C A N A D A

PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

NO : **450-17-000167-134**

C O U R S U P É R I E U R E
(Chambre commerciale)

Loi sur les arrangements avec les créanciers des compagnies

DANS L'AFFAIRE DU PLAN D'ARRANGEMENT AVEC LES CRÉANCIERS DE :

MONTREAL, MAINE & ATLANTIQUE CANADA CIE (MONTREAL, MAINE & ATLANTIC CANADA CO.)

Débitrice

-et-

RICHTER GROUPE CONSEIL INC. (RICHTER ADVISORY GROUP INC.)

Contrôleur

-et-

ROYAL & SUN ALLIANCE DU CANADA, SOCIÉTÉ D'ASSURANCE

-et-

GROUPE LEDOR INC., MUTUELLE D'ASSURANCE

Requérantes

PLAN D'ARGUMENTATION

A. Résumé des faits

- Un déraillement de train opéré par Montreal, Maine & Atlantique Canada Cie (ci-après « MMA ») est survenu en date du 6 juillet 2013 dans la Ville de Lac-Mégantic causant de sérieux dommages.

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- Transmission par Mme Chantale Lacroix, représentante de la requérante Groupe Ledor inc., Mutuelle d'assurance (ci-après « Ledor »), d'une lettre d'engagement de responsabilité à MMA en date du 17 juillet 2013 (R-1 – Ledor).

- Transmission d'une lettre à Mme Chantale Lacroix par Eddy Zajac, représentant des assureurs responsabilité de MMA, datée du 25 juillet 2013 (R-2 - Ledor).

- Dépôt par MMA d'une requête afin d'obtenir une ordonnance initiale en vertu de l'article 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, le 6 août 2013.

- Nomination de Richter à titre de contrôleur en date du 8 août 2013 par le juge Martin Castonguay, j.c.s.

- Échanges en septembre 2013 entre l'expert en sinistre Carl Migneault mandaté par la requérante Royal & Sun Alliance du Canada, société d'assurance (ci-après « RSA ») et Eddy Zajac (R-1 – RSA).

- Mandat donné à la fin de l'automne 2013 par les requérantes RSA et Ledor à la firme Carter Gourdeau pour le recouvrement de leurs déboursés encourus et à venir.

- Dépôt par MMA d'une requête afin d'établir un processus de sollicitation des réclamations et de l'établissement d'une date limite pour le dépôt, le 13 décembre 2013.

- Jugement rendu le 31 mars 2014 par le Juge Gaétan Dumas, j.c.s., accueillant la requête du 13 décembre 2013.

- Ordonnance rendue le 4 avril 2014 du Juge Gaétan Dumas, j.c.s., établissant la procédure de réclamation et ordonnant que les preuves de réclamations soient reçues par le contrôleur Richter avant le 13 juin 2014, à 17h00.

- Transmission d'une lettre le 28 octobre 2014 à MMA par l'expert en sinistre Claude Bergeron mandaté par RSA à laquelle aucune suite ne fut donnée (R-2 – RSA).

- Les requérantes et leurs représentants (experts en sinistre et procureurs) ont appris par les médias au début du mois d'avril 2015 qu'un Plan d'arrangement allait être voté à l'Assemblée des créanciers et que des tiers pourraient alors être quittancés.

- Dépôt des *Requête pour être autorisés à déposer une preuve de réclamation hors délai* par les requérantes RSA et Ledor dès le 14 avril 2015.

- Depuis la signification des Requêtes, le contrôleur Richter a demandé aux procureurs soussignés de lui transmettre les preuves de réclamation des requérantes accompagnées des pièces justificatives à leurs soutien. La preuve de réclamation de Ledor fut transmise le 21 avril dernier alors que celle de RSA sera acheminée au plus tard le 28 avril prochain.

B. Critères applicables

- *Enron Canada Corp.* v. *National Oil-Well Canada Ltd.*, 2000 ABCA 285 (Onglet 2)

> « [26] Therefore, the appropriate criteria to apply the late claimants is as follows :
>
> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith ?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay ?
>
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing ?
>
> 4. If relevant prejudice is found which cannot be alleviated, are there other considerations which may nonetheless warrant an order permitting late filing ?
>
> [27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. [...] »

1. Motifs justifiant le retard et établissant la bonne foi des requérantes et de leurs procureurs

- La représentante de Ledor, Mme Chantale Lacroix, a acheminé une lettre à MMA le 17 juillet 2013 et M. Eddy Zajac, représentant de l'assureur responsabilité de MMA, a répondu le 25 juillet 2013.

- Les représentants de RSA ont transmis des lettres d'engagement de responsabilité à MMA (R-1 et R-2 – RSA).

- M. Carl Migneault, expert en sinistre externe mandaté par la requérante RSA, a reçu une réponse de M. Eddy Zajac, représentant de l'assureur responsabilité de MMA, le 19 septembre 2013 l'enjoignant de lui transmettre ses documents subrogatoires lorsque le règlement de la perte serait finalisé. Or, cette perte n'est toujours pas finalisée à ce jour.

- M. Claude Bergeron, expert en sinistre externe mandaté par la requérante RSA, a quant à lui acheminé une correspondance à MMA le 28 octobre 2014 et celle-ci est demeurée sans réponse.

- Les représentants de MMA étaient au courant des potentielles pertes des requérantes RSA et Ledor mais ces dernières n'ont jamais reçu copie de l'ordonnance du juge Dumas du 4 avril 2014 ni du formulaire de preuve de réclamation à compléter.

- Les requérantes RSA et Ledor ne font pas partie des créanciers nommés au « Creditor Mailing List » joint à l'ordonnance du juge Gaétan Dumas, j.c.s., datée du 4 avril 2014.

- Les requérantes RSA et Ledor ont mandaté des procureurs, la firme d'avocats Carter Gourdeau, afin de veiller au recouvrement des sommes actuellement déboursées à leurs assurés et à venir.

- Les procureurs ont fait des suivis en lien avec l'avancement du recours collectif et de la demande d'autorisation entendue par le juge Martin Bureau, j.c.s. et prise en délibérée le 25 août 2014 (480-06-000001-132).

- Tous les représentants des requérantes, de même que leurs procureurs, n'ont jamais été mis au courant du mécanisme mis en place pour compléter une réclamation auprès de MMA et de la date butoir décidée par le juge Gaétan Dumas dans son ordonnance du 4 avril 2014.

- Les requérantes et leurs représentants, de même que leurs procureurs, ont toujours agi de bonne foi en suivant l'évolution du recours collectif.

- La prescription de 3 ans en vertu de l'article 2925 du *Code civil du Québec* n'est toujours pas acquise et elle le sera seulement le ou vers le 6 juillet 2016.

- Dès que les requérantes et leurs procureurs ont eu connaissance de l'existence d'une date butoir, du dépôt d'un Plan d'arrangement et du fait que des tiers pourraient être quittancés, les requérantes ont signifié et déposé sans délai leurs *Requête pour être autorisé à déposer une preuve de réclamation hors délai*.

  Royal Bank of Canada v. *Cow Harbour Construction Ltd.*, 2011 ABQB 223 (Onglet 4, par. 32 *in fine*)

- Les requérantes et leurs procureurs réfèrent également à la décision suivante :

  Air Canada (Re), [2004] O.J. No 1912 (Onglet 3)

- Les requérantes RSA et Ledor n'ont en aucun temps renoncé à leur réclamation.

- Les requérantes RSA et Ledor n'avaient aucun avantage à ne pas produire de preuve de réclamation dans les délais et n'ont pas usé de stratégie.

  Royal Bank of Canada v. *Cow Harbour Construction Ltd.*, 2011 ABQB 223 (Onglet 4, par. 29)

2. Absence de préjudice

- Le Plan d'arrangement a été déposé le 31 mars 2015 mais il n'a toujours pas été voté lors de l'Assemblée des créanciers et n'a pas été homologué par le Tribunal.

- Le Plan d'arrangement prévoit des catégories distinctes de créanciers, notamment la catégorie « Assureurs en subrogation », dont font partie les requérantes RSA et Ledor.

- Ainsi, l'acceptation du dépôt des preuves de réclamation des requérantes RSA et Ledor n'aurait aucune incidence sur les autres catégories de créanciers, particulièrement les victimes de la tragédie de Lac-Mégantic.

- La dilution de la part des autres créanciers d'une même catégorie dans une éventuelle distribution n'est pas considérée comme étant un préjudice suffisant.

  Enron Canada Corp. v. *National Oil-Well Canada Ltd.*, 2000 ABCA 285 (Onglet 2, par. 40)

  > « [40] In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: Re Cohen (1956, 36 C.B.R. 21 (Alta. C.A.) at 30-31. [...]»
  >
  > (nos soulignements)

  Royal Bank of Canada v. *Cow Harbour Construction Ltd.*, 2011 ABQB 223 (Onglet 4, par. 41)

  Roman Catholic Episcopal Corp. of St-George's (Re), [2007] N.J. No 32 (Onglet 5, par. 37 *in fine*)

- Le fait d'accepter les preuves de réclamation des requérantes RSA et Ledor ne retardera pas indûment le processus mis en place. En effet,

le Plan d'arrangement n'a toujours pas été voté à l'Assemblée des créanciers, laquelle est actuellement prévue pour le 27 mai 2015.

- Au contraire, les requérantes RSA et Ledor subiront un grave préjudice si elles ne peuvent présenter une preuve de réclamation puisque de nombreux tiers risquent d'être quittancés et elles seraient alors privées de tout recours.

- Les autres créanciers de la catégorie « Assureurs en subrogation », quant à eux, peuvent toujours voter sur le Plan d'arrangement, tel que constitué.

C. Conclusions recherchées

Les requérantes RSA et Ledor demandent donc au Tribunal :

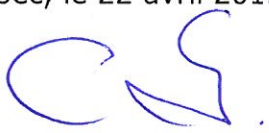
ACCUEILLIR les requêtes de Royal & Sun Alliance du Canada, société d'assurance et Groupe Ledor inc., Mutuelle d'assurance pour être autorisées à déposer une preuve de réclamation hors délai;

AUTORISER Royal & Sun Alliance du Canada, société d'assurance et Groupe Ledor inc., Mutuelle d'assurance à déposer leur preuve de réclamation tardivement auprès du Contrôleur Richter;

ORDONNER au Contrôleur Richter de recevoir les preuves de réclamation de Royal & Sun Alliance du Canada, société d'assurance et Groupe Ledor inc., Mutuelle d'assurance comme créance ordinaire;

LE TOUT avec dépens.

Québec, le 22 avril 2015



CARTER GOURDEAU
Procureurs des requérantes Royal & Sun Alliance du Canada, société d'assurance et Groupe Ledor inc., Mutuelle d'assurance

COUR SUPÉRIEURE
(CHAMBRE COMMERCIALE)
DISTRICT DE SAINT-FRANÇOIS

NO : 450-17-000167-134

DANS L'AFFAIRE DU PLAN D'ARRANGEMENT AVEC LES CRÉANCIERS DE:

MONTREAL, MAINE & ATLANTIQUE CANADA CIE (MONTREAL, MAINE & ATLANTIC CANADA CO.)

Débitrice

et
RICHTER GROUPE CONSEIL INC. (RICHTER ADVISORY GROUP INC.)

Contrôleur

et

ROYAL & SUN ALLIANCE DU CANADA, SOCIÉTÉ D'ASSURANCE
et
GROUPE LEDOR INC., MUTUELLE D'ASSURANCE

Requérantes

ORIGINAL

PLAN D'ARGUMENTATION

N/D: 750-1657 (sp)

Me Guy Leblanc
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Québec, le 22 avril 2015

PAR COURRIEL : martine.girard@judex.qc.ca

L'honorable Gaétan Dumas
Juge Coordonnateur
Cour supérieure
Palais de justice de Sherbrooke
375, rue King Ouest
Sherbrooke (Québec) J1H 6B9

Objet : Dans l'affaire du plan d'arrangement avec les créanciers de Montréal Main & Atlantique Canada cie
No de Cour : 450-17-000167-134
Notre dossier : 750-1657

Monsieur le Juge Dumas,

La présente fait suite à la séance de gestion qui s'est tenue devant vous en date du 15 avril dernier dans le dossier mentionné en rubrique.

À cet égard et tel que convenu, nous vous transmettons notre Plan d'argumentation ainsi que notre Liste d'autorités en prévision de l'audition des *Requête pour être autorisé à déposer une preuve de réclamation hors délai*, le 11 mai prochain.

Une version papier de ces documents vous sera transmise par prochain courrier.

En espérant le tout conforme, nous vous prions d'agréer, Monsieur le Juge Dumas, l'expression de nos sentiments les meilleurs.

CARTER GOURDEAU

Guy Leblanc
GL/cg

p.j.

c.c. Mailing list

C A N A D A

PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

NO : **450-17-000167-134**

C O U R S U P É R I E U R E
(Chambre commerciale)

Loi sur les arrangements avec les créanciers des compagnies

DANS L'AFFAIRE DU PLAN D'ARRANGEMENT AVEC LES CRÉANCIERS DE :

MONTREAL, MAINE & ATLANTIQUE CANADA CIE (MONTREAL, MAINE & ATLANTIC CANADA CO.)

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Contrôleur

-et-

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LISTE D'AUTORITÉS

Onglet 1 : *Montreal, Maine & Atlantic Co (Montréal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2014 QCCS 6468

Onglet 2 : *Enron Canada Corp.* v. *National Oil-Well Canada Ltd.*, 2000 ABCA 285

Onglet 3: *Air Canada (Re)*, [2004] O.J. No. 1912

Onglet 4: *Royal Bank of Canada* v. *Cow Harbour Construction Ltd.*, 2011 ABQB 223

Onglet 5: *Roman Catholic Episcopal Corp. of St-George's (Re)*, [2007] N.J. No. 32

Onglet 6: *Ontario* v. *Canadian Airlines Corp.*, [2000] A.J. No. 1321

Québec, le 22 avril 2015

CARTER GOURDEAU
Procureurs des requérantes Royal & Sun Alliance du Canada, société d'assurance et Groupe Ledor inc., Mutuelle d'assurance

COUR SUPÉRIEURE
(CHAMBRE COMMERCIALE)
DISTRICT DE SAINT-FRANÇOIS

NO : 450-17-000167-134

DANS L'AFFAIRE DU PLAN D'ARRANGEMENT AVEC LES CRÉANCIERS DE:

MONTREAL, MAINE & ATLANTIQUE CANADA CIE (MONTREAL, MAINE & ATLANTIC CANADA CO.)

Débitrice

et
RICHTER GROUPE CONSEIL INC. (RICHTER ADVISORY GROUP INC.)

Contrôleur

et

ROYAL & SUN ALLIANCE DU CANADA, SOCIÉTÉ D'ASSURANCE
et
GROUPE LEDOR INC., MUTUELLE D'ASSURANCE

Requérantes

ORIGINAL

LISTE DES AUTORITÉS

N/D: 750-1657 (sp)

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COUR SUPÉRIEURE

Chambre commerciale

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

N° : 450-11-000167-134

DATE : 31 mars 2014

SOUS LA PRÉSIDENCE DE : L'HONORABLE GAÉTAN DUMAS, J.C.S.

In the matter of the plan of compromise or arrangement of :

MONTREAL, MAINE & ATLANTIC CANADA CO. (MONTRÉAL, MAINE & ATLANTIQUE CANADA CIE)
Débitor
and
RICHTER ADVISORY GROUP INC. (RICHTER GROUPE CONSEIL INC.)
Monitor
and
YANNICK GAGNÉ, GUY OUELLET, SERGE JACQUES AND LOUIS-SERGE PARENT
Class Action Plaintifs - PETITIONNERS

JUGEMENT

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[1] Le tribunal est saisi des deux requêtes suivantes :

– requête pour l'obtention d'un processus de réclamation et pour l'établissement d'une date butoir au 13 juin 2014;

– requête pour désigner les requérants au recours collectif à titre de représentants dans le présent dossier.

[2] Le tribunal rendra un seul jugement sur les deux requêtes puisqu'elles sont reliées.

[3] Le soussigné a été désigné pour s'occuper du présent dossier suite à l'ordonnance initiale. Plusieurs jugements ont déjà été rendus dans le dossier. Ces jugements sont toujours d'actualité. Le tribunal ne reviendra donc pas sur tous les faits et réfère les parties et les lecteurs aux jugements déjà rendus. Plus particulièrement, les jugements du soussigné datés des 17 février et 14 mars 2014 sont particulièrement importants.

[4] D'ailleurs, dans le jugement du 17 février, il est expliqué pourquoi les deux requêtes dont le tribunal était déjà saisi ont été remises pour permettre un « *joint status hearing* » qui s'est tenu à Bangor, Maine, le 26 février 2014.

[5] Le jugement du 14 mars explique que cette audition commune nous permet d'être optimistes sur les chances de dépôt d'un plan viable. Le tribunal expliquait que nous avons plus qu'un « *germ of a plan* ».

[6] D'autre part, dans la décision du 17 février, le tribunal mentionnait qu'il était inutile, pour le moment, d'établir un processus de réclamation très coûteux alors que les actifs ont été vendus pour un montant de beaucoup inférieur aux créances garanties[1].

[7] La question est simple, qui financera le processus de réclamation et pourquoi en établir un si aucun plan n'est proposé.

[8] Nous devons également être conscients que la seule chance qu'un plan viable soit déposé est que des tiers offrent des sommes en échange de quittances. Toutes ces questions ont été soulevées dans les jugements précédents.

[9] Le rôle du tribunal dans l'application de la LACC est important :

> « The CCAA supervising judge will ensure that there are fair and just principles and processes in the proceeding, and in sanctioning a proposed plan, the court must be satisfied that the process and the plan itself are fair and reasonable in the circumstances. »[2]

[10] Ce principe s'applique non seulement au plan, mais, il nous semble, à tous les jugements rendus dans le cadre d'une restructuration.

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[1] Voir paragraphes 127 et suivants de la décision.

[2] Dr. Janis P. Sarra, Rescue! The Companies' Creditors Arrangement Act, 2nd edition, Carswell, 2013, page 140.

[11] Lors de la présentation des requêtes, toutes les parties présentes étaient d'accord pour que les requêtes soient accordées selon les conclusions. Seul le tribunal a soulevé des interrogations sur le processus proposé.

[12] Mentionnons d'abord que bien que le tribunal doit s'assurer que le processus est juste et raisonnable, il n'est pas celui qui rédige les procédures. Même si le tribunal peut moduler les conclusions sans agir *ultra-petita*, il ne peut quand même pas gérer le dossier à la place de ceux qui sont désignés pour le faire. En conséquence, si le tribunal n'est pas d'accord avec le processus proposé, il doit simplement rejeter la requête.

[13] Cela étant dit, voici les deux préoccupations soulevées par le tribunal.

[14] La première est celle du financement du processus.

[15] Là-dessus, le tribunal a été rapidement rassuré. Tous sont conscients qu'il n'y a pas d'actifs pour supporter le processus. Les créanciers garantis ne désirent pas ajouter de sommes. D'ailleurs, le processus à ce jour, pour les raisons expliquées dans le jugement du 14 mars, a coûté presque aussi cher que le montant de la vente des actifs.

[16] On sait également que la compagnie d'assurance XL, l'assureur responsabilité de MMA, est prête à payer la couverture d'assurance de 25 millions. Nous en avons discuté dans les jugements précédents.

[17] Or, ces 25 millions ne font pas partie des actifs de MMA. Il n'est donc pas question qu'une charge administrative soit imposée sur cette somme. Le tribunal le dit depuis le début et le répète encore afin d'éviter que des professionnels se plaignent d'avoir travaillé à perte. Les professionnels de l'insolvabilité ont parfaitement le droit de s'investir dans un dossier alors qu'il y a un risque de non-paiement de leurs honoraires s'il n'y a pas de résultat.

[18] La deuxième et principale préoccupation du tribunal est de vouloir s'assurer que les nombreux créanciers de MMA ne seront pas induits en erreur.

[19] Ainsi, si un plan était déposé avant qu'un processus de réclamation ne soit établi et surtout qu'une date butoir soit imposée, il nous semblait que la logique serait respectée et que les créanciers connaîtraient l'impact de produire ou non une preuve de réclamation.

[20] Rappelons que ce ne sont pas les créanciers corporatifs qui inquiètent le tribunal, mais surtout les victimes qui ont subi des dommages à la suite du déraillement.

[21] Dans l'esprit populaire, il pourrait être raisonnable de décider qu'il est inutile de produire une preuve de réclamation puisqu'il n'y a aucun actif. Les nombreux créanciers ne savent pas nécessairement que des tiers pourraient décider de contribuer à un plan d'arrangement dans le but de mettre fin à des procédures qui s'annoncent longues et en échange de quittances qui mettraient fin aux procédures.

[22] C'est donc la raison pour laquelle le tribunal a préféré faire part de ses inquiétudes séance tenante plutôt que de rendre jugement sans avoir donné l'occasion à toutes les parties d'éclairer le tribunal sur ce point. Le principe dans l'application d'un pouvoir discrétionnaire n'est pas de ne pas avoir d'opinion, mais plutôt de garder l'esprit ouvert aux opinions exprimées.

[23] Le tribunal doit donc décider si un processus de réclamation doit être établi même si aucun plan n'est déposé à ce jour. Si un processus est établi, doit-il y avoir une date butoir d'établie? En effet, il est possible qu'un processus de réclamation soit établi et qu'une date butoir soit fixée à une date postérieure au dépôt d'un plan.

[24] Pour décider de la question, le tribunal doit garder à l'esprit que :

> « In CCAA proceedings, a claims bar order can be made by the judge in charge of the proceedings. The purpose of the order is, amongst other things, to enable creditors to meaningfully assess and vote on a plan of arrangement and to ensure a timely and orderly completion of the CCAA proceedings. »[3]

[25] La date butoir est là en principe pour favoriser les créanciers et non pas les débiteurs ou les tiers. Mais elle est aussi là pour que le dossier puisse progresser et aboutir sans délai inutile[4].

[26] L'autre principe que doit suivre le tribunal pour rendre sa décision est la confiance qu'il doit avoir dans le contrôleur qu'il a nommé et les professionnels de l'insolvabilité qui se présentent devant lui.

[27] Dans son volume Rescue! The Companies Creditors Arrangement Act[5], la professeure Janis P. Sarra enseigne :

> « The monitor can serve as a stabilizing force in the sense of reassuring creditors, because it is monitoring the debtor's business and financial affairs, projected cash flow and appropriate use of assets, and managerial conduct in the

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[3] Lloyd W. Houlden, Geoffrey B. Morawetz et Janis P. Sarra, The 2012-2013 Annotated Bankruptcy and Insolvendy Act, Carswell, 2012, page 1263.

[4] *Hurricane Hydrocarbons ltd* c. *Komarnicki*, 37 C.B.R. (5th) 1 (Alta. C.A.).

[5] Dr. Janis P. Sarra, Rescue! The Companies' Creditors Arrangement Act, 2nd edition, Carswell, 2013, pages 570 et 571

> operation of the business during the stay period. Given the limited size of the Canadian market of insolvency professionals and the less litigious legal culture in Canada than in the United States, there has also developed a level of confidence and trust between professionals that serve as monitors and the creditors that are repeat players in insolvency proceedings. This confidence and trust can facilitate proceedings and enhance the effectiveness of the monitor. Equally, however, the process, the trust and co-operation among repeat players can create a perception of bias. The monitor must be scrupulous in fulfilling its obligation to consider and balance the interests of all stakeholders. »

[28] Il n'y a pas seulement que le contrôleur et les professionnels de l'insolvabilité en qui le tribunal doit avoir confiance. En l'espèce, le gouvernement du Québec est un créancier majeur. Il nous semble quasi impossible qu'un plan d'arrangement puisse être adopté sans son consentement. Or, depuis le début, le gouvernement déclare qu'il désire que les sommes recueillies aillent aux victimes de Lac-Mégantic. Dans un précédent jugement, le tribunal a indiqué que la définition de victime n'était pas la même pour le gouvernement et le tribunal. Inutile d'y revenir. Mais pour les besoins du présent jugement, les victimes que veut favoriser le gouvernement et celles que le tribunal veut protéger sont les mêmes.

[29] C'est pourquoi le tribunal croit que les moyens mis en place pour informer et protéger les créanciers de Lac-Mégantic sont suffisants.

[30] Des moyens hors du commun seront mis en place pour s'assurer que les créanciers et les victimes seront informés de leurs droits. Des séances d'informations seront tenues, des avis publics seront donnés. Une assistance sera fournie pour remplir les preuves de réclamations.

[31] De plus, le dossier bénéficie d'une couverture médiatique importante. Des journalistes couvrent ce dossier de façon assidue. Le tribunal a donc tout lieu de croire que l'information se rendra à qui de droit.

[32] À cela, il faut ajouter que la municipalité est également une créancière et que sa collaboration semble aussi acquise.

[33] Nous ne semblons pas être dans une situation où chaque créancier tire la couverture de son côté. Les principaux créanciers semblent vouloir privilégier les victimes.

[34] À cela, il est aussi important de rappeler que le tribunal a toujours discrétion pour admettre une réclamation tardive[6].

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[6] Société canadienne de la Croix Rouge, 2008, Carswell Ont. 6105 (Ont. S.c.j.) et re : Blue Range Ressource Corp. (2000), 15, C.B.R. (4th) 192.

[35] Mais attention, un mauvais choix stratégique sera rarement un motif pour déposer une preuve de réclamation hors délai[7].

[36] En autorisant le processus de réclamation et en imposant une date butoir, le tribunal continue donc dans la même logique sous-jacente à l'ordonnance d'un « *joint hearing* » en février 2014. À savoir, faciliter la participation de tiers dans l'élaboration d'un plan d'arrangement.

[37] Pour qu'un plan soit proposé, il semble que l'imposition d'une date butoir soit nécessaire. Les créanciers devront décider s'ils préfèrent être inclus dans un plan d'arrangement ou continuer leurs procédures sous d'autres juridictions.

[38] Le tribunal n'est évidemment pas le conseiller juridique des créanciers. Il leur appartient de décider s'ils déposent une preuve de réclamation dans le présent dossier, quitte à voter contre un plan proposé s'ils le désirent ou continuer leurs procédures s'ils croient ne pas être liés par un plan auquel ils n'ont pas participé.

[39] La décision leur appartient, mais ils doivent être conscients qu'ils ne participent pas à un tournoi « deux balles – meilleure balle ».

[40] S'ils s'excluent et qu'ils ont raison : tant mieux. Mais s'ils s'excluent et qu'ils ont tort et que les quittances obtenues de tiers dans le cadre d'un plan sous la LACC leur sont opposables, ce sera leur décision.

[41] Le présent tribunal ne peut certainement pas décider du droit américain, tel que déjà discuté dans la décision du 14 mars. Le tribunal y faisait la distinction entre la possibilité d'obtenir des quittances pour des tiers au Canada et aux États-Unis, ainsi que la possibilité de reconnaissance des jugements canadiens aux États-Unis dans le cadre d'une restructuration. Tout ce dont le tribunal peut s'assurer est que les créanciers auront l'opportunité d'obtenir les informations auxquelles ils ont droit.

[42] C'est aussi la raison pour laquelle le tribunal accueillera la requête pour désigner les requérants au recours collectif à titre de représentants dans le présent dossier.

[43] Cela assurera que les victimes reçoivent la meilleure information possible et qu'elles soient assistées dans la rédaction des preuves de réclamation.

[44] Il est par contre bien entendu que le présent jugement n'a aucune incidence sur la requête en autorisation de recours collectif et encore moins sur le groupe proposé dans ce recours. Le juge saisi de ce recours verra à décider de ces questions.

[7] Re : Semcanada Crude Co., 2012 ABQB 489 (J. Romaine).

[45] D'autre part, deux avis types ont été proposés au tribunal. L'avis proposé par MMA sera retenu, puisque celui des requérants laissait entendre que le tribunal prenait position sur les divers recours. Ce n'est pas le rôle du tribunal.

POUR CES MOTIFS, LE TRIBUNAL :

[46] **ACCUEILLE** la requête pour l'obtention d'un processus de réclamation et l'établissement d'une date butoir au 13 juin 2014, à 17 heures;

[47] Une ordonnance en ce sens sera signée ce jour.

[48] **ACCUEILLE** la requête pour désigner les requérants au recours collectif à titre de représentants dans le présent dossier;

[49] Une ordonnance en ce sens sera signée ce jour.

(s) Gaétan Dumas, j.c.s.
GAÉTAN DUMAS, J.C.S.

Me Patrice Benoit
Gowling Lafleur Henderson s.e.n.c.r.l
Procureurs de la débitrice

Me Sylvain Vauclair
Woods s.e.n.c.r.l.
Procureurs du contrôleur

Me Joël Rochon
Procureur de Yannick Gagné et al., requérants du recours collectif

Service list

Date d'audience : 28 mars 2014

Enron Canada Corp. v. National Oil-Well Canada Ltd., 2000 ABCA 285

Date: 20001024
Docket: 99-18564/18565
18566/18567/18568/18569/18570/18571 and 18802

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MR. JUSTICE SULATYCKY
THE HONOURABLE MR. JUSTICE WITTMANN

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c. C-36, as amended
AND IN THE MATTER OF BLUE RANGE RESOURCES CORPORATION

BETWEEN:

ENRON CANADA CORP., and THE CREDITOR'S COMMITTEE

Appellants (Appellants)

- and -

NATIONAL OIL-WELL CANADA LTD. et al.

Respondents (Respondents)

Appeal from the Decision of
THE HONOURABLE MR. JUSTICE LoVECCHIO
Dated the 9th day of November, 1999

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE WITTMANN
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE RUSSELL
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE SULATYCKY

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S. Collins (for TransAlta Utilities Corporation)
D. W. Dear (for Rigel Oil & Gas Ltd.)
D. Mann (for Barrington Petroleum Ltd. and PetroCanada Oil & Gas)
K. E. Staroszik (for Founders Energy Ltd.)
J. N. Thom (for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.)

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE WITTMANN

Introduction

[1] The ***Companies' Creditors Arrangement Act***, R.S.A. 1985, c. C-36, as amended ("***CCAA***"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

[2] In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the ***CCAA*** distribution.

Facts

[3] Blue Range sought and received court protection from its creditors under the ***CCAA*** on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P.01, A.B.P.06). Under this procedure $270,000,000 in claims were filed.

[4] The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

[5] The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result? (A.B.928).

Judgment Below

[6] The chambers judge found that the applicable section of the ***CCAA***, s. 12(2)(iii) did not mandate a claims procedure. He stated that preserving certainty in the ***CCAA*** process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non- compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a ***CCAA*** proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

[7] Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the ***United States Bankruptcy Code***, ***Federal Rules of Bankruptcy Procedure***, for Chapter 11 Reorganization Cases, ("***U.S. Bankruptcy Rules***") the chambers judge chose to incorporate the test in place under the ***Bankruptcy and Insolvency Act*** R.S.C. 1985 c. B-3 ("***BIA***"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the ***BIA*** was appropriate. Under the ***BIA***, late claims are permitted under almost any circumstance provided no injustice is done to other creditors. A late filing creditor under the ***BIA*** may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

[8] It has been recently held by this court that decisions of a ***CCAA*** supervising judge should only be interfered with in clear cases. Deference to a ***CCAA*** supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in ***Pacific National Lease Holding Corp.*** (1992), 15 C.B.R. (3d) 265 (B.C.C.A.) (cited with approval by Hunt, J.A. in ***Luscar Ltd. v. Smoky River Coal Ltd.***, [1999] A.J. No. 676 (C.A.)) as follows at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made...
> ...
> Orders depend on a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA.

The chambers judge was exercising his discretion under the ***CCAA*** in granting an extension of the claims bar dates. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

Analysis

[9] As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the individual creditors. The order dated April 6, 1999 stated in paragraph 2:

> Claims not proven in accordance with the procedures set out in Schedules "A" and "B" shall be deemed forever barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P.01)

The first page of Schedule "A" stated in part:

> A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be <u>forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.</u>
>
> [Emphasis added] (A.B.P.03).

The language used in Schedule "A" goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the ***CCAA*** has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

[10] It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to "smoke out" the creditors. I am dubious that the severe wording of the claims bar orders is effective to "smoke out" the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

The Appropriate Criteria

[11] The appellants advocated the adoption of the criteria under the ***U.S. Bankruptcy Rules***, Chapter 11, while the respondents favoured either the application of the tests under the ***BIA*** or some blending of the two standards.

[12] Rule 9006 of the ***U.S. Bankruptcy Rules*** deals with the extension of time in these circumstances. The relevant portion of the Rule states:

> 9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The key phrase in this section is "excusable neglect". In ***Pioneer Investment Services Company v. Brunswick Associates v. Brunswick Associates Limited Partnership et al.*** 507 U.S. 380, 113 S.Ct. 1489 (1993) the U.S. Supreme Court dealt with the interpretation of this phrase. In ***Pioneer***, the creditor's attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to "inadvertent delays" (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. ***In re Specialty Equipment Companies Inc.***, 159 B.R. 236 (1993).

[13] The Canadian approach under the ***BIA*** has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the ***BIA*** when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: ***Re Mount Jamie Mines (Quebec) Ltd.*** (1980),

110 D.L.R. (3rd) 80 (Ont. S.C.). The Canadian standard under the ***BIA*** is, therefore, less arduous than that applied under the ***U.S. Bankruptcy Rules***.

[14] I accept that some guidance can be gained from the ***BIA*** approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in ***CCAA*** proceedings. But I also take some guidance from the ***U.S. Bankruptcy Rules*** standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the ***BIA*** and ***U.S. Bankruptcy Rules*** approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

[15] In ***Lindsay v. Transtec Canada Ltd.*** (1994), 28 C.B.R. (3d) 110 (B.C.S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the ***CCAA***. Through oversight, the applicant Lindsay was not sent the relevant ***CCAA*** materials by APCL and was not included in the ***CCAA*** proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the ***CCAA*** proceedings became aware of them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking permission to sue APCL as a guarantor, potentially recovering considerably more than those creditors who participated in the ***CCAA*** process.

[16] After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para 19). She then went on to conclude that Lindsay preferred not to participate in the ***CCAA*** process and chose to take his chances later on.

[17] In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the ***CCAA*** and the terms of the plan" (para 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the ***CCAA*** proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

[18] While ***Lindsay*** is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the ***CCAA*** proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

[19] There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts' treatment of delays in the prosecution of actions and the late filing of notices of claim to insurers.

[20] In ***Lethbridge Motors Co. v. American Motors (Can.) Ltd.*** (1987), 53 Alta. L.R. (2d) 326 (C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in ***Allen v. Sir Alfred McAlpine & Sons Ltd.*** [1968] 1 All E.R. 543 where Salmon L.J. said at 561:

> In order for the application to succeed the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was "necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution" (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the Alberta Rules of Court in 1994. Rule 244(4) now states that proof of inordinate and inexcusable

delay constitutes ***prima facie*** evidence of serious prejudice: ***Kuziw v. Kucheran Estate***, 2000 ABCA 226 (Online: Alberta Courts).

[21] Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the ***Insurance Act*** R.S.A. 1980, c. I-5 states:

> 205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to by done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

[22] Similar wording is also found in ss. 211 and 385 of the ***Insurance Act*** and similar legislation exists throughout the common law provinces.

[23] When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: ***Hogan v. Kolisnyk*** (1983), 25 Alta L.R. (2d) 17 (Q.B.). In ***Hogan*** the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The "noncomplying" party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

[24] Considering whether the insurer has suffered any prejudice, the court in ***Hogan*** quoted from a decision of Stevenson, D.C.J. in ***Schoeler (W.) Trucking Ltd. v. Market Ins. Co. of Can***. (1980), 9 Alta L.R. (2d) 232 at 237 where Stevenson, D.C.J. said "[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice". In ***312630 British Columbia Ltd.*** **v.** ***Alta. Surety Co.*** (1995), 10 B.C.L.R. (3d) 84 (C.A) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

[25] These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact of late notice or delays in particular processes.

[26] Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

National-Oilwell Canada Ltd. ("National")

[28] National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

Campbell's Industrial Supply Ltd. ("Campbell's")

[29] Campbell's initial claim in the amount of $14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to $23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

TransAlta Utilities Corporation ("TransAlta")

[30] TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B.432-434). TransAlta was permitted to file its total claim of $120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the ***CCAA*** process. On the contrary, as soon as the

appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

Petro-Canada Oil and Gas ("PCOG")

[31] PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to secured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

[32] Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of $223,940.06 was submitted prior to the relevant date. Barrington received a Notice of Dispute of Claim which approved the claim to the extent of $57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B.549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

Rigel Oil & Gas Ltd. ("Rigel")

[33] The full amount of Rigel's Notice of Claim was $146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

Halliburton Group Canada Inc. ("Haliburton")

[34] Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the ***CCAA*** proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26, 1999 requesting that its claim be included in the ***CCAA*** proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

Founders Energy Ltd. ("Founders")

[35] Founders filed its claim prior to the relevant date, but, due to an oversight, claimed as an unsecured rather than a secured creditor. After filing its initial Notice of Claim, Founders received a Notice of Dispute from Blue Range. Within the 15 day appeal period, but outside the claims bar date, Founders then filed an amended Notice of Claim claiming a secured interest in the sum of $365,472.39, on July 26, 1999.

Prejudice

[36] The timing of these proceedings is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late and late amended claims are allowed. The total of all late and amended claims of the late claimants, secured and unsecured, is approximately $1,175,000. As set out above, in the initial claims bar order, the relevant date was 5:00 p.m. May 7, 1999. This date was extended for joint venture partners to 5:00 p.m. on June 15, 1999. The Plan of Arrangement, sponsored by Canadian Natural Resources Ltd. ("CNRL"), was voted on and passed on July 23, 1999. Status as a creditor, the classification as secured or unsecured, and the amount of a creditor's claim, are relevant to voting: s.6 ***CCAA***.

[37] Enron and the Creditor's Committee claim that they would be prejudiced if the late claims were allowed because, had they known late claims might be permitted without rigorous criteria for allowance, they might have voted differently on the Plan of Arrangement. Enron in particular submits that it would have voted against the CNRL Plan of Arrangement, thus effectively vetoing the plan, if it had known that late claims would be allowed. This bald assertion after the fact was not sufficient to compel the chambers judge to find this would in fact have been Enron's response. Nowhere else in the evidence is there any indication that late claimants being allowed would have impacted the voting on the different proposed Plans of Arrangement. In addition, materiality is relevant to the issue of prejudice. The relationship of $1,175,000 (which is the total of late claims) to $270,000,000 (which is the total of claims filed within time) is .435 per cent.

[38] Also, the contrary is indicated in the Third Interim Report of the Monitor where it is shown in Schedule D-1 (A.B.269) that $2 million was held as an estimate of unsecured disputed claims. Therefore, when considering which Plan of Arrangement to vote for, Enron, and all of the creditors, would have been aware that $2 million could still be legitimately allowed as unsecured claims, and would have been able to assess that potential effect on the amount available for distribution.

[39] Further, the late claimants were well known to the Monitor and all of the other creditors. The evidence discloses that officials at Enron received an e-mail from the Monitor on May 18, 1999 indicating that there were several creditors who had filed late, after the first deadline of May 7, and the Monitor thought that even though they were late the court would likely allow them (A.B.1040). Finally, all of the late claimants were on the distribution list as having potential claims. (A.B. 9-148). It cannot be said that these late claimants were lying in the weeds

waiting to pounce. On the contrary, all parties were fully aware of who had potential claims, especially Enron and the Creditors Committee.

[40] In a ***CCAA*** context, as in a ***BIA*** context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the ***CCAA*** involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: ***Re Cohen*** (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in ***312630 British Columbia Ltd***. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

Summary of Criteria

[41] In considering claims filed or amended after a claims bar date in a claims bar order, a ***CCAA*** supervising judge should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Conclusion

[42] Applying the criteria established, I find that the conclusion reached by the chambers judge ought not to be disturbed, and the late claims filed by the respondents should be permitted under the ***CCAA*** proceedings. The appeal is dismissed.

APPEAL HEARD on June 15, 2000

REASONS FILED at Calgary, Alberta,
this 24th day of October, 2000

WITTMANN J.A.

I concur: RUSSELL J.A.

I concur: SULATYCKY J.A.

Case Name:

Air Canada (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Air Canada and those Subsidiaries listed on Schedule "A"
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[**2004] O.J. No. 1912**

49 C.B.R. (4th) 175

130 A.C.W.S. (3d) 898

2004 CarswellOnt 1843

Court File No. 03-CL-4932

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: April 27, 2004.
Judgment: April 27, 2004.

(3 paras.)

Civil procedure -- Time -- Extension or abridgment under rules -- Creditors & debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act.

Application by Mr. Wickerson for leave to file the dispute notice late. Alberta counsel erred in not reading the rejection and compounded the error when he hesitated for several weeks thinking that the Alberta WCB ruling would have made the issue moot.

HELD: Application allowed. In allowing the application, it was key that the errors were acknowledged within a short period of time. The extension of time did not cause hardship to other interested parties or prejudice Air Canada's reorganization.

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended, s. 191.

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

Counsel:

Frederick W. Chenoweth, for the moving party, Thomas Rodney Wickerson.
Monique Jilesen, for Ernst & Young Inc., monitor.
Ashley Taylor, for Air Canada.
Gregory R. Azeff, for GECAS.

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1 **FARLEY J.** (endorsement):-- I have reviewed this request from the viewpoint of Blue Range, Royal Oak and Eaton's Liquidation. On the basis of the facts before me I am satisfied that leave ought to be granted to late file the dispute notice, provided that same is given to the Monitor by May 13, 2004 together with the supporting documentation.

2 I think it key to that leave that the Alberta counsel acknowledged that it was his error in not reading the rejection when it came in and then compounded the error when he hesitated for several weeks in doing anything as he thought that the Alberta WCB ruling would make the issue moot. More importantly the errors were acknowledged in a fairly short time period and this motion was brought (essentially all within a 2 month timeframe). The extension of time will not cause a hardship to any interested party or prejudice AC's reorganization at this time.

3 I would however, wish to emphasize that no one should assume that an extension will usually be granted. "Corrective" action must be taken forthwith upon the error being realized (or ought reasonably to have been appreciated). Lying in the weeds is not an option.

FARLEY J.

cp/e/nc/qw/qlhcc

Court of Queen's Bench of Alberta

Citation: Royal Bank of Canada v. Cow Harbour Construction Ltd., 2011 ABQB 223

Date: 20110405
Docket: 1003 11241, 1003 05560
Registry: Edmonton

Between:

Royal Bank of Canada

Plaintiff

- and -

Cow Harbour Construction Ltd. and 1134252 Alberta Ltd.

Defendant's

And Between:

Docket: 1003 05560
BKCY Action No: 24-115359

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

In the Matter of 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 Cow Harbour Construction Ltd.

Memorandum of Decision
of the
Honourable Mr. Justice K.D. Yamauchi

I. Introduction

[1] Cow Harbour Construction Ltd. (“Cow Harbour”) sought relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). By an order dated April 7, 2010, as amended by further order dated July 6, 2010 (collectively, the "Initial Order"), this Court granted Cow Harbour the relief it was seeking. The Initial Order appointed Deloitte & Touche Inc. as monitor with respect to those proceedings (the "Monitor").

[2] Matthews Equipment Limited, operating as Hertz Equipment Rental ("Hertz") is one of Cow Harbour’s creditors. Hertz has applied to this Court seeking an order granting it leave to file a proof of claim in a critical suppliers’ claims process that this Court established by way of court order. Hertz missed the court-ordered deadline for filing its proof of claim.

[3] PricewaterhouseCoopers Inc., in its capacity as Cow Harbour’s court-appointed receiver, along with other creditors, oppose Hertz’s application.

II. Facts

[4] The Initial Order imposed a stay of proceedings on all of Cow Harbour’s creditors. Specifically, the Initial Order prohibited creditors, defined by the Initial Order to be "Critical Suppliers," from filing builders' liens against lands on which Cow Harbour did work or furnished materials in respect of improvements. Were it not for the Initial Order, these Critical Suppliers would have been entitled to file valid and enforceable builders' liens. To protect the Critical Suppliers’ claims, the Initial Order granted them a charge over Cow Harbour’s property, not to exceed $8,000,000 (the "CS Charge").

[5] Hertz rented to Cow Harbour various equipment including heaters, loaders, light towers and generators. Hertz issued invoices to Cow Harbour for those rentals between December 23, 2009 and April 1, 2010. As at April 1, 2010, Cow Harbour owed Hertz $178,598.47, representing rental arrears for that period (the “Debt”). The Debt was unsecured.

[6] On May 19, 2010, the Monitor circulated its Fifth Report to the Court (the "Monitor's Fifth Report") among Cow Harbour’s creditors. The Monitor’s Fifth Report contained, among other things, a list of those creditors that the Monitor classified to be the holders of true leases with Cow Harbour, as opposed to capital, or financing, leases. Hertz was among those creditors that the Monitor classified as holding a true lease.

[7] The Monitor's Fifth Report also recommended that this Court establish a formal claims process pursuant to which those creditors claiming to be Critical Suppliers could assert their claims. By an order dated May 21, 2010 (the "May 21 Order"), this Court established a process by which the Monitor’s counsel would circulate a proof of claim form to those claimants who wanted to establish themselves as a Critical Supplier (a "Proof of Claim"). The Monitor’s counsel would send the Proof of Claim form to Cow Harbour’s equipment lessors and persons to whom Cow Harbour owed money as at April 1, 2010. All recipients had to complete and deliver

the Proof of Claim to the Monitor by June 16, 2010 (“Claims Bar Date”). The May 21 Order paras. 11(c) and 11(d) said:

> (c) any lessor or claimant of a payable failing to deliver to the Monitor by [the Claims Bar Date], a completed Proof of Claim, shall be disqualified as a Critical Supplier and not entitled to the benefit of the [CS Charge], unless otherwise ordered by the Court; and
>
> (d) so soon as practical following [the Claims Bar Date], the Monitor shall report to this Honourable Court, with respect to the Proofs of Claim received and other matters relating to claimants under the [CS Charge].

[8] Hertz retained Parlee McLaws LLP ("Parlee McLaws") in or about April, 2010, to act as its legal counsel in Cow Harbour’s *CCAA* proceedings. Marilyn Ann White, Credit Manager for Hertz ("Ms. White"), was the "sole point of contact" between Hertz and Parlee McLaws. All of Hertz's communications with Parlee McLaws ultimately went through Ms. White. Ms. White filed an affidavit and a supplementary affidavit in support of Hertz’s application and subjected herself to questioning on her affidavit. Ms. White’s supplemental affidavit specifically responded to the matters arising out of her questioning

[9] Ms. White stated that as a "routine matter," Parlee McLaws forwarded to her emails and court documents that were filed and which Parlee McLaws received from the Monitor with respect to the Cow Harbour's *CCAA* proceedings.

[10] On May 28, 2010, the Monitor's counsel sent, via email (the "May 28 Email"), a copy of the May 21 Order, to the service list, which included Bryan Maruyama, Dean Hitesman, and Jerry Hockin, all of Parlee McLaws.

[11] On June 1, 2010, the Monitor's counsel sent to Bryan Maruyama, Dean Hitesman, and Jerry Hockin, all of Parlee McLaws, via email (the "June 1 Email"), a copy of the Proof of Claim "package" that claimants would use if they wanted to make a claim as a Critical Supplier, and setting out the Claims Bar Date.

[12] Ms. White does not recall whether she received the May 28 Email or the June 1 Email. She has reviewed her email archives and has found no record of the May 28 Email or the June 1 Email. As well, Hertz's systems department informed Ms. White that once an email received by anyone at Hertz has been deleted, it cannot be retrieved.

[13] There was nothing that prevented Ms. White from asking Parlee McLaws to check their “sent items” to see whether (contrary to their “routine” practice) they failed to forward either the May 28 Email or the June 1 Email to Hertz or to Ms. White. She did not make that inquiry.

[14] Hertz did not file a Proof of Claim with the Monitor by the Claims Bar Date.

[15] On August 25, 2010, this Court granted an order in which it appointed PricewaterhouseCoopers Inc. as receiver (the "Receiver") of all of Cow Harbour's and 1134252 Alberta Ltd.'s current and future assets, undertakings and properties (the "Receivership Order"). This Court granted the Receivership Order pursuant to the *Judicature Act*, RSA 2002, c. J-2, s. 13(2) and the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 243(1) ("*BIA*").

[16] Parlee McLaws provided Hertz's Proof of Claim to the Receiver on January 12, 2011, together with the supporting invoices.

[17] On January 12, 2011, this Court granted a further order (the "January 12 Order"), in which it ordered, among other things, that in accordance with the May 21 Order, any creditor who did not file a Proof of Claim by June 16, 2010, shall, unless otherwise ordered, be conclusively deemed not to be a Critical Supplier.

[18] Hertz now requests this Court to grant it leave to file its Proof of Claim, even though it failed to file it on or before the Claims Bar Date.

III. Issue

[19] Whether this Court should grant Hertz leave to file its Proof of Claim subsequent to the Claims Bar Date.

IV. Discussion

[20] ***Blue Range Resource Corp. (Re)***, 2000 ABCA 285 at para. 26, held that courts, in a *CCAA* proceeding, respond to the following questions when they are determining whether they will permit a claimant to file its claim after the expiry of a deadline for filing claims:

(a) Was the delay caused by inadvertence and if so, did the claimant act in good faith?

(b) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

(c) If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?

(d) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

1. Inadvertence and Good Faith

[21] ***Blue Range*** held that "inadvertent" includes carelessness, negligence, accident, and is unintentional (para. 27).

[22] Hertz argues that the inadvertence in this case is attributable to Parlee McLaws failing to advise Hertz to file its Proof of Claim in advance of the Claims Bar Date. In fact, Hertz argues that it did not receive the Proof of Claim at all and did not recognize the need to file its Proof of Claim until Parlee McLaws advised it to do so on January 12, 2011. Hertz completed its Proof of Claim and had Parlee McLaws submit it to the Receiver on the day that Parlee McLaws brought this requirement to its attention. Finally, Hertz argues that its failure to file its Proof of Claim was not the result of any deliberate act attributable to Hertz.

[23] The Receiver argues that while "inadvertence" sets a seemingly low standard, it is not sufficient for a party to claim inadvertence if there is no explanation for its failure to file its claim on time. In the absence of conduct evidencing "inadvertence," a period of inadvertence will have "ceased to run" when a claimant's solicitor is given specific notice of a claims bar date.

[24] The Receiver further argues that Hertz has not provided sufficient or any evidence of conduct amounting to inadvertence, whether on Hertz's behalf, or on behalf of Parlee McLaws. In fact, it argues, there is no evidence to indicate why Hertz did not file its Proof of Claim in a timely manner. While Hertz argues that this was a result of Parlee McLaw's inadvertent failure to provide the documents to Hertz, there is no evidence to support this assertion. This is so, despite the fact that Ms. White was specifically asked this question during questioning and subsequently filed a supplemental affidavit.

[25] The Receiver argues that this Court may provide the relief Hertz seeks only if Hertz proves "exceptional circumstances." This term comes from ***Ivorylane Corp. v. Country Style Realty Ltd.***, 2004 CarswellOnt 2567 at para. 47. The court, in that case, cites ***Blue Range*** for this proposition. This Court does not agree that ***Blue Range*** made this a part of the test. Instead, it requires this Court to examine the facts before it in the light of the 4 questions it posed. Whether the result of that analysis is exceptional or unexceptional matters not.

[26] The description of "inadvertent" in ***Blue Range***, says that the action is "unintentional." It is difficult to imagine a situation where carelessness, negligence or accident could be "intentional" and still be inadvertent, unless the court in that case was envisaging a situation where a claimant is wilfully blind or procrastinating. Nonetheless, to determine inadvertence, one must look at the circumstances in which the claimant found itself. For example, was there an advantage to Hertz "lying in the weeds" until the Claims Bar Date passed? Although we must examine this question, as well, when deciding whether any prejudice flows, it is important to answer that question at this stage.

[27] Hertz's statement that it was not lying in the weeds is not sufficient. Further, the Receiver argues that there is no evidence before this Court to indicate why Hertz did not file its Proof of

Claim in a timely manner. While this Court agrees with the Receiver that it is Hertz's onus to show why it requires an extension, Romaine J. in ***BA Energy Inc. (Re)***, 2010 ABQB 507, 70 C.B.R. (5th) 24, tells us that "the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case" (para. 34).

[28] In ***Lindsay v. Transtec Canada Ltd.*** (1994), 28 C.B.R. (3d) 110 (B.C.S.C.), the court would not grant the claimant leave to pursue his claim after the creditors had approved a plan of arrangement and the court sanctioned it. He became aware of the *CCAA* proceedings at some point during the proceedings and at various stages throughout the proceedings, his solicitors contacted the debtor's solicitors to inquire about the process. He, however, did not pursue his claim until a point where he could recover potentially more than the debtor's other creditors. The court in ***Blue Range*** said of the ***Lindsay*** case:

> 18 ... [T]he case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

[29] The Receiver forcefully argued that, on the evidence, we still do not know whether Parlee McLaws ever forwarded the May 28 Email or the June 1 Email to Hertz. Ms. White's supplemental affidavit says nothing more than that Hertz is unable to retrieve emails once they are deleted. That may be so, but this lack of evidence does not completely answer the question. We must look at "the specific circumstances of the case" to answer it. In this case, there would be no advantage for any creditor to simply lie in the weeds. They could lose their claim completely or they could be subject to a costs claim. The only advantage could be that they would not have to incur the cost of having to file a Proof of Claim. As well, there could be a practical advantage, such as the one outlined in ***Lindsay v. Transtec Canada Ltd.*** (1994), 28 C.B.R. (3d) 110 (B.C.S.C.). That situation does not apply in this case. This Court finds that there would be no advantage to Hertz by its lying in the weeds and the only explanation for it not filing its Proof of Claim was inadvertence on its part or on the part of Parlee McLaws.

[30] The Receiver rightly points out that service on a solicitor of record is service on the claimant. In fact the *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 11.16, 11.17 and 11.20 permit this. Does the ***Blue Range*** test of unintentional negligence, carelessness and accident apply equally to the claimant's solicitors, as well as the claimant itself? Or is the ***Blue Range*** test limited only to claimants? If it is the latter, then the claimant's remedy would be as against the Alberta Lawyers Insurance Association. With respect to the former, the court in ***Air Canada (Re)*** (2004), 49 C.B.R. (4th) 175 (Ont. S.C.J. [Commercial]), allowed the claimant to file its late notice when counsel had acknowledged that it was through its inadvertence that the notice had not been filed on time, and that corrective action was taken promptly and that the extension of time would not cause a hardship to any interested party or prejudice the debtor company's reorganization.

[31] This Court does not countenance solicitors' negligence, but in the unique circumstances of this case where there are 3 solicitors from the same firm dealing with numerous clients involved in a *CCAA* matter, one can see how the solicitors might be inadvertent. In fact, throughout this Court's involvement in this matter, Parlee McLaws has made submissions which, at the same time, support and contest a particular approach to a matter. One would have thought that solicitors with the experience of those involved in this matter would never allow something like this to happen.

[32] This Court must also assess whether Hertz was acting in good faith in these circumstances. A simple assertion that it was acting in good faith is not enough. This analysis can be done by answering what appears to be two sides of the same coin. Was Hertz acting in bad faith and was it acting in good faith? With respect to the former, the "lying in the weeds" analysis will answer that question. With respect to the latter, a court will find that a claimant is acting in good faith if it submits its claim as soon as it becomes aware of the situation. See *e.g.* ***Blue Range*** at paras. 28 and 30. In the case at bar, Hertz, through Parlee McLaws, provided its Proof of Claim to the Receiver immediately on being advised of the need so to do.

[33] This Court finds that Hertz's failure to file its Proof of Claim was the result of Parlee McLaws' "inadvertence." To this end, this Court chooses to follow the approach that the court took in ***Air Canada***. In the alternative, if Hertz did receive the Proof of Claim, it failed to file the Proof of Claim through its own inadvertence. As well, Hertz, by providing the Receiver with its Proof of Claim immediately on being advised, or reminded, as the case may be, of its need to provide it, shows that it acted in good faith.

2. Prejudice

[34] Hertz argues that having this Court granting it leave to file its Proof of Claim after the Claims Bar Date, and the claim itself, would have a negligible impact on the Critical Supplier claims process. The Receiver has not yet (1) completed its review of the previously submitted Proofs of Claim; (2) completed the appeals process in respect of the Receiver's review of the previously submitted Proofs of Claim; or (3) made any distribution in respect of the CS Charge. Hertz has not been "lying in the weeds."

[35] It further argues that its claim was known to the Monitor and the other creditors. The Monitor categorized Hertz as a true lessor. The Monitor communicated that categorization to all creditors in the Monitor's Fifth Report. Hertz was also known to the Receiver and is listed as having an unsecured claim in the amount of $196,966.29, in the Notice and Statement of Receiver dated August 31, 2010, that the Receiver circulated to all of Cow Harbour's creditors, pursuant to the *BIA*.

[36] Furthermore, Cow Harbour's creditors were aware that there were other creditors who had filed late Proofs of Claim. This Court has not yet adjudicated on the validity of the other late-filed proofs of claim.

[37] Finally, Hertz argues that none of Cow Harbour's creditors will have lost a realistic opportunity to do anything that they otherwise might have done. Conversely, had Hertz submitted its Proof of Claim on time, each of the other creditors would have proceeded in exactly the same fashion as they did.

[38] The Receiver argues that in any consideration of prejudice, this Court should weigh the prejudice to the Receiver or a monitor in a *CCAA* proceeding on its ability carry out its duties and effect a level of predictability and finality in *CCAA* or receivership proceedings.

[39] ***Blue Range*** (para. 36) tells us that timing is a key element when determining whether Hertz or the other Critical Suppliers will suffer any prejudice if this Court were to grant Hertz leave to file its claim. What does this mean? Had the Receiver completed its analysis of the Critical Suppliers' issue and distributed funds then this Court might be less inclined to allow Hertz to file its Proof of Claim. As well, Cow Harbour's other creditors were aware of Hertz's potential claim through many of the Monitor's reports: ***Blue Range*** at para. 39. This Court has not adjudicated on the admissibility of any of the other late Proofs of Claim, as yet.

[40] ***Blue Range*** at para 37, also tells us that materiality is relevant to the issue of prejudice. Assuming that Hertz's claim is the agreed-upon amount of $178,598.47, its claim, as against the total amount of the Proofs of Claim of $49,962,687.68 is .357%. In ***Blue Range***, the court found a .435% claim to be immaterial. Surely, .357% is even less material.

[41] Even if materiality is not *sine qua non* of this Court's analysis, the fact that the Critical Suppliers will receive less money, should this Court grant Hertz leave to file its Proof of Claim, is not something this Court need consider:

> 37 In a *CCAA* context ... the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31.

[42] Because of the immateriality of Hertz's claim relative to the Proofs of Claim as a whole, Cow Harbour's other creditors' awareness of Hertz's potential claim, and the fact that nothing has been done concerning these claims to this point, this Court finds that neither the Critical Suppliers nor the Receiver will suffer any prejudice if this Court were to grant leave to Hertz to file its claim.

[43] Because this Court finds that there would be no "relevant prejudice" that flows as a result of its approving Hertz's late filing, this Court does not intend to deal with the third and fourth ***Blue Range*** questions.

V. Conclusion

[44] Proceedings under the *CCAA* are meant to deal with compromises and arrangements among a debtor company and its creditors. If a creditor fails to file its claim in those proceedings because of its solicitors' negligence or its own inadvertence, as defined in ***Blue Range***, it should be permitted to argue that, nonetheless, a court should permit it to file its claim. That is the reason why ***Blue Range*** outlined the four questions and why this Court inserted the "unless otherwise ordered by the court" provision in the May 21 Order and the January 12 Order.

[45] The objective of a claims procedure order was set out by Romaine J. in ***BA Energy*** as follows:

> 41 The objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure order provides the debtor and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors given the financial circumstances of the debtor and that may be sanctioned by the court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a late claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.
>
> 42 The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

[46] It is important to note that each case depends on its unique facts. This Court finds that Hertz was not attempting to seek an unjustified advantage by not filing its claim or that it was improperly manipulating the process. Its failure to file its claim was inadvertent. Accordingly, this Court grants Hertz leave to file its Proof of Claim subsequent to the June 16, 2010 deadline.

Heard on the 25th day of March, 2011.
Dated at the City of Edmonton, Alberta this 65th day of April, 2011.

K.D. Yamauchi
J.C.Q.B.A.

Appearances:

Bryan Maruyama
Parlee McLaws
for the Applicant Matthews Equipment Limited, operating as Hertz Equipment Rental

Randall S. Van de Mosselaar
Macleod Dixon
for the Respondent PricewaterhouseCoopers Inc., receiver of Cow Harbour Construction Ltd.

Case Name:

Roman Catholic Episcopal Corp. of St. George's (Re)

**IN THE MATTER OF the amended proposal of the Roman Catholic Episcopal Corporation of St. George's
AND IN THE MATTER OF applications by W.B., M.C., J.S. and R.K., Class 4 creditors, pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
AND IN THE MATTER OF the Notice of Disallowance of Claims of W.B., M.C., J.S. and R.K., Class 4 creditors**

[**2007] N.J. No. 32**

2007 NLTD 20

264 Nfld. & P.E.I.R. 309

32 C.B.R. (5th) 302

161 A.C.W.S. (3d) 21

2007 CarswellNfld 198

Docket: 2005 01T 11521

Newfoundland and Labrador Supreme Court - Trial Division
St. John's, Newfoundland and Labrador

A.E. Faour J.

Heard: January 18, 2007.
Oral judgment: January 18, 2007.
Released: January 29, 2007.

(54 paras.)

Insolvency law -- Claims -- Disallowance of -- Application by creditors of bankrupt Episcopal Corporation for order that applicants were entitled to file a claim against Corporation after deadline in proposal -- Trustee had disallowed claims -- Application allowed -- No prejudice established by allowing filing of claims -- No bad faith on part of applicants.

Insolvency law -- Practice -- Proceedings in bankruptcy -- Jurisdiction of courts -- Application by creditors of bankrupt Episcopal Corporation for order that applicants were entitled to file a claim against Corporation after deadline in proposal -- Trustee had disallowed claims -- Application allowed -- Court had jurisdiction pursuant to proposal and legislation to deal with matter.

Application by creditors of bankrupt Episcopal Corporation for order that applicants were entitled to file a claim against Corporation -- Trustee had disallowed claims on basis that claims were brought after deadline set out in proposal made by Corporation -- Applicants brought claims shortly after deadline -- Proposal presented as a mechanism to satisfy claims of claimants who were sexually abused by clergy attached to Corporation -- Applicants alleged sexual abuse and were part of class of creditors unknown to trustee at date of proposal's approval -- HELD: Application allowed -- Applicants' behaviour amounted to inadvertence which caused delay in bringing claims -- Court had jurisdiction to deal with application -- Court had authority pursuant to proposal to hear appeal respecting trustee's decision -- Bankruptcy and Insolvency Act provided court with authority to deal with actions of trustee -- No evidence of prejudice if claims were allowed -- Trustee had not indicated there was any lost opportunity by virtue of late filing which might give rise to prejudice -- Inclusion of four additional claims was within range of possibilities anticipated by proposal -- Claims were submitted within weeks of deadline and nothing indicated process of implementation of proposal was delayed or prejudiced by minor delays in making claims -- No evidence of bad faith on part of applicants.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 37, s. 135(4), s. 149(2), s. 189(9), s. 189(11)

Court Summary:

Corporate and commercial -- Civil practice and procedure -- Insolvency -- Corporations -- Arrangements and compromises -- Proposal -- Under Bankruptcy and Insolvency Act -- Disallowance of claim of creditor -- Jurisdiction of the Court.

The Corporation made a proposal to its creditors which was approved by the Court in July 2005. Most of the creditors were victims of sexual abuse for which the Corporation was vicariously liable. The proposal provided that creditors unknown to the Corporation at the time of the proposal could make claims as long as they were presented prior to the claims bar date. The Applicants filed their claims after the date, and the claims were disallowed by the Trustee on that basis. The Applicants sought to have the decision to disallow reversed.

Held: While the Trustee acted in accordance with the proposal, the court had the jurisdiction to supervise the implementation of the proposal. On balancing the issues of good faith of the claimants and the potential for prejudice to the Trustee's implementation of the proposal, the court held that it was reasonable to permit the claims to be considered in accordance with the assessment process set out in the proposal.

Cases cited:

Re Blue Range Resources, [2000] A.J. No. 1232 (C.A.).

Re NOMA Co., 2004 CarswellOnt 5033, [2004] O.J. No. 4914.

Society of Composers, Authors et. al. v. Armitage, 2000 CarswellOnt 4120.

Lindsay v. Transtec Canada (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73, 1994 CarswellBC 620 (B.C. S.C.).

Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of), 2001 CarswellNB 21, 21 C.B.R. (4th) 222, 233 N.B.R. (2d) 111, 601 A.P.R. 111.

Re Christian Brothers of Ireland and Canada, 2004 CarswellOnt 574, 49 C.B.R. (4th) 12, 69 O.R. (3d) 507.

Statutes cited:

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

Counsel:

Harry Mugford for the Applicants

John Stringer and Stacey O'Dea for the Respondent Trustee

John Lavers for a Class 1 creditor

DECISION OF FAOUR, J.

1 **A.E. FAOUR J.** (orally):-- This is an application by four individuals that they be entitled to file a claim against the Roman Catholic Episcopal Corporation, contrary to the decision of the trustee. I gave my decision orally at the end of the hearing. What follows is a written version of those reasons, edited for syntax and completeness.

2 I note for the record that Mr. Mugford is present on behalf of the four applicants. Mr. Stringer and Ms. O'Dea are here on behalf of the trustee in bankruptcy. Mr. Lavers and Mr. Budden appeared, each on behalf of one Class One creditor. Only Mr. Mugford and Mr. Stringer have filed submissions on behalf of their clients. Mr. Lavers did not file a written submission, but he did make a helpful submission to the Court. Mr. Budden indicated he had not received instructions, and asked leave of the court to withdraw from the proceeding. Leave was granted and he did not participate further.

3 The claims of the four applicants, W.B., M.C., J.S. and R.K. arise under an amended proposal under the *Bankruptcy and Insolvency Act (Canada)* approved by this Court in July 2005. That proposal was presented as a mechanism to satisfy the claims of a number of claimants who were sexually abused by a member of the clergy attached to the Corporation, the legal entity which oversees the activities of the Roman Catholic Church in the western region of the Province. That proposal created four classes of creditors. For the purposes of this proceeding the relevant groupings are first, the sexual abuse creditors who were known to the trustee at the date of approval. They are designated as Class One creditors. Second, the sexual abuse creditors unknown to the trustee at the date of approval. They are categorized as Class Four creditors. The proposal put in place a process

to assess subsequent claims, that would have gone into the Class Four category, and determine whether they had merit or validity.

4 The trustee in respect of the claims of the four applicants has denied the claims because they were received after the March 15, 2006 deadline set out in the proposal. I want to just provide a brief overview of the circumstances of each of the applications.

5 The first one was on behalf of W.B. who contacted his solicitors for the first time on March 22, 2006. They provided notice of his claim to the trustee on March 23, 2006. This was about a week after the deadline. The affidavit of W.B., and all of the applicants, notes that the trustee sent correspondence dated March 16, 2006 that any further claims must be brought to the attention of the Corporation immediately. His evidence included a statement of the allegations of sexual abuse which would ground his claim if accepted for consideration by the trustee.

6 M.C. contacted his solicitors at the end of May, 2005 which was almost a year before the deadline. By a letter dated June 2, 2005 Mr. Stringer was notified of M.C.'s claim and he confirmed receipt by e-mail the same date. The statement of M.C. outlining the allegations of abuse was forwarded on June 14, 2005. He also cites the March 16, 2006 correspondence which acknowledges receipt of the notice of claims from M.C. among others, and sought additional proof. The trustee says that the proof of claim, the formal form, was not received until March 29, 2006 and therefore was out of time. M.C.'s evidence also included a statement of the allegations of sexual abuse which would ground his claim if accepted for consideration by the trustee.

7 J., or J.S., as he indicated he would like to be called, first contacted his solicitors on April 26, 2006, some six weeks after the deadline. On the same date the solicitors for the trustee were notified of the claim and a proof of claim form was submitted. The trustee disallowed this claim on the basis that it was out of time by notice dated April 27, 2006.

8 The claim of J.S. contained allegations which are quite different from the others. The other three related incidents of sexual abuse, including fondling and ejaculation, which occurred generally in private. J.S. cited incidents of serious sexual and non-sexual abuse in public places, and involving significant violence, including gunshots and police involvement. These allegations, it would seem to me, are of quite a different character than the other three and would require some significant investigation by the trustee if accepted for consideration. I only comment to note that the allegations, even though they are different, *prima facie*, form the basis for a claim.

9 Finally, R.K. first contacted solicitors April 27, 2006. They advised the trustee of his claim on May 5, 2006. He made a written statement which was submitted to the solicitors for the Trustee on May 11, 2006. The claim was disallowed by notice from the Trustee on May 8, 2006 on the basis that it was out of time. His evidence also included a statement of the allegations of sexual abuse which would ground his claim if accepted for consideration by the trustee.

10 I note that the proceedings today deal only with the question of whether the claims can be considered given the submission of claims after the claims barred date. We're not concerned today with the merits or the validity of each of the claims. If accepted, the claims would have to be assessed in accordance with the process established under the amended proposal approved in July of 2005.

11 There are two issues that I have to consider. First the nature of this proceeding and my jurisdiction to deal with the applications; second, assuming I have the authority then the substantial issue

of whether it's appropriate to submit the claims to be considered effectively extending the time for submitting a claim.

12 On the first issue, the authority of the Court arises both from the proposal and from the *Bankruptcy and Insolvency Act*. The proposal sets out the four classes of creditors. It defines Class Four creditors in Article 2.1 as including "all unknown creditors who the Corporation becomes aware of after the Court approval date whose claims arose prior to the filing date as a result of the sexual abuse of such creditor by priests, employees or agents of the Corporation, ..."

13 Article 12.8 provides for the effect of the proposal on creditors, that being to provide finality and to satisfy and distinguish all claims. It goes on to provide,

> "Any creditor who has not submitted a proof of claim pursuant to the terms hereof, within the time limit set herein, or whose proof of claim has been disallowed and such creditor has not appealed such disallowance, shall not be entitled to any distribution"

14 I take this last provision to provide the Court implicitly, if not explicitly, with authority to hear an appeal in respect of a decision of the trustee. The proposal and its implementation is, of course, subject to supervision of the Court.

15 The Act provides the Court with authority to deal with actions of the trustee. Subsection 135(4) of the *Bankruptcy and Insolvency Act* provides for discretion to hear appeals from trustees' decisions:

> A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made with that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

16 Section 37 of the Act, provides for an application to the Court to confirm, reverse or modify the act or decision complained of:

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

17 In addition there are specific provisions in the Act cited by Mr. Mugford which provide specifically that the Court has remedial authority and may extend the time for doing something: sections 149(2), 189(9) and (11).

18 Based on the foregoing, I am satisfied that the Court has jurisdiction to deal with the matter.

19 There is an additional procedural matter raised by Mr. Stringer in his submission. He suggests that an alternate procedure open to the claimants was to seek approval of the Court for a late filing of a claim before such a claim was filed. If they had taken that approach, it would seem that the Court would have to consider only the merits of accepting a late claim. He suggested having

taken the route of an appeal, the burden the applicants have to meet is to demonstrate an error of law on the part of the trustee before the disallowance may be set aside. That is a high burden and one which would be more difficult to meet than the approach of seeking approval of the Court before making the claim.

20 Whether I should view this as an appeal where my task would be to determine whether the trustee made an error of law in disallowing the claims, or approve a late claim *nunc pro tunc*, or with retroactive effect, the effect is the same. Either the claims may be made, or they were out of time. I prefer the approach which would permit me to deal with the substantive issue of whether the claims ought to be considered rather than rule on whether the trustee has made an error at law. My preference is to take the approach that I should not let the procedures chosen by the applicants dictate the outcome of the proceeding, but deal with the substantive effect of filing the claims after the claims bar date. In taking this approach it may be necessary to consider that the application to set aside the trustee's decision is in reality an application to give leave *nunc pro tunc* to the applicants to file their claims after the deadline. I'm satisfied that whether or not I find an error of law I can deal with the substance of whether it's appropriate to permit these claims to be made rather than focus this proceeding on whether there was an error of law in the decision to disallow.

21 On the substantive point of whether I ought to permit a late claim, I have to consider two approaches taken in Canada on the question of delay in these circumstances. Counsel for the trustee has helpfully pointed out there are two lines of authority. The first follows the decision or is exemplified in the decision of the Alberta Court of Appeal in **Re Blue Range Resources**, [2000] A.J. No. 1232 (C.A.) which that sets out the factors which ought to be considered in determining whether to grant permission for late filing of claims. At para. 26 the court reviews the criteria applicable:

> 26 Therefore, the appropriate criteria to apply to the late claimants is as follows:
>
> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?
>
> 27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional.

22 In respect of the issue of prejudice, the court went on to elaborate, at para. 40:

> 40 In a CCAA context, as in a BIA context, the fact that Enron and the other creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share cannot be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I

> am in agreement with the test for prejudice used by the British Columbia Court of Appeal in *312630 British Columbia Ltd*, [1995] B.C.J. No. 1600. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

23 Based on this case in which the Alberta Court of Appeal permitted out of time claims to proceed it seems to me that the key factors are good faith on the part of the claimants and prejudice to either the trustee's administration of the proposal, the other creditors, or both.

24 An alternate view was argued by counsel for the trustee as exemplified by the case of **Re NOMA Co.**, 2004 CarswellOnt 5033, [2004] O.J. No. 4914 in the Ontario Superior Court. By denying a claim made after the claims bar date, this case is used by the Trustee to suggest that I should place emphasis on the contractual nature of the proposal and the inherent unfairness which would result if a late creditor could prejudice the delicate balance achieved between the corporation and the creditors who were part of the arrangement. This is the only sure way to ensure the integrity of the process and to bring finality. However, in this case, the court specifically acknowledged the approach in **Re Blue Range Resources**. In refusing the extension of time, the court found that the late claimant had not exercised good faith, and in fact there was inordinate delay in making the claim.

25 In my view, the two cases do not reflect different approaches. Rather, they reflect different results arising from the Court applying similar criteria. An examination of both cases confirms that the appropriate approach in a decision to permit late claims is to ensure a balancing of the relative impact on the claimants and the larger group of creditors. This involves, as set out in **Re Blue Range Resources**, balancing good faith on the part of the claimants with prejudice to the ability of the trustee to carry out its duties under the proposal. Acceptance of the contractual nature of the proposal as a paramount consideration is not inconsistency with such a balancing. Whether or not late claims are accepted, the Trustee is required to adhere to the terms of the proposal to permit a level of predictability and finality for both the corporation and the other creditors. Acceptance of a claim after the claims bar date requires evidence of prejudice to the Trustee in carrying out such a duty.

26 The Trustee argues that I should emphasize the contractual nature of the proposal and reject any claims which do not strictly comply with its terms. Counsel raised several points in defence of the Trustee's decision to disallow these claims. First, the trustee has an obligation to enforce the terms of the proposal as it was approved by the Court, and he cites the case of **Society of Composers, Authors et. al. v. Armitage**, [2000] O.J. No. 3993, 2000 CarswellOnt 4120. Second, that the Court should afford a significant degree of deference to the amended proposal and the decision of the trustee taken in implementation of its provisions. Third, that the claimants have given no good reason for the delay. They ought to have read the various newspapers in which the notice was placed and ought to have been aware of the need to make contact for the purpose of making a claim. Fourth, that the claimants took the wrong procedural approach. They ought to have made application to the Court requesting that the claims barr date be lifted prior to filing their claims rather than appealing the notices of disallowance. As a consequence, they have the burden of demonstrating that the trustee was wrong in law.

27 The applicants for their part make several arguments. First, they argue that a broad interpretation of the proposal would require the trustee to act equitably in implementing the proposal since the proposal contemplated a process to determine unknown creditors, the fact that the applicants were out of time by a few weeks should not deny them access to the process.

28 Second, they argue the claims bar date is a matter of form. It is submitted that both the case law and the provisions of the Act would not permit matters of form to trump matters of substance. Since it's a formality with which they were unable to comply, and as long as they made out a *prima facie* claim they should be permitted access to the process.

29 Third, they referred to the March 16, 2006 letter as a waiver by the trustee of any deadline date. I just want to say that in my view, while the wording of the letter is perhaps unfortunate, I do not believe that this letter can, by itself, cause a waiver of a clear provision of the proposal. I will not consider this argument of the applicants further.

30 Fourth, the applicants say that the prejudice to them if the claim is disallowed at this point is significant as it will make it almost impossible or perhaps impossible for them to obtain a remedy for the harm inflicted upon them.

31 Fifth, they argue that the practical considerations of disallowance would require them to go outside a conciliating mechanism which was established for the express purpose of dealing with such claims as theirs. It was meant to avoid time consuming litigation.

32 The submission of counsel for one of the class one creditors was essentially to support the trustee. He echoed the arguments that the other creditors are entitled to rely on the terms of the proposal. He suggested it was put in place to provide certainty and closure. He felt there was a possibility of inordinate delays should these claims be accepted. The claimants ought to be held to the terms of the proposal as were all the other creditors.

33 In considering all the arguments I reviewed the cases submitted. It is hard to find cases directly on point as the circumstances reflect different situations. First, virtually all of the cases reflect commercial creditors, and not the kind of creditors we have in this case. Second, none of the cases cited dealt with a proposal that contemplated unknown creditors and established a process for dealing with them as this one did.

34 I note the following cases. **Lindsay v. Transtec Canada** (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73, 1994 CarswellBC 620 (B.C. S.C.) involved a claim by a former executive of the company regarding his retirement benefits. He was fully aware of the process but declined to take any steps at the appropriate time to gain a tactical advantage. His application to make a late claim was denied.

35 The case of **Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)**, 2001 CarswellNB 21, 21 C.B.R. (4th) 222, 233 N.B.R. (2d) 111, 601 A.P.R. 111 allowed a late claim. However, it did so in circumstances where the only problem was a delay in the mail. I do not believe it is helpful in this case except to indicate that a short delay where good faith is not in question, is not a bar to filing a late claim. It also cited with approval the test in **Re Blue Range Resources**, to which I referred earlier.

36 In **Re Christian Brothers of Ireland and Canada**, 2004 CarswellOnt 574, 49 C.B.R. (4th) 12, 69 O.R. (3d) 507, the Ontario Court approved the distribution of assets to creditors who were sexual abuse victims over the objection of several of them. The court confirmed that the liquidator

had acted fairly and reasonably in placing limitations on creditor entitlements, given the obligations to distribute the limited assets fairly. The trustee is obligated to do the same in this case. However, that case centred on the substantive issues related to the overall distribution of the estate and not on a procedural question as here. As a consequence, I found that this case was not helpful in assisting in determining the proper balance to be reached between the needs of late creditors, and the integrity of the proposal.

37 In reaching a conclusion on this case I have considered the following factors. First, while the Trustee has spoken of the integrity of the proposal and the need to preserve the rights of the creditors who were part of the decision-making process, he has not set out any real prejudice which would arise if these claims were allowed. The submissions and the affidavit of Mr. Harris referred to the possibility of delay and the issue of dilution of the pool for satisfying the claims. However, during the hearing it was confirmed that the process of assessment is ongoing and nothing was presented to me which would cause me to think there would be any substantial prejudice, including delay, to the process by the addition of these claimants. I also accepted the view, set out in the **Re Blue Range Resources** case, that the possibility of additional creditors diluting the assets to be distributed does not constitute prejudice.

38 Second, the trustee has not indicated there was any lost opportunity by virtue of the late filing which might give rise to prejudice, and I note the decision of the British Columbia Court of Appeal to which I referred earlier, which was cited in the **Blue Range** case.

39 Third, the question of the proper procedure was raised by the trustee. In my view I am obliged to look at the substance of the matter and try to reach a decision based on substantive concerns and not to be hamstrung by the procedure that the applicants chose to follow in this particular case.

40 Fourth, the proposal itself contemplated there would be additional claimants. Other than the question of timing the trustee was directed by the proposal to consider additional claims for which notice had not been provided as of the date of the proposal. The inclusion of four additional claims was within the range of possibilities anticipated by the Proposal.

41 Fifth, while the letter from the trustee dated March 16th, one day after the claims bar date, purported to invite the submission of any final claims, I do not accept that this is somehow a waiver or estoppel which would make the deadline a nullity. I do however accept the letter as evidence of an overall intent in the proposal to determine and assess the claims of unknown victims of abuse.

42 Sixth, in my view there was no inordinate delay by each of the Applicants which in and of itself could prejudice the process. All of these claims were submitted within weeks of the deadline and nothing has been presented which would indicate the process of implementation of the proposal was delayed or prejudiced by what I consider minor delays in making the claim.

43 Seventh, the trustee has not pointed to anything greater than the inadvertence claimed by the claimants which would minimize the existence of good faith on their behalf. In fact, the affidavits of the claimants note the psychological consequences of the abuse by virtue of which they have required significant time to come to terms with their experiences. In the absence of evidence to the contrary, I accept that one of the consequences of sexual abuse of adolescents is the difficulty and reluctance to disclose these acts of abuse in adulthood. Each of these applicants has indicated this difficulty. In my view, they have made out a valid justification for their delay. In addition, once each of them came to the point of contacting counsel, there was no further delay.

44 For one of the claims, that of M.C., the trustee had knowledge for almost a year before the claims bar date. His claim was rejected because the specific claim form was not submitted in time. In my view, there can be no prejudice in this case for that reason. The fact that there was not strict compliance with the formal requirements of the process did not, of itself, present a problem for the trustee.

45 For the other three, W.B., J.S. and R.K, the reasons for delay were similar and related to their awareness of the process.

46 Based on these factors and the evidence before me I am satisfied if the Applicants had sought from the court an extension of time before filing claims, I would have approved it. Whether I treat this as an application to extend the deadline or an appeal from the decision of the trustee, I am satisfied that the circumstances of each of these cases are such that they ought to be considered on their merits. In the circumstances I do not believe that it is necessary to find an error of law. It is necessary for me to consider whether there exists sufficient grounds to approve, *nunc pro tunc*, an extension of the deadline for the purpose of these claims.

47 I accept the approach set out in the **Re Blue Range Resources** case. I am satisfied that there was behaviour amounting to inadvertence which caused the delay. I am also satisfied that nothing before me indicates anything but good faith. I note the circumstances of the **Lindsay v. Transtec** case where the delay was deliberate to gain a strategic advantage. That is certainly not the case here. These claimants have acted in good faith, albeit with significant ignorance of the process.

48 I have also examined the question of prejudice and attempted to balance the impact on the proposal and the other creditors, with the impact on the claimants before me. In my view the evidence is clear that for the claimants, the applicants in this proceeding, the impact of disallowance would be to deny them access to the process. For the trustee and the remainder of the creditors there was no evidence before me that the implementation of the proposal would be affected or delayed by accepting these claims. There was some speculation of delay and certainly concern about diluting the pool of funds available. However, I cannot accept speculation about delay as prejudice, particularly when the assessment process established under the proposal is ongoing to the present day. In respect of prejudice by dilution of the estate of the Corporation, the **Re Blue Range Resources** case provides authority that this is not the kind of prejudice which would underlie a disallowance of the claim.

49 In general, the key question for me was whether the delay in filing made any difference for the trustee in implementing the terms of the proposal. It was clear that the late claims were not in compliance with the strict terms of the proposal. Based on the evidence before me, I reach the conclusion that there was nothing presented to indicate that the delay would cause anything other than minor inconvenience to either the process of assessment of claims, or the Trustee's task of implementing the proposal.

50 I do want to say that I do not believe the trustee could have acted differently. The trustee was obligated to follow the terms of the proposal. The proposal created a deadline and gave him no discretion to vary it. The Court in its role of supervision of the process can authorize a variation of these terms.

51 I also reiterate that my decision today relates only to the question of acceptance of the claims for consideration notwithstanding timeliness. The substance and validity of these claims still

has to be assessed and proper proof provided, and I make no comment about the adequacy of the evidence presented or the narratives submitted by each of the claimants.

52 In summary, there is nothing before me to indicate there would be prejudice to the overall administration of the process under the proposal by accepting four additional claims which in my view were only slightly late in being submitted. Whether I treat this as an appeal of the decision of the trustee to disallow, or an application for leave to make a claim *nunc pro tunc* the applicants shall have the right to have their claims considered in the assessment process established under the amended proposal.

53 One further comment: the fact that these claims were made within weeks of the deadline was significant. Their claims were submitted, in my view, a short time following the claims bar date. This should not be seen as an invitation to others to make late claims at this stage. Almost a year has passed since the deadline. In my view it would be very unlikely that it would be possible to make the same argument for inclusion at this time.

54 I conclude that the application of the four applicants, W.B., M.C., J.S. and R.K. are approved. As successful parties they have leave to apply to address the issue of costs.

A.E. FAOUR J.

cp/ci/e/qljxh/qlbxs/qlbrl

Indexed as:

Ontario v. Canadian Airlines Corp.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36
AND IN THE MATTER OF Canadian Airlines Corporation and Canadian Airlines International Ltd.
Between
The Province of Ontario, applicant, and
Canadian Airlines Corporation and Canadian Airlines International Ltd., respondents

[2000] A.J. No. 1321

276 A.R. 273

101 A.C.W.S. (3d) 11

Action No. 0001-05071

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Heard: November 3, 2000.
Judgment: filed November 7, 2000.

(27 paras.)

Counsel:

Larry B. Robinson, for the applicant.
Chris Simard, for the respondents.

REASONS FOR JUDGMENT

1 **PAPERNY J.**:-- This is an application by the province of Ontario ("Ontario") to extend the time within which to file its distribution dispute notice ("Dispute Notice"). I granted the application with reasons to follow. These are those reasons.

I. Facts

2 Canadian Airlines International Ltd. ("Canadian") has followed a practice of self-assessing its tax liabilities and has made installment payments of tax under two Ontario statutes, the Retail Sales Tax Act and the Corporations Tax Act. Pursuant to an ongoing auditing process, Ontario has assessed Canadian for taxes owing under these two statutes. The assessments date back as far as 1981. Following the assessments, Canadian filed eight notices of objection and appeals are ongoing. Canadian has provided Ontario with three separate letters of credit to secure the assessments under appeal. The letters of credit have been renewed at least once.

3 Ontario estimates the total assessments at approximately $2 million. This may be subject to adjustment due to ongoing audits and the failure of Canadian to have completed its 1999 and 2000 tax returns. Canadian has disputed these assessments from the outset and as stated in the affidavit of Nhan Le, Canadian's Director of Taxation, is of the view that its liability to Ontario for these taxes is contingent and negligible. In short, the tax liability of Canadian to Ontario has been in dispute for several years.

4 Canadian received court protection under the Companies' Creditors Arrangement Act on March 24, 2000.

5 Canadian included Ontario in its list of "Affected Unsecured Claims" and quantified Ontario's claim at zero. Contrary to paragraph 27 of the March 24, 2000 order, Ontario was not served with a copy.

6 Ontario did not receive a copy of the March 24, 2000 order until it received it as part of the voting package sent out in accordance with my April 7, 2000 order in these proceedings. The package was mailed on April 25, 2000, the last possible day under the terms of the April 7, 2000 order and arrived in the mail room of the Corporations Tax Branch of the Revenue Division of Ontario on May 2, 2000, three days before the Claims Bar Date set in that order. The Revenue Division has nine branches. According to the affidavit of Rosita Vinkovic, Senior Collections Officer for the Bankruptcy and Insolvency Unit in the Collections and Compliance Branch of the Ministry of Finance, the normal procedure is for insolvency related documents to be mailed directly to the Insolvency Unit, not to the Corporations Tax Branch. According to Ms. Vinkovic, a notice to this effect was published by the Minister of Finance in a 1997 newsletter of the Canadian Insolvency Practitioners' Association. Canadian did not cross-examine Ms. Vinkovic on her affidavit and does not challenge this practice in its own evidence.

7 The voting package did not make its way to the Insolvency Unit until May 18, 2000. Despite extensive inquiries, Ms. Vinkovic has been unable to determine the reason for this delay. The collection officer in the Insolvency Unit that received the package on May 18, 2000 did not have an opportunity to review it in its entirety until May 23, 2000, the first business day after the long weekend (and the date that a second package was sent by the monitor to the Ministry of Finance public inquiry desk and directly routed to the Insolvency Unit).

8 As Senior Collections Officer, Ms. Vinkovic was assigned to handle the matter on May 25, 2000. She immediately noted the May 5, 2000 Claims Bar Date and a proof of claim along with

copies of the letters of credit were faxed to the monitor that same day. The amount claimed was expressed as preliminary due to the ongoing audit, which was lengthy due to the extent of Canadian's operations and its failure to timely respond to requests for information and documents. The monitor initially advised Ms. Vinkovic that the claim would not be accepted as it was past the Claims Bar Date, but changed its position upon being advised of the related security.

9 On June 19, 2000, nearly one month later, Ontario received a letter from Canadian's counsel advising that its claim would not be accepted because it was submitted after the Claims Bar Date. Ms. Vinkovic was away on vacation from June 23, 2000 until July 10th. On her return on the 10th she read the June 19th letter and immediately sent a request for assistance to Joel Weintraub, Senior Legal Counsel in the Legal Services Branch. Mr. Weintraub contacted the Alberta firm that had handled a similar claim for the BC government and a request was sent to the Assistant Deputy Attorney General for Ontario to authorize the retention of outside counsel. Mr. Robinson advised that he was retained September 14, 2000 and immediately advised Canadian's counsel of his intention to bring this motion but that it would take some time to prepare the necessary material and have it sworn. A notice of motion to extend the time to file a proof of claim in these proceedings was filed by Mr. Robinson on September 26, 2000.

II. Discussion

10 The Alberta Court of Appeal has recently developed an approach that CCAA supervising judges should follow in considering claims filed or amended after a claims bar date, as follows:

> 1. Was the delay caused by inadvertence, and if so, did the claimant act in good faith?
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order to permitting late filing?
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing? (Enron Canada Corp. v. National Oil-Well Canada Ltd, [2000] A.J. No. 1232, 2000 ABCA 285 at paragraph 41)

11 Canadian argued that the Court of Appeal in Enron restricted the use of these criteria to liquidation-style CCAA proceedings and that therefore the test is not applicable here. This is a narrow interpretation. In my view the Court of Appeal was providing guidelines generally applicable to late claims in CCAA proceedings. Even if the Court of Appeal did intend to direct its criteria only to liquidation-style CCAA proceedings, I would in any case find the principled approach of the Court of Appeal to be an excellent framework for the exercise of my discretion; I applied similar criteria in my June 28, 2000 reasons in these proceedings allowing the government of British Columbia to file a late claim.

12 On the facts of this case, the prejudice to the funder of the plan, Air Canada, will necessarily need to be considered. However, the criteria described by the Court of Appeal in Enron do not in my view rule out, but instead embrace addressing the interests of such a party. The Enron criteria are consistent with the rationale of the CCAA to consider and attempt to balance the interests of all affected parties, the character of which will vary with each case and type of plan involved. Empha-

sis on those interests and the appropriate weight to be given to each will also necessarily vary. In my view the criteria in Enron allow for this type of analysis. Accordingly I now turn to application of these criteria.

1. Delay due to inadvertence and presence of good faith

13 In Enron, Wittmann J.A. held that "inadvertence" includes carelessness, negligence, accident and is unintentional. The distinction to be drawn is that between a careless claimant and one who "lies in the weeds" hoping to gain an advantage.

14 Ontario is not in this latter category. It was not served with the initial order. The voting package was mailed on the last possible day to the wrong office, arriving just three days prior to the Claims Bar Date. I can fairly infer from the circumstances that the internal procedures in the government of Ontario failed in having the package re-routed to the proper place in a timely fashion. Once it arrived at the correct destination, however, steps were taken promptly by the responsible officer to file the claim and the monitor received it by fax on May 25, 2000, the very day that the responsible officer was assigned to handle the matter.

15 Canadian did not notify Ontario of its decision to reject its claim until June 19th, 2000. Vacations intervened and a request by the Insolvency Unit for assistance from internal government counsel to deal with this rejection was made within about two weeks. This led to a request to the Assistant Deputy Attorney General of Ontario for permission to hire outside Alberta counsel to handle the matter. It is reasonable to assume that this authorization process would have taken some time and counsel confirmed that this was the case.

16 I have difficulty concluding that the delay here was due to anything but inadvertence. Canadian conceded that there was no evidence of deliberate intent by Ontario to avoid participating in the CCAA process. There is no suggestion or evidence that Ontario was intentionally attempting to circumvent the CCAA process or gain some advantage over other creditors, unlike the applicant in Lindsay v. Transtec Canada Inc. (1994), 28 C.B.R.(3d) 110 (B.C.S.C.). The position of Ontario is not unlike that of TransAlta Utilities Corporation as described in Enron at paragraph 30 (appeal book references omitted):

> It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service...There is no evidence that TransAlta was attempting to circumvent the CCAA process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

17 Further, there is a similarity to the late claim filed by Campbell's Industrial Supply Ltd. also referred to in Enron at paragraph 29 where Wittmann J.A. noted that it was arguable that errors on the part of the debtor company resulted in the late filing. In this case, Canadian contributed to the delay by failing to serve Ontario with the initial order, not mailing the voting package until the last possible day, mailing it to the wrong office and waiting nearly a month to advise Ontario that its late claim was rejected.

2. Any relevant prejudice caused by the delay

18 Canadian argues that the most critical factor in this and any re-organization (as opposed to a liquidation) case is the economic effect on the fonder of the reorganization. I note that the second criteria of "any relevant prejudice" is broadly drawn and not restricted by the Court of Appeal to the interests of creditors and the debtor company. I agree that in consideration of this criteria in this case I must focus on the prejudice to Air Canada.

19 I would firstly note that despite being served with this application, Air Canada chose not to attend and make submissions or present evidence of prejudice.

20 Applying the test for prejudice adopted by the Court of Appeal in Enron, the question here is whether by reason of the late filing by Ontario, Air Canada lost a realistic opportunity to do anything that it might otherwise have done. There is no evidence to suggest this. As with the creditors in Enron, Air Canada and Canadian were specifically aware of the existence of Ontario's claim; Ontario was listed on the Affected Unsecured Claims list. The tax dispute with Ontario was long-standing and Canadian has filed eight notices of objection. Letters of credit have been posted as security for the assessments under appeal. Air Canada is the funder of the plan and has been directly involved in Canadian management and operations since early this year. This knowledge effectively negates any allegation of prejudice. As Wittmann J.A. concluded with respect to the late claimants in Enron, it cannot be said that Ontario was "lying in the weeds waiting to pounce" (paragraph 39).

21 Canadian referred to "procedural prejudice" in the costs associated with determination of the dispute and with potentially having to pay a dividend to Ontario. However, this prejudice too is negated by the knowledge of Ontario's claim. Air Canada and Canadian would have been well aware of the potential that the matter would need to be resolved, with concomitant costs, either by the tax courts in Ontario or the claims officer in these proceedings.

22 Wittmann J.A. held in Enron that the materiality of the late claims is also relevant to prejudice. In that case, the late claims totalled $1,175,000 as compared to the total timely claims pool of $270,000,000. In this case, the evidence of Air Canada's Chief Financial Officer at the fairness hearing was that Air Canada's funding cost amounted to approximately 3 billion dollars, including the anticipated dividend on creditors' claims. The possibility of paying 14 cents on the dollar on a further $2 million (which assumes Ontario will be entirely successful on its claim, which Canadian suggests is not likely) in relation to Air Canada's total cost cannot be described as material.

23 Having concluded that there is no relevant prejudice to Canadian or Air Canada, I need not review the final two criteria in the Enron test.

24 Even if I were to couch my analysis as a consideration of the equities between Air Canada and Ontario, as Canadian would have me do in following what they submit is the applicable test as set out in Lindsay, I would not find that the equities lie in Air Canada's favour. This analysis is largely encompassed in my review of the first two Enron criteria. Canadian adds that, as in Lindsay, if not for Air Canada's funding, the unsecured creditors would have received only 1-3 cents on the dollar and accordingly, Air Canada is entitled to certainty at some point in the process. It submits that Ontario's failure to act in a timely manner should subordinate its interest to the interest of certainty to the funding party, who will have to absorb the entirety of Ontario's claim. Canadian argues that the interests of Air Canada must be supreme in this non-liquidation scenario.

25 The problem with this argument is that unlike the "white knight" in Lindsay, for the reasons I have already described it cannot be fairly said that Air Canada was unaware of Ontario's claim. I emphasize that it is not a surprise claim by a creditor hoping to gain an advantage by delaying ac-

tion; there is no suggestion of bad faith and certainly there was nothing to be gained by waiting. Under the circumstances, which are distinct from those in Lindsay, it is not unfair to the funder of this plan to deal with Ontario's claim. Certainty, while always desirable, is not as compelling in this case as in Lindsay due to the knowledge surrounding Ontario's claim. Canadian and Air Canada were well aware of the claim and are now attempting to use the delay to avoid having to resolve the dispute with Ontario and potentially paying a further dividend.

26 Ontario shall have seven days from the date of these reasons to amend and submit its claim. It shall be entitled to make any further amendments necessitated by the late filing of Canadian's 1999 and 2000 returns.

27 Each party shall bear its own costs of this application.

PAPERNY J.

cp/s/qljpn/qlcas