations and are described in the IMA as administrators of the registered pension plans listed on the aforesaid schedules. The Investment Management Agreement states that:

- The Corporations are retaining GSA to serve as investment counsel and portfolio manager in respect of the management of a portion of the plans' assets.
- The Corporations appoint GSA as investment counsel and portfolio manager for the CanWest Income Trust Account. The Account consisted of the assets of the Plans which were credited to the Account from time to time, the securities in which such assets were invested and all dividends, interest and other income earned thereon and the proceeds of disposition thereof. The Account was registered in the name of CanWest Pension Pooled Fund.
- Certain individuals are authorized by the Corporations to provide GSA with instructions.
- On seven days' notice, the Corporations may withdraw cash or other assets from the Account, subject to any fees owing to GSA in respect of the Account.
- The Corporations have executed an Agreement with RBC Dexia Investor Service Trust ("the Custodian"). The assets of the Account are held by the Custodian. The Corporations shall instruct the Custodian to accept instructions from GSA in relation to the investment of the Account.
- GSA shall provide the Corporations with quarterly financial statements, written investment management reports and compliance reports for the Account.
- GSA shall manage and invest the assets of the Account in a diversified portfolio of *income trusts*. (Emphasis added.)
- Unless instructed otherwise by the Corporations, GSA has the right to vote in respect of any securities held in the Account.
- Management fees are calculated and paid monthly based upon the asset value of the Account net of fees. The management fee per annum is 0.5% of the assets held in the Account.
- All maintenance and operating fees charged by brokers, custodians, banks or trust companies shall be borne by the Account.
- GSA is also entitled to an annual performance fee. It is to be paid as soon as practicable following the end of the fiscal year of the Account which is June 30.[2] The fee is equal to 25% of the net appreciation of the assets in the Account in excess of a specified hurdle.
- The IMA may be terminated by either party on 30 days' written notice.

(c) Services Provided by GSA

8 Commencing in March, 2006, GSA provided investment services and continued to do so both before and after the October, 2009 CMI Entities initial order. Its last invoice was dated January 7, 2010. As such, no services were rendered after the LP Entities initial order. Although not specified in the IMA, GSA's fees were always paid from the Account.

9 From April 19, 2006 up to and including January 7, 2010, GSA invoiced "Canwest Media" on a quarterly basis for the monthly management fees. Invoices were not issued to the Custodian for payment directly from the Account. Similarly, invoices for the performance fee were not issued to the Custodian for payment directly from the Account. Rather, the relevant Canwest representative would direct the Custodian to pay the management fees and the performance fees out of the Account and also directed the proportionate share of the fee that was to be charged to each plan. In contrast, and as specifically authorized by the IMA, without any prior approval by the CMI or LP Entities, brokerage fees were paid directly from the Account as were maintenance and operating fees.

10 On October 31, 2006, the Federal Government announced its intention to introduce legislation that

would make income trusts less attractive. The number of available income trust securities shrank and became highly concentrated in specific economic sectors. To manage risk, GSA began to include other income oriented securities in the Account. GSA maintains that the Canwest Parties were aware of the mix of securities and took no objection. The Canwest Parties disagree with the characterization of the communications that passed between the parties.

11 The IMA was with Canwest Mediaworks Inc., a predecessor company to CMI, and with Canwest Mediaworks Publications Inc., a predecessor company to CPI. GSA states that Canwest Mediaworks Inc. was not the entity named in the initial CCAA order (although not stated, presumably GSA is referring to the October, 2009 order) but does not identify when it learnt that the party named in the IMA had been succeeded by an Applicant in the CCAA proceeding. GSA states that it had not been advised of this corporate reorganization at the time.

(d) The Dispute Between the Parties

12 On July 7, 2009, GSA issued an invoice to "Canwest Media" for its performance fee of $740,247.41 and a quarterly management fee of $30,913.28 for the quarter ended June, 2009. GSA states that the Account's performance outperformed the benchmark and that the incremental benefit to the plans was $3.5 million. The Canwest Parties advised that a performance fee was not warranted as the performance assessment was based on a portfolio that did not correspond to the approved mandate found in the IMA and the IMA did not provide for non-income trust investments. The parties had further discussions.

13 On October 8, 2009, GSA issued an invoice for management fees of $33,276.15 for the quarter ended September 30, 2009.

14 The management fees portion of the July 7, 2009 invoice was paid on October 28, 2009. The Canwest Parties directed the Custodian to pay the fees out of the account and to charge a proportionate share of the fees to each plan. GSA was told that there were no issues with the management fees invoiced for the quarter ended September 30, 2009. GSA continued to render services.

15 In December, the Canwest Parties requested a withdrawal of certain of the funds in the Account. While GSA objected, the withdrawal occurred. On December 22, 2009, GSA received a cheque for the management fees invoiced for the period ended September 30, 2009, but it was countermanded and the Canwest Parties continued to complain of GSA's failure to comply with the terms of the IMA. Consistent with their advice of December 23, 2009, they also terminated GSA's appointment effective immediately. They refused to pay any additional performance or management fees and wanted reimbursement of the fees paid for the period the Account was not compliant with the IMA. The basis for their actions was that the IMA had been breached by purchasing securities that were not income trusts.

16 The Canwest Parties then instructed GSA to redeem all the assets in the Account which it did.

17 As mentioned, the initial order in the CMI Entities' CCAA proceedings was granted on October 6, 2009. On October 14, 2009, I granted a Claims Procedure Order. Pursuant to that order, the CMI Entities called for claims against the CMI Entities and proof of claim forms were given to CMI Entitities' known creditors. GSA was not given, nor did it request, a proof of claim package. The Canwest Parties did not consider GSA to be a known creditor because they did not consider that GSA had an outstanding claim against it. GSA did not submit a proof of claim before the claims bar date or at all. The same was true with respect to the LP Entities. There the Claims Procedure Order was granted on April 12, 2010, but no proof of claim was ever filed by GSA.

(e) The Action

18 After some further discussions, GSA issued a Statement of Claim for payment of $849,648.51 representing its performance and management fees or in the alternative, damages on a quantum meruit basis. Of this sum, $777,259.78 represents a performance fee for the performance year ended June 30, 2009; $34,939.97 is for management fees for the period July to September, 2009 and which were invoiced on October 8, 2009; and $37,448.76 is for management fees for the period October 1, 2009 to December 23, 2009.

19 In the Statement of Claim, GSA denies that adding non-income trust securities to the Account amounted to a breach of fiduciary duty or entitled the Canwest Parties to terminate the IMA other than on 30 days' notice. It states that the Canwest Parties were aware of the changes made to the Account and raised no objection. Furthermore, members of the pension plans benefited from the management of the Account. GSA states that the Canwest Parties have acted in bad faith trying to take advantage of an inconsequential discrepancy between the IMA and the intent of the parties.

20 GSA states that the action will not consume the Canwest Parties' attention and resources so as to hinder the restructuring. The events are mostly decided; the amount in issue is not material and would be paid by the plans; and the relationship was handled by one senior employee. Additionally, examinations for discovery are now time limited.

21 The Canwest Parties take a different view. They state that allowing the action to continue would be disruptive. The purpose of the claims procedure was to ensure to the fullest extent possible that all claims be established and resolved before CCAA emergence, not afterwards. Much progress has been made in this regard. It would be both time consuming and distracting to have to deal with the issues raised in the Statement of Claim post-emergence particularly as the two enterprises being restructured will have gone their separate ways and will sponsor their own pension plans. Having the GSA dispute resolved outside the claims procedure would be contrary to the overall objectives of the restructurings and would mean that the GSA claim would be evaluated and possibly remedied on an entirely different basis than the claims of other creditors. Allowing the GSA action to proceed would be both prejudicial to the restructurings and unfair to other creditors.

Issues

22 The issues to consider are whether the stays are applicable and if so, whether they should be lifted.

Positions of the Parties

23 GSA takes the position that the stay is inapplicable because it is not within the stay language of the orders and its action is not against the Canwest Parties but rather against certain pension plans and their members and the assets of those plans. This is in accordance with the IMA and consistent with the Canwest Parties' acknowledgement that they were acting as plan administrators. The Canwest Parties are named solely in a representative capacity as administrator of those plans and no damages are being sought from them. Rather, fees are claimed from the assets of the plans. Naming the Canwest Parties and not the beneficiaries of the plans is authorized by Rule 9.01(1) of the Rules of Civil Procedure. Plan administrators hold the plans' assets in trust for the benefit of plan members and not for their own account or benefit and are authorized by the applicable legislation to engage agents to invest the plans' assets and to pay the agents from the plans' assets. GSA particularly relies on the Court of Appeal decision in *Morneau Sobeco Limited Partnership v. Aon Consulting Inc.*[3].

24 Alternatively, GSA asks that the stay be lifted. It submits that GSA is not a creditor within the CCAA proceedings and the action, if successful, will not impose any financial or other obligations on

the Canwest Parties. By analogy, the circumstances are similar to insured claims where stays have been lifted as judgment would only be enforceable against insurance proceeds and not against the debtor's assets. There is no evidence or reasonable basis to suggest that permitting the action to proceed will impair the restructurings. Lastly, GSA notes that services were provided after the October, 2009 CMI Entities' initial order.

25 The Canwest Parties state that the IMA was a contract with the Canwest Parties who were the administrators of the plans and who were alone responsible for GSA's fees. GSA had no contractual right to require that its fees be paid out of the trust funds relating to the plans and it invoiced the Canwest Parties for them. The Canwest Parties particularly rely on *General Motors v. Canada*[4] in support of its position. As to GSA's alternative request, they state that GSA is a sophisticated investment manager that is now attempting to manoeuver a better outcome for itself than it would have had under the claims processes established in the CCAA proceedings. These restructurings are now at a very advanced stage and it would be unfair to creditors and prejudicial to the two restructurings to allow GSA to pursue the action in court when other similarly situated contractual counterparties have participated in the claims processes established by the court.

26 The Ad Hoc Committee and CIBC Asset-Based Lending Inc. support the position of the Canwest Parties. The Monitor takes no position on whether the stay applies but is opposed to any lifting of the stay.

Discussion

27 In my view, the stays apply to the action brought by GSA.

28 Firstly, the wording of the stay provisions in the two orders[5] is extremely broad and encompasses GSA's action. The CMI Entities' Initial Order states:

> [40] THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

The LP Entities' Initial Order states:

> [41] THIS COURT ORDERS that until and including February 5, 2010, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property, except with the written consent of the applicable LP Entity, the Monitor and the LP CRA (in respect of proceedings affecting the LP Entities, the LP Property or the LP Business), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the

> LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property are hereby stayed and suspended pending further Order of this Court. In the case of the LP CRA, no Proceeding shall be commenced against the LP CRA or its directors and officers without prior leave of this Court on seven (7) days notice to CRS Inc.

29 An action is therefore captured by the stays if it is against or in respect of an Applicant or affects the Business or Property of an Applicant. The two orders define CMI and LP Business and Property broadly. In my view, GSA's action would fall into each of these four categories.

30 Secondly, a stay imposed in a CCAA proceeding is to be interpreted broadly and in accordance with the objective of providing debtors with the best possible chance of affecting a successful restructuring and ensuring that creditors are treated fairly. As noted by Farley J. in *Re Lehndorff General Partner Ltd.*[6],the power to grant a stay extends to affect not only creditors but to non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. As he also noted in that decision, a key purpose of the stay is to prevent manoeuvring for position among creditors. Furthermore, the possibility that a creditor or stakeholder might be prejudiced does not affect the court's exercise of authority to grant a stay as the prejudice is offset by the benefits of facilitating the reorganization.[7]

31 Thirdly, while capacity may be a factor to consider when faced with a request to lift a stay, it would undermine the objective of a stay if one could dissect the various capacities in which a debtor company serves. In this regard, Gillese J.A.'s comments in *Morneau Sobeco Partnership v. Aon Consulting Inc.* were obiter and the case dealt with a release and not a stay of proceedings. The Canwest Parties are the defendants in the action and the statement of claim is replete with allegations against them including that they acted in bad faith. Part of the purpose of a stay is to enable the debtor company to devote its time and attention to restructuring not to responding to allegations in pleadings.

32 Fourthly, even if one does dissect the capacities of the Canwest Parties, they were administrators who were responsible for investing and overseeing the investment of the pension funds. They were not the trustee[8]; RBC Dexia was. Furthermore, the Canwest Parties as administrators had the ability to engage investment advisors in the discharge of their responsibilities. Consistent with this fact, GSA was providing services to the Canwest Parties and invoices were sent to "Canwest Media".

33 I also accept the argument of the Canwest Parties that the *General Motors Canada Limited v. Canada* decision addressed this precise issue albeit in a different context. In that case, the issue was whether General Motors Canada Limited ("GMCL") was entitled to claim an input tax credit to offset goods and services tax payable on investment management fees relating to the administration and investment of its registered pension plans, or whether the input tax credit "belonged" to the pension funds from which GMCL recovered the fees. The Canada Revenue Agency asserted that the services were in essence provided to the pension funds. Both the Tax Court of Canada and the Federal Court of Appeal rejected this argument. The factual background in the GMCL case and the case before me are very similar. In the *GMCL* case, the Tax Court noted:

> "The roles and respective duties of GMCL, as administrator, and Royal Trust, as the trustee, were entirely separate. While GMCL may have exercised some fiduciary duties as the plan's administrator, that does not mean that GMCL was a trustee of the trust. The only trustee of these pension plans can be Royal Trust, the Custodial Trustee, which, according to the definition of "trustee" and the evidence, holds legal title. Consequently, it was GMCL that contracted for and acquired the services of the Investment Managers. ...

> No evidence whatsoever was adduced to suggest that the Plan Trusts were a party to the Investment Management and Fee Agreements that made GMCL liable to pay, or that GMCL entered into an Investment Management Agreement as an agent on behalf of the Plan Trusts. The Fee Agreements, pursuant to which consideration was calculated with respect to the Investment Management Agreements, were solely between GMCL and the respective Investment Managers. The Investment Managers issued invoices, pursuant to the Agreements, solely to GMCL. GMCL approved the amounts invoiced in accordance with the Fee Agreements and then instructed the Trust to pay the Investment Managers from the funds it had placed in the pension plans. This in no way converts or transfers the liability for payment of the invoices to the trustee.
>
> Contractually, GMCL is the only party that carried the liability to pay this consideration to the Investment Managers. The Investment Management and Fee Agreements are definitive on this point. The Investment Managers invoiced only GMCL. Generally, liability crystallizes upon the issuance of an invoice. If GMCL did not pay the invoice, the Managers could sue only GMCL, not the Plan Trust. Only GMCL is liable to pay these invoices. Since the trust was never vested with responsibility for managing the assets, it had no requirement for the services of Investment Managers. The Managers can look only to GMCL for payment."[9] [Emphasis added]

34 The Court accordingly held that GMCL itself was entitled to claim the input tax credits in respect of the GST relating to the investment management fees paid to the managers of the assets of GMCL's registered pension plans. This was in spite of the fact that GMCL entered into the investment management agreement in its capacity as administrator of its registered pension plans.

35 It seems to me that this decision is similar to the case before me. The Custodian, RBC Dexia, is the trustee who held legal title to the assets in the fund. The Canwest Parties contracted for and acquired the services of GSA. Although by statute, the fees could be paid from the Account, the plan trusts were not liable for payment; the Canwest Parties were. The Canwest Parties approved the payments to GSA and then authorized the Custodian to pay them out of the Account. The Custodian had no responsibility or requirement for investment management services; the Canwest Parties did. The Canwest Parties were described as contracting on behalf of the plans but this simply reflects their role as administrator. Again, as stated in the *GMCL v. Canada* decision,

> "It follows from these comments that, although GMCL re-supplied the investment services to the trusts, and despite a reimbursement to GMCL by the Trust in the event that GMCL paid these fees directly, GMCL was still the person liable for the payment of the supply of these services by the Investment Managers, pursuant to the terms of the Agreements between GMCL and the Managers. The origin of the payment is irrelevant."[10]

36 GSA's action is not only against or in respect of the Canwest Parties, it also affects their Business as that term is defined in the initial orders thereby attracting the application of the stays. The effective administration of the plans and the relationship between the Canwest Parties and their employees are important aspects of the Business of the Canwest Parties. It should also be observed that by statute, if there are unfunded liabilities in the defined benefit plans, the Canwest Parties are required to make special payments to ensure that the plans are funded.

37 Lastly, the action can also be said to affect the Property of the Canwest Parties as that term is defined in the initial orders. Nowhere does it say in the IMA that GSA is to be paid by the fund or by the Trustee. Unlike the Trustee in the Master Trust Agreement, GSA has no security interest over the fund. In addition, the Account has been collapsed. Recovery of any judgment against the Canwest Parties clearly affects their Property. Even if GSA could execute against the defined benefit plans, the Canwest Parties would still be responsible for any deficiency arising in the plans. As such the Canwest Parties' Property may also be affected by GSA's action.

38 For all of these reasons, it appears abundantly clear that the statement of claim of GSA is encompassed by the stays of proceedings.

39 The second issue to consider is whether the stay should be lifted to permit the action to proceed.

40 There is no statutory test under the CCAA that governs the lifting of a stay. The stay provisions in the CCAA orders are discretionary and should be applied so as to support the CCAA's legislative purpose: *Re Canwest Global Communications Corp.*[11]

41 In that case, I described in some detail the legal issues applicable to the granting and lifting of a stay. I wrote:

> According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[12], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[13] That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[14]
>
> Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[15] and Professor McLaren has added three more since then. They are:
>
> 1. When the plan is likely to fail.
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
> 4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
> 5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
> 6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
> 7. There is a real risk that a creditor's loan will become unsecured during the stay period.
> 8. It is necessary to allow the applicant to perfect a right that existed prior to the

commencement of the stay period.

9. It is in the interests of justice to do so.[16]

42 None of those situations is present here and in my view, a consideration of the balance of convenience, the relative prejudice to the parties and the merits of the action do not favour GSA's position. The objectives of the CCAA would not be met by lifting the stay. Indeed the converse is true. I accept the Canwest Parties' position that allowing the action to proceed would be prejudicial to the restructuring and unfair to others. GSA elected to commence this action in the face of the court ordered stays and opted not to file a proof of claim in either CCAA proceeding. It seems to me that this is the exact type of maneuvering that the CCAA is designed to avoid. The whole purpose of the claims procedures is to elicit and deal with claims against the Canwest Parties so that their businesses may emerge unencumbered by prior claims. It is also unfair to other creditors to permit this action to proceed. Those creditors did submit claims and their claims were subject to compromise in the plans advanced in the two separate CCAA restructurings.

43 I do not accept that this case is analogous to an insured claim. As already outlined, it cannot be assumed that a judgment would or should be enforceable against the funds and in any event, the Canwest Parties would ultimately be responsible for addressing any shortfalls in the defined benefit plans.[17] The CMI Entities have not yet emerged from CCAA protection and this action would be time consuming and a distraction. The absence of good faith and due diligence on the part of the Canwest Parties has not been established. Lastly, I note that the Monitor is opposed to the lifting of the stay. In all of these circumstances, with one modest exception which I will address, the stay should not be lifted.

44 The performance fee and the management fees are pre-filing debt with respect to the LP Entities and subject to compromise. The same is true for the CMI Entities with the exception of that portion of the October 1, 2009, to December 23, 2009 management fee attributable to them which is arguably recoverable for post-filing services rendered pursuant to section 11.2 of the CCAA. I am lifting the stay for the limited purpose of permitting a claim by GSA for that amount which I estimate would be less than $30,000. This does not preclude a claim for set-off by the CMI Entities. With that limited exception, GSA's motion is dismissed.

S.E. PEPALL J.

cp/e/qllqs/qlmxj/qljxr/qljyw/qlcas

1 R.S.C. 1985, c. C-36 as amended.

2 As noted in the affidavit of GSA's Deputy Chief Executive Officer, Jeremy Freedman, the performance of the Account over the year is determined at the end of the performance year which is June 30.

3 (2008), 65 C.C.P.B. 293 (C.A.).

4 [2009] F.C.J. No. 447 (F.C.A.), aff'g [2008] T.C.J. No. 80 (T.C.C.).

5 The power for the court to stay proceedings is found in section 11.2 of the CCAA. The stays in

both orders were extended from time to time by the court.

6 (1993), 17 C.B.R. (3d) 24 at p. 33.

7 Ibid, at p. 32.

8 Pursuant to section 22(b) of at least the Ontario *Pension Benefits Act*, R.S.O. 1990 c. P-8, they would not qualify to be trustees.

9 *Ibid*, at paras. 53-54.

10 Ibid, at para. 57.

11 [2009] O.J. No. 5379 at paras. 27 and 28.

12 Aurora: Canada Law Book, looseleaf, at para. 3.3400.

13 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

14 Ibid, at para. 68.

15 (2000), 19 C.B.R. (4th) 1.

16 Ibid, at paras. 32 and 33.

17 In their factum, the Canwest Parties state: "the Statement of Claim in the Action does not say that relief is sought only against the Plans and in fact scrupulously avoids specifying from whom damages are sought." That said, in argument, counsel for GSA acknowledged that GSA would restrict its recovery to the funds.

TAB 3

Case Name:

Azure Dynamics Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Azure Dynamics Corporation, Azure Dynamics Inc., Azure Dynamics Incorporated and Azure Dynamics Limited, Petitioners

[2012] B.C.J. No. 1068

2012 BCSC 781

Docket: S122223

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

S.C. Fitzpatrick J.
(In Chambers)

Heard: April 13, 2012.
Oral judgment: April 13, 2012.

(58 paras.)

Counsel:

Counsel for the Petitioners: S. Brotman, V. Tickle.

Counsel for the Monitor, Ernst & Young Inc.: G. Thompson.

Counsel for the Board of Directors: J.D. Schultz.

Counsel for Johnson Controls Inc.: D.P. Preger, A.A. Frydenlund.

Counsel for Johnson Controls Inc., by teleconference: M. Weinczok, L.S. Corne.

Counsel for Residual Asset Management Inc.: W.E.J. Skelly.

Counsel for Silicon Valley Bank: O.C. Hanson.

Counsel for Via Motors Inc.: E.J. Milton, Q.C.

Counsel for Ford Motor Company: P.L. Rubin.

Oral Reasons for Judgment

1 S.C. FITZPATRICK J. (orally):-- This is a proceeding pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 commenced by the petitioners, known as the Azure Group. I granted an initial order on March 26, 2012. The stay of proceeding granted under that order expires on April 25, 2012.

2 In the interim, the petitioners have found themselves without sufficient cash to continue their restructuring efforts. Accordingly, they have brought this application to approve certain debtor in possession or DIP financing in the amount of $4 million.

3 The second application before me is an application by the creditor, Johnson Controls Inc., Johnson Controls Advance Power Solutions LLC, and Johnson Controls APS Production Inc. who I will collectively call, as the parties have, "JCI". JCI advises that they are owed approximately $13 million. They have security on certain battery systems that they have supplied to the Azure Group and, as such, they have purchase money security interests or PMSI security pursuant to the *Personal Property Security Act*, R.S.B.C. 1996, c. 359. I am told by JCI's counsel that while they are a secured creditor, they may also have an unsecured position in these proceedings. The application by JCI is to lift the stay of proceedings as granted in the initial order so that they can move to realize on their security.

4 Having now heard the two applications, in my view it makes some sense to deal with the application of JCI in the first instance because if they are successful, a decision on the application for DIP financing will be unnecessary.

5 JCI's counsel has referred me to the decision of Madam Justice Pepall (as she then was) in *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200 (Ont. Sup. Ct. J.). In that case, Pepall J. noted that while there are no statutory guidelines as to when and in what circumstances the stay should be lifted, the court should have regard to the objectives of the *CCAA*, the balance of convenience, the relative prejudice to the parties, and the actions of the debtor company:

> [32] As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.
>
> [footnotes omitted]

6 In addition, the Court in *Canwest* at para. 33 outlined various situations in which courts will lift a stay order:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so.

7 As counsel for the Azure Group indicates, JCI is now making a classic "doomed to fail" argument in support of their application to lift the stay. This argument would arise from the first enumerated situation where the "plan is likely to fail".

8 Mr. Shemanski gave evidence on behalf of JCI that while JCI is a secured creditor, JCI will also have a controlling vote with respect to the unsecured class. It is unclear just what unsecured position JCI might hold since at one point, it was also submitted by JCI's counsel that if JCI obtains their secured assets back, JCI may be able to fully recoup their debt. In any event, I will consider this argument on the basis that JCI does hold an unsecured position. JCI then says that they hold a veto or blocking position with respect to the approval of any plan of arrangement or compromise and that they will not vote in favour of any plan unless any plan or compromise provides for full repayment to them.

9 This position is easily met by the comments of Madam Justice Newbury in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319:

> [27] As for AE's insistence that it will refuse to vote in favour of any plan brought to a meeting of creditors under s. 6 of the *CCAA*, I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner. When the Act is invoked, the court properly considers the interests of many stakeholders, not simply those of the creditor and debtor ...

10 I have recently rejected a similar argument in *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 41.

11 The comments of the Court in *Asset Engineering* are also well taken in this situation. Here, as in that case, there are many other stakeholders beyond JCI. There are secured creditors such as Silicon Valley Bank, who is present on this application and who in essence supports these proceedings. Ford is also a significant stakeholder, who is not a creditor, but who has important contractual relationships with the Azure Group at this time. Ford is not actively supporting the restructuring, having reserved its rights in that respect. However, Ford is not supporting the position of JCI towards terminating the stay of proceedings.

12 There are, needless to say, many other stakeholders who are not before the court such as

employees, other unsecured creditors, trade creditors, landlords, and the general community that the Azure Group is a part of. I conclude that the position of JCI as to how it may vote on any plan of arrangement is clearly not a controlling factor on this application and as such, it cannot be said that the plan is likely to fail for this reason.

13 The next issue concerns whether or not the Azure Group has a "kernel of a plan". As counsel for JCI points out, it is generally considered to be a prerequisite that there must be some sense of what the petitioners intend to do so as to give the court and, obviously, the stakeholders, some comfort that there is some utility in continuing further with these proceedings. To that extent, this issue potentially involves both the first situation (whether the plan is likely to fail) and the sixth situation (whether the proceedings are showing some progress in the restructuring efforts).

14 Counsel for JCI says that there is no viable business here. He readily concedes that JCI is very pessimistic about the chances of the Azure Group to reorganize themselves.

15 However, in my view there was substantial evidence adduced on this application that, in fact, there is a kernel of a plan.

16 I would note in particular Mr. Lee's evidence where he outlines the quite significant efforts that were made by the Azure Group to obtain further financing and also the other efforts that members of the Group were making as late as early to mid-March 2012, all just before the filing took place on March 26, 2012. It is clear that those efforts did not succeed at that time, but nevertheless those efforts continue to go forward at this time.

17 Mr. Lee outlines continuing discussions with potential parties who might be interested in either refinancing the Azure Group or recapitalizing it. I accept JCI's counsel's comments that the reference in that portion of the affidavit does seem concentrated on certain Chinese interests and that is relevant because of JCI's position that they do not think those Chinese interests will be interested in this particular enterprise given some structural difficulties. However, I do not think it is appropriate at this time to prejudge whether or not that will be the decision of these clearly interested parties.

18 I note the comments of the Monitor in its first report dated April 12, 2012. The Monitor comments favourably on the Azure Group's contact with various interested parties towards, as earlier stated, either a refinancing, recapitalization, or a sales process. I am told that the Azure Group will continue with its efforts in that respect and it intends to do so with some further rapidity if the DIP financing is approved. It bears noting that the proceedings were only commenced some three weeks ago and as such, it cannot be said that there has been any failure on the part of the Azure Group to show progress in its restructuring efforts.

19 It is evident from this hearing itself that interest in the Azure Group has been generated through the process of canvassing the market for the DIP financing. In its report, the Monitor has outlined certain parties who came forward through that process. Two were financing partners and two were what could be called potential strategic partners and a significant portion of the latter group tied their DIP financing proposals to the sales effort. This indicates that there is some substance to the proposition that other parties see value in the Azure Group that could be explored through a sales or refinancing process.

20 Via Motors Inc. was represented on this application and counsel indicated that it is interested in this sales or refinancing process. In fact, Via is in the midst of completing certain due diligence. Again, this indicates that the efforts of the Azure Group are garnering a reaction from the marketplace sufficient to indicate that progress is being made in that respect.

21 Finally, Mr. Skelly on behalf of the proposed DIP lender, Residual Asset Management Inc.

("RAM"), indicates that his client is prepared to loan $4 million to the Azure Group behind the present secured creditors. This is a further indication that others see some value in the Azure Group that, as I said, the Azure Group seek to explore.

22 I conclude that there is the kernel of a plan. Although JCI pessimistically thinks otherwise, I conclude that the Azure Group should be given a reasonable chance to explore the formulation of a plan. The Monitor has been given oversight in respect of this process and will be commenting on the efficacy of the refinancing or sales process as the proceedings go forward. If, for example, there is any negativity coming out of the refinancing or sales process such that it appears that it is not going to be successful, then I would expect that the Monitor would report further to the court on those matters.

23 The other factor discussed in *Canwest* is that of relative prejudice to the parties. In the fourth situation outlined above, Pepall J. refers to "significant" prejudice to the moving party if the stay is not lifted. In JCI's notice of application, the prejudice alleged is twofold. Firstly, JCI says that there is prejudice by the continued consumption by the Azure Group of products supplied by JCI. Secondly, JCI says that there is ongoing prejudice concerning the costs that are being incurred and, by that, I take JCI to mean the professional costs that are being incurred which are secured by the prior ranking Administration Charge and Director's Charge, as defined in the initial order.

24 Dealing with the first alleged prejudice, I am of the view that the prejudice that JCI is speaking of is not unusual in the sense that there would inevitably be this sort of prejudice in a situation where, for example, there has been inventory supplied by a debtor company. In the normal course, where the debtor company continues to seek to operate during the restructuring period, there is typically a continued consumption of the product. That is a factor that applies not only to JCI, but also to many other creditors who have supplied product and have not been paid for it. JCI does not stand in any special or unique position in that respect.

25 The same can be said in respect of the Administration Charge and Director's Charge. The fact of the matter is that these restructurings do not take place on their own and they require the oversight and assistance of counsel and parties like the Monitor to see these matters through. In addition, a restructuring cannot occur without proper management being in place and that will typically require that the directors and officers be protected from certain liabilities during the restructuring.

26 The cost of these proceedings is essentially recognized as a prejudice to all parties in that these costs must be paid from the assets of the debtor company and will inevitably reduce the recovery to the creditors from what is already a financially stressed and in fact, insolvent, company. But that prejudice is balanced against what is seen as being a reasonable prospect that there will be a successful restructuring which will ultimately benefit all parties (or conversely, that the restructuring is not doomed to fail). As such, the cost of these professionals and the cost to maintain and protect management during the restructuring are seen simply as a requirement to take advantage of that opportunity.

27 I cannot leave the topic of prejudice without dealing with the prejudice that would accrue to the Azure Group if the stay was lifted. JCI says that they want to take back their battery systems for which they have not received payment. Again, I note that the Azure Group is currently in a very delicate situation in terms of trying to find a strategic partner or financier or someone to buy the business of the Group. A lifting of the stay, even as it relates only to JCI, would result in great prejudice to the Azure Group in terms of its ongoing efforts. There are indications that there is enterprise value in this Group; that is part of the germ of the plan and that is the value which the Azure Group is trying to preserve. Any material change to the current situation would cause prejudice to those efforts, a matter that would accrue to all of the stakeholders in this case. I consider that JCI taking its secured assets back would be such a material change.

28 The ninth situation set out in *Canwest* is whether it is in the interests of justice to lift the stay. This is an overarching consideration and, frankly, subsumes the other factors that I have already discussed above in more detail. I do not think the parties will be surprised to hear that, in my view, it is in the interests of justice that this restructuring be allowed to continue. I am satisfied that it is appropriate in this case and that the concerns of JCI cannot override the interests of all stakeholders in allowing this restructuring to continue at least to some extent to see whether this germ of a plan can be brought to fruition.

29 I also note that the Monitor continues to affirm that the Azure Group is acting in good faith and with due diligence. This is a key consideration under the *CCAA*, and supports my decision that it is in the interests of justice that this restructuring be allowed to continue.

30 Accordingly, the application of JCI to lift the stay is dismissed.

31 I now turn to the application to approve the DIP financing. The application is to approve a DIP financing agreement between the Azure Group and RAM. The financing agreement is dated April 12, 2012 and the particulars of that financing have been summarized by the Monitor in its report. The financing is to a maximum amount of $4 million. It is not intended that that amount be taken out in one tranche at the very beginning, but it is intended that that be drawn upon as needed in accordance with the cash flow projections which have been prepared by the Azure Group and which have been commented on favourably by the Monitor.

32 The cash flow produced on this application indicates that without this DIP financing, the current cash on hand, which is about $200,000, is intended to be down to $128,000 by April 15th and $657 by April 22nd. So the need for financing is obviously critical from the Azure Group's point of view in terms of continuing its business operations, *albeit* on a fairly limited basis given the restructuring that has already occurred, but also in terms of going forward with the restructuring plan.

33 The proposal is that the DIP facility will be subordinate to the various charges that I granted in the initial order, being the Administrative Charge, the Director's Charge, and the inter-company charges.

34 It is intended that RAM, the DIP lender, would rank subordinate to not only the major secured creditors, such as Silicon Valley Bank and JCI, but various other lenders with security who I presume are registered under the *Personal Property Security Act* or otherwise hold security. In any event, RAM is intended to take a fairly significant subordinate position.

35 The DIP facility is to be repaid on the earlier of September 30, 2012, or the termination of the *CCAA* proceedings, or if there is an earlier event of default. The interest rate is somewhat modest for DIP financing, being 10.5%. There is a 1.5% commitment fee. There is also an exit fee which is the greater of $400,000 or 10% of the aggregate proceeds realized from a sale or the enterprise value if there is a refinancing. So while the exit fee, as it is called, will clearly put that beyond the 10.5% basic interest rate, I am also advised that the interest and the various fees will be effectively capped at 35%, excluding the commitment fee.

36 While it is fairly expensive financing, it appears that this offer has resulted from a fairly rigorous process to test the market for DIP financing. The proposal of RAM has emerged as the best available in the circumstances. It should clearly be a preferable DIP financing proposal from the secured creditors' point of view given the relative priority position that RAM intends to take.

37 The test to approve DIP financing is now codified in the *CCAA*, and in particular s. 11.2(4). That section sets out various factors that are to be considered by the court. I will deal with each of those in

turn.

38 The first factor is the period during which the Azure Group expects to be subject to proceedings under the *CCAA*. As I said, the stay of proceedings is currently effective until April 25, 2012, and I would expect that any further extensions that may be granted by the court will be in accordance with how the Azure Group is progressing in its refinancing or sales efforts and the Monitor's comments on those efforts. It is intended that the Azure Group will come back at some point with the results of the marketing process. Accordingly, there will be some continuing oversight by the court in respect of how that process is going forward so that the court can be satisfied that things are moving along as they should. I would also note that the cash flow in the Monitor's report indicates that it is intended that only $2.7 million of the $4 million will have been drawn by July 8, 2012.

39 The second factor is how the company's business and financial affairs are to be managed during the proceedings. Mr. Lee states in his affidavit that the current management would remain employed by the Azure Group and would continue with the restructuring efforts. I have not been advised that there is any change in that respect. It is to be noted that the management will be subject to the oversight of the Monitor going forward.

40 The third factor is whether the company's management has the confidence of its major creditors. One of the major creditors, Silicon Valley Bank, supports the DIP financing. JCI's counsel says that the Azure Group's management does not have the confidence of JCI. There is, however, no evidence of that because Mr. Shemanski on behalf of JCI speaks of a loss of confidence in the ability of the Azure Group to survive, not a lack of confidence in the management. Accordingly, I do not see that that is an issue.

41 The fourth factor is whether the loan will enhance the prospects of a viable compromise or arrangement being made in respect to the Azure Group. Consistent with my earlier comments in these reasons, I am satisfied that the loan would enhance the prospects of a viable compromise or arrangement. As I said, the Azure Group is essentially out of money and, if DIP financing is not obtained, the Monitor has indicated that that will be a material adverse change that will necessarily be reported. I do not think it takes much imagination to conclude that that would likely be followed very quickly by a receivership and/or bankruptcy. Again, DIP financing will enhance the prospects of a viable compromise as it allows the Azure Group to explore the market towards a restructuring plan.

42 I turn to the fifth factor, the nature and value of the Azure Group's properties. No liquidation value has been provided on this application that would give the court a clear picture of the downside of a failure to fund the DIP financing or in other words, what a liquidation scenario would look like. JCI has stated in its submissions that even if there is a failure, then there would still be money for the unsecured creditors. However, it is apparent from a review of the types of assets owned by the Azure Group that there will be a significant negative effect by any liquidation. In fact, there are few companies that would not be negatively affected by a liquidation of their assets, as opposed to a going concern sale.

43 The Monitor has filed a supplementary report to explain why there is no liquidation analysis before the court. In the first instance, the Monitor points out that the costs of obtaining liquidation values for the assets in Canada, the U.S. and the U.K. would likely exceed $100,000. For companies who are short of cash already, such as the Azure Group, that is an inordinate sum. In addition, the Monitor has analyzed the types of assets quite carefully in terms of pointing out certain negative factors that will be realized in respect of the various asset categories - those include relating to collection of accounts receivable, sale of the very specialized inventory and the very specialized property plant and equipment, and the realization of the intellectual property to the extent that it is said to be tied to the intellectual capital of the engineers of the Azure Group who are employees.

44 I conclude that there would be a significant negative effect on the asset values in the event of a

liquidation. It also bears pointing out that there would be significant professional costs incurred in the event of a liquidation and, to that extent, the professional costs that are being incurred in the restructuring may include costs that would inevitably be incurred even in a liquidation.

45 The sixth factor is material prejudice to any creditor as a result of the granting of the DIP Charge. I think that factor is largely dealt with by the fact that the RAM DIP financing is not to take priority over that of any secured creditor. I appreciate that there may be some prejudice, *per se*, to the unsecured creditors in the sense that the cost of this DIP financing will inevitably reduce their recovery, but I am of the view that the DIP financing is a justifiable cost at this time given the circumstances that the Azure Group finds itself in and given its present plans to address its financial difficulties.

46 The seventh and final factor is the Monitor's report. The report indicates that the Monitor has reviewed the matter in some detail and conclusively recommends that the DIP financing be approved by the Court. In addition:

> The Monitor is of the view that the DIP Financing negotiated by the Azure Group is fair and reasonable in the circumstances and will stabilize the Applicants to allow management to focus its efforts on the sale and investment process with a view to maximizing value for all stakeholders.

The Monitor considers the DIP financing to be reasonable and necessary in the circumstances.

47 The Monitor's supplementary report reconfirms the Monitor's earlier view that the DIP financing is fair and reasonable in the circumstances. At that time, the Monitor also stated that the realizable values of the Azure Group assets in a going concern sale are far superior to that achievable in a forced liquidation, bankruptcy, or receivership of the Azure Group.

48 In conclusion, I am satisfied that DIP financing is appropriate in the circumstances and the order sought is granted.

49 THE COURT: The Azure Group is also seeking a sealing order in respect of the affidavit of Mr. Brennan of the Monitor in relation to certain offers made in the process of seeking DIP financing. The test is as set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. The test was recently applied in the context of *CCAA* proceedings in *Hollinger Inc. (Re)*, 2011 ONCA 579, leave to appeal to SCC refused, 34506, [2011] S.C.C.A. No. 473 (May 3, 2012). Can counsel address those issues, please?

[SUBMISSIONS RE SEALING ORDERS]

50 THE COURT: Thank you. Does anyone support the position to seal the affidavit?

51 MR. THOMPSON: I think obviously the Monitor would.

52 THE COURT: Does anyone oppose it?

53 MR. PREGER: I am prepared at this stage, My Lady, to reserve my rights on that issue.

54 THE COURT: Well, I am satisfied that it is appropriate to seal the affidavit. Now, *Hollinger* follows one of the aspects of the *Sierra Club* test in the sense that any sealing of the material should be as minimally restricted as possible. I note that in the paragraph we have since struck out you proposed added wording "... pending the conclusion of the *CCAA* proceedings or further order of the court." I think that type of wording is appropriate -

55 MR. BROTMAN: I absolutely agree. That was absolutely the intention. A party can bring a motion to the court to have the document unsealed and, certainly, at the conclusion of the proceedings, it will be unsealed and further, to address the *Hollinger* aspect, I would note the Monitor has put certain terms in its publicly available report and more terms in the documents that it is asking be sealed and so I would submit the minimally invasive aspect addressed in *Hollinger* is equally addressed.

56 THE COURT: I think it also goes to the point where at the conclusion of the *CCAA* proceedings, there is no point - there is no business interest that is being - that should be protected by reason of the sealing. So if someone wanted to get it at that point, then they should be able to get that.

57 MR. BROTMAN: I think that is fair, yes.

58 THE COURT: All right. I will leave you to add that to the order.

S.C. FITZPATRICK J.

cp/e/qlrds/qllmr/qlana

TAB 4

Court of Queen's Bench of Alberta

Citation: Re SemCanada Crude Company (Companies' Creditors Arrangement Act), 2009 ABQB 90

Date: 20080211
Docket: 0801 08510
Registry: Calgary

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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC

Applicants

Reasons for Decision of the Honourable Madam Justice B.E. Romaine

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Introduction

[1] Three of this group of CCAA debtors have applied for an order authorizing an interim distribution of funds to a banking syndicate, their major secured creditor under a guarantee of the indebtedness of the entire corporate group, including debtors engaged in Chapter 11 proceedings in the United States.

Background to Application

[2] SemCanada Energy Company ("SemCanada Energy") and its subsidiaries A.E. Sharp Ltd. ("AES") and CEG Energy Options, Inc. ("CEG") are three of a group of seven companies referred to as the SemCanada Group that obtained protection from their creditors pursuant to an Order granted under the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, on July 30, 2008. Prior to the initial order, SemCanada Energy, AES and CEG had

commenced proceedings under the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, on July 24, 2008 and those proceedings were then converted to proceedings under the CCAA.

[3] On July 22, 2008, SemGroup L.P. and its direct and indirect subsidiaries in the United States (the "U.S. Debtors") filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

[4] According to the second report of the Monitor, the financial problems of the SemGroup arose from a failed trading strategy and the volatility of petroleum products prices, leading to material margin calls related to large futures and options positions on the NYMEX and OTC markets, resulting in a severe liquidity crisis. SemGroup's credit facilities were insufficient to accommodate its capital needs, and the corporate group sought protection under Chapter 11 and the CCAA.

[5] The SemCanada Group are indirect wholly-owned subsidiaries of SemGroup LP. The SemCanada Group is comprised of three separate businesses:

(a) SemCanada Crude Company ("SemCanada Crude"), a crude oil marketing and blending operation;
(b) SemEnergy Group, whose business is gas marketing, including the purchase and sale of gas to certain of its four subsidiaries as well as to SemCAMS ULC; ("SemCAMS"); and
(c) SemCAMS, whose business consists of ownership interests in large gas processing facilities located in Alberta, as well as agreements to operate these facilities.

[6] SemCrude, L.P. as U.S. borrower and a predecessor company of SemCAMS as Canadian borrower, certain U.S. SemGroup corporations and Bank of America as administrative agent for a syndicate of lenders (the "Lenders") entered into a credit agreement in 2005 (the "Credit Agreement"). The Credit Agreement provides four different credit facilities. There are no advances outstanding with respect to the Canadian term loan facility, but in excess of U.S. $2.5 billion is owing under the U.S. term loan facility, the working capital loan facility and the revolver loan.

[7] Five of the SemCanada Group of companies, including SemCanada, have provided a guarantee of all obligations under the Credit Agreement to the Lenders, who rank as senior secured lenders, and to a US $600 million bond indenture issued by SemGroup. The amount owing under these instruments is in excess of US $3.3 billion. The guarantee is secured by a security and pledge agreement (the "Security Agreement") signed by five members of the SemCanada Group.

[8] While it is intended to present a plan of arrangement or compromise with respect to at least one of the other two businesses, the SemEnergy Group is in self liquidation and has no significant ongoing operations. As a result of liquidation proceedings and the collection of

outstanding accounts receivable, SemCanada Energy, AES and CEG now hold $113 million in cash.

[9] The SemEnergy Group proposes to make an interim distribution payment to the Lenders of $90 million. The remainder of the $113 million would be held back to satisfy claims that may rank in priority to that of the Lenders, costs and fees related to the CCAA proceedings and the employee retention plan, potential claims under the Directors' Charge and a general contingency reserve. Since the time of the first application, the Lenders have requested that the outstanding and continuing fees of their Canadian advisors be paid by the SemEnergy Group. The current outstanding fees amount to approximately $1.8 million. It is common ground that if such interim payment is allowed, there will be nothing left from the $113 million to be distributed to unsecured creditors, subject to certain recovery measures in the United States proceedings that will be referred to later in this decision.

[10] A number of unsecured creditors objected to the application, and it was adjourned to allow the unsecured creditors access to the security opinion of the Monitor's counsel, cross-examination on affidavits and the preparation of a report from the Monitor on the status of the restructuring efforts of the U.S. Debtors to date.

[11] The unsecured creditors of the SemCanada Group that object to the application have raised a number of issues. They can be summarized as follows:

(a) the obligations of the SemCanada Group under the guarantee to the Lenders may be voidable as fraudulent preferences or fraudulent conveyances. The Court has insufficient evidence on that issue to grant the order sought, and the SemCanada Group should be compelled to provide further financial information and to answer specific questions on the issue during cross-examination on the affidavits;
(b) the amounts that the SemCanada Group are obligated to pay under the guarantee are expressly limited by the terms of the guarantee itself;
(c) the interim distribution may unfairly prejudice Canadian unsecured creditors and bestow an unwarranted benefit on unsecured creditors in the United States proceedings; and
(d) there is no urgency and a delay may provide more clarity with respect to the situation in the U.S. Chapter 11 proceedings.

Analysis

(a) *The Fraudulent Preferences Issue*

[12] The opinion obtained by the Monitor from counsel on the validity of the Lenders' security does not address any issue of fraudulent preference. It would not be normal practice in this kind of proceeding for the Monitor's counsel to address the possibility of fraudulent preference unless the Monitor is alerted to some evidence that this may be an issue. The Monitor has not identified any such concern in this case. Thus, in the normal course, it would be up to

creditors, if they believe circumstances exist, to bring appropriate proceedings to attack the guarantee and Security Agreement. The SemCanada Group points out that the unsecured creditors have not brought any action (which might leave them open to sanctions of costs if unsuccessful) and submit that they are attempting to use the proceeding as a fishing expedition to delay and obfuscate the application. The applicants and the Lenders submit that the analysis of the possibility of fraudulent preference submitted by the unsecured creditors is flawed at any rate and lacking in merit.

[13] There is, however, a complication in the argument as to who has the onus to address the possibility of fraudulent preferences. The unsecured creditors point out that the draft order proposed by the applicants for the interim distribution seeks a declaration that the Lenders' security (as embodied in the guarantee and the Security Agreement, which was executed by all five major companies in the SemCanada Group) constitutes a valid and enforceable obligation of the SemEnergy Group and that the payment of the interim distribution will not be void or voidable at the instance of creditors and does not constitute an unjust preference, fraudulent conveyance or reviewable transaction. Pursuant to the proposed order, this declaration would be binding on any trustee in bankruptcy or receiver that may be appointed in respect of the debtors. Thus, the unsecured creditors argue, the issue of fraudulent preferences is relevant and the SemCanada Group should be obligated to file more complete affidavits providing financial statements at relevant periods at and around the time the loan documents and guarantee were entered into and to answer cross-examination questions on the value of the assets of the SemEnergy Group at such times.

[14] The declaratory language at issue is common to this type of order, and the SemEnergy Group and the Lenders submit that it applies only to the interim distribution, not the underlying guarantee and Security Agreement that precedes it. They also submit that, at any rate, language can be crafted to ensure that the declaration is not given effect beyond a limited purpose. While it could be argued that declaratory relief relating to the interim distribution could be construed as extending to the underlying guarantee obligations, I accept that the language of the proposed order was not intended to protect the guarantee and the Security Agreement from the possibility of attack as a fraudulent preference, conveyance or reviewable transaction.

[15] It is not inappropriate for the applicants to ask for a declaration that the interim distribution is not a fraudulent preference or conveyance and such a declaration would arise from the Court's review of the relief sought as a part of CCAA process. Given the limited nature of what is being sought and the purpose of the proceedings, the creditors are not entitled to a full review of the possibility of historical fraudulent preferences or fulsome financial information from the CCAA debtors arising from this application standing alone. This does not preclude the unsecured creditors from applying to lift the stay to bring an independent action if they believe that it is justified by evidence.

[16] The applicants and the Lenders raised a number of arguments about the weakness of any allegations of fraudulent preference, the passing of limitation periods and the absence of any

intent that could form the basis for such an action. It is not necessary to address these submissions at this point in time.

[17] I therefore decline to require the CCAA debtors to file further financial information on this application or to answer the questions or provide the undertakings previously refused.

(b) The Guarantee is Limited - Section 2(f) of the Guarantee

[18] The guarantee signed by SemEnergy and the other guarantors includes the following provision:

> 2(f) The liability of each Guarantor hereunder shall be limited to the maximum amount of liability that can be incurred without rendering this Guaranty, as it relates to such Guarantor, voidable under applicable Law relating to fraudulent conveyance or fraudulent transfer, and not for any greater amount.

[19] It appears from academic commentary that this clause was designed to address an issue that exists under United States corporate law relating to the inability of a corporation to grant a guarantee if it causes the guarantor to become insolvent: Corporate Guarantees As a Form of Financial Assistance: The Banker's View, S.D.N. Belcher and Peter J. Lewarne, (1990)5 B.F.L.R. at 1. While certain insolvency tests under corporate legislation historically limited Canadian corporations in granting guarantees, they have now been repealed, and the same issue does not exist under Canadian law.

[20] Thus, while this clause may have effect when construed under U.S. law to limit the guarantee to an amount that would not render the guarantors insolvent at relevant periods of time, there are no corresponding obligations under the laws of Alberta (the governing law of the guarantee) or the corporate statutes of Nova Scotia, Alberta and Saskatchewan that govern SemEnergy, AES and CEG, respectively, that would limit the amount of the guarantee arising from the potential of insolvency when the guarantee was granted, or to the asset value of the guarantor, net of unsecured indebtedness, as suggested by the unsecured creditors. The "next asset value" limitation argued by the unsecured creditors appears to arise from either the wording of Section 6(c) of the guarantee (set out later in these reasons) or a representation as to solvency given by the SemGroup companies to the banking syndicate in the Credit Agreement for the indebtedness that underlies the guarantee.

[21] The wording of Section 6(c) relating to the concept of "net worth" is restricted to the subsection and plainly refers only to the calculation of a limited right of subrogation.

[22] While the breach of the representation in the Credit Agreement may form the basis for an action by the banking syndicate under the Credit Agreement it if is established to be incorrect, there is no evidence incorporating this representation into Section 2(f) of the guarantee, or that would warrant it being read into the section or otherwise modifying the section's plain meaning.

[23] While Section 2(f) may take effect in addition to the standard statutory remedies if the guarantee is determined to be a fraudulent conveyance or fraudulent transfer under applicable Canadian insolvency law, that argument refers back to the issue of fraudulent preferences in the more generally understood "all or nothing" sense, and the current lack of any persuasive evidence that would indicate a fraudulent preference. Thus, Section 2(f) of the guarantee does not, as submitted by the unsecured creditors, limit the liability of each individual guarantor to its net asset value on certain relevant dates, either by its plain language, the operation of any ambiguity or cross-reference to another agreement or a reference to applicable Canadian law, and there is no reason arising from this provision of the guarantee to require further financial information from the applicants.

(c) Potential Prejudice to Canadian Unsecured Creditors

[24] The unsecured creditors submit that the payment of the interim distribution may give rise to the development of inequities among the unsecured creditors of the SemCanada Group and the U.S. Debtors. They note that, according to material filed with the application for the initial order, all the CCAA applicants were solvent but for their secured guarantee obligations. The declaration filed at the commencement of Chapter 11 proceeding in the United States disclosed that the consolidated assets of the SemGroup as of May 31, 2008 totalled approximately $6.14 billion. It appears that subsequent events have reduced the value of the SemGroup's assets by approximately $2 billion and it must be noted that the value declared is book value. However, given that secured and senior debt totals approximately $3.3 billion, it does not appear that there are insufficient assets in the U.S. estate to fully pay the Lenders.

[25] There have been no distributions made to the Lenders in the United States since the commencement of the U.S. proceedings. The unsecured creditors submit that, if the interim distribution is authorized, an inequitable situation arises whereby the SemEnergy Group of debtor companies will have applied all of their assets to the secured debt, leaving their unsecured creditors without the possibility of recovery, while other debtor companies, including in the U.S. proceedings, will have their burdens reduced, making it possible that U.S. unsecured debtors will benefit disproportionally.

[26] The applicants and the Lenders point out, firstly, that the guarantee is an unconditional guarantee and that the Lenders are not required to exhaust their remedies against any other party before invoking its provisions against the applicants. That is clear from the language of the guarantee and the law. However, the contractual rights of the Lenders, in common with the contractual rights of many stakeholders, have been stayed by the CCAA proceedings. The rights of a secured creditor are not awarded a unique status under the CCAA: *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (.C.A.) at page 92. It is not uncommon for contractual rights to be affected by CCAA proceedings and it is important to note that what is being proposed by the applicants is a deviation from the normal course of such proceedings, which are designed to prevent manoeuvring for position among creditors while a reorganization is attempted.

[27] While orders allowing interim distributions to creditors for one reason or another are not without precedent, at the least, an application for an interim distribution to one creditor must be carefully scrutinized and found to be justifiable for good and sustainable reasons, recognizing that it may create a preference. The court is required to consider the advantages, disadvantages and potential prejudice of such an interim distribution to all the stakeholders of the debtor entity.

[28] The applicants and the Lenders point out that the Lenders have established the indebtedness of the SemEnergy Group and that their security is valid and ranks first in priority. While the Lenders have not made a formal demand of payment or filed a notice of intention, they are only precluded from doing so by the stay provisions of the initial order. The SemEnergy Group has been liquidated, and, they submit, these companies were only included in the CCAA proceedings for administrative convenience. The unsecured creditors counter that the SemEnergy Group sought the protection of the CCAA in July of 2008 purportedly to "reorganize and/or liquidate", that the CCAA applicants argued that adding the SemEnergy Group to the CCAA proceedings made sense given the inter-relationship of the SemCanada Group's businesses, and that, having chosen to use the CCAA process, the SemEnergy Group should be compelled to live with its choice.

[29] I agree that I cannot ignore the fact that this is a CCAA proceeding and not a receivership merely because it is more convenient for the applicants and the Lenders at this point to characterize the proceedings in those terms. While the SemEnergy Group standing alone may have liquidated with no current intention of formulating a reorganization plan, the whole of the SemGroup is under the protection of the CCAA in Canada and Chapter 11 in the United States. This is not only for the convenience of the debtors and the Lenders, but to allow the corporate group time to accomplish the goals of such legislation in terms of attempting to reorganize its business, maximizing the value of its estate for the benefit of all stakeholders, and ensuring fairness of treatment. I am not only permitted but required in my supervisory role under the CCAA to consider the implications of the corporate group's cross-border reorganization efforts as a whole.

[30] The applicants argue that if the application does not succeed, the Lenders will apply to appoint a receiver. The Lenders in fact invite the Court to convert the proceedings to a receivership on its own motion. That application is not before me and not likely to be unopposed in any event.

[31] The applicants and the Lenders submit that the interim distribution would not prejudice the SemEnergy's Group's other creditors because SemCanada Energy has rights of indemnification and subrogation from the other members of the corporate group.

[32] Sections 6(a) and 6(c) of the guarantee, however, read as follows:

> Section 6. Limited Subrogation

(a) Until all of the Obligations have been paid and performed in full, no Guarantor shall have any right to exercise any right of subrogation, reimbursement, indemnity, exoneration, contribution or any other claim which it may now or hereafter have against or to any Obligor or any Security in connection with this Guaranty (including any right of subrogation under any law, as amended), and each Guarantor hereby waives any rights to enforce any remedy which such Guarantor may have against either Borrower or any other Obligor and any right to participate in any Security until such time. ...

(c) Upon full and final payment of the Obligations, each guarantor of the Obligations which has made payments upon the Obligations shall be entitled to contribution from each other guarantor of the Obligations, to the end that all such payments upon the Obligations shall be shared among all such guarantors in proportion to their respective net worth, provided that the contribution obligations of each Guarantor shall be limited to the maximum amount that it can pay at such time without rendering its contribution obligations voidable under applicable Law relating to fraudulent conveyances or fraudulent transfers. As used in this subsection, the "Net Worth" of each guarantor means, at any time, the remainder of (i) the fair value of such guarantor's assets (other that such right of contribution), minus (ii) the fair value of such guarantor's liabilities (other than its liabilities under its guaranty of the Obligations).

[33] It appears, therefore, that the SemEnergy Group's right of subrogation and indemnity may not be enforceable against other borrowers or guarantors unless and until all the indebtedness to the Lenders is paid in full. It also appears that the right to contribution from other members of the SemGroup may be limited under U.S. law to amounts that would not result in the insolvency of such a entity in proportion to such entity's net worth. At this stage of proceedings, both in Canada and in the United States, it is not possible to say with certainty that the reorganization of the corporate group will result in the payment of indebtedness to the Lenders in full or in such a fashion that the limitation upon subrogation is not triggered. It is possible, for example, that a reorganization may compromise the claims of the Lenders or may have them continue the loans on revised terms to a reorganized corporate group. The SemEnergy Group's right of subrogation and indemnity could prove to be a hollow or inadequate remedy.

[34] The unsecured creditors submit that the language of the guarantee prevents the SemEnergy Group from filing a claim for subrogation in the U.S. proceedings. The applicants submit that, if payment under the guarantee is authorized, they would file a claim and the Lenders agree that, in their view, such a filing would not be a breach of Section 6 of the guarantee. What is not clear is whether the U.S. debtors would also agree. Even if they did, the filing of a claim does not eliminate the contractual limits on subrogation.

[35] The Lenders submit that making the payment and subsequently filing a claim in the U.S. proceedings may ultimately be beneficial to the SemEnergy Group's other creditors, as it allows the timely filing of a claim. The unsecured creditors do not appear to agree.

[36] The Lenders submit that there is no good reason to delay the rights of the Lenders to collect on the guarantee, and that to refuse the application would be to improve the position of the unsecured creditors to the detriment of the secured creditor. I am satisfied that an interim distribution to the Lenders gives rise to the possibility that unsecured creditors may be prejudiced and that such potential for prejudice outweighs the benefits of an early payment on the guarantee to the Lenders. To suggest, as the Lenders do, that if the right to subrogation is contractually barred or is compromised by a plan of arrangement in the United States, the unsecured creditors are where they would be if the Lenders had exercised their contractual rights in any event is to treat the Canadian CCAA proceedings as a mere administrative convenience.

[37] The unsecured creditors made certain representations regarding a claim by NGX Financial Inc. Given the decision I have reached, it is not necessary that I address this issue at this time.

(d) The Lack of Urgency and Benefit of Delay

[38] The unsecured creditors submit that the applicants have shown no urgency to this application, and the only evidence before this court to justify the application is the statement of the Chief Executive Officer of the SemEnergy Group that, given the status of the group and the significant proceeds in their bank accounts, an interim distribution is appropriate. The Monitor, in commenting that the interim distribution is appropriate, repeats these reasons and notes that the claims bar date has passed and that it has received its security opinion from counsel. While the Monitor's recommendations are entitled to great deference, the Monitor has not delved into or addressed the issues of potential prejudice raised by the unsecured creditors in its analysis of the issue.

[39] The unsecured creditors submit that even a short delay in the distribution of funds may provide more clarity with respect to the situation in the U.S. Chapter 11 proceedings. They refer to media reports that indicate that a third party may be purposing a plan of arrangement or reorganization to the U.S. Debtors in the near future, and the Monitor reports that it understands that business plans and confidential information memorandums have been prepared for some of the significant U.S. Debtors and the SemGroup's intention is to either seek a sale of certain operating units or companies or restructure under the ownership of Semgroup. The Monitor advises, however, that it is premature and unrealistic to estimate the timing for the conclusion of the U.S. proceedings.

[40] It is not necessarily the case that a distribution of funds from the Canadian estate must await the resolution of Chapter 11 proceedings in the United States. The Canadian CCAA proceedings may advance at a different pace if the Court is satisfied by evidence before it that it is appropriate to do so. In the case of this application, however, it is prudent to delay an interim distribution until there is sufficient information to better evaluate the potential of prejudice to Canadian creditors.

Conclusion

[41] I find the application to be premature, and adjourn it sine die with leave to the applicants and the Lenders to reapply with more current information if it becomes apparent that the potential prejudice identified to the unsecured creditors is unlikely to materialize, can be avoided by other measures or that the balance of prejudice and benefit has shifted.

Heard on the 19th day of January, 2009.
Dated at the City of Calgary, Alberta this 11th day of February, 2009.

B.E. Romaine
J.C.Q.B.A.

Appearances:

A. Robert Anderson, Q.C., Cynthia L. Spry and Douglas Schweitzer
Osler, Hoskin & Harcourt LLP
for the Applicants

David R. Byers, Ashley J. Taylor and Maya Poliak
Stikeman Elliott LLP
for The Bank of America

Patrick T. McCarthy and Josef A. Kruger
Borden Ladner Gervais LLP
for the Monitor

Chris Simard
Bennet Jones LLP
for Iteration Energy Ltd. Plains Canada Marketing, L.P. Plains Midstream Canada ULC, Sabre Energy Partnership (by its Managing Partner Sabre Energy Ltd.), 1316751 Alberta Ltd., Northern Sun Exploration Inc., ATCO Midstream Ltd. And Devon Canada Corporation

Craig McMahon
Gowling Lafleur Henderson LLP
for Barnwell of Canada, Limited and Celtic Exploration Ltd.

Douglas S. Nishimura and Brian O'Leary
Burnet Duckworth & Palmer LLP
for ARC Resources Ltd., City of Medicine Hat, PennWest Petroleum, Avenir Operating Corp., NuVista Energy Ltd., Black Rider Resources Inc., Wolf Coulee Resources Inc., Profound Energy Inc., Orleans Energy Ltd., Baytex Energy Ltd., Daylight Energy Ltd., Crew Energy Inc., Trilogy Energy LP

Brendan O'Neill
Goodmans LLP
for Fortis Capital Corp.

Travis Lysak
Fraser Milner Gasgrain LLP
for Nexen Marketing and Keyera Energy Partnership

William E.J. Skelly
Heenan Blaikie LLP
for Fractal Systems Inc. Bellamont Exploration Ltd., Enersul Limited Parthership and Dynamysk Automation Ltd.

TAB 5

Case Name:

Pacific Coastal Airlines Ltd. v. Air Canada

Between
Pacific Coastal Airlines Limited, plaintiff, and
Air Canada and Air BC Limited, defendants

[2001] B.C.J. No. 2580

2001 BCSC 1721

19 B.L.R. (3d) 286

110 A.C.W.S. (3d) 259

Vancouver Registry No. S003953

British Columbia Supreme Court
Vancouver, British Columbia

Tysoe J.

Heard: November 19 - 20, 2001.
Judgment: December 7, 2001.

(59 paras.)

Estoppel -- Estoppel by record (res judicata) -- Records of courts -- Res judicata as a bar to subsequent proceedings -- Cause of action estoppel v. issue estoppel -- Collateral issues decided in prior proceedings -- Practice -- Pleadings -- Striking out pleadings -- Grounds, abuse of process, hopeless suit -- Torts -- Interference with economic relations.

Application by Air Canada to dismiss Pacific's claims in tort. The claims were based upon conduct prior to an Order sanctioning a plan of compromise and arrangement restructuring Canadian Airlines Corporation and Canadian Airlines International under the Companies' Creditors Arrangement Act, (CCAA). Pacific was a regional carrier for Canadian. Canadian ran into financial difficulties and Air Canada agreed to merge with Canadian upon a financial restructuring. Pacific's tort claims arose from the termination by Canadian of its rights to operate its routes using their code and its inability to obtain bookings using the code. In the CCAA proceeding Pacific's claim was determined to be $370,000. Pacific disputed this amount and stated that there were claims for damages for breach of contract, inducing breach of contract, breach of fiduciary duty and other economic torts which claims had not been formalized or adjudicated. On approval Pacific's claim was classified as that of an unsecured creditor to be paid 14 cents on the dollar of their claim. Pacific did not accept or appeal the determination and returned the payment. Pacific commenced this action asserting four tort claims and two claims pursuant to the Competition Act. This application was restricted to the tort claims for inducing breach of contract, unlawful interference with contractual relations, conspiracy and breach of

confidence. Air Canada asserted that these claims were precluded by the CCAA proceedings on the basis of res judicata or abuse of process. It further maintained that the claims could not succeed because Pacific could not establish the causation link between their damages and the conduct of Air Canada since the CCAA proceedings had found that Canadian would have ceased operations if Air Canada had not provided financial support to it.

HELD: Application dismissed. The causes of action asserted by Pacific could not have been pursued in the CCAA proceedings. There was no basis for invoking the doctrine of res judicata or cause of action estoppel because the CCAA proceeding did not deal with disputes between creditors of Canadian and third parties. Issue estoppel did not apply as none of the criteria and matters considered in the CCAA proceeding involved a decision on an issue which was required to be proven by Pacific in order to establish their tort claims. The principal question in the CCAA proceeding was whether the restructuring plan was fair and reasonable. The re-alignment of the routes which gave rise to this action was only an incidental issue. The CCAA proceeding did not require an inquiry into matters prior to the filing of the plan of arrangement. The amount determined by the claims officer as owing to Pacific was based upon inadequate notice of termination of Pacific's agreement with Canadian and not upon Pacific's tort claims. There was no abuse of process as this action was not repetitious of the CCAA proceedings which did not involve a determination of any of Pacific's tort claims. It was not demonstrated that Pacific was unable to establish causation between the damages suffered and the improper actions of Air Canada.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, Competition Act, Rule 18A.

Counsel:

V. Philippe Lalonde and Kenneth P. Regier, Q.C., for the plaintiff.
Sean F. Dunphy and Michael J. Libby, for the defendants.

TYSOE J.:--

INTRODUCTION

1 The Defendants apply under Rule 18A for an order dismissing the Plaintiff's claims sounding in tort. These claims are based upon allegations of conduct by the Defendants prior to the Order granted on June 27, 2001 by the Alberta Queen's Bench sanctioning the plan of compromise and arrangement (the "Restructuring Plan" or the "Plan") of Canadian Airlines Corporation and Canadian Airlines International Ltd. (which I will refer to individually and collectively as "Canadian", unless the context requires them to be identified individually, in which case I will refer to them as "CAC" and "CAIL") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2 The Plaintiff's claims against the Defendants fall into two categories. The first category includes the tort claims of inducing breach of contract, unlawful interference with contractual relations, conspiracy and breach of confidence. The second category of claims relates to alleged breaches of the Competition Act, R.S.C. 1985, c. C-34, as amended. This Rule 18A application focuses only on the tort claims and does not relate to any of the claims based on the Competition Act. In addition, the Defendants have not required the Plaintiff to prove the elements of the tort claims on this application and it is agreed that I am to assume for the purposes of this application that the Plaintiff would be able to prove all of the requisite elements of the alleged torts. It is the position of the Defendants that, even if the Plaintiff could prove all

of the requisite elements of the alleged torts, it is estopped from pursuing the tort claims as a result of determinations made in Canadian's CCAA proceedings or it is unable to prove that the Defendants' actions caused its loss.

FACTS

3 I will now set out the facts which underlie this matter. In view of the assumption which it has been agreed I am to make for the purposes of this application, it is not necessary for me to make any findings with respect to disputed facts. I will set out facts which I believe to be undisputed and I am being asked to give effect to findings of fact made by the Alberta Queen's Bench in the CCAA proceedings.

4 Canadian and Air Canada were the two national airlines in Canada during the years leading up to 2000. The two airlines flew planes on major national and international routes, and they made arrangements with regional carriers to service smaller communities within Canada. The Plaintiff was one of the regional carriers which worked with Canadian. Air BC Limited, which is a wholly owned subsidiary of Air Canada, has been one of the regional carriers for Air Canada.

5 On or about November 1, 1997, the Plaintiff and CAIL entered into an agreement (the "Agreement") in which it was agreed that the Plaintiff would operate its air services to carry passengers and cargo on behalf of CAIL on the route between Nanaimo and Vancouver. The routes covered by the Agreement were subsequently expanded to include routes between Vancouver and two other communities on Vancouver Island, Comox and Campbell River. The Agreement permitted the Plaintiff to use CAIL's flight designator code (the "CP Code") on these routes. This permission enabled the Plaintiff to sell tickets with the CP Code, which facilitated connections to Canadian's national and international flights departing from and arriving in Vancouver. The Agreement provided that it was to renew automatically for one year periods from November 1 to October 31 in each year after 1997 unless terminated by 120 days' notice prior to November 1 (or cancelled pursuant to provisions of the Agreement which are not relevant to this application).

6 Canadian encountered financial difficulties through most of the 1990s. It underwent financial restructurings in 1994 and 1996, but continued to sustain losses. Canadian had discussions with Air Canada in early 1999 about a potential merger or other transaction but they were unable to reach an agreement. Canadian then pursued other alternatives but was not successful. On November 11, 1999, a numbered company named 853350 Alberta Ltd. ("853350"), which was financed and partially owned by Air Canada, made a take-over bid to acquire all of the shares of CAC (which owned the majority of the shares of CAIL). Air Canada indicated that it would merge with Canadian but only if Canadian completed a financial restructuring which would enable Air Canada to effect the acquisition on a financially sound basis.

7 In December 1999, Air Canada purchased certain assets from Canadian for $45 million in order to allow Canadian to have sufficient liquidity to continue operations until the completion of the take-over bid. In early January 2000, 853350 purchased 82% of CAC's common shares and all of its preferred shares. Canadian and Air Canada then embarked on efforts to restructure the financial affairs of Canadian on a consensual basis without having to resort to formal proceedings.

8 It is alleged in the present action that on or about January 17, 2000, a representative of Canadian Regional Airlines Ltd. ("Canadian Regional"), a subsidiary of CAIL, told the Plaintiff that the use of the CP Code was being taken away from it. By letter dated February 4, 2000, the Plaintiff was advised the following by Canadian Regional:

> This letter is to notify you that effective April 2, 2000 the flying you are currently doing under CP code pursuant to the Commercial Agreement on Vancouver to

Nanaimo, Campbell River and Comox will be terminated.

Effective April 2, 2000, Air BC Limited began operating the three routes using the CP Code (as well as the AC code, which it had been previously using as the regional carrier for Air Canada). It is alleged that all bookings made with the Plaintiff on these routes prior to April 2, 2000 were transferred to Air BC Limited and that the Plaintiff's flights using the CP Code were removed from the computer reservation systems so that no bookings using the CP Code could be made for the benefit of the Plaintiff after April 2, 2000.

9 On February 1, 2000, Canadian announced a moratorium on payments to its lenders and lessors. It continued with its private negotiations but pressure from certain creditors forced it to commence the CCAA proceedings in the Alberta Queen's Bench on March 24, 2000. A stay order was obtained by Canadian on that day and it provided, among other things, that Canadian was authorized to terminate or cancel such contracts and agreements as it deemed advisable, provided that there was to be provision in the Restructuring Plan for the consequences of any such terminations or cancellations.

10 By Orders in the CCAA proceedings dated April 7 and May 8, 2000, Paperny J. appointed a claims officer and set out a procedure for the creditors of Canadian to dispute the amounts of their claims for voting and distribution purposes should they disagree with the amounts set out in claims lists prepared by Canadian. The procedure included an appeal to the court in the event that the creditor disagreed with the amount of its claim as determined by the claims officer. The April 7 Order also provided that Canadian was to file its Restructuring Plan by April 25 and that meetings of Canadian's creditors were to be held on May 26 to consider and vote upon the Plan.

11 Canadian listed the Plaintiff's claim to be in the amount of $370,000. The Plaintiff did not accept this figure and filed a Voting/Distribution Dispute Notice dated May 4, 2000 (the party filling out the form was given the choice of indicating whether it disputed the amount of its claim for purposes of voting and for purposes of distribution, and the Plaintiff indicated that it was disputing the amount of its claim for purposes of distribution). In the Dispute Notice, the Plaintiff stated that the Agreement was wrongfully and effectively terminated on April 1, 2000 and that Air Canada had taken over the routes previously operated by the Plaintiff. The Dispute Notice stated that there were claims for damages against both Canadian and Air Canada for breach of contract, inducing breach of contract, breach of fiduciary duty and certain other economic torts and that the claims had not been formalized for court or regulatory purposes as yet. Attached to the Dispute Notice was an appendix setting out the Plaintiff's dollar claim in the amount of $1,537,818, together with a further sum of $64,000 regarding computerized reservation system charges. The Dispute Notice stated that, in addition, there were claims in an, as yet, undetermined amount for damages for breach of contract, inducing breach of contract, breach of fiduciary duty and other economic torts and that the position and liability of Air Canada in relation to both Canadian and the Plaintiff had yet to be determined.

12 Canadian filed its Restructuring Plan and the creditor groups approved it at the meetings held on May 26, 2000. The Plan provided different treatment for four creditor groups. The Plaintiff fell within the class called the affected unsecured creditors which had total claims of approximately $700 million. The Plan proposed that the affected unsecured creditors would receive 14 cents on the dollar of their claims. This payment was to be funded by Air Canada. The Plan had the usual type of release provision, by which the affected creditors were deemed to release Canadian and its subsidiaries of all claims against them upon the implementation of the Plan.

13 In accordance with the provisions of the CCAA, it was necessary to have the Restructuring Plan sanctioned by the court. The court hearing, which is often referred to as the fairness hearing, was set before Paperny J. on June 5, 2000, and it lasted until June 19, 2000. There were two vociferous opponents of the Plan, Resurgence Asset Management LLC (which is colloquially referred to as a

vulture fund) and four minority shareholders of CAC. Paperny J. gave her decision on June 27, 2000 (cited as Re Canadian Airlines Corp., 2000 ABQB 442; [2000] A.J. No. 771). I will subsequently deal with her reasons in some detail but I will simply indicate at this stage that she sanctioned the Plan and dismissed applications which had been brought by Resurgence and the minority shareholders.

14 An articled student at the Alberta law firm representing the Plaintiff attended at the fairness hearing on June 16 to seek a date for an application in the following week for the Plaintiff to be excluded from the CCAA proceedings. Another member of the law firm appeared on June 19 and stated that she was finalizing her instructions but had drafted a notice of motion and affidavit.

15 On June 22 the Plaintiff's Alberta law firm wrote a letter to the claims officer, with a copy to Canadian's lawyers, stating that the Plaintiff would not be participating in the claims procedure as it did not intend to claim any distribution under the Plan. On June 26 Canadian's lawyers wrote back pointing out that the Plaintiff would nevertheless remain an affected unsecured creditor and have its claim compromised in accordance with the provisions of the Plan. The Plaintiff's lawyers replied on June 28, stating that (i) the Plaintiff would not be making a claim for distribution and would not be participating in the process, and (ii) the claims officer had neither the role nor the jurisdiction to continue with the disputed claims process vis-a-vis the Plaintiff. On July 10, the Plaintiff's lawyers wrote a letter to the claims officer stating that the Plaintiff intended to sue Air Canada in British Columbia and that the Plaintiff withdrew its Dispute Notice and took no position on the quantum of its claim against CAIL for the purposes of compromise under the Plan.

16 The claims officer proceeded with the determination of the Plaintiff's claim. He considered submissions made by Canadian's lawyer and, on July 12, he determined the Plaintiff's claim in the amount of $370,000. No appeal was taken from this determination

17 The Restructuring Plan was implemented and Canadian was subsequently merged with Air Canada. The Plaintiff was sent a cheque in the amount of $51,800 as part of the distribution under the Plan but counsel for the Plaintiff returned the cheque to Canadian.

18 This action was commenced by the Plaintiff on July 20, 2000 against Air Canada and Air BC Limited. The Plaintiff asserts four tort claims and two claims pursuant to the Competition Act. As mentioned earlier, the present application is restricted to a consideration of the four tort claims of inducing breach of contract, unlawful interference with contractual relations, conspiracy and breach of confidence.

ISSUES

19 The issues on this application, as framed by counsel for the Defendants with some modification by me, are as follows:

(a) do the doctrines of res judicata or abuse of process prevent the Plaintiff from asserting the tort claims?
(b) should the tort claims be dismissed on the basis that the Plaintiff cannot establish causation between the conduct of the Defendants and the damages it suffered?

DISCUSSION

(a) Res Judicata and Abuse of Process

20 Much has been written in case decisions and textbooks about the doctrines of res judicata and

abuse of process. Although many people commonly refer separately to the doctrines of res judicata and issue estoppel, they are properly viewed as part of the principle of estoppel by res judicata, the two components of which are cause of action estoppel and issue estoppel. In simple terms, the doctrines of res judicata and abuse of process within the present context stand for the proposition that a party may not litigate a cause of action or an issue which has been or could have been litigated in earlier proceedings. Counsel do not have a fundamental disagreement about the relevant law, and the dispute on this application concerns the application of the law to the present circumstances.

21 The decision in 420093 B.C. Ltd. v. Bank of Montreal (1995), 128 D.L.R. (4th) 488 (Alta. C.A.) contains an excellent discussion of the topics of cause of action estoppel, issue estoppel, collateral attack on prior orders and abuse of process. As the decision is reported, I will not quote from it extensively. After pointing out that estoppel by res judicata is a rule of evidence, O'Leary J.A. summarized the principle in the following terms:

> A prior judicial decision will not raise an estoppel by res judicata, either issue estoppel or cause of action estoppel, unless (i) it was a final decision pronounced by a court of competent jurisdiction over the parties and subject matter; (ii) the decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation; and (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies. (p. 494)

In dealing with the topic of abuse of process, the Alberta Court of Appeal relied on another leading authority, the decision of the Manitoba Court of Appeal in Solomon v. Smith (1987), 45 D.L.R. (4th) 266, 22 C.P.C. (2d) 12, [1988] 1 W.W.R. 410. O'Leary J.A. quoted the following portion of a passage from that decision discussing the use of the doctrine of abuse of process in circumstances where res judicata cannot be invoked:

> I agree ... that a plea of issue estoppel is not available. However, to permit the Statement of Claim to proceed would be an abuse of process and that is the principle applicable. In considering this doctrine, it seems to me prudent to avoid hard and fast institutionalized rules such as those which attach to the plea of issue estoppel. By encouraging the determination of each case on its own facts against the general principle of the plea of abuse, serious prejudice to either party as well as to the proper administration of justice can best be avoided. ... we must be vigilant to ensure that the system does not become unnecessarily clogged with repetitious litigation of the kind here attempted. There should be an end to this litigation. To allow the plaintiff to retry the issue of misrepresentation would be a classic example of abuse of process - - a waste of time and resources of litigants and the court and an erosion of the principle of finality so crucial to the proper administration of justice. (p. 275 of 45 D.L.R. (4th) and pp. 504-5 of 128 D.L.R. (4th))

I will now address each of these principles in the context of the present circumstances.

(i) Cause of action estoppel

22 Cause of action estoppel is clearly inapplicable in the present circumstances. The causes of action being asserted in the present litigation were not and could not have been pursued in the CCAA proceedings. There was no determination in the CCAA proceedings with respect to the causes of action alleged against the Defendants of inducing breach of contract, interference with contractual relations, conspiracy and breach of confidence.

23 Counsel for the Defendants submits that res judicata can extend to matters that ought to have been raised and is not restricted to issues actually determined on the merits. I agree with that proposition but I do not agree with the attempt of counsel to extend it to the present case by arguing that the Plaintiff could have advanced the allegations in its Dispute Notice before the Alberta Court and is now precluded from advancing them in this action.

24 It is true that, in addition to alleging breach of contract by Canadian, the Dispute Notice made reference to allegations against Air Canada for inducing breach of contract, breach of fiduciary duty and other economic torts. However, the Plaintiff could not have pursued those claims in the CCAA proceedings. The purpose of a CCAA proceeding, as reflected in the preamble to the legislation, is to "facilitate compromises and arrangements between companies and their creditors". Its purpose is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

25 A somewhat analogous situation arose in Royal Bank v. Gentra Canada Investments Inc., [2000] O.J. No. 315 (Ont. Sup. Ct.). The Royal Bank sought to recover from Gentra an amount paid by it on a letter of credit issued to Gentra in connection with obligations of a company which subsequently initiated CCAA proceedings. In the CCAA proceedings, title to one of the debtor company's properties was vested in Gentra and the Royal Bank had been given notice of the application to have the property vested in Gentra. One of the issues in the subsequent litigation was whether the Royal Bank was estopped from objecting to the allocation which Gentra made to the funds received under the letter of credit in respect of this property, given that it could have appeared at the hearing of the application to have the property vested in Gentra. Lederman J. held that there was no basis for invoking the doctrine of res judicata or issue estoppel because the CCAA proceeding did not deal with disputes between creditors inter se and there was no provision in the restructuring plan expressly delineating the dispute between Gentra and the Royal Bank.

26 I hold that the Plaintiff is not prevented by the doctrine of cause of action estoppel from pursuing its tort claims in this action.

(ii) Issue estoppel

27 The question here is whether there was a determination of an issue in the CCAA proceedings which the Plaintiff is estopped from denying and which fatally affects its claims in this litigation. The two potential sources of such a determination are the ruling of Paperny J. in sanctioning the Restructuring Plan and the ruling of the claims officer in ascertaining the amount of the Plaintiff's damages.

28 The global issue before Paperny J. was whether the Restructuring Plan should be sanctioned. She stated that the criteria which needed to be satisfied were as follows:

> (1) there must be compliance with all statutory requirements;
> (2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
> (3) the plan must be fair and reasonable.
>
> (para. 60)

In connection with the fairness and reasonableness of the Plan, Paperny J. considered the following matters in addition to the favourable vote of the creditors:

> a. The composition of the unsecured vote;
>
> b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
>
> c. Alternatives available to the Plan and bankruptcy;
>
> d. Oppression;
>
> e. Unfairness to Shareholders of CAC; and
>
> f. The public interest.
>
> (para. 96)

After considering these matters, Paperny J. concluded that the Plan was fair and reasonable.

29 In my view, none of the above criteria and matters considered by Paperny J. involved a decision on an issue which is required to be proven by the Plaintiff in order to sustain its tort claims in this action. Paperny J. was directing her mind to the statutory requirements and to the fairness and reasonableness of the Plan. She was not directing her mind to activities of Air Canada in connection with Canadian's relationship with the Plaintiff.

30 The closest that Paperny J. came to considering matters relevant to this litigation was when she dealt with the allegation of Resurgence that Canadian and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests. In its Notice of Motion, Resurgence alleged, among other things, that (i) Air Canada induced Canadian to breach its obligations under its contract with Resurgence and other noteholders, (ii) Air Canada conspired with Canadian to default on the notes and to cause the failure of Canadian, and (iii) Air Canada and 853350 used their control of Canadian to, among other things, cause Canadian to re-align its flight route networks, thereby decreasing Canadian's revenues and increasing Air Canada's profitability through reduced competition.

31 In her Reasons for Decision, Paperny J. summarized Resurgence's allegations in the following two passages:

> Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan. (para. 146)
>
> Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it. (para. 153)

Paperny J. found either that these allegations were not proven or did not constitute unfairness. All but one of these allegations are unrelated to the Plaintiff's tort claims. The only one of the allegations that has some relevance to the Plaintiff is the one which Resurgence referred to as the re-alignment of the flight route network and which Paperny J. referred to as a consolidation of the operations of Air Canada

and Canadian prior to the commencement of the CCAA proceedings. I quote the relevant portions of the two paragraphs in which Paperny J. dealt with this allegation:

> The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.
>
> I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors.
>
> (para. 155 and 156)

32 On a fair reading of the Reasons for Decision, the most that can be said in respect of the operational realignment is that Paperny J. held that the evidence did not support a conclusion that Air Canada had received an overall benefit or that the creditors of Canadian were prejudiced. She did not absolve Air Canada of any torts which it may have committed in connection with the operational realignment. In stating that there was no detriment to Canadian's creditors, she was referring to the ability of the creditors to recover from Canadian's assets and she was not suggesting that there was no detriment to creditors such as the Plaintiff who claimed to be harmed by torts committed by Air Canada.

33 In his oral submissions, counsel for the Defendants borrowed language found in constitutional cases and submitted that the pith and substance of the reasons of Paperny J. was that the re-alignment of the routes was fair and reasonable and that the very issue before her was the integration of the routes. I disagree. The principal question before Paperny J. was whether the Restructuring Plan was fair and reasonable. The re-alignment of the routes was an incidental issue in the sense of determining whether the process leading up to the Plan was unfair on the basis that Air Canada was obtaining an unfair benefit. She was not giving a global blessing or release in respect of all actions taken by Air Canada in connection with the re-alignment of the routes, including any torts it may have committed. Nor was she deciding that any of the requisite elements of the torts alleged in this action did not exist.

34 A similar situation existed in Samos Investments Inc. v. Pattison, [2000] B.C.J. No. 1344, although that decision involved a consideration of the principle by which collateral attacks on orders are prohibited. In that case, an order had been made approving a company's plan of arrangement under the Company Act by which the shares of minority shareholders were acquired at a price of $70 a share. One of the minority shareholders subsequently sued numerous parties alleging that prior to the plan of arrangement there had been a conspiracy to increase the number of shares in the company held by the majority shareholder and thereby dilute the value of the minority shares (from $100 a share to the $70 acquisition value). The majority of the B.C. Court of Appeal held that the subsequent action did not constitute a collateral attack on the order approving the plan of arrangement and refused to grant a stay of proceedings in respect of the subsequent action.

35 Rowles and Mackenzie JJ. wrote concurring judgments on behalf of the majority. Rowles J. held that the inquiry by the Court on the application to approve the plan of arrangement was limited by the terms of the plan and the relevant legislation, and that an application to approve a plan does not require an inquiry into past matters. Mackenzie J. agreed with the position taken by the company at the hearing to approve the plan that the objections made by the minority shareholders (and which were the subject matter of the subsequent action) were outside the scope of the arrangement hearing.

36 Similarly in the present case, the application to sanction the Restructuring Plan did not require an inquiry into past matters such as the actions of the Defendants prior to the filing of the Plan in relation to the Agreement. Those past matters were outside the scope of the fairness hearing before Paperny J. Although Paperny J. did consider past matters when she dealt with the allegations of oppression, she was required to do so because Resurgence had filed a notice of motion alleging that the actions of Canadian, Air Canada and 853350 were oppressive and unfairly prejudicial within the meaning of s. 234 of the Business Corporations Act, S.A. 1981, c. B-15. While there may be occasion when a court will have to consider past matters in order to determine whether a restructuring plan under the CCAA is fair and reasonable, those past matters would have to be related to the contents of the restructuring plan. In the instant case, the actions in relation to the breach or termination of the Agreement were not related to the provisions of the Plan and were not matters which Paperny J. was asked to consider in deciding whether the Plan was fair and reasonable.

37 The second potential source of a determination in the CCAA proceedings of an issue which may be in contention in this action is the ruling of the claims officer in determining the amount of the Plaintiff's claim. The claims officer did not decide an issue which is fatal to the Plaintiff's tort claims in this litigation because he accepted that there had been inadequate notice of termination of the Agreement and he assessed the damages flowing therefrom. Although the Plaintiff's Dispute Notice made reference to economic tort claims, the claims officer did not deal with any of them and restricted his findings to damages caused by Canadian's inadequate notice of termination.

38 During the course of submissions, I raised the possibility that the Plaintiff may be estopped in this action from denying the amount of the damages caused by the alleged torts on the basis that those damages are the same as the damages caused by Canadian's breach or wrongful termination of the Agreement. Counsel for the Plaintiff responded that the measure of damages for a tort is different from the measure of damages for breach of contract. Counsel referred me to two texts on the topic of damages, J.G. Fleming, Law of Torts, 9th ed. (Sydney: LBC Information Services, 1998) at p. 765 and H.D. Pitch and R.M. Snyder, Damages for Breach of Contract, 2nd ed.(Vancouver: Carswell, 1989 and updates) at pp. 1-1 and 1-2 where, among other things, it is stated that it may be possible to recover aggravated and exemplary damages in tort claims, but not in actions for breach of contract.

39 I have concluded that I should not decide on this application whether the Plaintiff is estopped from asserting compensatory damages in this action which are different from the damages assessed by the claims officer in the CCAA proceeding. The Notice of Motion for this application requests an order dismissing the Plaintiff's tort claims. If I were to conclude that the Plaintiff is estopped from asserting different compensatory damages, it would only limit the amount of its damages which can be recovered in this litigation and it would not lead to a dismissal of any of its tort claims. Hence, it is my view that I would be going beyond the purview of the Notice of Motion if I made a ruling on this point. In addition, the point was raised by me during the course of submissions and counsel did not have a full opportunity to research and consider the issue. I leave the point open for further argument at trial (or on a subsequent Rule 18A application if leave were to be granted pursuant to Rule 18A(12)).

40 I hold that there was not a determination of any issue in the CCAA proceedings which the Plaintiff is estopped from denying and which would lead to the dismissal of any of its tort claims.

(iii) Abuse of process

41 As noted in Solomon v. Smith, the doctrine of abuse of process may be invoked to prevent repetitious litigation when the requirements of estoppel by res judicata have not been technically fulfilled.

42 In my view, with the potential exception of the amount of compensatory damages, the present litigation is not repetitious of the CCAA proceedings. Those proceedings dealt with the restructuring of Canadian's financial affairs as a prelude to a merger with Air Canada, including the compromising of the claims of Canadian's creditors. The present litigation involves a determination of whether Air Canada and its subsidiary, Air BC Limited, committed any torts against the Plaintiff in connection with the re-alignment of Canadian's regional routes (in particular, the three regional routes flown by the Plaintiff under the terms of the Agreement). The CCAA proceedings did not involve a determination of any of those tort claims or of any of the requisite elements of the tort claims.

43 In addition to submitting that the Plaintiff is attempting to undermine the CCAA process by re-litigating the very issues and factual determinations already made by the Alberta Court (a submission which I have rejected), counsel for the Defendants argues that this proceeding is an affront to the Court because it ignores that the very foundation of its allegations was expressly permitted by the Alberta Court in advance of the breach of the Agreement and was subsequently absolved by it.

44 There is a disagreement between the parties as to whether Canadian breached the Agreement or wrongfully terminated it. A sub-issue in this regard is whether the wrong was committed when the February 4, 2000 letter was sent (or on January 17, 2000 when the Plaintiff was orally advised that the CP Code was being taken away from it) or when Air BC Limited began flying the routes using the CP Code on April 2, 2000. In making the submission, counsel for the Defendants is relying on the fact that the March 24, 2000 stay order in the CCAA proceedings authorized Canadian to terminate such contracts and agreements as it deemed advisable.

45 Even assuming that Canadian's wrong was a termination of the Agreement which occurred after the March 24, 2000 stay order, it cannot be said that the Alberta Court authorized the commission of any torts by the Defendants. All it did was authorize Canadian to terminate contracts and agreements, provided that it made provision for any consequences in the Restructuring Plan. Canadian was still liable for any wrongful terminations, albeit that the damages in respect of any wrongful terminations could be compromised by the Plan (provided that the Plan received the requisite approval or sanctioning by Canadian's creditors and the Alberta Court). The authorization contained in the March 24 order did not relieve Canadian, much less the Defendants, of any liability incurred as a result of the termination of any of Canadian's contracts or agreements.

46 Nor did the Alberta Court subsequently absolve either Canadian or the Defendants in respect of the breach or termination of the Agreement. The most the Alberta Court held in connection with the re-alignment of flight routes was that it did not render the Restructuring Plan unfair or unreasonable. It did not purport to relieve either Canadian or the Defendants of the consequences of the breach or termination of the Agreement or any other of Canadian's contracts or agreements. The relief achieved by Canadian in connection with the breach or termination of the Agreement was that the consequential damages were compromised by operation of the CCAA when the Plan was approved or sanctioned by Canadian's creditors and the Alberta Court. This compromise operated for the benefit of Canadian, not the Defendants (this statement is subject to an argument which was not pursued on this application to the effect that Air Canada is entitled to the benefit of the release contained in the Plan as a result of its subsequent merger with Canadian).

47 I hold that it is not an abuse of process to allow the Plaintiff to pursue the tort claims in this action.

(b) Causation and Damages

48 One of the findings made by Paperny J. from the evidence introduced at the fairness hearing was that Canadian would have ceased operations if Air Canada had not provided financial support to it

commencing in December 1999. Counsel for the Defendants submits that based on this finding, the Plaintiff cannot succeed on its tort claims because it would have suffered its losses in any event of the Defendants' actions. In support of this submission, counsel relies on the decisions in Cabral v. Metzger (1991), 83 Alta. L.R. (2d) 271 (C.A.), Edwin Hill & Partners v. First National Finance Corp., [1988] 3 All E.R. 801 (C.A.), Rogers Cable TV Ltd. v. 373041 Ontario Ltd., [1996] O.J. No. 2033 (Gen. Div.) and Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 6 W.W.R. 385 (S.C.C.).

49 In my view, these decisions are all distinguishable. None of them stand for the proposition that when a party provides financial support to allow a company to continue in business, that party is not liable in respect of torts involving or related to the company which it may subsequently commit on the basis that the torts are not the cause of any damages.

50 In both the Edwin Hill and Rogers Cable decisions, the Court relied on the concept of superior rights. In Edwin Hill, a property developer encountered financial difficulties and a mortgagee of the developer's property was in the position to exercise its power of sale and appoint a receiver. The mortgagee agreed that it would finance the development rather than pursue its remedies but, as a condition of this agreement, it required the developer to terminate its contract with an architect. In an action by the architect against the mortgagee for procuring a breach of its contract, the Court held that the mortgagee was not liable on the basis that it was justified to interfere with the contract as a result of its superior right to receive payment of its loan.

51 Similarly, in Rogers Cable, an owner of an apartment building was sued for interfering with a contract between Rogers Cable and tenants of the building. The Court held that the owner of the apartment building was justified in interfering with the contractual rights because it had a superior right to deal with the tenants of the building.

52 In my opinion, these two decisions have no application to the circumstances giving rise to this action. It has not been shown that the Defendants had any rights which were superior to the rights of the Plaintiff. The fact that Air Canada provided financial support to Canadian by way of purchasing assets from Canadian does not give it superior rights over other parties, including the Plaintiff.

53 The Cabral case involved a personal injury claim. The trial judge simply held that the plaintiff had not proved that his hearing loss was caused by the motor vehicle accident in question, especially in view of the fact that he had worked in a noisy environment for some years. This conclusion was upheld on appeal. In my view, the decision is distinguishable from the present circumstances because in Cabral, there were two competing potential causes of the hearing loss and the trial judge held that it had not been proven that the accident was the cause. In the case at bar, the Plaintiff's damages were caused by a breach or a termination of the Agreement, and there was no other competing cause in operation at the relevant time.

54 The fourth case relied upon by counsel for the Defendants on this point is Canada Cement LaFarge. In that case, the Court held that there was no causal connection between the unlawful activities of the defendant and the demise of the plaintiff's enterprise because it was not shown that the defendant's use of an imported raw material which competed with the plaintiff's product was part of an unlawful scheme to injure the plaintiff in its business. This decision is also distinguishable because it was not proven in that case that the unlawful activities of the defendant were a cause of the plaintiff's demise. In the present case, the breach or termination of the Agreement did give rise to the Plaintiff's loss and the issue at trial will be whether the Defendants tortiously participated in the breach or termination.

55 The Defendants' argument may have had a more solid footing if the financial support provided to Canadian was causally linked to Canadian's breach or termination of the Agreement. For example, Air

Canada could possibly have acquired superior rights if it was a condition to its provision of financial support that Canadian terminate the Agreement, but there is no evidence of any conditions being attached to Air Canada's $45 million purchase of assets from Canadian. In addition, it should be noted that the financial support was in the form of purchases of assets and, while the purchase monies provided liquidity for Canadian, there is nothing to indicate that the aggregate purchase price was in excess of the fair market value of the assets.

56 Similarly, the Defendants' argument would have more force if the alleged tortious acts had saved Canadian from its demise and the evidence established that Canadian would inevitably have failed if those acts had not been taken. In my view, the evidence before me does not go that far. Air Canada had announced that it would only merge with Canadian if there was a financial restructuring so that the acquisition could be accomplished on a financially sound basis but that condition did not necessarily involve a breach or termination of the Agreement. In response to Resurgence's complaint that Air Canada caused Canadian to re-align its flight route networks, Paperny J. did state that the financial support and corporate integration provided by Air Canada was Canadian's only option for survival. However, this finding does not mean that Canadian's only option for survival was the breach or wrongful termination of the Agreement. Canadian may have been able to survive if it gave timely notice to bring the Agreement to an end as of October 31, 2000, and it has not been demonstrated that it was essential to Canadian's continued existence for the Agreement to be breached or wrongfully terminated as of April 2, 2000.

57 The evidence before me does not establish that the Agreement would inevitably have been breached or terminated apart from the February 4, 2000 letter (or the January 17, 2000 conversation) and the actions which took place on April 2, 2000. In other words, it has not been shown that these matters did not cause the Plaintiff's loss because there was another cause which would have inevitably brought about the loss.

58 I hold that it has not been demonstrated that the Plaintiff is unable to establish causation between the conduct of the Plaintiff and the damages it suffered as a result of allegedly improper actions of the Defendants.

CONCLUSION

59 I dismiss the Defendants' application. I grant costs of the application to the Plaintiff in the cause.

TYSOE J.

cp/i/qlsng/qlbrl

TAB 6

Case Name:

Stelco Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement with respect to Stelco Inc. and the other applicants listed in Schedule "A"
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2005] O.J. No. 4814

15 C.B.R. (5th) 297

143 A.C.W.S. (3d) 623

2005 CarswellOnt 6483

Court File No. 04-CL-5306

Ontario Superior Court of Justice
Commercial List

J.M. Farley J.

Heard: November 9, 2005.
Judgment: November 10, 2005.

(17 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Rights of all unsecured creditors to survive and no case made out for separate classes -- Companies' Creditors Arrangement Act, s. 8. Insolvency law -- Creditors -- Unsecured creditors -- Rights of all unsecured creditors to survive and no case made out for separate classes -- Companies' Creditors Arrangement Act, s. 8.

Application by the convertible note holders of the bankrupt corporation for an order extinguishing certain rights of the senior debenture holders and for an order that they constitute a separate class of creditors for purposes of voting on a Proposed Plan or any amended version -- There was a supplemental trust indenture between the bankrupt and the convertible note holders, to which the senior debenture holders were not party -- Both groups of creditors were unsecured -- HELD: Application dismissed -- The senior debenture holders were able despite the indenture to assert their claims on the concept of third party beneficiary -- Section 8 of the Companies' Creditors Arrangement Act did not come into play within inter-creditor disputes not directly involving the bankrupt -- No rights to be extinguished -- Neither had the convertible note holders established a case for separate classes.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act s. 4, s. 5, s. 6

Counsel:

Michael E. Barrack, James D. Gage, Geoff R. Hall for the Applicants

Kyla Mahar for the Monitor

Robert Staley for Senior Debenture Holders

Ashley John Taylor for CIT, Agent to Secured Creditors

Paul MacDonald, Andy Kent, Hilary Clarke for Converts Committee

Aubrey Kauffman for Tricap

Ken Rosenberg, Jeff Larry for USW

Gale Rubenstein, for the Superintendent

H. Whitely for CIBC

Steven Bosnick for USW Locals 8782 and 8328

Murray Gold, Andrew Hatney for Salaried Retirees

[Editor's note: A corrected version was released by the Court November 16, 2005; the corrections have been made to the text and the corrigendum is appended to this document.]

ENDORSEMENT

1 J.M. FARLEY J. (endorsement):-- Fortunately time cleared so that the motion of the Informal Independent Converts' Committee ("ConCom") which surfaced late last week - and the responding cross motion of the Informal Committee of Senior Debenture Holders ("BondCom") - could be accommodated today, less than week before the scheduled vote on Stelco Inc.'s Plan of Arrangement under the CCAA set for November 15, 2005.

2 The motion of ConCom was for an order:

(i) directing the Applicants to amend page 39 of the Notice of Proceedings and Meetings and Information Circular (the "Information Circular") with respect to the Applicants' Proposed Plan of Arrangement or Compromise (the "Proposed Plan") in the manner set out in the Draft Order to confirm that the right (if any) of the Bondholders (as hereinafter defined) to assert claims or other remedies against other creditors of Stelco Inc. ("Stelco") will be subject to the effect of the Proposed Plan (the "Bondholders Claims Statement") and that the right (if any) of the Bondholders to assert claims (the "Anti-Convert Claims") pursuant to Article 6 (the "Inter-Trustee Provisions") of the First Supplemental Trust

Indenture dated January 21, 2002 between Stelco and CIBC Mellon Trust Company (the "Supplemental Trust Indenture") will be extinguished effective upon the implementation of the Proposed Plan;

(ii) declaring that, if the Proposed Plan is approved by the requisite majority of the creditors of Stelco and sanctioned by this Court, the Inter-Trustee Provisions shall, from and after the effective date of the Proposed Plan, be of no force or effect;

(iii) in the alternative, directing the Applicants to amend the Proposed Plan to provide that the Noteholders (as hereinafter defined) shall constitute a separate class of Stelco creditors for the purposes of voting on the Proposed Plan or any amended version thereof; and

(iv) such further and other relief as counsel may request and this Honourable Court may permit.

3 The cross motion of BondCom was for an Order:

2. for a declaration that, if any or all of the relief sought by the Convertible Noteholders as set out in its notice of motion dated November 4, 2005 is granted, that the Senior Debenture Holders shall constitute a separate class of Stelco Inc. ("Stelco") creditors for the purposes of voting on the Proposed Plan of Arrangement or Compromise (the "Proposed Plan") or any amended version thereof; and

3. such further and other relief as to this Honourable Court seems just.

4 No one present at this hearing disputed the proposition that it was appropriate to have the creditors vote on the Plan with the necessary benefit of clear statements of what was involved in such a vote and to eliminate therefore any ambiguities to the extent possible so that an objective creditor could make a reasoned decision. In that respect it would appear to me that the language of the Information Circular at p. 39 thereof should be clarified to track that of the Meeting Order of October 4, 2005 at para. 34 thereof as to the operative element. Further it was acknowledged by everyone that the Plan itself provided that it may be amended before the vote. In that respect there would be no impediment for Stelco to adjust the language of the Plan in the sense of clarifying what its intent has been and continues to be in respect of matters affecting the debt in question and as held by those represented by the ConCom and by the BondCom. (Note: Subsequent to release of these reasons in handwritten form, I was advised on November 10, 2005 that Stelco has undertaken to make the aforesaid clarifications.)

5 I wish to emphasize that nothing in my reasons should be taken as being determinative of or affecting the relationship of the ConCom holders of debt vis-à-vis the BondCom holders of debt (that would as well encompass the holders of all Senior Debt as that term is defined in the Supplemental Trust Indenture). If those two sides are not able to work out an agreement between themselves, then they are at liberty to come to court to have that adjudicated.

6 ConCom points out that the Supplemental Trust Indenture was an agreement between Stelco and the holders of the ConCom debt, but it was not an agreement signed by the holders of the BondCom debt. While true, that would not preclude a claim of the BondCom holders based on the concept of third party beneficiary.

7 The CCAA is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: Companies' Creditors Arrangement Act. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors

themselves and not directly involving the company. See Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580 (S.C.) at paras. 24-25; Royal Bank of Canada v. Gentra Canada Investments Inc., [2000] O.J. No. 315 (S.C.J.) at para. 41, appeal dismissed [2001] O.J. No. 2344 (C.A.); Re 843504 Alberta Ltd., [2003] A.J. No. 1549 (Q.B.) at para. 13; Re Royal Oak Mines Inc., [1999] O.J. No. 709 (Gen. Div.) at para. 24; Re Royal Oak Mines Inc., [1999] O.J. No. 864 (Gen. Div.) at para. 1.

8 ConCom points out the language of article 4.01 of the Plan:

> 4.01 Cancellation of Certificates
>
> At the Effective Time, all debentures, certificates, agreements, invoices and other instruments evidencing Affected Claims against Stelco or Existing Common Shares will not entitle any holder thereof to any compensation or participation other than as expressly provided for in this Plan or in the Articles or Reorganization, respectively, and will be cancelled and null and void, and all debentures, certificates, agreements, invoices and other instruments evidencing Affected Claims against any Subsidiary Applicant will not entitle any holder thereof (other than Stelco or its successors and assignees) to any compensation or participation other than as expressly provided for in this Plan and, if in the possession or control of any Person must, at the request of Stelco, be delivered to Stelco. (emphasis added)

However this must be carefully analyzed in context. This deals with "Affected Claims against Stelco." See also in this respect articles 6.01, 6.02 and 6.05.

> 6.01 Effect of Plan Generally
>
> At the Effective Time, the treatment of Affected Claims will be final and binding on the Applicants, the Affected Creditors and the trustees under the trust indentures for the Bonds (and their respective heirs, executors, administrators and other legal representatives, successors and assigns), and this Plan will constitute: (a) full, final and absolute settlement of all rights of the Affected Creditors; (b) an absolute release and discharge of all indebtedness, liabilities and obligations of or in respect of the Affected Claims against Stelco, including any interest and costs accruing thereon; (c) an absolute assignment to Stelco of all indebtedness, liabilities and obligations of or in respect of the Affected Claims against Subsidiary Applicants, including any interest and costs accruing thereon, and an absolute release and discharge of any rights of Affected Creditors in respect thereof (excluding, for greater certainty, any rights assigned to Stelco); and (d) a reorganization of the capital and change in the minimum and maximum number of directors of Stelco in accordance with the provisions of Article 3 and the Articles of Reorganization. (emphasis added)
>
> 6.02 Prosecution of Judgments
>
> At the Effective Time, no step or proceeding may be taken in respect of any suit, judgement, execution, cause of action or similar proceeding in connection with any Affected Claim (other than by Stelco in respect of Affected Claims assigned to it pursuant to this Plan) and any such proceedings will be deemed to have no further effect against any Applicant or any of its assets and will be released, discharged, dismissed or vacated without cost to the Applicants. Any Applicant may apply to Court to obtain a discharge or dismissal, if necessary, of any such proceedings without notice to the Affected Creditor. (emphasis added)

6.05 Consents, Waivers and Agreements

At the Effective Time, each Affected Creditor will be deemed to have consented and agreed to all of the provisions of the Plan, as an entirety. Without limitation to the foregoing, each Affected Creditor (but for greater certainty, excluding Stelco in respect of Affected Claims assigned to it pursuant to this Plan) will be deemed:

(a) to have executed and delivered to the Applicants all consents, assignments, releases and waivers, statutory or otherwise, required to implement and carry out this Plan as an entirety;
(b) to have waived any default by or rescinded any demand for payment against any Applicant that has occurred on or prior to the Plan Implementation Date pursuant to, based on or as a result of any provision, express or implied, in any agreement or other arrangement, written or oral, existing between such Affected Creditor and such Applicant with respect to an Affected Claim; and
(c) to have agreed that, if there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Affected Creditor and any Applicant with respect to an Affected Claim as at the Plan Implementation Date and the provisions of this Plan, then the provisions of this Plan take precedence and priority and the provisions of such agreement or other arrangement are amended accordingly. (emphasis added)

This is not language which purports to, nor in my opinion does, affect relationships between creditors vis-à-vis themselves. With respect, I do not see s. 8 of the CCAA as coming into play here, nor is it necessary to have it come into play in this inter-creditor dispute which does not directly involve Stelco. No doubt it would be helpful to have Stelco clarify that aspect which ConCom has sincerely felt was ambiguous in article 4.01 of the Plan to reflect that these instruments are cancelled and null and void only as to the future (i.e. that is after the Effective Time) vis-à-vis Stelco, but not as to the inter-creditor dispute or relationship. (See note above re: undertaking of Stelco.)

9 I would only note in passing that the holders of the ConCom debt freely bought into a situation governed by s. 6.2 of the Supplemental Trust Indenture which contemplated their relationship with the BondCom debt (Senior Debt) in the event of insolvency proceedings or a reorganization. Give the caveats in s. 6.3 it would not appear to me that this clause advances the argument pressed by the ConCom.

10 Therefore as to the relief request by ConCom in (i) and (ii) above, I would dismiss that part of the motion. That dismissal in no way affects the clarification of language mentioned above which would be of assistance to all concerned.

11 Secondly, I would note that while apparently Stelco had not specifically advised as to its position, at the time of the hearing, its counsel was quite straight forward in his opening comments when he stated that Stelco had intended and always intended that its Plan (as distributed) was only to affect rights between Stelco and its Affected Creditors, and specifically Stelco had no intent to alter the relationship between its creditors in the sense of one group of creditors vis-à-vis another group (i.e. the ConCom debt vis-à-vis BondCom debt (Senior Debt)). In this latter regard he indicated that Stelco was not intending to affect whatever subordination rights there may be between these two groups. This would be in the sense that what was the situation between these two groups as a result of the Supplemental Trust Indenture, especially at s. 6, would continue to be the relationship after the Effective Time.

12 The next question is whether or not there should be separate classes for the ConCom debt and/or the BondCom debt/Senior Debt. I am of the view that the law in regard to classification is correctly set out in Re Canadian Airlines Corp. (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), leave to appeal denied (2000), 19 C.B.R. (4th) 33(Alta. C.A. [In Chambers]), cited in the Alberta Court of Appeal subsequent decision Re Canadian Airlines Corp. (2000), 261 A.R. 120, 2000 ABCA 149 (Alta. C.A. [In Chambers]) at para. 27. See also Re San Francisco Gifts Ltd. (2004), 5 C.B.R. (5th) 92 (Alta. Q.B.) at para. 11, leave to appeal denied [2004] A.J. No. 1369, 2004 ABCA 386 (C.A.). As noted by Toplinski J. at para. 11 of San Francisco:

> (11) The commonality of interest test has evolved over time and now involves application of the following guidelines that were neatly summarized by Paperny J. (as she then was) in Resurgence Asset Management LLS v. Canadian Airlines Corp. ("Canadian Airlines")
>
> 1. Community of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor prior to and under the Plan as well as on liquidation.
> 3. The commonality of interests should be viewed purposively, bearing in mind that the object of the CCAA, namely to facilitate reorganizations if possible.
> 4. In placing a broad and purposive interpretation on the CCAA, the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans.
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the Plan in a similar manner. (emphasis added)

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

14 Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis-à-vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible (subject to the practical caution that whatever is achieved must be compatible with Stelco being able to continue in a competitive industry so that the burden of this consideration cannot be so great as to swamp the newly renovated boat which had previously been sinking). That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there

may be a difference of opinion as to the valuation of the consideration obtained.

15 Counsel for BondCom and Stelco raised generally the question of there possibly being a tyranny of the minority if the ConCom debt was a separate class; counsel for ConCom raised the issue of tyranny of the majority if there was not a separate class for the ConCom debt. To my mind that question of tyranny of the majority is something which may be addressed in the sanction hearing, if one takes place, as to the fairness, reasonableness and equitableness of the Plan. See item 4 of the Paperny list in Canadian Airlines; see also Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3rd) 312 (Gen. Div.) at p. 318 and Re Campeau Corp. (1991), 10 C.B.R. (3rd) 100 (Gen. Div.) at p. 103.

16 Therefore I do not see that ConCom has made out a case for a separate class. That aspect of its motion is also dismissed.

17 Given the dismissal of the ConCom motion, the BondCom motion for a separate class for its debt becomes moot.

J.M. FARLEY J.

* * * * *

Corrigendum
Released: November 16, 2005

A correction was made to the counsel list with the "addition of Gale Rubenstein, for the Superintendent."

cp/e/qw/qlnxd/qlbdp/qlrme/qlmll

Case Name:

Stelco Inc. (Re)

APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended
IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C., c. C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement with respect to Stelco Inc., and other applicants listed in Schedule "A"

[2005] O.J. No. 4883

Dockets: C44436 and M33171

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, R.J. Sharpe and R.A. Blair JJ.A.

Heard: November 14, 2005.
Judgment: November 17, 2005.

(41 paras.)

Creditors and debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Application by the Informal Independent Converts' Committee for leave to appeal, and appeal, a decision dismissing their motion to classify the Subordinated Debenture Holders as a separate class for voting purposes on a Proposed Plan of Compromise to unsecured creditors dismissed.

Application by the Informal Independent Converts' Committee (IICC) for leave to appeal a decision dismissing their motion to classify the Subordinated Debenture Holders as a separate class for voting purposes on a Proposed Plan of Compromise to unsecured creditors. The appeal arose out of the reorganization of Stelco and related companies, pursuant to the Companies' Creditors Arrangement Act (CCAA). Stelco had been in the midst of the fractious process for approximately twenty-one months. Stelco had presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval and the vote was scheduled for November 15, 2005. On November 10, the IICC sought an order from the supervising judge classifying the Subordinated Debenture Holders whom they represented, as a separate class for voting purposes. The motion was dismissed on the basis that the IICC did not show a reason to separate from the other unsecured creditors.

HELD: Leave to appeal allowed. Appeal dismissed. The classification of creditors was determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. The IICC did not demonstrate a different legal interest from the other unsecured creditors vis à vis the debtor, nor any basis for setting aside the finding of the supervising judge that there were no different practical interests such that the IICC deserved a separate class. There was no legal error or

error in principle in the supervising judge's exercise of discretion.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act

Appeal From:

Application for Leave to Appeal, and if leave be granted, an appeal from the Order of Farley J. dated November 10, 2005.

Counsel:

Paul Macdonald, Andrew Kent and Brett Harrison, for the Informal Independent Converts' Committee

Michael E. Barrack and Geoff R. Hall, for Stelco Inc.

Robert Staley and Alan Gardner, for the Senior Debenture Holders

Fred Myers, for Her Majesty the Queen in Right of Ontario, and the Superintendent of Financial Services

Ken Rosenberg, for United Steelworkers of America

A Kauffman, for Tricap Management Ltd.

Kyla Mahar, for the Monitor

Murray Gold, for the Salaried Retirees

Heath Whitley, for CIBC

Steven Bosnick, for U.S.W.A. Loc. 5328 and 8782

The judgment of the Court was delivered by

R.A. BLAIR J.A.:--

Background

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

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

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

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

4 The endorsement read as follows:

> In our view, the appellants have not demonstrated a different legal interest from the other unsecured creditors vis à vis the debtor, nor any basis for setting aside the finding of Farley J. that there are no different practical interests such that the appellants deserve a separate class. We see no legal error or error in principle in his exercise of discretion.
>
> Leave to appeal is granted, but the appeal must therefore be dismissed. Because of the importance of the issue for Ontario practice in this area, we propose to expand somewhat on these reasons in due course.

5 These are those expanded reasons.

Facts

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

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

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

9 In making their argument about a different interest, the appellants rely upon their status as subordinated debt holders as shaped particularly by Articles 6.2 and 6.3 of the Supplemental Trust Indenture. In essence those provisions reinforce the subordinated nature of their debt. They stipulate (a) that if the Subordinated Debenture Holders receive any payment from Stelco, or any distribution from the assets of Stelco, before the Senior Debt is fully paid, they are obliged to remit any such payment or

distribution to the Senior Debt Holders until the latter have been paid in full (Art. 6.2(3)), but (b) that no such payment or distribution by Stelco shall be deemed to constitute a payment on the Subordinated Debenture Holders' debt (Art. 6.3). The parties refer to these provisions as the "Turnover Payment" provisions.

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

11 The appellants contend that the Turnover Payment provisions distinguish their interests from those of the Subordinated Debenture Holders when it comes to voting on Stelco's Proposed Plan. They say that the Subordinated Debenture Holders' interest in maximizing the amounts to be made available to unsecured creditors ends once they have received full recovery, in part as a result of the Turnover Payments that the Subordinated Debenture Holders will be required to make from their portion of the funds. On the other hand, the Subordinated Debenture Holders will have an interest in seeking more because their recovery, for practical purposes, will have only begun once that point is reached.

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

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

> [13] I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/Senior Debt[2] plus the trade debt vis-à-vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid any unnecessary fragmentation - and in this respect multiplicity of classes does not mean that that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.
>
> [14] Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of the ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis-à-vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible ... That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the variation of the consideration obtained.

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

The Leave Application

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

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

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

16 Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in Re Canadian Airlines Corp. (2000), 19 C.B.R. (4th) 12 (Alta. Q.B), this court has not dealt with the issue since its decision in Elan Corp. v. Comiskey, supra, and the Converts' Committee argues that the Alberta line of authorities is contrary to Elan.

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

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

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

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

The Appeal

No Error in Law or Principle

21 Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class. Most analyses of this approach start with a reference to Sovereign Life Assurance Co. v. Dodd (1892), [1891-4] All E.R. Rep. 246, which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited:

> At pp. 249-250 Lord Esher said:
>
> The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act[3] recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.
>
> At p. 251, Bowen L.J. stated:
>
> The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

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

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

> In summary, the cases establish the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the

plan as well as on liquidation.

3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

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

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

26 We do not read the foregoing principles as being inconsistent with the earlier decision of this court in Elan Corp. v. Comiskey. There the court applied a common interest test in determining that the two creditors in question ought not to be grouped in the same class of creditors for voting purposes. But the differing interests in question were not different legal interests as between the two creditors; they were different legal interests as between each of the creditors and the debtor company. One creditor (the Bank) held first security over the debtor company's receivables and the other creditor (RoyNat) held second security on those assets; RoyNat, however, held first security over the debtor's building and realty, whereas the Bank was second in priority in relation to those assets. The two creditors had differing commercial interests in how the assets should be dealt with (it was in the interests of the bank, with a smaller claim, to collect and retain the more realizable receivable assets, but in the interests of RoyNat to preserve the cash flow and have the business sold as a going concern). Those differing commercial interests were rooted in differing legal interests as between the individual creditors and the debtor company, arising from the different security held. Because of the size of its claim, RoyNat would dominate any group that it was in, and Finlayson J.A. was of the view that RoyNat, as the holder of second security, should not be able to override the Bank's legal interest as the first secured creditor with respect to the receivables by virtue of its voting rights. On the basis that there was "no true community of interest" between the secured creditors (p. 259), given their different legal interests, he ordered that the Bank be placed in a separate class for voting purposes.

27 Elan Corp. v. Comiskey did not deal with the issue of whether creditors with divergent interests as amongst themselves - as opposed to divergent legal interests vis-à-vis the debtor company - could be forced to vote as members of a common class. Nor did it apply an "identity of interest" test - a test that

has been rejected as too narrow and too likely to lead to excessive fragmentation: see Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, supra; Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra; Re Fairview Industries Ltd., supra; Re Woodward's Ltd., supra. In our view, there is nothing in the decision in Elan Corp. that is inconsistent with the evolutionary set of principles developed in the Alberta jurisprudence and applied by the supervising judge here.

28 In addition to commonality of interest concerns, a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority." Examples of the former include Elan Corp. v. Comiskey[4] and Re Wellington Building Corp., supra[5]. Examples of the latter include Sklar-Peppler, supra,[6] and Re Campeau Corp. (1990), 10 C.B.R. (3d) 100 (Ont. Gen. Div.)[7].

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

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

31 There are good reasons for such an approach.

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

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

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

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

35 Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite

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

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

Discretion and Fact Finding

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

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

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

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

Disposition

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

R.A. BLAIR J.A.
S.T. GOUDGE J.A. -- I agree.
R.J. SHARPE J.A. -- I agree.

cp/e/qw/qlmxf

e/drs/qlls/qljal

1 R.S.C. 1985, c. C-36, as amended.

2 Farley J. uses the term "ConCom debt" to refer to the debt represented by the Converts' Committee (i.e., that of the Subordinated Debenture Holders), and the term "BondCom debt" to refer to that of the Senior Debt Holders.

3 The Joint Stock Companies Arrangement Act, 1870.

4 A second secured creditor with superior voting power was separated from a first secured creditor for voting purposes, in order prevent the former from utilising its superior voting strength to adversely affect the latter's prior security position.

5 The court refused to allow subsequent mortgagees to vote in the same class as a first mortgagee because in the circumstances the subsequent mortgagees would be able to use their voting power to destroy the priority rights and security of the first mortgagee.

6 Borins J., as he then was, warned against the dangers of "excessive fragmentation" and of creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power."

7 Montgomery J. declined to grant a separate classification to a minority group of creditors who would use that classification to extract benefits to which it was not otherwise entitled.

TAB 7

NBD Bank, Canada v. Dofasco Inc. et al.*
[Indexed as: NBD Bank, Canada v. Dofasco Inc.]

46 O.R. (3d) 514

[1999] O.J. No. 4749

Docket Nos. C27414 and C27152

Court of Appeal for Ontario

Krever, Carthy and Rosenberg JJ.A.

December 15, 1999

*Application for leave to appeal to the Supreme Court of Canada was dismissed with costs April 6, 2000 (McLachlin C.J., Iacobucci and Major JJ.).

Torts -- Negligent misrepresentation -- Company's Vice-President (Finance) making misrepresentations to Bank about company's financial state which induced Bank to fund cheques totalling $4 million U.S. -- Officer of company's parent affirming those misrepresentations -- Parent company having duty of care to Bank -- Parent company liable for misrepresentations of its officer -- Company's Vice-President owing duty of care to Bank -- Vice-President personally liable for negligent misrepresentation -- Vice-President could not escape personal liability for acts performed for company's benefit as his conduct independently tortious -- Bank could not sue company for negligent misrepresentation as result of arrangement under Companies' Creditors Arrangement Act -- Action against company's Vice-President would not undermine or subvert purposes of Act -- Imposition of personal liability on Vice-President not contrary to public policy -- Section 8 of Statute of Frauds not applying to negligent misrepresentation -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Statute of Frauds, R.S.O. 1990, c. S.19, s. 8.

The respondent Bank funded cheques totalling approximately $4 million U.S. in accordance with a credit facility given by the Bank to A Ltd., a wholly owned subsidiary of D Inc., at a time when A Ltd. was in serious financial difficulty. A Ltd. had a U.S. subsidiary, C Co. It was proposing to sell C Co. in 1991. The sale would provide necessary working capital for A Ltd. and was critical to any successful restructuring. The $4 million cheques included the C Co. payroll. The defendant M was A Ltd.'s Vice-President (Finance), Secretary and Treasurer. He dealt with H, a vice-president of the Bank responsible for the A Ltd. account. Before the Bank funded the cheques in question, H expressed some concerns about the Bank's status as A Ltd.'s only unsecured creditor. In a conversation with H on January 10, 1991, M stated that its U.S. accounts receivable were unencumbered and that he could give the Bank those receivables as security. He stated that there were about $2 to $3 million in receivables but that these we re going to increase as A Ltd. ramped up following a lengthy strike. He said that the proceeds of the C Co. sale could be used to pay out the respondent. H set out the substance of that conversation in a letter and faxed a copy to M and to N, an official at D Inc. On January 11, 1991, H spoke to N, who said that he had reviewed the contents of the letter and that it "sounded reasonable". On January 22, D Inc.'s board of directors decided not to extend any further financial support to A Ltd. and to write off its

equity interest in A Ltd. On the same day, A Ltd.'s board decided to pursue a financial restructuring. On January 30, the Bank made a demand of A Ltd. on the facility. A Ltd. did not respond. On June 1, 1992, a court-ordered arrangement was entered into under the Companies' Creditors Arrangement Act. As a result of the restructuring, the Bank suffered a significant loss and was barred from bringing an action for misrepresentation against A Ltd. itself. The Bank brought an action for damages f or negligent misrepresentation against D Inc., N and M.

The trial judge found that M made the following misrepresentations: he stated on January 4, 1991 that A Ltd. was having short term cash problems due to the ramping up after the strike; he promised to supply cash flow statements (wrongly implying that the cash flow statements would support the short term ramping up); he stated on January 10 that A Ltd.'s line of credit with the Royal Bank had been secured for about ten years, when in fact the security had only been taken in June 1990; he stated that A Ltd.'s U.S. accounts receivable were not pledged and were available as security to the Bank when, in fact, all the receivables, including the U.S. accounts, were pledged to the Royal Bank; and he stated that the Bank's loan position would be paid out upon the sale of C Co., when he knew that the truth of this representation depended upon A Ltd. still being an operating, viable entity in late February or March and in control of its assets, and knew that A Ltd. could be insolvent by January 22, 1991. D Inc.'s lia bility to the Bank turned on the representations made by N in his conversation with H on January 11, 1991. The trial judge found that N affirmed the contents of the January 10 letter knowing, inter alia, that the receivables were already pledged to the Royal Bank. D Inc. and M were found jointly and severally liable to the Bank for negligent misrepresentation. They appealed.

Held, the appeal should be dismissed.

Absent fraud, deceit, dishonesty or want of authority, it is rare for officers of companies to be held personally liable for actions ostensibly carried out under a corporate name unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company. In this case, M's actions were themselves tortious. Accordingly, he could be held personally liable for acts that he performed in his role as an officer of A Ltd. and for the benefit of A Ltd.

There was a sufficiently close relationship between M and the Bank so that, in the reasonable contemplation of M, carelessness on his part might cause damage to the Bank. M was L Ltd.'s Vice-President (Finance), Secretary and Treasurer. He was the Bank's contact at A Ltd. He held himself out as capable of making decisions on A Ltd.'s behalf as it related to satisfying the Bank's concerns about its lack of security. He would reasonably know, and did in fact know, that H and the Bank trusted him and would accept and rely upon what he said to them. Reliance by the Bank was reasonable. M owed a prima facie duty of care to the Bank.

While the Bank was barred from bringing an action against A Ltd. for the misrepresentations by its officer M, it would not subvert or undermine the purposes of the Act to permit the Bank to pursue the same cause of action against M personally. In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the Act and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". It would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.

By his own conduct M put the Bank in a vulnerable position and undermined the effectiveness of the safeguards which existed to protect it. In those circumstances, there was no policy reason for immunizing M from the consequences of his negligent misrepresentations on the basis that the Bank did

not take any security for the lending facility and accepted the risk of dealing with a corporation enjoying limited liability.

D Inc. also owed a duty of care to the Bank. D Inc. had stepped into the shoes of A Ltd. for the purposes of daily cash management, the very matter for which the credit facility was available. There was a sufficiently close relationship between D Inc. and the Bank that, in the reasonable contemplation of D Inc., carelessness on its part might cause damage to the Bank. This was particularly so given that the Bank was the only bank that did not have security. There were no policy grounds to negate or limit the scope of the duty owed to the Bank.

The trial judge did not place a duty on D Inc. to fully disclose A Ltd.'s true financial position, as if it were in a fiduciary relationship with the Bank. He simply found that there was a duty in the circumstances to disclose highly relevant information as to the risks of lending the $4 million.

The Bank's claim was not barred by s. 8 of the Statute of Frauds, as s. 8 does not apply to negligent misrepresentation.

Anns v. Merton London Borough Council, [1978] A.C. 728, [1977] 2 W.L.R. 1024, 121 Sol. Jo. 377, 75 L.G.R. 555 (H.L.); Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd., [1993] 3 S.C.R. 206, 83 B.C.L.R. (2d) 145, 107 D.L.R. (4th) 169, 157 N.R. 241, [1993] 8 W.W.R. 129, 11 B.L.R. (2d) 101, 17 C.C.L.T. (2d) 101; Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, 115 Man. R. (2d) 241, 146 D.L.R. (4th) 577, 211 N.R. 352, 139 W.A.C. 241, [1997] 8 W.W.R. 80, 31 B.L.R. (2d) 147, 35 C.C.L.T. (2d) 115; London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, 73 B.C.L.R. (2d) 1, 97 D.L.R. (4th) 261, 143 N.R. 1, [1993] 1 W.W.R. 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1, consd

Other cases referred to

ADGA Systems International Ltd. v. Valcom Ltd. (1999), 43 O.R. (3d) 101, 168 D.L.R. (4th) 351, 41 B.L.R. (2d) 157, 39 C.C.E.L. (2d) 163, 44 C.C.L.T. (2d) 174 (C.A.); Anderson Lumber Co. v. Canadian Conifer Ltd. (1977), 4 A.R. 292, 77 D.L.R. (3d) 126, [1977] 5 W.W.R. 41, 25 C.B.R. 35 (C.A.); Banbury v. Bank of Montreal, [1918] A.C. 626, [1918-19] All E.R. Rep. 1, 87 L.J.K.B. 1158, 119 L.T. 446, 34 T.L.R. 518, 62 Sol. Jo. 665 (H.L.); Barclay Construction Corp. v. Bank of Montreal (1989), 41 B.C.L.R. (2d) 239, 65 D.L.R. (4th) 213, [1990] 2 W.W.R. 489, 45 B.L.R. 282 (C.A.); Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, 75 N.S.R. (2d) 109, 31 D.L.R. (4th) 481, 69 N.R. 321, 86 A.P.R. 109, 34 B.L.R. 187, 37 C.C.L.T. 117, 42 R.P.R. 161 (sub nom. Central & Eastern Trust Co. v. Rafuse); Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, 41 O.A.C. 282, 1 C.B.R. (3d) 101 (C.A.) (sub nom. Nova Metal Products v. Comiskey); Haig v. Bamford, [1977] 1 S.C.R. 466, 72 D.L.R. (3d) 68, 9 N.R. 43, [1976] 3 W.W.R. 331, 27 C.P.R. (2d) 149; Inter-City Express Ltd. v. Toronto-Dominion Bank (1976), 66 D.L.R. (3d) 754 (B.C.S.C.); Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, 66 B.C.L.R. 273, 10 D.L.R. (4th) 641, 54 N.R. 1, [1984] 5 W.W.R. 1, 29 C.C.L.T. 97, 26 M.P.L.R. 81, 26 M.P.L.R. 81; Kripps v. Touche Ross & Co. (1997), 33 B.C.L.R. (3d) 254, 89 B.C.A.C. 288, 35 C.C.L.T. (2d) 60, [1997] 6 W.W.R. 421 (C.A.); Meditrust Healthcare Inc. v. Shoppers Drug Mart, [1999] O.J. No. 3243 (C.A.); Queen v. Cognos Inc., [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626, 147 N.R. 169, 45 C.C.E.L. 153, 14 C.C.L.T. (2d) 113, 93 C.L.L.C. 14,019; Said v. Butt, [1920] 3 K.B. 497, [1920] All E.R. Rep. 232, 90 L.J.K.B. 239, 124 L.T. 413, 36 T.L.R. 762; ScotiaMcLeod Inc. v. Peoples Jewellers Ltd. (1995), 26 O.R. (3d) 481, 129 D.L.R. (4th) 711 (C.A.); W.B. Anderson & Sons Ltd. v. Rhodes (Liverpool), Ltd.[cf1], [1967] 2 All E.R. 850 (H.C.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 50(14)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2)
Statute of Frauds, R.S.O. 1990, c. S.19, s. 8

Authorities referred to

The 2000 Annotated Bankruptcy and Insolvency Act, Houlden and Morawetz, eds. (Toronto: Carswell, 1999), p. 192
Fleming, The Law of Torts, 8th ed. (Sydney, Australia: Law Book Co., 1992), p. 639

APPEAL from a judgment of Crane J. (1997), 34 B.L.R. (2d) 209 (Ont. Gen. Div.) for the plaintiff in an action for damages for negligent misrepresentation.

Michael E. Barrack and Glynnis P. Burt, for appellant, James T. Melville.
Jeffrey S. Leon and David F. O'Connor, for appellant, Dofasco Inc.
Thomas J. Corbett and K. Daniel Reason, for respondent (appellant by cross-appeal), NBD Bank, Canada.

The judgment of the court was delivered by

[1] **ROSENBERG J.A.**: -- The appellants Dofasco Inc. and James T. Melville appeal from the judgment of Crane J. [reported (1997), 34 B.L.R. (2d) 209] finding them jointly and severally liable to the respondent NBD Bank, Canada in the amount of $1,984,945.27 U.S. for negligent misrepresentation. The appellants raise a number of factual and legal issues that will require a detailed summary of the facts. The essential issues in the litigation, however, concern the legal effect of several telephone calls that occurred on January 10 and 11, 1991 and a letter that was sent on January 10, 1991. These communications led to a decision by the respondent to fund cheques totalling approximately $4 million U.S. in accordance with a $20 million credit facility given by the respondent to Algoma Steel Corporation Limited. At the time, Algoma, a wholly owned subsidiary of Dofasco, was in serious financial difficulty. The trial judge found that Percival Nicholas, an official at Dofasco, and James Melville, Algoma's Vice-President (Finance), misled the respondent as to Algoma's true financial state. As a result of these misleading representations the respondent agreed to lend the requested $4 million. Two weeks later, Algoma and Dofasco announced that Algoma was insolvent. Algoma was subsequently able to restructure under the auspices of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA") but the respondent suffered a significant loss. For the reasons that follow, I would dismiss the appeals. The respondent cross-appeals on the basis that, inter alia, the trial judge erred in finding that the tort of deceit was not made out. In view of my conclusions on the appeals, it is unnecessary to deal with the cross-appeal.

THE FACTS

THE PERSONS INVOLVED

[2] The respondent, NBD Bank, Canada, is a Canadian chartered bank and is a subsidiary of NBD Bank N.A., which is based in the United States. The original agreement between Algoma and the respondent was made in October 1987. That agreement was amended from time to time. The principal witness for the respondent was Jeremy Hynes. He joined the Bank as second vice-president in September 1990 and immediately became responsible for the Algoma account. The allegedly negligent misrepresentations were made to Mr. Hynes. Mr. Hynes reported to the respondent's president, William Schmid.

[3] Algoma was Canada's third largest steel producer and was based in Sault Ste. Marie. The appellant James Melville began working for Algoma as a teenager. After finishing university and law school he returned to Sault Ste. Marie and joined Algoma as a solicitor. In 1990 and 1991 he was Algoma's Vice-President (Finance), Secretary and Treasurer. He was the person at Algoma with whom Mr. Hynes dealt.

[4] Algoma had a United States subsidiary, Cannelton Coal Co. It was proposing to sell Cannelton in 1991. This sale would provide necessary working capital for Algoma and was critical to any successful restructuring. The alleged negligent misrepresentations concerned the funding of cheques in the amount of $4 million, which included the Cannelton payroll.

[5] The appellant Dofasco acquired ownership of the shares in Algoma in August 1988. It had invested $600 million in Algoma, but by late 1990 that investment was in peril. Initially, Algoma operated autonomously, with operations and overall responsibility left to the management and the board of Algoma. However, in July 1990, the operation of the daily cash management function for Algoma was transferred to Dofasco. John Rule, a Dofasco treasury analyst, assumed responsibility for netting out the daily payables and receivables for Algoma and its subsidiaries and, as necessary, accessing the appropriate bank facilities, including the facility at the respondent. Rule had responsibility for contacting the traders in the respondent's trading room. Rule was named as a defendant. The trial judge dismissed the claim against him.

[6] Rule's superior was Percival Nicholas, the manager of cash and banking in Dofasco's treasury department. The trial judge found that Nicholas made negligent misrepresentations to Mr. Hynes. Dofasco accepted that it was vicariously liable for the actions of Nicholas.[1] at end of document] Nicholas reported to Allen Root, the Dofasco treasurer, who in turn reported to Dofasco's vice-president finance, Bill Solski.

The Credit Facility

[7] The initial credit facility between the respondent and Algoma was taken out in 1987. That facility was unsecured, uncommitted, and subject to payment on demand. The facility was used primarily to fund, on a daily basis, cash flow requirements of Algoma's U.S. accounts with NBD Bank, N.A. Thus, if the total payables exceeded the total receivables in the U.S. accounts on any day, Algoma would borrow U.S. dollars from the respondent, which would be transferred to NBD Bank, N.A. to cover the deficiency. Paragraph (e) of the facility originally provided that Algoma was to maintain unused portions of other credit facilities with other banks in amounts sufficient to repay any advance made by the respondent. In November 1988, the respondent agreed to remove para. (e) on condition that Algoma would notify the respondent if the other available credit facilities fell below $20 million Cdn.

[8] The mechanics for accessing the facility are important. The facility contemplated that Algoma would notify the respondent by telephone that it wished to borrow money. Under the facility, the amount of the loan and the interest rate were to be agreed upon by the respondent and Algoma's assistant treasurer and its supervisor of cash operations. In 1990, Mr. Hynes had the authority to approve the loan on behalf of the respondent. In the normal course, other persons handled the day-to-day management of the facility.

[9] As indicated, in July 1990, Dofasco and Algoma integrated their treasury functions at Dofasco. Accordingly, Dofasco employees, in particular John Rule, became responsible for dealing with the respondent on a day-to-day basis. The trial judge found that while Mr. Rule actually dealt with one of the traders in the respondent's trading room, the loan had to be approved by the loan officer, Mr. Hynes. The appellants challenge this finding and it forms one of the grounds of appeal. In short, the appellants

argue that even if there were negligent misrepresentations, they did not result in any loss because the loans that caused the loss were made before any misrepresentations, as a result of the communications between Mr. Rule and the traders. I will return to the facts in support of this submission below when I deal in detail with the events of January 10 and 11, 1991.

[10] Dofasco did not otherwise have a direct customer/bank relationship with the respondent. It did have a banking relationship with the respondent's parent company, NBD Bank N.A. There is some suggestion in the evidence that NBD Bank N.A. was anxious to ensure that relations between Algoma and the respondent did not adversely affect the relationship between the two parent companies. An underlying theory of the defence was that the decision to advance the $4 million was made so as not to prejudice the relationship between the two parent companies and that Mr. Hynes was not seeking information or assurances from Dofasco officials in January 1990. Rather, he was merely keeping them "in the loop" at the request of NBD Bank N.A.

The Strike

[11] In mid-1990, Algoma's employees went on strike. The strike lasted for 112 days and was the longest strike in the company's history. Algoma, which was already in a weak financial condition, was further weakened by the strike. Even after the strike was settled (November 21, 1990), Algoma would experience short-term financing difficulties during the "ramping-up" period. At this time, the company had to pay the full cost of producing steel and had no choice but to wait the normal course of payment of 60 to 90 days before it received payment. Thus, in late 1990, Algoma had a need for cash to meet its fixed overhead costs and the costs of production following the settlement of the strike.

The Fall of 1990

[12] However, the short-term problems caused by the ramping-up after the strike were not Algoma's only problems. Its income had been falling steadily since 1988 while its capital expenditures had been increasing. In early 1989, Dofasco had loaned Algoma $100 million (unsecured). By 1990, the steel industry had moved into a downturn. The weakest companies, like Algoma, would be most affected by these adverse economic conditions. In October 1990, Dofasco initiated a project under the code name "Liz Dodge" for "dislodging Algoma from Dofasco". In November 1990, Dofasco's chief financial officer reported to the Dofasco board that Algoma was in very serious financial trouble and that by continuing to support Algoma, Dofasco itself would be put at risk. The immediate cause of concern was a request by Algoma to increase its credit facilities with its other bankers (i.e., other than the respondent). The syndicate of bankers, led by the Royal Bank, was willing to give Algoma a new $250 million facility only if Dofasco would provide some form of guarantee. Algoma needed the increase in the credit facility in part to fund $122 million in debentures that were coming due on November 30, 1990. Dofasco refused to guarantee the loan. Instead, Dofasco purchased the debentures itself. The trial judge found that this "desperate" purchase was to give the Dofasco Board sufficient time to establish study teams on the Algoma situation to present options to the Dofasco Board at the end of January 1991. The work of these committees, including the Liz Dodge committee, took on a new urgency as a result of the November developments. The committees included experts in insolvency.

[13] The trial judge found that the appellants knew that from November 1990, standing alone, Algoma was no longer solvent. They recognized that Algoma had to be restructured if it were to survive.

[14] The next crisis for Algoma was a $32.5 million milestone payment upon the existing syndicated bank credit facility due on December 31, 1990. Dofasco sought to defer this payment. This would require an amendment to the Royal Bank facility. Mr. Solski and Mr. Nicholas of Dofasco met with the Royal Bank and in late December, the banks agreed to the postponement. At a Dofasco Board meeting in December, a presentation was made concerning reorganization of Algoma, including a discussion of

the CCAA. Mr. Melville was present for this presentation.

January 1991

[15] On January 3, 1991, Mr. Hynes called Mr. Nicholas because he was concerned that the failure to pay the $32.5 million to the Royal Bank, which had been publicly announced, was a default. Mr. Nicholas told him that the payment was not defaulted but deferred to provide a window to Algoma for the purpose of ramping-up after the strike. Nicholas also told Hynes that Dofasco was not putting more money into Algoma and that the respondent should do whatever it had to do to get comfortable with Algoma as a stand-alone credit risk. He referred Hynes to the appellant Melville for any further inquiries.

[16] The following day, Hynes spoke to Melville. Melville confirmed the deferral of the $32.5 million. He also said that Algoma had $60 million in available working credit lines, but that Algoma would need $80 million to ramp up after the strike. He said that they would be back to normal operations at the end of March. In his evidence, Mr. Melville agreed that this statement about available credit was misleading and incorrect. It would seem that Algoma was now in breach of the terms of the facility by not informing the respondent that available credit facilities had fallen below $20 million.

[17] Mr. Melville also promised to provide statements of cash flow analysis to show how Algoma would be dealing with the demands on cash flow. The trial judge rejected Melville's evidence that he only promised to provide an analysis of how Algoma intended to use the moneys borrowed from the respondent. The trial judge found that Melville knew that if he provided the cash flow forecasts to Mr. Hynes the loan facility with the respondent would be cancelled. The trial judge found that there was an implied misrepresentation to the effect that the cash flow statements would support the representation that Algoma's problems were due to the short-term ramping-up problem. In any event, Mr. Melville did not provide a cash flow statement, nor a statement of the estimated cash activity of the facility with the respondent at any time. The trial judge also referred to minutes of an Algoma Board meeting of January 7 in which there was a discussion led by Mr. Melville on a six-month cash flow forecast which indicated that a shortfall, in comparison to existing available credit lines, would occur in early February.

[18] There was other evidence that the cash flow problem was even more desperate. At a meeting of the Liz Dodge committee on January 7, one of the members noted that unless Algoma could obtain access to the credit line with the respondent or sell pellets to Dofasco, Algoma would run out of cash that week. Mr. Nicholas had previously noted in his diary that the proposed sale of the pellets to Dofasco could be attacked by creditors in the future as an improper preference. Mr. Nicholas was now working in his day-to-day cash management function for Algoma in an atmosphere of crisis. Cash flow estimates that were normally prepared every month were now prepared every day.

[19] Then, on January 9, Mr. Hynes learned from a colleague that the Royal Bank line of credit was secured. In the result, the respondent was now the only unsecured lender to Algoma. Mr. Hynes' superior instructed him to limit the facility to the current level, which on that date stood at $700,000 U.S. Mr. Hynes did not immediately pass on this information to the appellants.

January 10 and 11, 1991

[20] On January 10, Mr. Rule of Dofasco called the respondent's trading room and requested a loan of $4 million to cover cheques, including the Cannelton Coal payroll. Dishonouring of these cheques could have impaired the sale of Cannelton, which was important to any restructuring of Algoma. The trading room conversations are tape-recorded and transcripts of the relevant conversations were produced at the trial. As indicated, it is the position of the appellants that the loans were made during these conversations, before the representations by Nicholas and Melville that the trial judge found to be

misleading. The substance of the conversation between Mr. Rule and the trader at 10:00 a.m. on January 10 was as follows. Mr. Rule made the request for $4 million in addition to the $700,000 outstanding. The trader replied, "Okay that shall be done and I think it looks as though its going to be 7 + 7/8". The respondent's trader then relayed the request to Mr. Hynes. Mr. Hynes conferred with his superior and they decided that the respondent would not make the loan. Fifteen minutes after the trading-room conversation, Hynes left an urgent message for Nicholas. Nicholas returned the call with Mr. Rule present to participate by way of speaker telephone. Hynes said that there was no alternative but to return the cheques since the respondent would not make the loan. Nicholas said either, "you can't bounce cheques" or "hold on, let's not be rash, something can be worked out". Nicholas said Hynes should speak to Melville.

[21] Mr. Hynes put in a call to Mr. Melville. The call was returned in the mid-afternoon on January 10. Melville was confrontational and demanded that the respondent make the $4 million loan. Hynes told Melville of the respondent's concern because they had just learned about the Royal Bank security. Melville told Hynes that Royal Bank had been secured for ten years. This was only partially true. From time to time the line of credit had been secured. However, more recently the Royal Bank had taken security on the line of credit in its annual credit review, before the strike. After the conversation, Hynes again consulted with his superiors and the decision not to fund the loan was confirmed. Hynes was told to inform Dofasco of the decision.

[22] Hynes called Nicholas, who urged him to speak to Melville again because Melville was "reasonable". Nicholas also told Hynes that the cheques could not be funded elsewhere because Algoma did not have sufficient margins available under the Royal Bank facility to permit more borrowing. It would seem that this is the first time that the respondent learned that Algoma was in breach of the terms of the facility. Nicholas urged Hynes to call Melville to see if something could be worked out.

[23] Mr. Hynes again called Mr. Melville. The trial judge found that the most serious misrepresentations were made during this conversation. There were conflicting versions of this conversation. The trial judge accepted Mr. Hynes' evidence over that of Mr. Melville. Mr. Hynes returned to the issue that the Royal Bank had security. Mr. Melville indicated that the U.S. accounts were not encumbered and that if the respondent's discomfort was that it was the only unsecured lender, he could give it the U.S. accounts receivable. He said that there were about $2 to $3 million receivables but these were going to increase as Algoma ramped up after the strike. They also talked about the cash flows that had been promised six days earlier regarding the ramp-up as Algoma's operations returned to normal. Melville also said that he had the proceeds from the Cannelton sale coming in around March 1 and that could be used to pay out the respondent.

[24] Following the conversation, Mr. Hynes typed out a letter summarizing the conversation and faxed a copy to Mr. Melville at Algoma and Mr. Nicholas at Dofasco. The letter was as follows:

> This confirms and is further to our conversation of January 10, 1991 regarding the captioned unsecured facilities. The Bank originally provided its uncommitted facilities in return for an undertaking from Algoma that it would maintain sufficient unutilized credit facilities from its other banks to retire outstandings under NBD Bank's facilities upon request. In letters exchanged August 15, 1988 and November 4, 1988 this was modified to an undertaking by Algoma to advise the Bank if the aforementioned unutilized facilities fell below Cdn. $20,000,000. The intent hereunder was clearly to ensure that NBD Bank's unsecured position could be funded from an alternative source at any time.
>
> Today's conversations with you, John Rule and Perc Nicholas at Dofasco indicate that this reserve is not available to fund cheques written by Algoma against its U.S. Dollar account

at NBD Bank, N.A. in Detroit. This places the Bank in the unforeseen position of choosing whether to return Algoma cheques to cap its exposure at current levels. In conversations last week, NBD (assuming the other unutilized facilities existed) expressed its desire to limit Algoma's use of its facilities to U.S. $8,000,000 until Algoma could provide information regarding its credit needs and cash inflows for the first quarter of 1991.

Although this information has not been received and it appears unutilized alternative funds to clear cheques drawn on NBD are not available, the Bank wants to help Algoma. In order to clear the cheques outstanding, could you please provide no later than 12:00 p.m. Friday, January 11, 1991 the following:

1. a list of the cheques (or cheque groups like payroll) outstanding and the date(s) they were written;
2. confirmation that no further cheques are being drawn on NBD until a mutually-satisfactory line of credit has been arranged;
3. a statement of the amount of outstanding receivables available to reduce outstandings, along with your undertaking that these lock-box proceeds will be dedicated to reducing NBD's exposure from its peak not to exceed U.S. $8,000,000;
4. your estimate of the U.S. receivables available going forward which are not pledged to any other lender and Algoma is willing to pledge to secure a mutually-satisfactory credit facility from NBD;
5. your undertaking that, if NBD temporarily provides advances to Algoma that exceed the amount of the mutually-satisfactory credit facility to be arranged, Algoma will first apply cash proceeds from the sale of its U.S. coal assets to repay said excess advances. If no facility can be agreed, the aforementioned proceeds will first be used to retire all NBD's exposure.

The preceding request does not materially deviate from the information outlined last week to assist NBD in accommodating Algoma's first quarter cash needs. It is NBD's desire to meet Algoma's banking needs during this difficult period of restructuring, if this can be accomplished without exposing the Bank to an unsecured, uncovered position without a highly probable source of repayment. NBD trusts that Algoma understands this and will provide it with the assurances needed to continue our good relationship.

Please provide the requested reply as soon as possible. Thank you for your cooperation in this matter.

(Emphasis added)

[25] The trial judge found several misrepresentations by Mr. Melville in this conversation and as recorded in the letter. The U.S. receivables were not available as security to the respondent. Melville knew that they had been pledged to the Royal Bank. The representation about the Cannelton Coal proceeds was misleading since it was dependent upon Algoma still being an operating and viable entity in control of its assets. Melville knew that as early as January 22, 1991, Algoma could be declared insolvent.

[26] At approximately 10:00 a.m. on January 11, Mr. Rule telephoned the respondent's trading room and spoke to Peter Evans, the respondent's senior vice-president, money market and chief trader. Dofasco relies on this conversation, because it precedes the communication between Mr. Hynes and Mr. Nicholas that was the basis of Dofasco's liability. Mr. Rule asked the trader if they can "roll the 4.7

today". Mr. Evans replied that he did not think it was a problem but he wanted to talk to Mr. Hynes because he was aware that there had been a lot of activity the previous night and he wasn't sure if Mr. Hynes had "resolved his problem". When Evans came back on the telephone he said the following:

> Here now, apparently what happened as a result of these conversations we have rolled the funds. The thing is he is going to ask for prime on it so it would go to 9-1/2%.
>
> . . . . .
>
> Okay 4.7 for three days and then I will get Jerry [Hynes] to speak to all the interested parties, obviously resolve what ever his concerns are with them.

[27] Mr. Rule replied "okay". Mr. Hynes testified and confirmed that Mr. Evans did talk to him and he had asked for the higher interest rate. Mr. Hynes spoke to Mr. Nicholas on the morning of January 11, sometime after this conversation. This conversation formed the basis of liability of the appellant, Dofasco. Hynes asked Nicholas if he had seen the letter. He said that he had and they reviewed its contents. Nicholas said that, "it sounded reasonable to me" and, "Is this okay with Jamie [Melville]?" Hynes testified that at that point it "looked like a done deal", the only thing left was for Melville to get back to him as required in the letter. He told Nicholas that the cheques would clear. The trial judge found that as a result of this conversation Hynes waived the noon deadline set out in the letter.

[28] Later in the day, Mr. Hynes received a letter from Mr. Melville. That letter merely confirmed that Algoma would not write any further cheques on the credit facility until a new or amended facility had been approved and Melville's understanding that the amount outstanding against the facility was approximately $6.4 million. The trial judge characterized this letter as "disingenuous". Mr. Hynes was concerned that this was not a response to the five points in his January 10 letter and he tried to get hold of Melville. They eventually talked around 4:40 p.m. and the conversation lasted about 20 minutes. At the end of the conversation, Mr. Hynes was satisfied that he had a deal. Melville repeated the representations about the U.S. receivables. He somewhat modified the representation about the Cannelton Coal sale, indicating that in the event the U.S. receivables were not sufficient, the Cannelton proceeds would be available to take the respondent out, subject to approval by the Board. Mr. Hynes believed tha t this agreement would be documented within the next three weeks to make the respondent a secured lender. Mr. Hynes took no steps to dishonour the cheques after this conversation. He testified that had he been told of Algoma's potential insolvency, the respondent would not have cleared the cheques.

[29] Mr. Hynes spoke to Mr. Melville the next week about receiving the cash flow estimates. For the first time, Melville stated that he could not give the respondent the U.S. receivables without Board approval, but the Board would be meeting in two weeks to consider the new arrangement. Mr. Hynes made several attempts to get hold of Melville over the next few days, but was unsuccessful. In the meantime, he prepared the necessary paperwork that Melville would need to present to the Algoma Board.

[30] On January 22, Dofasco's Board decided not to extend any further financial support to Algoma and to write off its equity interest in Algoma. On the same day, Algoma's Board decided to pursue a financial restructuring. On January 23, Melville sent Mr. Hynes a press release indicating that Algoma was seeking to restructure its debt and that "all reasonable forecasts show the company is unable to produce adequate cash flow to support the heavy debt load, even with the contemplated sale of Cannelton [Coal]". Mr. Hynes had never been provided with the promised cash flow forecasts. When he received the press release, Mr. Hynes tried to get hold of Nicholas. Nicholas referred him back to Melville. By this time he was very angry. He felt that he had been negotiating in good faith with Algoma

and that this turn of events was "inappropriate".

[31] On January 30, the respondent made a demand of Algoma on the facility. Algoma did not respond. On June 1, 1992, a court-ordered arrangement was entered into under the CCAA, whereby Algoma was restructured and emerged under new ownership. As a result of the restructuring, the respondent received approximately $1.6 million U.S., resulting in a net loss of about $2 million U.S. Under the CCAA arrangement, the respondent was barred from bringing an action for misrepresentation against Algoma itself.

THE TRIAL JUDGE'S REASONS

LIABILITY OF MR. MELVILLE

[32] I have referred to some of the findings made by the trial judge in relation to the appellant Mr. Melville. To summarize, the trial judge found the following misrepresentations by Melville. I have placed in square brackets a very brief summary of the findings by the trial judge as to the true state of affairs.

January 4, 1991:

1. Algoma was having short term cash problems due to the "ramping up" after the strike. [Implying that this was the only problem when there was a longer term structural problem.]
2. The promise to supply cash flow statements. [Wrongly implying that the cash flow statements would support the short term "ramping up" problem.]

January 10, 1991:

1. The Royal Bank line of credit had been secured for about 10 years. [In fact, the security had only been taken in June 1990.]
2. Algoma's U.S. accounts receivable were not pledged and available as security to the respondent. [In fact, all the receivables, including the U.S. accounts, were pledged to the Royal Bank.]
3. The respondent's loan position would be paid out upon the sale of Cannelton Coal. [The truth of this representation depended upon Algoma still being an operating, viable entity in late February or March and in control of its assets. Melville was not in a position to make this representation since he knew Algoma could be insolvent by January 22, 1991 after the meetings of the Dofasco and Algoma boards. Melville did not disclose this fact to Hynes.]

Liability of Dofasco

[33] Dofasco's liability turns on the representations made by Mr. Nicholas in his conversation with Mr. Hynes on the morning of January 11, 1991. The trial judge found that Mr. Nicholas affirmed the contents of the January 10 letter knowing, inter alia, that the receivables were already pledged to the Royal Bank. The trial judge made this finding, in part, because of the context set by earlier conversations with Mr. Hynes that would have led him to believe that Algoma did have something to offer the respondent to give it sufficient comfort to make the $4 million loan. In addition, the trial judge found that in the circumstances, the only non-negligent response Mr. Nicholas could make to Mr. Hynes' inquiries was to expressly disclaim. However, since he found a positive misrepresentation it is unnecessary to determine whether the failure to disclaim or disclose the true state of Algoma's financial state of affairs would alone suffice to render Dofasco liable.

THE GROUNDS OF APPEAL

[34] Mr. Melville and Dofasco raised many grounds of appeal. Some of them are common to the two appellants. Where possible I have grouped the common grounds together. I intend to deal with the grounds of appeal in the following order:

1. When the loans were made -- the indoor management rule

    (a) As applied to Mr. Melville
    (b) As applied to Dofasco

2. Mr. Melville's personal liability
3. The duty of care with respect to negligent misrepresentation

    (a) As applied to Mr. Melville

        (i) Sufficiently close or "special" relationship (the prima facie duty of care)
        (ii) Policy reasons for not attributing personal liability

    (b) As applied to Dofasco

4. The standard of care imposed on Dofasco
5. The Statute of Frauds
6. Misrepresentations by Mr. Melville
7. Negligent misrepresentation by Mr. Nicholas (Dofasco's liability)

ANALYSIS

1. When the Loans Were Made -- The Indoor Management Rule

    (a) As applied to Mr. Melville

[35] Counsel for the appellant Melville submits that although the trial judge found misrepresentations by Melville on January 4, 1991 concerning the cash flow estimates, the misrepresentations, if any, that caused the loss to the respondent were Mr. Melville's statements to Mr. Hynes on January 10 and 11. Counsel submits that even these conversations did not cause any loss to the respondent, because the loans were made prior to the misrepresentations.

[36] I am prepared to deal with this submission on the basis that Mr. Melville would not have been found liable based solely on the January 4 conversation. In my view, this ground of appeal cannot succeed. The trial judge dealt with this issue only as it applies to the January 10 conversation. That was sufficient to find liability on Melville's behalf. It was not sufficient for dealing with the appellant Dofasco and I will deal with that below. With respect to the January 10 trading room conversations, the trial judge made the following findings. The trading room telephone conversations did not effect the actual loan. Since it was a term of the facility that it was uncommitted, a loan officer such as Mr. Hynes would have to approve the loan. The procedure in the trading room was that when a request for funds was received, the trader would quote a rate of interest and determine the duration of the advance. The trader then took this request to the loan officer. Upon the request being approved the internal transfers would be made in the United States to cover the indebtedness in the Algoma account. In this case, when the request for $4 million U.S. was made on January 10, the decision was made not to fund and Mr. Hynes advised Mr. Nicholas a short time later that the respondent required the $4 million to be funded elsewhere. It was after this decision was conveyed first to Mr. Nicholas and then to Mr. Melville that

Mr. Melville made the misrepresentations.

[37] The appellant argues that so far as Algoma was concerned, the loan was completed during the initial trading room conversation and in accordance with the indoor management rule, the respondent cannot set up its own internal procedures as a defence. In my view, that is not what occurred here. Under the terms of the facility between Algoma and the respondent, there was no commitment by the respondent to lend. It was unsecured. Its only protection, as the trial judge observed, was in the assessment of the risk of each advance. This was not something that Algoma could reasonably believe would be left to someone in the trading room. It was open to the trial judge to find that in those circumstances there could be no loan until a loan officer had approved. The subsequent course of events involving Mr. Hynes, Mr. Nicholas and Mr. Melville indicate that everyone understood that the loan had not been funded on January 10.

(b) As applied to Dofasco

[38] While the trial judge did not deal specifically with the trading room conversation on January 11, in my view the indoor management rule had no application. By late January 10, all of the parties were aware that unless Algoma made some satisfactory arrangement with the respondent, the $4 million loan would not be funded and the cheques would be dishonoured. The indoor management rule has no application where the other party has knowledge of the limitation on the authority: Anderson Lumber Co. v. Canadian Conifer Ltd. (1977), 77 D.L.R. (3d) 126, [1977] 5 W.W.R. 41 (Alta. C.A.). Dofasco knew, through Mr. Nicholas, that the loan would not be funded unless Mr. Hynes received a reply to his letter of January 10, by noon on January 11. It may be that Mr. Hynes waived that requirement when he spoke to Mr. Nicholas, received Mr. Nicholas' assurances and told him that the cheques would be cleared. However, that does not assist Dofasco in this case, since by that time Mr. Nicholas had made the statements upon which the trial judge imposed liability on Dofasco.

[39] There is a further problem with this submission by the appellant. At the time of the conversations on the mornings of January 10 and 11, the cheques had not yet cleared. Algoma had breached its agreement with the respondent in that it had not informed the respondent that it no longer had $20 million credit available. Mr. Hynes only learned of this state of affairs on January 10 after the trading room conversation on that date. In any event, as indicated, the essential features of this facility were that it was unsecured, uncommitted, and subject to payment on demand. As late as 5:00 p.m. on January 11, the respondent with some effort could have dishonoured the cheques and thus not suffered any loss. In my view, given the terms of the facility it would have been entitled to do so, even if the loans were made during the trading room conversations on January 10 and 11: see Barclay Construction Corp. v. Bank of Montreal (1989), 41 B.C.L.R. (2d) 239, 65 D.L.R. (4th) 213 (C.A.) and Inter-City Express Ltd. v. Toronto-Dominion Bank (1976), 66 D.L.R. (3d) 754 (B.C.S.C.). The respondent did not make a demand nor dishonour the cheques and thereby continued to extend credit to Algoma because of the representations by Mr. Melville and Mr. Nicholas.

[40] Accordingly, I would not give effect to this ground of appeal in respect of either appellant.

2. Mr. Melville's Personal Liability

[41] Mr. Melville argues that he should not be held personally liable for acts that he performed in his role as an officer of the company and for the benefit of the company. Counsel, in effect, put this submission on two different bases. First, he argues that the respondent should not be permitted to pierce the corporate veil to render Mr. Melville liable for acts done for the benefit of his corporate employer, in accordance with the decision in ScotiaMcLeod Inc. v. Peoples Jewellers Ltd. (1995), 26 O.R. (3d) 481, 129 D.L.R. (4th) 711 (C.A.). Second, he argues that in his individual capacity Mr. Melville did not owe

a duty of care to the respondent. I will deal with this first submission under this heading.

[42] In ScotiaMcLeod, at pp. 490-91, Finlayson J.A. held that absent fraud, deceit, dishonesty or want of authority it is rare for officers of companies to be held personally liable for actions ostensibly carried out under a corporate name "unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company". The short answer to the appellant's submission is that the respondent established to the trial judge's satisfaction that Mr. Melville's actions were themselves tortious. In the subsequent decision of this court in ADGA Systems International Ltd. v. Valcom Ltd. (1999), 43 O.R. (3d) 101, 168 D.L.R. (4th) 351, Carthy J.A. speaking for the court confirmed that the general rule is that officers are liable for their own tortious acts. As he said at p. 107:

> The consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a bona fide manner to the best interests of the company, always subject to the Said v. Butt exception.[2] at end of document]

[43] In Valcom, the plaintiff claimed against a corporate competitor and a director and two employees of that competitor. The action was based on allegations that the competitor raided the plaintiff's employees and caused the plaintiff economic damage. Carthy J.A. held that the action could proceed against the individuals and he concluded with this comment [at p. 113]:

> It is my conclusion that there is no principled basis for protecting the director and employees of Valcom from liability for their alleged conduct on the basis that such conduct was in pursuance of the interests of the corporation. It may be that for policy reasons the law as to the allocation of responsibility for tortious conduct should be adjusted to provide some protection to employees, officers or directors, or all of them, in limited circumstances where, for instance, they are acting in the best interests of the corporation with parties who have voluntarily chosen to accept the ambit of risk of a limited liability company. However, the creation of such a policy should not evolve from the facts of this case where the alleged conduct was intentional and the only relationship between the corporate parties was as competitors. Any such evolution should await facts which are apposite to the policy concerns and should probably be articulated as a definitive extension of the defence in Said v. Butt. Such a development would be in the direction indicated by La Forest J. in his dissenting reasons in London Drugs and thus may have to await further consideration by the Supreme Court.[3] at end of document]

(Emphasis added)

[44] Similarly, I can see no basis for protecting Mr. Melville from liability for his tortious acts towards the respondent simply because he may have been acting in pursuance of the interests of the corporation. If he is to avoid liability, it can only be on the basis that he did not owe a duty of care to the respondent and I turn to that issue now as it affects both of the appellants.

3. The Duty of Care with Respect to Negligent Misrepresentation

(a) As applied to Mr. Melville

[45] The appellant, Melville, argues that he did not owe a duty of care in his personal capacity to the respondent in accordance with the test in Anns v. Merton London Borough Council, [1978] A.C. 728, [1977] 2 W.L.R. 1024 (H.L.). The appellant makes two submissions in this respect. He submits that it was not reasonable or foreseeable that the respondent would be relying on him personally. Second, he

submits that there are policy reasons why personal liability should not be found against him in the circumstances of this case. These submissions track the two parts of the Anns test as summarized by Wilson J. in Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2 at pp. 10-11, 10 D.L.R. (4th) 641:

> (1) is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

[46] In Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165 at pp. 185-86, 146 D.L.R. (4th) 577, the Supreme Court of Canada held that this test applies to negligent misrepresentation. I will deal with the two submissions separately.

(i) Sufficiently close or "special" relationship (the prima facie duty of care)

[47] In Hercules Managements, at pp. 186-87, La Forest J., speaking for the court, referred to this first part of the Anns test as the prima facie duty of care. Determination of whether there was this prima facie duty of care required an inquiry as to whether there could be said to be a relationship of proximity or neighbourhood between the defendant-representer and the plaintiff-representee. He also equated it with what Iacobucci J. referred to as the "special relationship" in the earlier case of Queen v. Cognos Inc., [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626, and held that it subsumed two essential criteria. As he said at p. 188:

> In cases of negligent misrepresentation, the relationship between the plaintiff and the defendant arises through reliance by the plaintiff on the defendant's words. Thus, if "proximity" is meant to distinguish the cases where the defendant has a responsibility to take reasonable care of the plaintiff from those where he or she has no such responsibility, then in negligent misrepresentation cases, it must pertain to some aspect of the relationship of reliance. To my mind, proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J., in Cognos, supra, at p. 110, the plaintiff and the defendant can be said to be in a "spe cial relationship" whenever these two factors inhere.

(Emphasis added)

[48] In my view, there was a special relationship between Mr. Melville and the respondent to meet the first part of the Anns test. Mr. Melville was Algoma's Vice-President (Finance), Secretary and Treasurer. He was the respondent's contact at Algoma. He held himself out as capable of making decisions on Algoma's behalf as it related to satisfying the respondent's concerns about its lack of security. He must have known that carelessness on his part would result in a loss by the respondent. The trial judge found that the appellant "would reasonably know and in fact did know, that Mr. Hynes and his bank trusted him and would accept and rely upon what he said to them". This finding was amply supported by the record. Thus, Mr. Melville ought reasonably to have foreseen that the respondent would rely upon his representations. The first criterion was met. For virtually the same reasons, reliance by the respondent was reasonable. In addition, there was the particular circumstance that on two

occasions, Mr . Nicholas referred Mr. Hynes back to Mr. Melville to try to come to some sort of arrangement that would allow the cheques to clear. The second criterion was also met and thus the first part of the Anns test was met. Mr. Melville owed a prima facie duty of care to the respondent. In the course of argument, counsel framed this part of the Anns test as requiring an inquiry into whether the defendant reasonably relied upon Mr. Melville in his personal capacity. In my view, that kind of inquiry is better considered under the second part of the Anns test, which requires the court to consider whether there are any policy concerns to be taken into account to limit the prima facie duty of care: see Hercules Managements at pp. 190-91.

(ii) Policy reasons for not attributing personal liability

[49] Counsel for the appellant focused most of his argument as to the application of the Anns test on the policy reasons for not attributing personal liability to the appellant. He suggested three reasons why the court should not find that Mr. Melville owed a duty of care to the respondent. Those reasons may be summarized as follows:

I. it is anomalous to hold Mr. Melville personally liable when as a result of the CCAA process, the respondent was barred from pursuing the claim against Algoma;
II. the parties, Algoma and the respondent, had allocated the risk between them by contract, and the court should not impose personal liability when the damage suffered arose out of the very dealings contemplated in the contract;
III. imposition of personal liability in the circumstances of this case would result in indeterminate liability.

[50] I will deal with each of these issues in turn.

I. The impact of the CCAA

[51] Algoma commenced the process under the CCAA on February 18, 1991. The process was a lengthy one and the plan of arrangement was approved by Farley J. in April 1992. The plan had previously been accepted by the overwhelming majority of creditors and others with an interest in Algoma. The plan of arrangement included the following term:

6.03 Releases

> From and after the Effective Date, each Creditor and Shareholder of Algoma prior to the Effective Date (other than Dofasco) will be deemed to forever release Algoma from any and all suits, claims and causes of action that it may have had against Algoma or its directors, officers, employees and advisors.

(Emphasis added)

[52] Thus, the respondent was barred from bringing an action against Algoma for the misrepresentations by its officer, the appellant Melville. Mr. Melville argues that permitting the respondent to pursue the same cause of action against Mr. Melville personally would subvert the CCAA process. He argues by analogy from the holding in London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261. In that case, the defendants, employees of a warehouse company, badly damaged a transformer that the plaintiff had stored with the warehouse company. Under the contract between the plaintiff and the warehouse company the "warehouseman's" liability was limited to $40. It was held that the defendant employees were entitled to take advantage of the limitation of liability clause in the contract of storage between their employer and the plaintiff notwithstanding

there was no privity of contract between the employees and the plaintiff. The court held that privity of co ntract should be relaxed having regard to the particular circumstances of the case, especially the wording of the limitation of liability in the contract. Writing for the majority of the court, Iacobucci J. found that there were sound policy reasons for relaxing the doctrine of privity. In particular, he was concerned that otherwise the plaintiff would be allowed to circumvent or escape the limitation of liability clause to which it had expressly consented. He referred with approval at pp. 441-42 to an excerpt from the reasons of Le Dain J. in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147 at p. 206, 31 D.L.R. (4th) 481:

> A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence.

(Emphasis added)

[53] In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289 at p. 297, 1 C.B.R. (3d) 101, the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

[54] In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors".[4] at end of document] L.W. Houlden and G.B. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.

[55] Finally, I agree with counsel for the respondent that the analogy to London Drugs is flawed. In that case, upholding a strict application of the doctrine of privity of contract would have allowed the plaintiff to circumvent or escape the limitation of liability clause to which it had expressly consented. On January 10 and 11, when the respondent decided to extend credit because of Mr. Melville's misrepresentations, the respondent could not reasonably have contemplated any future limitation on its rights through a CCAA process. To the contrary, because of those misrepresentations, it did not contemplate any reorganization through such a process. As far as it was concerned, based on the

statements made by Mr. Melville, Algoma was experiencing short-term cash flow problems due to the ramping up.

II. Allocation of risk

[56] A related submission by the appellant centred on what counsel referred to as an attempt by the respondent to reallocate the risk. Counsel argues that the respondent and Algoma had made their bargain and allocated the risks in accordance with the contract. In this case, the respondent did not take any security for the lending facility. It accepted the risk of dealing with a corporation enjoying limited liability and the courts should not allow the parties to circumvent their prior risk allocation by imposing personal liability on employees.

[57] This submission is similar to the submission that the respondent was attempting to circumvent the effect of the CCAA process. It is largely based upon the dissenting reasons of La Forest J. in London Drugs and his concurring reasons in Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd., [1993] 3 S.C.R. 206, 107 D.L.R. (4th) 169. In the former case, he held, in part, that where there is a contractual relationship between the employer and the plaintiff, the employee should remain liable to the plaintiff only for "independent torts" committed by the employee. However, to date that approach has not attracted a majority of the Supreme Court of Canada. The majority of the Court in London Drugs held that the individual employees were entitled to take advantage of the clause limiting liability in the contract between their employer and the plaintiff to $40. There was, however, no question that the employees were liable to the plaintiffs for their negligence in mov ing the plaintiff's machinery. Iacobucci J. speaking for the majority at pp. 407-08 rejected the independent tort exception:

> Having said this, I wish simply to add what has already become evident by my conclusion. There is no general rule in Canada to the effect that an employee acting in the course of his or her employment and performing the "very essence" of his or her employer's contractual obligations with a customer does not owe a duty of care, whether one labels it "independent" or otherwise, to the employer's customer. Our law of negligence has long since moved away from a category approach when dealing with duties of care. It is now well established that the question of whether a duty of care arises will depend on the circumstances of each particular case, not on pre-determined categories and blanket rules as to who is, and who is not, under a duty to exercise reasonable care. There may well be cases where, having regard to the particular circumstances involved, an employee will not owe a duty of care to his or her employer's customer. Indeed, the respondents have provided this Court with a series of decisions where this conclusion appears to have been reached: see Sealand of the Pacific v. Robert C. McHaffie Ltd. (1974), 51 D.L.R. (3d) 702 (B.C.C.A.); Moss v. Richardson Greenshields of Canada Ltd., [1989] 3 W.W.R. 50 (Man. C.A.); Summitville Consolidated Mining Co. v. Klohn Leonoff Ltd., B.C.S.C., Van. Reg. No. C880756, July 6, 1989; and R.M. & R. Log Ltd. v. Texada Towing Co. (1967), 62 D.L.R. (2d) 744 (Ex. Ct.).
>
> However, this does not mean that this is the necessary result in all factual situations. Abstaining from commenting on the conclusions reached in the cases cited, I find nothing in any of them, nor have I found anything else, which supports the type of blanket rule advocated by the respondents. At best, these decisions simply confirm that the question of whether a duty of care arises between an employee and his or her employer's customer depends on the circumstances of each particular case. The mere fact that the employee is performing the "very essence" of a contract between the plaintiff and his or her employer does not, in itself, necessarily preclude a conclusion that a duty of care was present.

(Emphasis added)

[58] Thus, according to the majority, whether or not a duty of care arises depends on the facts of the particular case. Also see Edgeworth Construction, per McLachlin J., at pp. 218 and 222. One of the most important policy considerations is the problem of imposition of indeterminate liability, which is discussed separately below. I have not been persuaded that there are any other policy considerations specific to the facts of this case that would justify a holding that Mr. Melville was not liable. While it is true that the respondent did not take any security, its arrangement with Algoma did include certain safeguards. For example, as the facility was amended, Algoma was required to inform the respondent if unused lines of credit available to Algoma fell below $20 million. As the Vice-president (Finance), Mr. Melville should have been aware of this requirement and that Algoma was in breach of this requirement. He was also aware of all of the circumstances that put the respondent at risk . He had attended the relevant board meetings of Algoma and Dofasco. He had promised to provide cash flow forecasts to Mr. Hynes, but had failed to do so because, as found by the trial judge, he knew that if they were disclosed the respondent would have cancelled the facility. By his own conduct he had put the respondent in a vulnerable position and undermined the effectiveness of the safeguards that did exist to protect the respondent. In those circumstances, I see no policy reason for immunizing Mr. Melville from the consequences of the negligent misrepresentations that the trial judge characterized as "egregious, serious mis-statements".

III. Indeterminate liability

[59] In Hercules Managements, supra, at p. 192, La Forest J., speaking for the court, held that "the fundamental policy consideration that must be addressed in negligent misrepresentation actions centres around the possibility that the defendant might be exposed to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'". However, in Hercules Managements, at p. 198, La Forest J. held that "in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can readily be circumscribed". In my view, this is a complete answer to the indeterminate liability policy concerns. Mr. Melville was aware of the identity of the plaintiff and his statements were used for the very purpose and transaction for which they were made. No question of indeterminate liability arises in this case: see Haig v. Bamford, [1977] 1 S.C.R. 466 at pp. 478-79, 72 D.L.R. (3d) 68.

[60] Accordingly, I agree with the trial judge that the appellant Melville was properly found to owe a duty of care to the respondent.

(b) As applied to Dofasco

[61] Dofasco also argues that it did not owe a duty of care to the respondent in accordance with the Anns test. For many of the same reasons discussed in relation to Melville, this argument must fail. Dofasco had stepped into the shoes of Algoma for the purposes of daily cash management, the very matter for which the credit facility was available. There was a sufficiently close relationship between Dofasco and the respondent that, in the reasonable contemplation of Dofasco, carelessness on its part might cause damage to the respondent. This is particularly so given that the respondent was the only bank that did not have security.

[62] Dofasco has also not advanced any policy grounds to negative or limit the scope of the duty owed to the respondent. The same considerations concerning the CCAA and indeterminate liability

apply to Dofasco as they did to Melville.

[63] Dofasco also argues that imposing liability is inconsistent with commercial reality. According to the contractual relationship between the respondent and Algoma, it was for the bank to assess its own risk. The respondent assessed the risk and increased the interest rate accordingly. Dofasco argues that therefore it was not just or reasonable to find a duty of care.

[64] In Hercules Managements, La Forest J. used terms such as "reasonable", "simple justice" and "basic fairness" in discussing the application of the Anns test to cases of negligent misrepresentation. These expressions must be read in context. La Forest J. adopted a rigorous analysis of the Anns test as it applied to negligent misrepresentation. Thus, at p. 190, he wrote that, "determining whether 'proximity' exists on a given set of facts consists in an attempt to discern whether, as a matter of simple justice, the defendant may be said to have an obligation to be mindful of the plaintiff's interest in going about his or her business". However, this forms part of his reasons for defining the scope of the prima facie duty in terms only of foreseeability and reliance and pushing other factors into a consideration of whether there are policy reasons for limiting the duty of care in the particular case.

[65] It is worth setting out some of the discussion about the two criteria relating to the prima facie duty as explained by La Forest J. at pp. 187-89 of Hercules Management:

> In order to render "proximity" a useful tool in defining when a duty of care exists in negligent misrepresentation cases, therefore, it is necessary to infuse that term with some meaning. In other words, it is necessary to set out the basis upon which one may properly reach the conclusion that proximity inheres between a representor and a representee.
>
> . . . In cases of negligent misrepresentation, the relationship between the plaintiff and the defendant arises through reliance by the plaintiff on the defendant's words. Thus, if "proximity" is meant to distinguish the cases where the defendant has a responsibility to take reasonable care of the plaintiff from those where he or she has no such responsibility, then in negligent misrepresentation cases, it must pertain to some aspect of the relationship of reliance. To my mind, proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J., in Cognos, supra, at p. 110, the plaintiff and the defendant can be said to be in a "special relationship" whenever these two factors inhere.
>
> . . . The purpose behind the Anns/Kamloops test is simply to ensure that enquiries into the existence of a duty of care in negligence cases is conducted in two parts: The first involves discerning whether, in a given situation, a duty of care would be imposed by law; the second demands an investigation into whether the legal duty, if found, ought to be negatived or ousted by policy considerations. In the context of actions based on negligence causing physical damage, determining whether harm to the plaintiff was reasonably foreseeable to the defendant is alone a sufficient criterion for deciding proximity or neighbourhood under the first branch of the Anns/Kamloops test . . .
>
> In negligent misrepresentation actions, however, the plaintiff's claim stems from his or her detrimental reliance on the defendant's (negligent) statement, and it is abundantly clear that reliance on the statement or representation of another will not, in all circumstances, be reasonable. The assumption that always inheres in physical damage cases concerning the

> reasonableness of the plaintiff's expectations cannot, therefore, be said to inhere in reliance cases.

(Emphasis added)

[66] The trial judge based his findings on the earlier decision in Queen v. Cognos Inc., supra, and did not address the application of the Anns test in these terms. Thus, he did not expressly find that Dofasco ought to reasonably have foreseen that the respondent would rely on Nicholas' representation; and that reliance by the respondent would, in the particular circumstances of the case, be reasonable. On the other hand, he did find that Nicholas "knew that the plaintiff would be relying on anything he said to Mr. Hynes in these telephone conversations and that the plaintiff bank was looking to him for information". There was evidence to support this finding, which in my view disposes of the first part of this element of the Anns test.

[67] The trial judge's reasons also support a finding that Hynes' reliance would, in the particular circumstances, be reasonable. He found that the inquiries by Mr. Hynes on behalf of the respondent were pursuant to its contractual relationship to provide credit to Algoma on the terms and conditions agreed to in the letter that led to the granting of the facility. The letter included a term that loans would be available "subject to our continued satisfaction with Algoma's financial conditions". Since Dofasco had taken over the daily cash management function it would be reasonable for Hynes to look to Dofasco for information notwithstanding the January 3, 1991 "disclaimer" that the bank should do whatever it had to do to get comfortable with Algoma as a stand-alone credit risk. As Nicholas was in charge of the day-to-day banking function, it was reasonable for Hynes to rely upon information provided by Nicholas. The facility was directly tied to the day-to-day banking function. The trial judge described the relationship between the facility and the day-to-day banking function in this way [at p. 220 B.L.R.]:

> The Plaintiff's facility brought Algoma a sophisticated Cash-Net lock box system, under which Algoma, in the course of the considerable business of itself and its subsidiaries in the United States, could make optimum use of available cash by netting out of receivables and payables each day. The arrangement was that the treasury officers at Algoma and subsequently by the summer of 1990, at Dofasco on behalf of Algoma, would each morning access by computer the information of the cash in and cash out for the day. If a deficiency, they would borrow against the debit balance to zero. On those days when the receipts exceeded the payables in the system, the excess would pay down the outstanding indebtedness of the plaintiff. All to the effect that there was an optimum use of cash and of credit. Both banker and customer were well satisfied with the system.

[68] Given this relationship it was reasonable for the respondent to look to and rely upon representations by Mr. Nicholas. It was also reasonable given the particular circumstances in early January 1991. Prior to the crucial telephone conversation between Hynes and Nicholas, Nicholas had referred Hynes to Melville on two occasions and encouraged him to work something out with him. As the trial judge said, this would at the very least leave Mr. Hynes with the impression that there was a capacity to make an arrangement that would provide the necessary comfort to the respondent. It was reasonable then, as Hynes testified, for him to get back to Nicholas to verify the agreement he thought he had reached with Melville and more importantly his understanding of the facts upon which any deal would be based. This did not necessarily impose any duty on Nicholas to respond. He might have refused to make any comment, but then this would in all likelihood have caused Hynes to refuse to clear the cheques, given that t hree of the five pieces of information referred to in the January 10 letter relate directly to the day-to-day cash management and the use of the facility.

[69] Accordingly, in my view, the trial judge properly found that the respondent had established the

necessary special relationship to render Nicholas and hence Dofasco,[5] at end of document] liable for misrepresentations to the respondent.

4. The Standard of Care Imposed on Dofasco

[70] Dofasco also argues that the trial judge erred in placing a duty on it to fully disclose Algoma's true financial position, as if it were in a fiduciary relationship with the respondent. This submission misconstrues the trial judge's reasons. The trial judge made it clear that there was no duty to make full disclosure of all affairs of Algoma and he rejected the respondent's submission that the appellants had breached a fiduciary duty. As he said, this was a typical commercial relationship between corporations of ample resources of experience or foresight. He did hold that there was a duty "in the circumstances" to disclose highly relevant information as to the risks of lending the $4 million.[6] at end of document] Those circumstances included the following. Nicholas was aware that Mr. Hynes was attempting to assess the risk of lending to Algoma and was looking for a probable source of repayment. He had referred Hynes to Mr. Melville to attempt to reach some kind of accommodation, although he knew that Algoma had run out of credit from other sources. He also knew or ought to have known that Algoma was in breach of its contractual obligation to disclose this fact to the respondent.

[71] The trial judge referred to the following excerpt from Cognos at p. 123:

> In reality, the trial judge did not impose a duty to make full disclosure on the respondent and its representative. He simply imposed a duty of care, the respect of which required, among other things and in the circumstances of this case, that the appellant be given highly relevant information about the nature and existence of the employment for which he had applied.

[72] When he came to apply the law to the facts, the trial judge held that Dofasco's liability did not depend on a failure to make full disclosure, or even on a duty to disclose. Admittedly, at first blush some of the trial judge's holdings might appear inconsistent. At one point, he said that when called by Hynes to discuss the letter Nicholas had only one option in the circumstances and that was not to discuss it. Later, the trial judge said that Nicholas was "caught" and "had to disclaim". However, when the reasons are read as a whole it is my view that there is no inconsistency, nor did the trial judge impose a duty of full disclosure. He held that if Nicholas had said nothing about the letter in the telephone call with Hynes on the morning of January 11, there would not have been any liability. Having discussed the contents of the letter in detail with Mr. Hynes, Mr. Nicholas' only option at that point was to disclaim. There was liability because, in the words of the trial judge, "Mr. Nicholas crosse d the line contrary to his original intentions and did provide information and assurances to Mr. Hynes which were misrepresentations on the facts and law of this case, constituting the tort of negligent misrepresentation." Having entered the arena and provided some information or assurances to the respondent, Mr. Nicholas was required to exercise reasonable care in making those representations. This could, depending on the circumstances, require the disclosure of information to ensure that representations made are accurate and not misleading: Cognos, at p. 121. In my view, the trial judge did not impose an inappropriate standard of care upon Dofasco. I would not give effect to this ground of appeal.

5. The Statute of Frauds

[73] The appellants argue that the respondent's claim is barred by s. 8 of the Statute of Frauds, R.S.O. 1990, c. S.19, which provides as follows:

> 8. No action shall be brought to charge a person upon or by reason of a representation or assurance made or given concerning or relating to the character, conduct, credit, ability,

> trade or dealings of any other person, to the intent or purpose that such other person may obtain money, goods or credit thereupon, unless the representation or assurance is made by a writing signed by the party to be charged therewith.

(Emphasis added)

[74] I have considerable doubt that either Mr. Melville or Dofasco could be considered "any other person" for the purposes of s. 8 given that Dofasco had taken over Algoma's cash management function and Melville was Algoma's Vice-President (Finance). In any event, this section has been held not to apply to negligent misrepresentation: see W.B. Anderson & Sons, Ltd. v. Rhodes (Liverpool), Ltd., [1967] 2 All E.R. 850 (H.C.) applying Banbury v. Bank of Montreal, [1918] A.C. 626, 87 L.J.K.B. 1158 (H.L.) and J.G. Fleming, The Law of Torts, 8th ed. (Sydney, Australia: Law Book Co., 1992) at p. 639. I would apply that holding to this case. In my view, the Statute of Frauds was no defence to this action for either appellant.

6. Misrepresentation by Melville

[75] The elements of negligent misrepresentation are summarized by Iacobucci J. in Queen v. Cognos Inc., at p. 110 as follows:

> . . . (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[76] In addition to the question of causation in relation to the trading room conversations dealt with above, counsel for Mr. Melville made two submissions with respect to these elements. He argued that the damages resulted from the assurances given by Nicholas to Mr. Hynes after Hynes discussed the letter with him on the morning of January 11. He points out that the January 10 letter was conditional. Hynes would agree to advance the money only if he received certain assurances from Melville by noon. He actually never received those assurances from Melville before taking the decision to clear the cheques. Thus, it was not shown that the respondent relied upon any representations by Melville and there was no detrimental reliance.

[77] I would not give effect to these submissions. The trial judge found that Mr. Melville's liability depended upon the statements that he made to Mr. Hynes on January 4 and 10. On January 4, Melville said that Algoma was merely having short-term cash problems due to the "ramping-up" after the strike and promised to provide cash flow statements. The trial judge found that the former was not true and that the latter implied that the cash flow statements would support this representation. On January 10, Melville said that the Royal Bank had been secured for about ten years, that Algoma's U.S. accounts receivable were not pledged and were available as security to the respondent and that if a new credit facility could not be effected, the respondent's loan position would be paid out of the sale of the Cannelton Coal Company sale proceeds. The trial judge found that these were misrepresentations. It was open to him to do so on this record. He referred to Cognos and held that all of the elements as sta ted there were made out in relation to Mr. Melville. It is implicit in this holding that the requisite detrimental reliance was made out.

[78] The appellant's argument is focused too narrowly. Melville's statements of January 4 and 10 must be put in context. As of January 3, 1991, Mr. Hynes was concerned about Algoma's ability to repay

funds advanced under the facility. Thereafter, he was seeking information from Melville so that he could assess the credit risk. Melville's statements were designed to reassure Mr. Hynes and ensure that the cheques, especially the Cannelton payroll, cleared. Those statements were the foundation for the letter and set the stage for the final conversation with Nicholas. The trial judge could properly infer that the respondent relied upon those statements to its detriment and that they were one of the causes of the loss. The respondent's case against Melville does not fail simply because Nicholas' statements also contributed to the loss. It is not the law that a particular defendant's negligent misrepresentation must be the sole cause of the plaintiff's loss. It is sufficient that the plaintiff relied upon those s tatements to its detriment. The respondent clearly did.

[79] Accordingly, I would dismiss Mr. Melville's appeal.

7. Negligent Misrepresentation by Nicholas (Dofasco's Liability)

[80] Dofasco submits that Nicholas made no untrue statement and the trial judge erred in imposing a duty on Dofasco, through Nicholas, to disclose the true state of Algoma's affairs. Dofasco submits that Nicholas' comment that "it sounds reasonable" was not a misrepresentation of a fact, especially given Nicholas' earlier unequivocal statement to Hynes that the respondent should do whatever it had to do to get comfortable with Algoma as a stand-alone credit risk. Dofasco also submits that there was no evidence from Hynes as to what he thought the "sounds reasonable" comment meant and it was not open to the trial judge to infer that Hynes relied upon that statement to the respondent's detriment. In any event, the only deal that Nicholas was saying was reasonable was, as set out in the letter, a request for information. Finally, Dofasco takes issue with the trial judge's finding that Hynes and Nicholas discussed each of the five numbered points in Hynes' letter to Melville item by item. This last point can be disposed of quickly. While Hynes did not recall this part of the conversation, Nicholas did. It was open to the trial judge to accept this part of Mr. Nicholas' evidence.

[81] Whether or not Mr. Nicholas' statements were misrepresentations and whether or not the respondent reasonably relied upon them are findings of fact. These findings turned upon the trial judge's assessment of the credibility of the many witnesses and the inferences to be drawn from the evidence: see Kripps v. Touche Ross & Co. (1997), 89 B.C.A.C. 288, [1997] 6 W.W.R. 421 (C.A.) at paras. 88 to 104. It was not necessary, for example, for Mr. Hynes to testify that he relied upon the statements by Nicholas on the morning of January 11. That reliance could be inferred from all the circumstances. The fact that after the conversation, Mr. Hynes took no steps to stop the cheques from clearing, notwithstanding he did not have a reply from Mr. Melville, is compelling evidence that Mr. Hynes must have relied upon the assurances he received from Mr. Nicholas. As indicated above, it was not necessary for the respondent to prove that the statements by Mr. Nicholas were the only factors that induced the resp ondent to act to its detriment: Kripps v. Touche Ross & Co., supra, at para. 103. With that in mind, I will turn to the findings of fact by the trial judge.

[82] A critical finding of fact made by the trial judge and a finding that is supported by the evidence is that by December 1990, the appellants knew that standing alone, Algoma was no longer solvent. That fact alone called for prudence on the part of Nicholas in dealing with the respondent. Nicholas himself had written in a memo that a proposed sale of pellets by Algoma to Dofasco could be attacked by creditors as a preference. His statements to Mr. Hynes must be measured against this background. The trial judge found that the respondent did not have sufficient information independent of the statements by Nicholas and Melville to enable it to evaluate the risk. On the other hand, Nicholas knew that standing alone Algoma was insolvent. He knew that no decision had been made about whether Dofasco would commit further funds to Algoma. He knew, or should have known, that all of the receivables, including the U.S. accounts receivable, were encumbered. He knew, or ought to have known, that Mr. Melville could not commit to using the proceeds of the Cannelton sale to pay out the respondent's loan.

The proceeds from that sale were seen as crucial to any Algoma reorganization. At the very least, Nicholson knew or ought to have known that only the Algoma board could make that commitment and it was very much an open question whether Algoma would still be a viable entity when a sale was completed.

[83] The appellant submits that Dofasco's liability turned entirely upon the statement by Nicholas to Hynes to the effect that what was contained in the letter sounded reasonable. Based on this submission, the appellant argues that it was unreasonable for the trial judge to find liability solely on the basis of this comment when, it argues, Hynes was merely keeping Dofasco "in the loop" to appease the respondent's parent. In my view, this is not a fair reading of the trial judge's reasons. As I read those reasons, liability was based on the entire conversation, which included a point-by-point discussion of the five items. For example, the trial judge found as follows [at p. 236]:

> I find that Mr. Nicholas understood that Mr. Hynes was attempting to assess a risk of whether to fund the 4 million dollars outstanding. I find Mr. Nicholas despite his original intentions was drawn into the determination of this matter. I find that Mr. Nicholas, although initially intending to remain neutral with regard to the Algoma credit, did cross the line and involved himself.

[84] The trial judge then reviewed the five items in the letter and concluded that Mr. Nicholas knew or ought to have known that the letter contained misrepresentations, for example, the availability of the U.S. accounts receivable. In that context, the trial judge concluded that, "Dofasco could not purport to act on the agreement of January 10 without, by implication conveying acceptance of that agreement unless, there was a specific and expressed disclaimer to the contrary". Further, Mr. Hynes' evidence was that keeping Dofasco in the loop was only one of his reasons for speaking to Mr. Nicholas. He was also attempting to have Dofasco "verify" what Melville had told him.

[85] These findings were reasonably open to the trial judge and established Dofasco's liability. This court is in no position to retry the case and draw our own different inferences, as was urged by the appellant, from the literal wording of the letter. The context was all important and the trial judge who heard five weeks of evidence was in the best position to interpret the letter and the conversations between Hynes and Nicholas, especially since liability can be founded on what was implicitly represented by Nicholas: Cognos, at pp. 129-31. I have not been convinced that the trial judge made an overriding and palpable error of fact in concluding that Nicholas made negligent misrepresentations upon which the respondent reasonably relied to its detriment.

[86] I have considered whether the conversation between Hynes and Nicholas of January 3 in which Nicholas told Hynes that he should get comfortable with Algoma as a stand-alone risk constituted some kind of disclaimer such that it was unreasonable for Hynes to then rely upon the statements made by Nicholas one week later in the conversation of January 11. The trial judge implicitly found to the contrary when he held that only an express disclaimer at the very time of the January 11 conversation would suffice. Again, this was a conclusion that was reasonably open to the trial judge. He found that notwithstanding the earlier disclaimer and Nicholas' own professed intention not to be drawn into making any representations about the continued viability of Algoma, he crossed the line and did make representations that he knew the respondent would rely upon. It was reasonable for Hynes to rely upon the representations in the January 11 conversation in the circumstances, some of which I have reviewed above. In addit ion to those circumstances, there was also the fact that Mr. Nicholas was the first person to inform Hynes that Algoma did not have credit available from other lenders. It was during this conversation, on January 10, that Nicholas expressed great concern about the cheques not clearing, stating according to Hynes that "you can't bounce cheques". The entire context would reasonably leave Hynes with the impression that Nicholas and Dofasco were acutely aware of the Algoma situation and

were taking a keen interest in its financial affairs, notwithstanding the earlier "disclaimer". There was nothing in the conversations of January 10 and 11 to suggest that Mr. Nicholas was not at the time assuming responsibility for what he was representing to the respondent: Cognos, supra, at p. 116.

[87] As to the standard of care, I have already dealt with this question above. More generally, it is not a fair characterization that the trial judge imposed a duty upon Nicholas to disclose the true state of Algoma's financial affairs. The duty of care imposed by the trial judge was the duty to "exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading" as referred to in Cognos, at p. 121. In Cognos, at p. 123, the court recognized that in some circumstances a "failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made". In any event, the trial judge found that Nicholas "affirmed in the circumstances of this case". This can only mean that the trial judge found that Nicholas affirmed the truth of the misrepresentations in the January 10 letter. I can see no basis for interfering with this finding of fact.

[88] Accordingly, I would dismiss Dofasco's appeal.

THE CROSS-APPEAL

[89] The respondent raised two issues in its cross-appeal. Both were contingent on the appellants' success in their appeals. In light of my conclusions, it is unnecessary to deal with the cross-appeal.

DISPOSITION

[90] Accordingly, I would dismiss the appeals with costs. I would dismiss the cross-appeal without costs.

Appeal dismissed.

Notes

Note 1: The claim against Nicholas, who was also named as a defendant, was therefore dismissed.

Note 2: Said v. Butt, [1920] 3 K.B. 497, [1920] All E.R. Rep. 232 holds that where the corporate officer acting bona fide within the scope of his authority procures or causes the breach of a contract between the employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has been broken. It has no application to the facts of this case.

Note 3: Similarly, see Meditrust Healthcare Inc. v. Shoppers Drug Mart, a judgment of the Ontario Court of Appeal, delivered September 9, 1999, [1999] O.J. No. 3243.

Note 4: Section 5.1(2) of the CCAA and s. 50(14) of the Bankruptcy and Insolvency Act.

Note 5: As indicated, Dofasco accepted that it was vicariously liable if Nicholas were found to be negligent.

Note 6: When the trial judge's reasons are read as a whole, I have considerable doubt that the trial judge imposed any liability on the basis of non-disclosure. It seems to me that a fair reading of his reasons shows that the trial judge imposed liability on the appellants for their positive misrepresentation.

Court File No.: CV-11-9283-00CL

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

AND IN THE MATTER OF THE A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS INC.
(the "**Applicant**")

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

(PROCEEDING COMMENCED AT TORONTO)

BRIEF OF AUTHORITIES OF
UNIQUE BROADBAND SYSTEMS, INC.
(RETURNABLE 13 JUNE 2012)

GOWLING LAFLEUR HENDERSON LLP
Barristers and Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

E. Patrick Shea
LSUC No.: 39655K
Telephone: (416) 369-7399
Facsimile: (416) 862-7661

SOLICITORS FOR THE APPLICANT