CANADA
PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

NO: 450-11-000167-134

BK/0194
n/réf. : 332372.0004

COUR SUPÉRIEURE
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.), personne morale constituée en vertu des lois de la province de la Nouvelle-Écosse, ayant un établissement commercial au 1, Place Ville-Marie, 37^{e} étage, Montréal (Québec), H3B 3P4 (au bureau de son avocat [le « **Fondé de pouvoir** »]);

Débitrice

-et-

RICHTER GROUPE CONSEIL INC. (RICHTER ADVISORY GROUP INC.), personne morale constituée ayant son principal établissement au 1981, avenue McGill College, 12e étage, Montréal (Québec), H3A 0G6;

Contrôleur

-et-

LA GARANTIE COMPAGNIE D'ASSURANCE DE L'AMÉRIQUE DU NORD, personne morale constituée (Canada) ayant un établissement commercial au 1560-1010, rue De La Gauchetière Ouest, Montréal (Québec), H3B 2R4;

-et-

L'UNIQUE ASSURANCES GÉNÉRALES INC., personne morale constituée (Québec) ayant son principal établissement au 625, rue Saint-Amable, Québec (Québec), G1R 2G5;

-et-

LA CAPITALE, ASSURANCES GÉNÉRALES INC., personne morale constituée (Québec) ayant son principal établissement au 625, rue Saint-Amable, Québec (Québec), G1R 2G5;

Requérantes

**NOTE ET AUTORITÉS DES REQUÉRANTES
LA GARANTIE COMPAGNIE D'ASSURANCE DE L'AMÉRIQUE DU NORD, L'UNIQUE ASSURANCES GÉNÉRALES INC. ET LA CAPITALE, ASSURANCES GÉNÉRALES INC. DANS LE CADRE DE LA REQUÊTE POUR ÊTRE AUTORISÉ À DÉPOSER UNE PREUVE DE RÉCLAMATION HORS DÉLAI
(Art. 10 de la *Loi sur les arrangements avec les créanciers des compagnies*)**

À L'HONORABLE GAÉTAN DUMAS, JUGE À LA COUR SUPÉRIEURE, SIÉGEANT EN CHAMBRE COMMERCIALE, POUR LE DISTRICT DE SAINT-FRANÇOIS, LA REQUÉRANTE EXPOSE RESPECTUEUSEMENT CE QUI SUIT :

INTRODUCTION

1. Le 6 juillet 2013, un train opéré par la société Montreal Main & Atlantique Canada Cie (ci-après la « **MMA** ») a déraillé dans la Ville de Lac-Mégantic, Québec, Canada, causant des dommages sérieux et importants à la population, aux propriétés et à l'environnement (ci-après l'« **Accident** »);

2. Suivant cet Accident, de nombreuses poursuites ont été entreprises à l'encontre de MMA;

3. Le 6 août 2013, MMA a déposé auprès de la Cour supérieure du Québec, 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*, L.R.C. (1985), c. 36 (ci-après « **LACC** »), telle qu'amendée;

4. Le 8 août 2013, l'honorable Martin Castonguay, j.c.s., a rendu une ordonnance initiale, laquelle a notamment désigné Richter Groupe Conseil inc. (ci-après « **Richter** ») à titre de contrôleur;

5. Le 13 décembre 2013, MMA a présenté une requête afin d'établir un processus de sollicitation des réclamations et l'établissement d'une limite pour le dépôt desdites réclamations, le tout tel qu'il appert du dossier de Cour;

6. Cette requête visant à établir une procédure de réclamation a été entendue par le tribunal le 28 mars 2014;

7. Le 31 mars 2014, l'Honorable Gaétan Dumas, j.c.s., accueillait la requête visant à établir une procédure de réclamation concluant qu'une ordonnance allait suivre sous peu;

8. Le 4 avril 2014, l'Honorable Gaétan Dumas, j.c.s., rendait ladite ordonnance (ci-après l' « **Ordonnance**») relativement à la procédure de réclamation;

9. Par cette ordonnance, les preuves de réclamation devaient être reçues par le contrôleur Richter, soit par la poste, par courrier recommandé, par messagerie,

par télécopieur ou par courrier électronique au plus tard le 13 juin 2014, à 17h00, heure de Montréal;

10. En date du 4 avril 2014, les Requérantes n'étaient pas des « créanciers connus » au sens de l'Ordonnance;

ORDONNANCE RECHERCHÉE

11. Les Requérantes demandent donc au Tribunal d'être autorisées à déposer leur preuve de réclamation produite au soutien des présentes requêtes malgré l'expiration du délai pour ce faire prévu à l'Ordonnance.

AUTORISATION D'UNE PREUVE DE RÉCLAMATION TARDIVE

12. Dans le cadre d'une requête pour être autorisé à déposer une preuve de réclamation tardive, les tribunaux ont établis 4 critères permettant de déterminer du sort de ce genre de requête. La Cour d'appel de l'Alberta, dans la décision *Enron Canada Corp.* v. *National Oil-Well Canada Ltd.,* écrivait :

> *[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?*

- ***Enron Canada Corp.* v. *National Oil-Well Canada Ltd.*, 2000 ABCA 285 [Onglet 1]**

13. Ces critères ont été repris par la Cour supérieure dans la décision *Pangeo Pharma Inc.* c. *Livingston international Inc.*

- ***Pangeo Pharma Inc.* c. *Livingston international Inc.*, 2004 CanLII 14941 (QC CS). [Onglet 2]**

14. Quant au premier critère, la Cour mentionnait dans la même décision que l'erreur du créancier dans le retard du dépôt de sa preuve de réclamation peut également être due à sa négligence ou à son insouciance s'il s'est toujours comporté de bonne foi. La Cour d'appel de l'Alberta écrivait :

> *[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), 1980 CanLII 1797 (ON SC), 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.* [Nos soulignements]

- ***Enron Canada Corp.* v. *National Oil-Well Canada Ltd.*, 2000 ABCA 285 [Onglet 1]**

15. La Cour d'appel réitérait également ce principe dans la décision *BA Energy Inc. (Re)* où elle mentionnait :

> *[35] Wittmann, J.A. noted that "inadvertence" in the context of the first criterion includes carelessness, negligence or accident and is unintentional.*

- ***BA Energy Inc. (Re)*, 2010 ABQB 507 [Onglet 3]**

16. Quant au deuxième critère d'analyse, la Cour d'appel de l'Alberta soulignait que le préjudice économique subi par les autres créanciers ayant déposé leur preuve de réclamation n'est pas pertinent aux fins de l'analyse :

> *[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.* [Nos soulignements]

- ***Enron Canada Corp.* v. *National Oil-Well Canada Ltd.*, 2000 ABCA 285. [Onglet 1]**

17. La Cour d'appel de l'Alberta, dans la décision *BA Energy Inc. (Re)* confirmait à nouveau que le fait que les autres créanciers qui pourraient subir un préjudice économique en cas d'acceptation de la réclamation tardive n'est pas un critère à prendre en considération lors de l'analyse du tribunal :

> *[46] With respect to the materiality of the claim, it would if accepted comprise approximately 5.4% of the total pool of affected creditors and, if paid from plan proceeds, would reduce the amount available to unsecured creditors from 55 cents per dollar of a claim to 53 cents per dollar of claim. The Dresser-Rand claim therefore is not as insignificant as the late claimsaccepted by the Court in Blue Range.*

> *[47] As noted in Blue Range at paragraph 40, the fact that creditors may receive less money if a late claim is accepted is not prejudice relative to the second criterion. The test is whether creditors by reason of the late claimlost a realistic opportunity to do anything that they otherwise might have done. In this case, it is not possible to determine if any of the proxy votes cast in favour of the plan would have been affected by knowledge of the lateclaim. It is only apparent that a significant number of creditors were not aware of the claim when they decided how to vote.*
>
> *[48] During the sanction hearing of April 16, 2010, BA Energy indicated that, instead of reducing the distribution to other creditors if Dresser-Rand's lateclaim was accepted by the Court, BA Energy would find another way to pay the required distribution to Dresser-Rand.*
>
> *[49] Consideration of prejudice is not restricted to prejudice to other creditors. The second criterion also requires consideration of prejudice to the debtor company or other interested parties: Blue Range at paras. 14 and 18. The timing of the late claim with respect to the stage of proceedings is a key consideration in determining whether there has been prejudice: Blue Rangeat para. 36.*

- ***BA Energy Inc. (Re),* 2010 ABQB 507 [Onglet 3]**

18. Considérant que le vote des créanciers nommés « Assureurs subrogés » est déjà prédéterminé et limité au plan d'arrangement, le seul réel préjudice pouvant être soulevé par les autres « Assureurs subrogés » est un préjudice économique.

19. Dans le cadre de l'analyse de ces critères, la Cour supérieure, dans la décision *Pangeo Pharma Inc.* c. *Livingston international Inc.*, tenait également compte du fait qu'aucun dividende n'avait été versé et que les réclamations tardives n'avaient pas d'influence sur le sens du vote des créanciers :

> *[29] Finalement, comme aucun dividende n'a été versé, que la réclamation ne peut changer le sens du vote des créanciers, que la réclamation ne peut changer l'arrangement proposé par la débitrice et que le montant de cette réclamation est minime par rapport à l'ensemble des créanciers prouvés, le tribunal est d'avis que l'autorisation de déposer la preuve de réclamation n'aura et pourra avoir aucun impact sur le sort réservé aux créanciers et à la débitrice dans l'arrangement proposé.*

- ***Pangeo Pharma Inc.* c. *Livingston international Inc.*, 2004 CanLII 14941 (QC CS). [Onglet 2]**

20. En l'espèce, l'assemblée des créanciers n'a pas encore eu lieu et ceux-ci n'ont pas encore été appelés à se prononcer sur le plan d'arrangement proposé.

21. En ce qui concerne la débitrice, celle-ci ne subit également aucun préjudice puisque les sommes proposées au plan d'arrangement proposé constitue une somme forfaitaire.

22. Quant aux tiers qui participeront monétairement au plan d'arrangement proposé, ceux-ci ne subissent également aucun préjudice de la présence des

Requérantes comme créancières puisque d'une part, aucun d'entre eux n'a manifestement son désir de contester les présentes requêtes et d'autre part, ceux-ci contribuent, nous présumons, pour des montants forfaitaires dans le cadre du plan d'arrangement proposé.

23. Au contraire, ces tiers seront rassurés par la présence d'un plus grand nombre de créanciers.

24. Quant aux autres créanciers, ceux-ci ne subissent également aucun préjudice.

PAR CES MOTIFS, PLAISE AU TRIBUNAL :

ACCUEILLIR les présentes requêtes;

AUTORISER LA GARANTIE COMPAGNIE D'ASSURANCE DE L'AMÉRIQUE DU NORD à déposer sa preuve de réclamation tardivement auprès du Contrôleur;

ORDONNER au Contrôleur de recevoir la réclamation de LA GARANTIE COMPAGNIE D'ASSURANCE DE L'AMÉRIQUE DU NORD, comme créance ordinaire déposée pour un montant de 2 697 005 $;

AUTORISER L'UNIQUE ASSURANCES GÉNÉRALES INC. à déposer sa preuve de réclamation tardivement auprès du Contrôleur;

ORDONNER au Contrôleur de recevoir la réclamation de L'UNIQUE ASSURANCES GÉNÉRALES INC., comme créance ordinaire déposée pour un montant de 656 943,36$;

AUTORISER LA CAPITALE ASSURANCES GÉNÉRALES INC. à déposer sa preuve de réclamation tardivement auprès du Contrôleur;

ORDONNER au Contrôleur de recevoir la réclamation de LA CAPITALE ASSURANCES GÉNÉRALES INC., comme créance ordinaire déposée pour un montant de 1 057 583,57 $;

LE TOUT sans frais, sauf en cas de contestation.

Québec, le 22 avril 2015

Langlois Kronström Desjardins

LANGLOIS KRONSTRÖM DESJARDINS, S.E.N.C.R.L.
Procureurs des Requérantes

N° : 450-11-000167-134

Cour supérieure (Chambre commerciale)
District de Saint-François

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-

LA GARANTIE COMPAGNIE D'ASSURANCE DE L'AMÉRIQUE DU NORD,;
L'UNIQUE ASSURANCES GÉNÉRALES INC.,
LA CAPITALE, ASSURANCES GÉNÉRALES INC.,
Requérantes

NOTE ET AUTORITÉS DES REQUÉRANTES LA GARANTIE COMPAGNIE D'ASSURANCE DE L'AMÉRIQUE DU NORD, L'UNIQUE ASSURANCES GÉNÉRALES INC. ET LA CAPITALE, ASSURANCES GÉNÉRALES INC. DANS LE CADRE DE LA REQUÊTE POUR ÊTRE AUTORISÉ À DÉPOSER UNE PREUVE DE RÉCLAMATION HORS DÉLAI (Art. 10 LACC)

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Casier
BK 0194

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

COUNSEL:
A. Robert Anderson
and Scott J. Burrell
(for Enron Canada Corp. and the Creditors' Committee)

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.

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-11-021037-037

DATE : LE 5 FÉVRIER 2004

SOUS LA PRÉSIDENCE DE : L'HONORABLE PIERRE JOURNET, J.C.S.

DANS L'AFFAIRE DU PLAN D'ARRANGEMENTS DE :

PANGEO PHARMA INC., PANGEO PHARMA (Canada) INC., LIOH INC., MEDRO PRODUCTS (2001) INC., 1375092 ONTARIO INC., INSTITUTE OF APPLIED COMPLEMENTARY MEDICINE INC. AND 9046-7093 QUEBEC INC.
Débitrices
-et-
ERNST & YOUNG
Contrôleur/Intimé
-et-
LIVINGSTON INTERNATIONAL INC.
Requérante

JUGEMENT

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[1] Le 10 juillet 2003, le Tribunal nomme Ernst & Young, à titre de contrôleur auprès des compagnies Pangeo Pharma inc., Pangeo Pharma (Canada) inc., Lioh inc., Medro Products (2001) inc., 1375092 Ontario inc., l'Institut de médecine complémentaire appliquée et 9046-7093 Québec inc.

[2] Ces compagnies ont déposé un plan d'arrangements qui nécessitait la production de toutes les réclamations des créanciers auprès du contrôleur, avant le 17 octobre 2003, à 17 heures.

[3] Le tribunal par ordonnance fixait le « Bar Date » ou la date butoir au 17 octobre 2003, stipulant que les preuves de réclamations qui ne seraient pas déposées à cette date, ne pourraient plus l'être par la suite et devraient être considérées comme éteintes.

[4] Il n'est pas contesté que les avis ont été envoyés et publiés afin que tous les créanciers aient connaissance de l'ordonnance du tribunal et des dates prévues pour la production des preuves de réclamations.

[5] Linvingston International est créancière ordinaire. Son vice-président finance donne instruction à ses employés de préparer la preuve de réclamation. Les avocats de la compagnie ne sont pas consultés.

[6] La preuve de réclamation est finalement complétée et transmise au contrôleur le 22 octobre, le lendemain où les créanciers ont été appelés à se prononcer sur le plan d'arrangements.

[7] L'ensemble des créanciers a approuvé le plan lors de l'assemblée du 21 octobre et le tribunal a ratifié le plan, le 5 novembre 2003.

[8] Ce n'est que le 18 décembre 2003 que la preuve de réclamation de Livingston International est rejetée par le contrôleur.

[9] La créancière fait appel de cette décision d'où la requête sous étude.

[10] Le tribunal peut en vertu des pouvoirs qui lui sont conférés par la *Loi facilitant les transactions et les arrangements entre les compagnies et leurs créanciers*[1] rendre toutes les ordonnances requises aux fins de permettre aux créanciers ainsi qu'à toute partie au litige, d'exercer pleinement les droits qui leur sont conférés par cette loi.

[11] Aucune disposition législative spécifique ne permet à un créancier de requérir une autorisation pour déposer une preuve de réclamation hors les délais fixés.

[12] Le tribunal a cependant la compétence pour entendre la demande et rendre les ordonnances qui s'imposent[2]. Il s'agit d'un pouvoir discrétionnaire.

[13] Les tribunaux ont eu à décider à de rares occasions si une demande de production tardive d'une réclamation pouvait être admissible.

[14] C'est ainsi que le tribunal de l'Alberta, confirmé par la Cour d'appel de cette province a établi les principes généraux devant guider les tribunaux dans l'acceptation

1. L.R.C. (1985), ch. C-36;
2. Art. 10, 12 (2) (iii) de la loi précitée;

ou le refus d'octroyer la permission de produire une preuve après l'arrivée de la date butoir « Claims Bar Date » fixée par le tribunal[3].

[15] Le tribunal souligne que la *LFI* prévoit qu'un créancier peut obtenir l'autorisation de produire sa preuve de réclamation en retard. Si ce droit lui est reconnu, il ne pourra cependant obtenir de dividende qu'à partir des sommes non réparties au moment de l'autorisation.

[16] Aux Etats-Unis, le chapitre XI de la *Loi sur la faillite* prévoit que le créancier qui veut produire une réclamation tardive devra prouver que le retard est excusable, c'est-à-dire, qu'il existe des motifs raisonnables au retard.

[17] Notre *loi* est silencieuse sur le sujet. Le juge Wittman de la Cour d'appel de l'Alberta s'en rapporte à une approche mixte en retenant l'approche américaine et celle contenue dans la *LFI.*

[18] Il ajoute :

> « 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 concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.[4]

[19] Suite à ces propos, la Cour d'appel établit (4) critères qui serviront à décider du sort d'une demande comme celle soumise dans le présent dossier.

[20] Le juge devra donc prendre en considération les critères suivants :

1. Le retard dans la production est-il dû à une erreur (négligence, insouciance, faute non intentionnelle) et si oui, le créancier a-t-il agi de bonne foi ?

2. Quels seront les conséquences et les préjudices possibles découlant de la permission de produire une réclamation tardive ?

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3. *Re : Blue Range Resources Corp.*, [1999] Carswell (Alta. Q.B.) confirmé 2000, Carswell 1145 (Alta. CA) demande à la Cour suprême, C.S.C. [2000] 648;
4. *Op. cité*, note 3 ;

3. Si le créancier subit un préjudice, peut-on le compenser par l'imposition de conditions précises rattachées au droit de production tardif ?

4. Si le créancier subit un préjudice ne pouvant être compensé par des mesures appropriées, peut-on envisager d'autres motifs permettant d'accorder le droit à la production tardive ?

[21] À la lumière de ces critères, le tribunal n'hésite pas à conclure que la conduite de la requérante, de ses officiers et de ses employés a été négligente, puisque le mandat du vice-président a été donné le jour de la date butoir et qu'il n'a aucunement vérifié si les ordres qu'il avait donnés avaient été respectés.

[22] Le tribunal ne peut conclure que la requérante a agi de mauvaise foi ou pour obtenir un avantage sur les autres créanciers, puisque la bonne foi se présume et qu'aucune preuve de mauvaise foi n'a été faite.

[23] Le tribunal est aussi d'avis que la production tardive ne peut causer aucun préjudice aux autres créanciers. De plus, il n'y a pas de demande relative à la tenue d'un nouveau vote des créanciers.

[24] Somme toute, le seul effet de la permission de produire tardivement la preuve de réclamation sera d'ajouter une goutte d'eau dans la mer de réclamations contre la débitrice.

[25] Le tribunal partage l'opinion du juge Wittman dans l'arrêt *Blue Range Resources* à l'effet que l'ajout de la preuve de réclamation ne constitue pas un préjudice pour les autres créanciers, même s'il devait réduire les dividendes auxquels ils auraient eu droit.

[26] Chaque cas en est un d'espèce et le tribunal doit exercer sa discrétion de manière à faciliter l'exercice des droits d'une partie dans la mesure où cela ne cause pas de préjudice aux autres créanciers.

[27] Le tribunal est d'avis qu'il faut s'inspirer principalement de la *LFI* plutôt que de la loi américaine pour décider de la demande soumise puisque la *Loi sur les arrangements avec les créanciers des compagnies* a été adoptée comme complément à la *LFI* et pour des situations d'insolvabilité très importantes.

[28] Comme, d'autre part, la décision du refus de la preuve de réclamation n'a été connue qu'environ 2 mois après l'avènement de la date butoir, il était impossible au requérant de présenter sa demande plus rapidement.

[29] Finalement, comme aucun dividende n'a été versé, que la réclamation ne peut changer le sens du vote des créanciers, que la réclamation ne peut changer l'arrangement proposé par la débitrice et que le montant de cette réclamation est minime par rapport à l'ensemble des créanciers prouvés, le tribunal est d'avis que

l'autorisation de déposer la preuve de réclamation n'aura et pourra avoir aucun impact sur le sort réservé aux créanciers et à la débitrice dans l'arrangement proposé.

[30] **POUR TOUS CES MOTIFS, LE TRIBUNAL :**

[31] **ACCUEILLE** la requête ;

[32] **ANNULE** l'avis de rejet du contrôleur en date du 18 décembre 2003 ;

[33] **ORDONNE** au contrôleur de considérer la réclamation de Livingston International inc., comme créance ordinaire déposée pour un montant de 50 092,37 $;

[34] **AVEC DÉPENS.**

_____
PIERRE JOURNET, J.C.S.

Me Lewis M. Cytrynbaum
Partie requérante

Me Jacques Darche
Borden, Ladner, Gervais
Partie Intimé

Date d'audience : Le 4 février 2004

Court of Queen's Bench of Alberta

Citation: BA Energy Inc. (Re) 2010 ABQB 507

Date: 20100805
Docket: 0801 16292
Registry: Calgary

In the Matter of Section 193 of the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9, as amended; and in the matter of the *Judicature Act*, R.S.A. 2000, c. J-2, as amended,

And in the Matter of a Proposed Arrangement involving Value Creation Inc., BA Energy Inc. and the holders of common shares of Value Creation Inc.

And in the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended; and in the Matter of BA Energy Inc.

Corrected judgment: A corrigendum was issued on August 13, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

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

Introduction

[1] Dresser-Rand Canada, Inc. ("Dresser-Rand") applies for acceptance of its late amended proof of claim so that it may participate in a distribution to unsecured creditors pursuant to the plan of arrangement and reorganization of BA Energy Inc. ("BA Energy") under the *Companies' Creditors Arrangement Act.*

[2] The issue is whether Dresser-Rand, having initially filed a claim which it characterized as fully secured on the basis of holding assets that it described as having a value equal to its claim,

is entitled to file a late amended claim that now alleges that a large portion of the claim is unsecured.

Facts

[3] In 2006, BA Energy had entered into an agreement of sale with Dresser-Rand for the purchase of a wet-gas compressor and ancillary equipment for use at the proposed Heartland Upgrader, a heavy oil upgrader that BA Energy was in the process of constructing at a site near Fort Saskatchewan, Alberta. The total purchase price for this compressor was USD $8,577,942.39.

[4] On December 30, 2008, BA Energy was granted an initial order under the *Companies' Creditors Arrangement Act*,R.S.C. 1985, c. C-36 as amended (the "CCAA").

[5] At the time of the filing under the CCAA, BA Energy had paid USD $7,021,918 pursuant to the purchase agreement, leaving a balance owing of USD $1,651.543.63. The compressor was still in the possession of Dresser-Rand at its premises in Edmonton, with the exception of some of the ancillary equipment which had been delivered to the proposed site of the Heartland Upgrader.

[6] On March 9, 2009, counsel to Dresser-Rand enquired of counsel to BA Energy and counsel to the Monitor whether the balance of the purchase price would be paid, "failing which Dresser-Rand will be free to exercise its right of sale pursuant to the *Sale of Goods Act.*" On May 15, 2009, Dresser-Rand sent a Proof of Claim to the Monitor, signed by Dresser-Rand's General Manager in Canada, indicating that it had a secured claim for USD $1,655,477.95 and that "in respect of the said debt, we hold assets of the CCAA Debtor valued at $1,655,477.95 US as security". Under the Claims Procedure Order, claims were to be filed by June 15, 2009.

[7] On August 26, 2009, BA Energy repudiated the purchase agreement and advised Dresser-Rand that it had a duty to mitigate its losses with respect to the terminated agreement.

[8] In an email dated August 31, 2009, counsel to Dresser-Rand asked counsel to BA Energy to confirm that Dresser-Rand was free to deal with the compressor equipment in its possession and enquired whether BA Energy would return the parts in its possession. On the same day, counsel to BA Energy responded that Dresser-Rand could deal with the equipment subject to any requirement to act reasonably in performing its duty to mitigate and said that he would ask his client about the equipment in its possession.

[9] On September 18, 2009, the Monitor advised counsel to Dresser-Rand that, in light of the repudiation, Dresser-Rand's previous claim may have been stayed and that Dresser-Rand may have the right to file "Subsequent Claim" as set out in the Claims Procedure Order. The Monitor also told Dresser-Rand that BA Energy believed that the ancillary equipment in its possession was worth about $1 million. Counsel to Dresser-Rand responded that he did not believe his client would be interested in the equipment at that price.

[10] On September 22, 2009, Dresser-Rand submitted a Subsequent Claim for USD $1,651,543.63 (taking into account a further invoice paid by BA Energy). Again, Dresser-Rand in its claim form characterized the claim as secured and, again, the claim form states that Dresser-Rand held assets of the CCAA Debtor valued at USD $1,651.543.63.

[11] On December 16, 2009, the Monitor issued a Notice of Revision or Disallowance of the claim. This notice indicates that the Proof of Claim as submitted in the amount of USD $1,651,543.53 was revised and accepted at nil. The Monitor noted as follows:

> Retained Assets
> [Dresser-Rand] retained possession of certain assets as a result of the termination of the Purchase Order. In the Termination Letter the Applicant directed [Dresser-Rand] to mitigate its losses in respect of the termination of the Purchase Order. The Applicant noted in its review of [Dresser-Rand]'s Claim that the retained assets have a value in excess of the amount of [Dresser-Rand]'s Claim. Accordingly, the Applicant has revised [Dresser-Rand]'s claim to $0.00.

[12] On December 18, 2009, counsel to Dresser-Rand asked to meet with counsel to BA Energy and the Monitor to discuss the reasoning behind the Notice of Revision, commenting that "(p)reviously you did not dispute our priority to the extent of what we could realize from the equipment we have in our possession." The email also notes that the compressor is custom-made equipment and that its sale may take some time.

[13] On December 20, 2009, counsel to Dresser-Rand delivered a Notice of Dispute to the Monitor, with a covering letter that noted as follows:

> With respect to the enclosed Notice of Dispute, in reviewing the documentation you forwarded to Dresser-Rand Canada, Inc. in this regard, this simply may be a situation where there is misunderstanding of terminology between us. Looking at your statement about the "retained assets", you do not appear to be disputing Dresser-Rand Canada, Inc.'s right to retain the assets in question (being compressor equipment) and deal with it as it wishes. To this stage, we have always valued the retained assets as being worth as much or more than the debt that is owed by BA Energy Inc. to Dresser-Rand Canada, Inc. We do not believe that you should have put $0.00 beside the secured aspect of this claim in the Notice of Revision or Disallowance dated December 16, 2009.

[14] The Notice of Dispute lists $1,651.543.63 under the designation "Reviewed Claim or Subsequent Claim as Disputed" and characterizes this amount as "Secured". It makes no claim on an unsecured basis. The Notice stipulates that "(t)his claim is fully secured. The Notice of Revision or Disallowance did not reflect this fact."

[15] A without-prejudice conference call was held on January 6, 2010 among counsel to BA Energy, the Monitor and counsel to Dresser-Rand.

[16] In an email dated January 11, 2010, the Monitor asked Dresser-Rand's counsel whether he had been able to determine the appropriate person for the Monitor to speak to with respect to the equipment in the possession of BA Energy. Counsel to Dresser-Rand responded that he had not and that he was "awaiting the letter [counsel to BA Energy] indicated last week you would be sending on the other point that deals more generally with the claim, etc."

[17] On January 14, 2010, the Monitor sent counsel to Dresser Rand an email that attached a letter that he was asked to review, commenting: ... "let me know if it meets your needs before I finalize it."

[18] The letter, marked "draft", reads as follows:

> As Court Appointed Monitor of BA Energy Inc. I am sending this letter to you as a follow-up to our teleconference of January 5, 2010 and to provide more clarity with respect to the Notice of Revision and Notice of Dispute between BA Energy Inc. ("BA Energy") and Dresser Rand Canada, Inc. ("DRC").
>
> As agreed on our teleconference, BA Energy does not dispute DRC's rights to retain the assets in question and deal with them as it wishes. This right means DRC shall have no claim against BA Energy given that the value of the assets are at least as much or more than the claim amount. Furthermore, I must note that DRC will accept all potential risks and rewards of its actions in dealing with the assets. For further clarity, should DRC sell the assets for an amount greater than the amount of the claim filed against BA Energy, then this excess amount benefits DRC. Should DRC sell the assets for an amount less than DRC's claim against BA Energy, DRC will not be able to claim the difference against BA Energy.
>
> I trust this clarifies any misunderstanding between the parties. (emphasis added)

[19] Counsel to Dresser-Rand responded saying that the letter would be reviewed internally and by his client and that he would get back to the Monitor. Numerous emails ensued between counsel to Dresser-Rand and the Monitor. On January 25, 2010, counsel to Dresser-Rand advised the Monitor that "I am told that I should hear from someone in the US part of the organization tomorrow. Unfortunately, many people have become involved within my client and has made it more complex for me to get instructions."

[20] In an email dated January 27, 2010, counsel to Dresser Rand advised the Monitor that:

> ...my people as of yesterday were still assessing their position, including what can be done with the part of the compressor they have and those parts which BA has in its position. Unfortunately, these machines are very custom made for a

> particular customer and are not readily saleable or useable for anyone else. They [sic] inquiries out to see what they can do and hope to get back to me this week.

[21] On February 19, 2010 counsel to Dresser-Rand left a voice mail for the Monitor. The recording was not preserved. Counsel to Dresser-Rand in an email to his client said that in the voice mail, he enquired if BA Energy was interested in making an offer to Dresser-Rand for the compressor "with the concept being that if an acceptable cash offer was made to [Dresser-Rand] for that equipment, [Dresser Rand] would forego any further claim against [BA Energy] for the balance owing." The Monitor in an email to BA Energy said that in the voice mail, counsel to Dresser-Rand was enquiring whether BA Energy would like to acquire the compressor for an unnamed price and that "if [BA Energy] acquired this equipment then Dresser-Rand would withdraw their claim".

[22] On February 23, 2010, BA Energy advised the Monitor that it did not wish to purchase the compressor. On the same day, the Monitor filed its Ninth Report with the Court and served it on the parties on the service list. The report states that BA Energy anticipated filing a plan of arrangement which would result in a recovery that would be better than a liquidation, and that it was expected that the plan would be brought to the Court for approval in mid to late March, 2010. During this time period, the Monitor and BA Energy were finalizing the sale of a key asset necessary to fund the plan and were in the course of structuring the plan.

[23] On March 15, 2010, BA Energy filed and served its Notice of Motion for approval to circulate a plan of arrangement and hold a meeting of creditors. Dresser-Rand was not listed either as an affected or unaffected creditor nor was it mentioned on the list of disputed claims.

[24] Apparently, counsel to Dresser-Rand had not yet been added to the service list at this time and did not receive a copy of the Ninth Report until it was posted on the Monitor's web-site on March 16, 2010. Counsel to Dresser-Rand received a copy of the plan motion materials on March 17, 2010 and requested to be put on the service list on that date. The Monitor also informed counsel to Dresser-Rand on March 17, 2010 that BA Energy was not interested in purchasing the compressor from Dresser-Rand and that it took the position that the Dresser-Rand claim had been satisfied.

[25] On March 18, 2010, the Court approved the circulation of the plan of arrangement to creditors.

[26] On March 26, 2010, Dresser-Rand submitted a late amended proof of claim in which it stated it had an unsecured claim of USD $1,474,161.63 and a secured claim of USD $177,382.

[27] On April 5, 2010, the Monitor issued a Notice of Revision or Disallowance relating to Dresser-Rand's amended proof of claim, with a revised claim amount of zero. The Monitor set out the following as reasons for disallowance:

Dresser-Rand's Late Amended proof of claim dated March 26, 2010, claiming an unsecured claim in the amount of $1,474,161.63 USD and a secured claim in the amount of $177,382.00 USD (the "Late Amended Claim") is barred and extinguished pursuant to the claims procedure order dated April 29, 2009 (the "Claims Procedure Order"). The Late Amended Claim is in essence the same as the Initial Claim (as defined below) submitted by Dresser-Rand, which claim has been resolved as described below.

Dresser-Rand was aware of and participated in the claims process established under the Claims Procedure Order. Dresser-Rand's initial proof of claim was received by the Monitor on or about May 15, 2009, as amended to a Subsequent Claim (as defined in the Claims Procedure Order) on September 22, 2009 (the "Initial Claim") following BA Energy's repudiation of the purchase order. The Initial Claim by Dresser-Rand was for $0.00 unsecured and Dresser-Rand acknowledged it held equipment or collateral of a value equal to its claim.

On December 16, 2009, the Monitor issued a notice of revision or disallowance thereby disallowing the total claim amount listed by Dresser-Rand in its Initial Claim (the "NOR"). The reason for the disallowance in the NOR was that Dresser-Rand acknowledged that it retained possession of the collateral equipment that it held in full satisfaction of the Initial Claim amounts (the "POC Satisfaction"), therefore, Dresser-Rand had no claim against BA Energy. Dresser-Rand did respond by issuing a notice of dispute on December 21, 2009 (the "NOD"); however, the NOD served to only address a "misunderstanding of terminology" on the part of Dresser-Rand regarding the classification of the claim amounts and not a dispute as to or the rejection of the POC Satisfaction. After further discussions between the parties, the Monitor sent draft correspondence to Dresser-Rand's solicitors dated January 13, 2010 affirming the POC Satisfaction, that Dresser-Rand was retaining the equipment in full satisfaction of its claim and that it had the risk and benefit of any potential recovery. Throughout the process leading up to the Late Amended Claim, Dresser-Rand valued the collateral equipment as being worth as much or more than the debt owed by the Applicant.

BA Energy and the Monitor relied upon the proofs of claim as filed in the claims process, including the Initial Claim, in calculating the dividend in the BA Energy Plan of Arrangement filed March 10, 2010 (the "Plan"). The inclusion of the Late Amended Claim would have significantly affected BA Energy's/the Monitor's calculations and provisions contained in the Plan, and the subsequent BA Energy creditor review, consideration and implementation of the Plan.

The Dresser-Rand filing of the Late Amended Claim occurred only after distribution of the Plan proposing a 55% dividend. Allowance of the Amended Proof of Claim would: (i) circumvent the *Companies' Creditor Arrangement Act* (Canada) process, the Claims Procedure Order and provide Dresser-Rand an

> unjustified and improper advantage, and (ii) prejudice BA Energy and/or BA Energy's creditors generally in the pro rata or total distribution under the Plan.

[28] Dresser-Rand filed a Notice of Dispute on April 8, 2010, submitting that there was no resolution of its claim as asserted by the Monitor, that it was "prudent and reasonable" for it to amend its claim on March 26, 2010 and that not accepting the claim would be prejudicial to Dresser-Rand and not prejudicial to BA Energy or its creditors. Dresser-Rand filed a Notice of Motion with respect to its claim on April 12, 2010 and served the service list.

[29] The meeting of creditors was held on April 15, 2010. Only one creditor appeared in person: the rest voted by proxy. No-one voted against the plan. Counsel to Dresser-Rand read a prepared statement indicating that it had filed an amended proof of claim that may impact the other creditors if ultimately validated.

Analysis

[30] Dresser-Rand submits that the amended proof of claim it filed on March 26, 2010 is not a "late claim", but merely an amendment to the September, 2009 proof of claim which was filed in a timely manner in compliance with the Claims Procedure Order. I cannot agree with this submission. The amended proof of claim purports to assert an unsecured claim for the first time, a claim that would qualify as an affected claim under the plan as opposed to the fully-secured claim previously asserted. It changes the nature of the original claim to such a degree that it must be considered a new claim and not a mere amendment.

[31] Dresser-Rand initially filed its claim on the basis that it was in possession of assets of such a value as to satisfy its claim and that it was secured by its possession of such assets. It maintained that position for approximately eight months, leading the debtor and the Monitor to believe, not unreasonably, that Dresser-Rand would not be an affected creditor in a plan of arrangement. BA Energy structured its plan on that assumption. Dresser-Rand changed its approach and amended its claim to file in large part as an affected unsecured creditor at a time when it would have been clear to creditors that the distribution to unsecured creditors under a plan would be substantial, albeit prior to a formal vote by unsecured creditors on the plan.

[32] While this application involves a determination of whether Dresser-Rand's late amended claim should be accepted, it is neither a clear case of a creditor "lying in the weeds" nor is it clearly the kind of late claim reviewed by Wittmann, J. A. (as he then was) in *Enron Canada Corp. v. National Oil-Well Canada Ltd.*, 2000 ABCA 285 (Alta. C.A.), ("*Re: Blue Range Resource Corp.*"), the leading authority on the assessment of late claims. However, the principles set out in *Blue Range* are relevant to the application.

[33] Wittmann, J. A. set out the following as appropriate criteria for a court to apply to the assessment of late claims:

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?

[34] In identifying these criteria and applying them to specific late claims, Wittmann, J. A. favoured a "blended approach", taking into consideration both the standards set out under the *Bankruptcy and Insolvency Act.* and the U.S. Bankruptcy Rules, and informed by concepts drawn from the approaches taken in a variety of areas of law when dealing with late notice or delays in process. It is clear from the nature of the criteria that the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case.

A. Inadvertence and Good Faith

[35] Wittmann, J.A. noted that "inadvertence" in the context of the first criterion includes carelessness, negligence or accident and is unintentional.

[36] BA Energy submits that Dresser-Rand's conduct in this case cannot be described as careless, negligent or accidental, but arose from a deliberate intent to reframe its claim as an unsecured claim when it became apparent that there would be a distribution to unsecured creditors of approximately $0.55 per dollar of claim.

[37] It is clear that Dresser-Rand was aware of BA Energy's process under the CCAA from shortly after the initial order and had retained counsel active on its behalf as early as March, 2009. It filed its initial proof of claim in a timely manner in May, 2009. It was aware from August, 2009 that BA Energy had repudiated the agreement but it was also clear that from March, 2009, Dresser-Rand took the position that it was free to exercise a right of sale of the equipment in its possession. I agree that it cannot be said that Dresser-Rand's amended proof of claim arose from inadvertence.

[38] BA Energy alleges that Dresser-Rand has acted in bad faith in putting forth its recharacterized and amended claim only when it became apparent that it may do better as an unsecured creditor, given the level of distribution to unsecured creditors anticipated by the successful monetization of assets.

[39] While there is insufficient evidence to reach the conclusion that Dresser-Rand acted in bad faith, it is true that it would have been clear to creditors in the relevant time period that a successful plan with an acceptable distribution to unsecured creditors was a strong possibility. At

the least, Dresser-Rand delayed approximately eight months before taking any substantial or meaningful steps to value the assets in its possession in order to come to a valuation of its security. While Scott Kaffka, an employee of a U.S. affiliate of Dresser-Rand, suggests in his affidavits that Dresser-Rand was investigating the possibility of remarketing the equipment before January, 2010, it is also clear from the affidavits and cross-examination on them that relatively little was done in that regard until Mr. Kaffka became involved and contacted an equipment dealer to obtain an estimate of value for the compressor on January 28, 2010, some eleven months after counsel for Dresser-Rand first stated that it took the position that it was entitled to sell the equipment. It is noteworthy that on January 27, 2010, counsel to Dresser-Rand advised the Monitor that Dresser-Rand was still assessing its position, and that the opinion as to of value that Dresser-Rand relies upon was not formally prepared until March 19, 2010.

[40] The consequences of the delay in adequately investigating the value of the assets it held as security for its claim, which accounts for most of the delay in filing the amended claim, must be borne by Dresser-Rand. The question of the resale value of the compressor was a question within the reasonable control of Dresser-Rand to determine.

[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.

[43] Dresser-Rand was offered an opportunity to amend its claim after the purchase agreement with BA Energy was formally repudiated, and did so on September 22, 2010, confirming its initial claim with only a slight variation in amount claimed. As late as December 21, 2009, Dresser-Rand characterized its claim as a fully-secured claim its Notice of Dispute and concedes that it believed at least to this point in time that the compressor was worth at least as much as its claim. Dresser-Rand submits that there was delay by the Monitor in responding to the amended claim, but a three-month delay in the circumstances of a large restructuring with many claims is not unusual. Dresser-Rand also submits that the Monitor should have reacted more quickly to its February 19, 2010 suggestion that it was open to accepting an unspecified cash offer from BA Energy to settle its claim. While the Monitor did not respond for roughly a month, it is clear that

the Monitor was involved in preparing and filing a key report on the restructuring with the Court and also involved in a major monetization of BA Energy's assets that would subsequently fund the plan.

B. Prejudice Caused by the Delay

[44] BA Energy, in consultation with the Monitor, prepared its plan in the early months of 2010 without making any provision for an unsecured deficiency claim from Dresser-Rand. Given what had been communicated among the parties with respect to Dresser-Rand's claim at this point of time, this was not unreasonable.

[45] It is difficult to determine what the effect Dresser-Rand's late amended claim may have had on the decisions of creditors with respect to whether to approve the plan. All but one creditor voted on the plan by proxy, and some of those proxies were authorized before Dresser-Rand served other creditors with a Notice of Motion with respect to its revised claim on April 12, 2010. Dresser-Rand states in its brief that 16 out of 30 proxies were submitted after April 7, 2010. Therefore, roughly half of the creditors in number had already voted on the plan several days prior to receiving notice of Dresser-Rand's late claim.

[46] With respect to the materiality of the claim, it would if accepted comprise approximately 5.4% of the total pool of affected creditors and, if paid from plan proceeds, would reduce the amount available to unsecured creditors from 55 cents per dollar of a claim to 53 cents per dollar of claim. The Dresser-Rand claim therefore is not as insignificant as the late claims accepted by the Court in *Blue Range.*

[47] As noted in *Blue Range* at paragraph 40, the fact that creditors may receive less money if a late claim is accepted is not prejudice relative to the second criterion. The test is whether creditors by reason of the late claim lost a realistic opportunity to do anything that they otherwise might have done. In this case, it is not possible to determine if any of the proxy votes cast in favour of the plan would have been affected by knowledge of the late claim. It is only apparent that a significant number of creditors were not aware of the claim when they decided how to vote.

[48] During the sanction hearing of April 16, 2010, BA Energy indicated that, instead of reducing the distribution to other creditors if Dresser-Rand's late claim was accepted by the Court, BA Energy would find another way to pay the required distribution to Dresser-Rand.

[49] Consideration of prejudice is not restricted to prejudice to other creditors. The second criterion also requires consideration of prejudice to the debtor company or other interested parties: *Blue Range* at paras. 14 and 18. The timing of the late claim with respect to the stage of proceedings is a key consideration in determining whether there has been prejudice: *Blue Range* at para. 36.

[50] The parties prejudiced by this late amended claim are BA Energy and its parent Value Creation, BA Energy's largest secured creditor. Value Creation refrained from requiring BA Energy to pay all of the proceeds of the assets it had monetized on Value Creation's secured claim and allowed BA Energy to use a portion of those proceeds to distribute to other creditors under the plan. While there is no doubt that Value Creation benefits from BA Energy's restructuring under the CCAA as a continuing entity with surviving assets, the postponement of a portion of Value Creation's secured claim was arrived at in consideration of the status of creditor claims as they had been filed, without Dresser-Rand's late amended claim.

[51] It is not surprising that BA Energy did not attempt to alter its plan after having received notice of Dresser-Rand's amended proof of claim. Given the negotiations that necessarily proceed a vote on the plan, the status of proxy voting and the limited time to the creditors' meeting, BA Energy did not have a realistic opportunity to amend its plan to include Dresser-Rand without the risk of losing support from other creditors and jeopardizing the plan.

[52] In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.) at para. 74, Huddart, J. held, in a case where there would have been no effect on other creditors if a late claim was accepted as it would be paid from post-arrangement revenue, that it was fair to refuse to grant leave to the late creditor to commence an action against the debtor company for a number of reasons, noting that "(a) CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for himself ... As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything."

[53] While the facts of this case are distinguishable from the facts before the Court in *Lindsay*, Dresser-Rand filed a very late revised claim after months of relative lack of diligence with respect to the value of its security, at a time when it had become apparent that the distribution to unsecured creditors under a proposed plan would be substantial. Dresser-Rand's recovery would be improved considerably by its very late recharacterization of claim if Dresser-Rand's new submissions with respect to the resale value of the compressor is accepted.

[54] Dresser-Rand submits that, from its perspective, the Monitor's draft letter of January 14, 2010 was a "proposed resolution" of the claim, and that thus BA Energy and the Monitor should have been aware from early 2010 that the Dresser-Rand claim was unresolved and that Dresser-Rand would be claiming a deficiency in value as an unsecured claim. While the letter is marked "draft" and the Monitor requested a response before it was finalized, it refers to an agreement reached in the teleconference and the clarification of a misunderstanding arising from the Notice of Revision. While the Monitor was advised that this letter was being reviewed by Dresser-Rand, and Dresser-Rand invited a proposal for settlement on February 19, 2010, it was not until March 26, 2010, ten months after the expiry of the initial claims bar date that Dresser-Rand made its revised position clear to the debtor and the Monitor.

[55] Mr. Kaffka states in his affidavits that Dresser-Rand received a verbal estimate of value from an equipment dealer on January 28, 2010. It may well be that Dresser-Rand did not wish to

disclose the low resale value it was now alleging for the compressor at a point in time when it was hoping that BA Energy would make an offer to purchase the compressor, but this was a strategic decision by Dresser-Rand, and, again, the risk of further delay in clearly communicating its revised estimate of value because of this strategic decision must be borne by Dresser-Rand.

[56] Dresser-Rand also submits that it would have filed its amended claim sooner had the Monitor advised it sooner that BA Energy was not interested in purchasing the compressor. It is true that Dresser-Rand may have been able to file its amended claim at the end of February, 2010 instead of at the end of March, 2010 had the Monitor responded earlier to Dresser-Rand's suggestion that BA Energy may wish to make an offer on the equipment, but it should be noted that Dresser-Rand's "proposal" was merely an invitation to BA Energy to make a settlement offer, and not a proposal specifying an acceptable price for the compressor that may have alerted the Monitor to its importance. The Monitor in the Thirteenth Report to the Court dated April 30, 2010 explained that it did not place a high priority on its response to the voice-mail enquiry as it thought that it was one of several enquiries that Dresser-Rand was making to potential purchasers to of the compressor.

[57] Dresser-Rand submits that BA Energy knew as early as January 14, 2010 (the date of the Monitor's draft letter) that Dresser-Rand may have been in the position of recovering less than it was owed if it sold the equipment. While this was anticipated as a possibility in the January 14, 2010 letter, the responsibility for valuing the equipment Dresser-Rand claimed as its security cannot be transferred to the debtor or the Monitor. Dresser-Rand is in the business of manufacturing and marketing the equipment, and had as late as September 22, 2009 made the formal representation in its revised proof of claim that the equipment was worth the amount of its claim. It appears that in January 2010, an officer of BA Energy enquired of the Monitor whether BA Energy could recover any surplus proceeds from Dresser-Rand's sale of the compressor, further indicating that there is no evidence that either the debtor or the Monitor anticipated Dresser-Rand's late change of position on value.

C. *Other Considerations*

[58] Dresser-Rand submits that equity favours its application, as it is a wronged party with a legitimate claim that has been compromised by the CCAA proceedings. While if Dresser-Rand's current position with respect to value is accepted, it may suffer a deficiency in its claim of roughly $1.6 million still owing on the purchase price of roughly $8 million for the compressor, Dresser-Rand has possession of the compressor and current estimates of a deficiency are still speculative. There is no overwhelming equitable consideration that would counter-balance relevant prejudice to BA Energy of the late claim.

[59] Dresser-Rand submits that the situation is similar to that described in *Re Look Communications Inc*. (2005) 21 C.B.R. (5th) 265 (Ont. Sup. Ct. J.). However, this is not a situation where BA Energy was aware at all times of the applicant's claim and did not object, nor is it a case where, had court approval of the claim been sought prior to plan approval, it would be

clear that such approval would be granted as a matter of course. No assumptions can be made about the outcome if this amended claim had been brought in a timely way and disputed.

D. Conclusion on a Late Claim

[60] It would not be fair or equitable to accept this late amended claim. Given the facts of this case, there are no conditions that would alleviate relevant prejudice.

[61] If I am wrong in my assessment of whether the late revised claim should be accepted, I would agree with BA Energy that the claim should not in any event be accepted as set out in the Amended Proof of Claim, but should be remitted to the Monitor to allow a proper consideration of value. BA Energy and the Monitor have not been given an opportunity to test the allegations made as to the resale value of the compressor as would occur in the normal course of a claim, given the timing of the late claim in relation to the plan and its sanctioning. While the parties may not have discussed this in advance of the application, it is clear that this was not a normal claims dispute, but was restricted to the issue of whether the claim should be accepted.

E. Conduct Money

[62] In support of this application, Dresser-Rand filed and relied upon affidavits sworn by Mr. Kaffka, who resides in New York. Mr. Kaffka was cross-examined on these affidavits. Dresser-Rand submits that BA Energy should be required to pay conduct money for Mr. Kaffka's attendance at cross-examination.

[63] BA Energy objects to paying conduct money for Mr. Kaffka's cross-examination because he is not an employee of Dresser-Rand Canada Inc., because he had no involvement with the issues prior to January, 2010 and because Dresser-Rand has employees in Alberta who could have provided an affidavit, including Bill Colpitts, its recently-retired General Manager who was involved with the matter and signed the first Proof of Claim.

[64] Dresser-Rand submits that Mr. Kaffka was an appropriate affiant because he was primarily responsible for Dresser-Rand's mitigation efforts after January, 2010 and because he was the individual who determined the market value of the compressor.

[65] While Mr. Kafka's evidence of pre-2010 efforts by Dresser-Rand to mitigate and to assess value was of necessity hearsay, he was involved in 2010 mitigation efforts. He was not so clearly an inappropriate witness that Dresser-Rand is disentitled to reasonable conduct money. I direct that BA Energy be required to pay reasonable conduct money for Mr. Kaffka's attendance.

F. Costs

[66] This is not an appropriate case to depart from the usual practice with respect to costs in commercial insolvency applications, and therefore both Dresser-Rand and BA Energy will bear their own costs.

Heard on the 1st day of June, 2010.
Dated at the City of Calgary, Alberta this 5th day of August, 2010.

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

Appearances:

Chris D. Simard and Kelsey J. Drozdowski
Bennett Jones LLP
for Dresser-Rand Canada, Ltd.

David LeGeyt
Fraser Milner Casgrain LLP
for Ernst & Young Inc.

Howard A. Gorman and Kyle D. Kashuba
Macleod Dixon LLP
for BA Energy Inc.

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

The cite in paragraph [32] has been changed to read: *Enron Canada Corp. v. National Oil-Well Canada Ltd.*, 2000 ABCA 285 (Alta. C.A.), ("*Re: Blue Range Resource Corp.*").