CANADA

PROVINCE OF QUÉBEC
DISTRICT OF ST-FRANÇOIS

N°: 450-11-000167-134

SUPERIOR COURT
(Commercial Division)

(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. C. C-36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

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

DEBTOR

and

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

MONITOR

NOTES AND AUTHORITIES OF MONTREAL, MAINE & ATLANTIC CANADA CO. REGARDING MOTIONS FOR AUTHORIZATION TO FILE LATE CLAIMS

BACKGROUND

1. On July 6, 2013, a train operated by Montreal Maine & Atlantic Canada Co. ("**MMAC**") derailed in the city of Lac-Mégantic, Quebec, Canada, causing numerous fatalities, bodily injuries, psychological and moral damages to thousands of people, and extensive property and environmental damages (the "**Derailment**");

2. Numerous claims have been made against MMAC and its parent company, Montreal, Maine & Atlantic Railway Ltd ("**MMA**"), arising out of the Derailment;

3. On August 7, 2013, MMA filed a voluntary petition in the United States Bankruptcy Court, District of Maine (the "**Bankruptcy Court**") for relief under Chapter 11 of the U.S. Bankruptcy Code (the "**Bankruptcy Case**");

4. On August 8, 2013, the Honourable Justice Castonguay of the Quebec Superior Court granted an initial order in respect of MMAC (the "**Initial Order**") pursuant to the CCAA and Richter Advisory Group Inc. (Richter Groupe Conseil Inc.) was appointed as monitor of MMAC (the "**Monitor**");

5. On September 4, 2013, both this Court and the Bankruptcy Court issued orders adopting the Cross-Border Insolvency Protocol;

6. On April 4, 2014, the Court issued a Claims Procedure Order that was subsequently amended on June 13, 2014 (as amended, the "**Claims Procedure Order**"), whereby a Claims Bar Date was established and creditors were called upon to file their claims;

7. The purpose of the Claims Procedure Order was essentially to allow MMAC and the Monitor to assess the total breadth of claims. Said order provided that the procedure for the review and determination of claims, as well as for the calling, holding and conduct of a creditors' meeting, would be established by further order of the Court;

8. The Claims Procedure Order, in keeping with the Cross-Border Insolvency Protocol, provides, at paragraph 14 thereof, that claims filed in these proceedings are deemed to have also been filed in the Bankruptcy Case;

9. Also on April 4, 2014, the Court issued a Representation Order (the "**Representation Order**") essentially appointing the Class Representatives (defined in the Representation Order as the Class Action Plaintiffs) and their attorneys, the Class Counsel, as representatives of the Class Members (each as defined in the Representation Order);

10. On March 31, 2015, MMAC filed a *Plan of Compromise and Arrangement* (the "**Plan**") with a view to providing compensation for the victims of the Derailment;

CLASS REPRESENTATIVES

11. On April 14, 2015, Class Counsel filed a *Motion of the Court Appointed Representatives of Class Members for an Order Authorizing the Filing of Additional Claims* (the "**Original Late Claims Motion**");

12. The Original Late Claims Motion was filed with the Class Representatives, namely Guy Ouellette, Serge Jacques and Louis-Serge Parent, as petitioners;

13. Said motion sought the authorization to file approximately 1,500 new claims and was supported by an affidavit of attorney Daniel E. Larochelle, a member of the Class Counsel;

14. The Original Late Claims Motion was presented on a *pro forma* basis on April 15, 2015, at which time the Court rendered the following orders in respect of same, the whole as appears from the procès-verbal of April 15, 2015:

    (a) An amended motion was to be filed by April 20, 2015;

    (b) Class Counsel was to produce an affidavit of the Class Representatives ("*un affidavit des Requérants*");

    (c) Class Counsel was to produce its notes and authorities by April 20, 2015;

15. On April 20, 2015, Class Counsel filed a *Fresh as Amended Motion of the Court Appointed Representatives of Class Members for an Order Authorizing the Filing of Additional/Late Claims* (the "**Amended Late Claims Motion**"), which motion is supported by a new affidavit of Daniel E. Larochelle;

16. Despite the Court's order, the Amended Late Claims Motion is not supported by an affidavit of the Class Representatives and Class Counsel failed to produce any notes and authorities by April 20, 2015;

17. The Amended Late Claims Motion has reduced the number of late claims sought to be filed from nearly 1,500 to at most 208. MMAC employs the term "at most" because the information contained in the exhibits in support of the Amended Late Claims Motion is unreliable and it would appear that there are duplicate claims;

18. In addition to reducing the number, the nature of the late claims sought to be filed has been significantly limited; the request is essentially divided into two (2) primary groups:

    (a) claims that Class Counsel received on or prior to the Claims Bar Date but did not file in time due either to inadvertence or time constraints (defined in the Amended Late Claims Motion as "**June 2014 Claims**"); and

    (b) claims advanced to Class Counsel only after the creditors in question realized that a distribution was likely (defined in the Amended Late Claims Motion as "**January 2015 Claims**" and "**April 2015 Claims**");

19. As appears from paragraph 27 of the affidavit of Daniel E. Larochelle in support of the Amended Late Claims Motion, the purported mandate given to the Class Counsel by the Class Representatives ("purported" because the motion is not supported by an affidavit of the Class Representatives, as ordered by the Court) does not extend to January 2015 Claims and April 2015 Claims unless it is shown that exceptional circumstances, supported by affidavit or other proof, prevented the filing in due course;

20. The Amended Late Claims Motion does not propose a process for determining what will be considered "exceptional circumstances", which is essential to determining whether or not the Class Counsel have the mandate necessary to seek a further order of the Court for the filing of January 2015 Claims and April 2015 Claims (as suggested at paragraph 6(b) of the Amended Late Claims Motion);

21. It is also important to note that the late claims sought to be filed pursuant to the Amended Late Claims Motion would not impact the amounts available for distribution to categories of claims other than those categories in which late claims would be filed;

22. Moreover, the Amended Late Claims Motion states that the late claims in question can be admitted for distribution purposes only and not for voting;

SUBROGATED INSURERS

23. The following subrogated insurers have filed motions for authorization to file late claims:

La Garantie Compagnie d'assurance de l'Amérique du Nord	$2,697,005.00
La Capitale Assurances Générales inc.	$656,943.36
L'Unique Assurances Générales inc.	$1,057,583.57

Groupe Ledor Inc. Mutuelle Assurance	$500,639.98
Royal & Sun Alliance du Canada, Société d'Assurance	$2,177,917.30

24. In all instances, it is contemplated that only the subrogated insurer category of claims would be impacted by the filing of these late claims and that the distribution to creditors in other categories would not be affected;

AUTHORITES

Applicable Criteria: *Enron Canada Corp. v. National Oil-Well Canada Ltd (or: Blue Range Resources Corporations, Re),* 2000 ABCA 285[1] (**TAB 1**):

25. The Court of Appeal of Alberta established the applicable criteria in considering whether to allow the filing of claims after the claims bar date :

> *"[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."* (emphasis added)

26. The Alberta Court of Appeal discusses the notion of prejudice as follows:

> *"[40] In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share cannot be characterized as prejudice: 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*

[1] Leave to appeal to S.C.C. refused, [2000] SCCA No. 648.

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."

27. Note that, in *Re Blue Range*, there were two (2) types of late claimants:

"[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."

28. Considering the silence of the Companies' Creditors Arrangement Act and the discretionary powers it grants to the courts to render the necessary orders, the Court of Appeal of Alberta took some guidance from the approaches used in the United States Bankruptcy Code, Federal Rules of Bankruptcy Procedure and the Bankruptcy and Insolvency Act in order to elaborate the applicable criteria in determining whether or not to grant permission for a late filing of claims.

"[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."

29. *Re Blue Range* is also discussed by Houlden and Morawetz :

- L.W. Houlden and Geoffrey B. Morawetz, N§ 126, *Claims of Creditors*, Houlden and Morawetz Bankruptcy and Insolvency Analysis, Toronto, Thomson*Carswell, Section 12 (p.13). (see **TAB 2**)

Examples of the Application of the *Re Blue Range* Criteria

Ontario

- *Re Canadian Red Cross Society*, 2008 CanLII 53855 (ON SC), 48 C.B.R. (5th) 41 (Ont. S.C.). (**TAB 3**)

"[28] In Re Blue Range Resources Corp., [2000] A.J. No. 1232 (C.A.) - the decision that has been most influential in the later cases - all counsel conceded that the jurisdiction existed notwithstanding that an arrangement under the CCAA had been approved by creditors who had filed Proofs of Claim, and an unqualified provision in a claims bar order that claims filed out of time would be "forever barred". [...]

[31] I note that, in permitting a number of late-filed claims, the court in Blue Range Resources did not purport to amend the provisions of the bar order by imposing a new deadline. The jurisdiction supported was limited to determining whether, in individual cases, equitable relief should be given to those who for some reason had not filed in time. [...]

[41] In Blue Range Resources, prejudice to other creditors was recognised as an important factor that would militate against an exercise of the court's discretionary jurisdiction under the CCAA. [...]

[49] I am satisfied that the court has the discretionary jurisdiction discussed in Blue Range Resources and the cases that have followed the reasoning of the Alberta Court of Appeal. I accept also that it is a jurisdiction to be exercised sparingly in the light of the particular circumstances of each case. It is very much fact specific." (emphasis added)

Quebec

- *Pangeo Pharma Inc.* c. *Livingston international Inc.*, 2004 CanLII 14941 (QC CS). (**TAB 4**)

"*[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. [...]*

[*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 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. [...]*

[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. [...]

[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. "

Alberta

- *Royal Bank of Canada v. Cow Harbour Construction Ltd.*, 2011 ABQB 223. (**TAB 5**)

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

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

MONTREAL, April 23, 2015

Gowling Lafleur Henderson

GOWLING LAFLEUR HENDERSON LLP
Attorneys for Montreal, Maine & Atlantic Canada Co.

TAB 1

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

2000 ABCA 285 (CanLII)

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.)

2000 ABCA 285 (CanLII)

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE WITTMANN

2000 ABCA 285 (CanLII)

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).

2000 ABCA 285 (CanLII)

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.

2000 ABCA 285 (CanLII)

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 forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.
>
> [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

2000 ABCA 285 (CanLII)

[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.

2000 ABCA 285 (CanLII)

2000 ABCA 285 (CanLII)

[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).

2000 ABCA 285 (CanLII)

[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?

2000 ABCA 285 (CanLII)

[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.

2000 ABCA 285 (CanLII)

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")

2000 ABCA 285 (CanLII)

[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

2000 ABCA 285 (CanLII)

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.

2000 ABCA 285 (CanLII)

TAB 2

HMANALY N§126
Houlden & Morawetz Analysis N§126

Houlden and Morawetz Bankruptcy and Insolvency Analysis

Companies Creditors Arrangement Act
Section 12

L.W. Houlden and Geoffrey B. Morawetz

N§126 — Claims of Creditors

N§126 — Claims of Creditors

See s. 12

For the purposes of the *CCAA*, "claim" means indebtedness, liability or obligation that would be provable under the *BIA*. The amount represented by a claim of any secured or unsecured creditor is determined as the following. Where a company is being wound up under the *Winding-up and Restructuring Act*, proof is in accordance with the *WURA*; in the case of a company that has made an assignment or against which a bankruptcy order has been made under the *BIA*, proof of which has been made in accordance with the *BIA*. The debtor can admit the amount. If not, the court can determine the value of the claim on summary application by either the company or a creditor: s. 12(2). The company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes: s. 11(3). Nothing in the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted: s. 11(3). The law of set-off applies: s. 18.1.

The 2009 amendments renumbered and clarified the language of the provisions, as well as adding specified claims that are not compromised by a plan, in order to align the *CCAA* with the *BIA*. However, the cases below referring to s. 12 are still relevant in most instances. Under s. 20(1), for purposes of the *CCAA*, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows: the amount of an unsecured claim is the amount (i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with the *WURA*; (ii) in the case of a company that has made an assignment or against which a bankruptcy order has been made under the *BIA*, proof of which has been made in accordance with the *BIA*; or (iii) in the case of any other company, proof of which might be made under the *BIA*. If the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor. The amount of a secured claim is the amount, proof of which might be made under the *BIA* if the claim were unsecured; but if not admitted by the company the amount is, in the case of a company subject to pending proceedings under the *WURA* or the *BIA*, to be established by proof in the same manner as an unsecured claim under the *WURA* or the *BIA*, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor: s. 20(1).

A debtor company may admit the amount of a claim for voting purposes and reserve its right to contest liability on the claim for other purposes: s. 20(2). Section 20(2) specifies that nothing prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be: s. 21.

Under the previous wording of s. 12 prior to the amendments made by R.S.C. 1985, it was held that s. 12 was only dealing with "amount" of a claim and was not intended to incorporate into the *CCAA the Bankruptcy and Insolvency Act* definition of an unsecured claim. Hence, a creditor with a contingent claim for unliquidated damages was found not to be an unsecured creditor:

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Que. Steel Prod. (Indust.) Ltd. v. James United Steel Ltd., [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (S.C.). With amendment to s. 12. *Que. Steel Prod.* is no longer valid law.

In *Re Quintette Coal Ltd.* (1991), 7 C.B.R. (3d) 165, 1991 CarswellBC 488, (sub nom. *Quintette Coal Ltd. v. Nippon Steel Corp)* 56 B.C.L.R. (2d) 80 (S.C.); leave to appeal refused (1991), 7 C.B.R. (3d) 183, 1991 CarswellBC 489 (C.A.), Thackray J. of the British Columbia Supreme Court held that, as a result of the amendments to s. 12 that were made in 1985, a contingent claim of a surety of a debt owed by the debtor company was provable in *CCAA* proceedings but with no right to vote unless and to the extent that it had paid its obligations under the guarantee and that such a claim should be put in the same class as other unsecured creditors. "Claim" in s. 12(1) envisages giving potential creditors a role in *CCAA* proceedings. To the same effect, see *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262, 1999 CarswellOnt 3240 (Ont. S.C.J. [Commercial List.]).

The onus is on any claimant to prove its claim. Where a contingent claimant seeks to prove its claim, it must show that the claim is not speculative or remote. However, it need not establish that success is probable: *Re Air Canada (CUPE contingent claim appeal)* (2004), 2004 CarswellOnt 3320, 2 C.B.R. (5th) 23 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice held that a claims officer under a *CCAA* proceeding, who is given authority under a court-ordered claims determination process to determine the manner in which evidence is adduced, may decide not to hear oral evidence where claimants are given an opportunity to make fulsome written submissions to the claims officer. The court found that the "new evidence" could have easily been provided to the claims officer when requested. Had the appellant complied with the claims officer's request to provide additional documentation, the court found that the claims officer might well have decided to receive oral evidence. The court held that it would not interfere with the claims officer's findings of fact unless the claims officer made a palpable and overriding error, and that an appeal is not a *de novo* hearing in the same manner in which a registrar in bankruptcy considers an appeal from a trustee in disallowance of a claim in bankruptcy proceedings. The court further held that where a party has given a pledge of shares owned by it as additional security for the loan obligations of such granting party's affiliate, such pledge of shares does not create an independent obligation on the granting party to pay the underlying loan obligation and does not become a surety or guarantor by virtue of having signed a pledge agreement in favour of the lender. Where the granting party has delivered the shares it has pledged to the lender, the granting party has no further obligation to the lender and the lender has no further provable claim against the granting party: *Re 1587930 Ontario Inc.* (2006), 2006 CarswellOnt 6259, 25 C.B.R. (5th) 264 (Ont. S.C.J. [Commercial List]).

The Saskatchewan Court of Queen's Bench, in determining the amount of a creditor's claim pursuant to s. 12 of the *CCAA*, held that: (a) a claim will be given no value for voting purposes where it is plain and obvious that it has no foundation or is frivolous; (b) the amount of a claim may be determined on the information filed with the court or after the trial of an issue; and (c) the debtor company, after admitting the amount of a claim for voting purposes, retains its right to contest liability for other purposes. The court emphasized that although it is important for disputed claims to be resolved expeditiously, it is also important that the debtor company's focus not be diverted from completing a *CCAA* plan on which its economic survival depends: *Worldwide Pork Co. v. Agricultural Credit Corp. of Saskatchewan* (2006), 2006 CarswellSask 82, 2006 SKQB 8, 19 C.B.R. (5th) 41 (Sask. Q.B.).

In *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1, 1992 CarswellOnt 162 (Ont. Gen. Div.), Farley J. held that the holder of a guarantee given by the debtor company could prove a claim for the full amount of the debt owing by the principal debtor. The holder of the guarantee need not, however, file a claim but can proceed against the principal debtor without being affected by a plan made under the *CCAA* "Indebtedness, liability or obligation" is to be determined by reference to whether a claim is a debt provable in bankruptcy under the *Bankruptcy and Insolvency Act*. *Québec Steel Prod. (Indust.) Ltd. v. James United Steel Ltd.*, *supra*, is no longer good law in view of the amendments to s. 12. The same conclusion as to the effect of the change in wording in s. 12 was reached in *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17, 1995 CarswellOnt 35 (Ont. Gen. Div.), and in *Re Alternative Fuel Systems Inc.* (2003), 46 C.B.R. (4th) 8, 2003 CarswellAlta 1262, [2004] 5 W.W.R. 467, 20 Alta. L.R. (4th) 265, 2003 ABQB 745 (Alta. Q.B.); appeal dismissed (2004), 47 C.B.R. (4th) 1, 2004 CarswellAlta 64, 2004 ABCA 31, 24 Alta. L.R. (4th) 1, [2004] 5 W.W.R. 475, 236 D.L.R. (4th) 155 (Alta. C.A.).

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The interpretation given to the word "debt" in s. 12(1) in *Algoma Steel Corp. v. Royal Bank, supra*, was approved by the Alberta Court of Appeal in *Re Smoky River Coal Ltd.* (1999), 175 D.L.R. (4th) 703, 237 A.R. 326, 12 C.B.R. (4th) 94, 1999 CarswellAlta 491, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 197 W.A.C. 326 (C.A.). In the *Smoky River* case, the court was of the view that if a party alleged that it had the right to exercise an option to acquire shares of the debtor company, this was a right to property falling under s. 81 of the *Bankruptcy and Insolvency Act* and the holder of the option was a creditor for the purposes of s. 12.

In the context of a *CCAA* plan of arrangement that contemplated a liquidation, the issue was whether an unperfected security interest can be asserted as a secured claim in the plan of arrangement. The secured party never filed a financing statement to perfect its security interest. After the plan of arrangement had been proposed, the creditor filed as a secured creditor. The monitor disallowed the claim and the creditor appealed. The Ontario Superior Court of Justice allowed the appeal and held that the creditor was entitled to perfect its security by registration under the *PPSA* as there was nothing in the statute that would allow for the denial of the registration. The monitor was held not to be a person under the *PPSA* that "represents the creditors" for the purposes of defeating the claim of one creditor. The court held that the flexibility of the *CCAA* should not be used to defeat a creditor that has security. It was recognized that the creditor raised the issue very late in the day and the court applied equity to redress the issue of costs that other parties had suffered as a result of this delay: *Re TRG Services Inc.* (2006), 2006 CarswellOnt 7024, 26 C.B.R. (5th) 203 (Ont. S.C.J.).

A claim determined to be valid under Part III of the *Canada Labour Code* becomes a judgment debt and will be determined at an amount of 100% of the claim. The judgment creditor in turn becomes an unsecured debt holder and may determine whether or not, in a *CCAA* procedure, it wishes to support or reject the plan. If the proposal is rejected, then Part III creditors will be free to pursue whatever remedies they may have to collect their judgment debt: *Re Air Canada (Canada Labour Code Claims)* (2004), [2004] O.J. No. 3048, 2004 CarswellOnt 2946, 2 C.B.R. (5th) 18 (Ont. S.C.J. [Commercial List]).

In *Ontario v. Canadian Airlines Corp.* (2001), 29 C.B.R. (4th) 236, 2001 CarswellAlta 1488, 2001 ABQB 983, [2002] 3 W.W.R. 373 (Alta. Q.B.), a creditor, prior to the filing of a plan under the *CCAA*, received letters of credit from the debtor company as security for payment of part of its account. The plan offered a compromise of claims of unsecured creditors. It was held that the creditor was a secured creditor with respect to the amount of its claim covered by the letters of credit and that only the balance of its claim was subject to the compromise.

A pensioner purchaser allowance plan, which gave retirees and survivors of retirees of the debtor a right to purchase goods in the debtor's stores at a discount, was held to give rise to a provable claim for damages when it was repudiated by the debtor under a *CCAA* plan: *Re T. Eaton Co.* (2000), 20 C.B.R. (4th) 286, 2000 CarswellOnt 4179, 25 C.C.P.B. 179 (Ont. Claims Officer).

The constructive trust remedy may be available to creditors under the *CCAA*. A proceeding under the *CCAA* is not by itself a juristic reason that would disentitle a party to the remedy. However, where a debt claim and a constructive trust claim are based on the same evidence, the *CCAA* process may be a reason for denying the imposition of a constructive trust. See for example *Caterpillar Financial Services Ltd. v. 360networks corp.* (2004), 2004 CarswellBC 1835, 7 P.P.S.A.C. (3d) 1, 35 B.C.L.R. (4th) 145, 2004 BCSC 1066, 10 E.T.R. (3d) 59, 4 C.B.R. (5th) 4 (B.C. S.C.).

The Saskatchewan Court of Queen's Bench held that the claims of two unions for severance pay, arising from a collective bargaining agreement, should not be granted special status and dealt with outside of a debtor's *CCAA* plan of arrangement with the effect that the claims are paid in full since claims for severance pay arising from a collective bargaining agreement did not, in the particular circumstances, fall into the category of essential services provided during the *CCAA* reorganization period in order to enable the debtor company to function; and such a result would be unfair and unreasonable to other unsecured creditors, such as suppliers of goods and services, who would only recover a fraction of their claims: *Printwest Communications Ltd. v. Saskatchewan Cooperative Financial Services Ltd.* (2005), 2005 CarswellSask 508, 2005 SKQB 331, 16 C.B.R. (5th) 244 (Sask. Q.B.).

The purpose of s. 12(2) is to provide a means of determining the amount of a claim, not to incorporate the provisions of the *Bankruptcy and Insolvency Act* as to what constitutes a preferred or unsecured claim: *Parisian Cleaners & Laundry Ltd. v.*

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Blondin (1938), 20 C.B.R. 452, 1938 CarswellQue 29, 66 Que. K.B. 456 (Que. C.A.); *Re Alternative Fuel Systems Inc.* (2004), 236 D.L.R. (4th) 155, 47 C.B.R. (4th) 1, 2004 CarswellAlta 64, 2004 ABCA 31, [2004] A.W.L.D. 182 (Alta. C.A.).

Section 12(2)(iii) does not compel the court to determine the valuation summarily. It simply authorizes the proceedings to be brought summarily, *i.e.*, by an originating motion; but in an appropriate case, the court can direct the trial of an issue in which production and discovery would be available: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 1992 CarswellOnt 163 (C.A.); *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17, 1995 CarswellOnt 35 (Ont. Gen. Div.); *Re Blue Range Resource Corp.* (2000), [2000] 4 W.W.R. 738, 15 C.B.R. (4th) 169, 76 Alta. L.R. (3d) 338, 2000 CarswellAlta 12 (Q.B.).

Where a contingent claimant leads no evidence as to its claim or its probable success, the decision of the claims officer to disallow it will be upheld by the court: *Re Air Canada (CUPE contingent claim appeal), supra.*

Where a plan did not identify a date for the valuation of assets, it was held that the effective date for the valuation should be the date the plan was filed: *Caterpillar Financial Services Ltd. v. 360networks corp.* (2004), 2004 CarswellBC 1835, 7 P.P.S.A.C. (3d) 1, 35 B.C.L.R. (4th) 145, 2004 BCSC 1066, 10 E.T.R. (3d) 59, 4 C.B.R. (5th) 4 (B.C. S.C.).

Section 12(2)(a)(iii) speaks only to the determination as to who is a creditor, and not to the value of the claim. Unless there is an admission of the amount owed, the valuation of a landlord's claim should be made by the court in the normal course in a *CCAA* proceeding: *Re Alternative Fuel Systems Inc.* (2003), 46 C.B.R. (4th) 8, 2003 CarswellAlta 1262, [2004] 5 W.W.R. 467, 20 Alta. L.R. (4th) 265, 2003 ABQB 745 (Alta. Q.B.); appeal dismissed (2004), 47 C.B.R. (4th) 1, 2004 CarswellAlta 64, 2004 ABCA 31, 24 Alta. L.R. (4th) 1, [2004] 5 W.W.R. 475, 236 D.L.R. (4th) 155 (Alta. C.A.). In valuing a landlord's claim in *CCAA* proceedings, where there has been no bankruptcy or winding-up order, the claim will be valued in accordance with the provisions of the plan. Section 12(2)(iii) does not require that the claim be valued in accordance with ss. 65.2 or 135(1)(f) of the *Bankruptcy and Insolvency Act*, or provincial legislation such as the Alberta *Landlord's Rights in Bankruptcy Act*. The plan may adopt one of these methods of valuation but it need not do so. The plan may adopt some other method of valuation such as the present value of the unexpired term of the lease: *Re Alternative Fuel Systems Inc.* (2004), 236 D.L.R. (4th) 155, 47 C.B.R. (4th) 1, 2004 CarswellAlta 64, 2004 ABCA 31, [2004] A.W.L.D. 182 (Alta. C.A.). See article by Carla A. Murray, "*CCAA*: Valuation of the Landlord's Claim: *In the Matter of Alternative Fuel Systems Inc.*", 16 Comm. Insol. Rep. 49.

Where a plan of arrangement that is sanctioned by the court provides that a creditor who receives a distribution under the plan is to satisfy tax obligations that may be imposed as a result of the distribution, it is the creditor's responsibility to pay tax claims that arise from the distribution: *PCT Building Ltd. v. Canadian Airlines Corp.* (2001), 34 C.B.R. (4th) 266, 2001 CarswellAlta 1800, 296 A.P.R. 128 (Alta. Q.B.).

In *Re Cage Logistics Inc.* (2002), 50 C.B.R. (4th) 169, 2002 CarswellAlta 1896 (Alta. Q.B.); leave to appeal refused (2003), 2003 CarswellAlta 123, 2003 ABCA 36, 9 Alta. L.R. (4th) 65, 320 A.R. 281, 288 W.A.C. 281, 40 C.B.R. (4th) 165 (Alta. C.A.), a credit agreement provided for the payment of "breakage costs" in the event of the pre-payment of a loan. The court found that the debtors were not obliged to pay those costs where the creditors were paid the principal owed, plus interest and other applicable charges under the credit arrangement as part of a plan of arrangement. The obligation to pay the breakage fee did not arise, pursuant to the contract, unless the pre-payment was with the tacit consent of the debtor.

In *Re Mirant Canada Energy Marketing Ltd.* (2004), 2004 CarswellAlta 699, 4 C.B.R. (5th) 56, 2004 ABQB 398 (Alta. Q.B.), although an employee had received pre-filing annual bonuses representing roughly 5% of the profits he generated for the now-insolvent company, the company had made representations post-filing that the 5% figure would be used to calculate bonuses going forward and that the insolvency would not affect compensation levels, the court dismissed the employee's application claiming entitlement to bonuses at the 5% rate. The bonus amount was subject to management discretion and the monitor and company had determined the quantum of bonuses to be paid. There was no requirement that the employer was obliged to follow past practices in calculating bonuses after commencing *CCAA* proceedings.

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In *Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10, 2003 CarswellOnt 1104 (Ont. S.C.J.), the debtor company made a plan of arrangement under the *CCAA*. Under which the debtor entered into a trust indenture pursuant to which what were called residue certificates were issued to creditors in satisfaction of their claims. The holders of the certificates were paid in full together with accrued interest. Certain certificate holders had not proved their claims. After payment of the claims of creditors, there remained a substantial surplus. The Public Guardian and Trustee of Ontario contended that all residue certificates not claimed by the holders were escheated and forfeited to the Crown as *bona vacantia*. The court held that the unclaimed moneys were not *bona vacantia*, since property that is undistributed under a trust is not *bona vacantia*. The debtor company did not wish to receive the surplus funds. The court amended the trust indenture to distribute the surplus funds between the holders of residue certificates and the professional advisors who had worked on the plan. The professional advisors, the court said, had achieved a highly successful result beyond all reasonable expectations and were entitled to a premium.

In considering whether a pre-*CCAA* claim for arrears of rent under a lease may be asserted in full against the re-organized *CCAA* company after the *CCAA* proceedings, where the lease in question was not repudiated as part of the *CCAA* proceedings, the Ontario Court of Appeal upheld the lower court finding that the pre-*CCAA* claim for arrears of rent was an unaffected claim and was not compromised or barred by the plan of arrangement and sanction order. The creditor was entitled to bring an action: *Ivorylane Corp. v. Country Style Realty Ltd.* (2005), 2005 CarswellOnt 2516, 11 C.B.R. (5th) 230 (Ont. C.A.); affirming (2004), 2004 CarswellOnt 2567 (Ont. S.C.J. [Commercial List]).

In dismissing an appeal of a judgment that for the most part denied a claim to recover amounts owed to a creditor under its equipment leases to a debtor, the British Columbia Court of Appeal held that in the absence of a specified date for calculating realizable value, the judge considered all other reasonable sources for determining that critical date, including the *CCAA* plan. While the lessor's security position was eroded between the filing date and the plan filing date, the lessor had knowledge that the debtor intended to sell the lessor's collateral and had sufficient opportunity to demand payment prior to the filing date of the *CCAA* application and hence its inaction contributed to the risk that materialized: *Caterpillar Financial Services Ltd. v. 360networks Corp.* (2007), 2007 CarswellBC 29, 2007 BCCA 14, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311 (B.C. C.A.).

The Alberta Court of Queen's Bench held that, regardless of form, an assessment of GST liability occurs at the time the Commissioner of the Canada Customs and Revenue Agency ("CRA") ascertains the amount of tax chargeable to a given taxpayer. The Tax Court of Canada has exclusive jurisdiction to determine a disputed tax liability assessment, even where the debtor is operating under *CCAA* protection, since s. 12 of the *Tax Court of Canada Act* ("*TCCA*") provides exclusive jurisdiction to the Tax Court of Canada to hear and determine references and appeals on matters arising pursuant to, among other things, assessments under the *Excise Tax Act* ("*ETA*"). Section 12 of the *CCAA*, which grants the *CCAA* court jurisdiction over disputed claims, is not engaged and therefore not in conflict with s. 12 of the *TCCA* when a monitor disputes an assessment because the *ETA* deems an assessment to be valid and binding unless and until an appeal under the *ETA*'s procedure holds otherwise such that, if no appeal under the *ETA* has occurred, an assessment is considered valid and binding: *Re CCI Industries Ltd.* (2005), 2005 CarswellAlta 1261, 2005 ABQB 675, [2005] G.S.T.C. 144, 15 C.B.R. (5th) 180 (Alta. Q.B.).

The British Columbia Supreme Court held that an order in a debtor company's *CCAA* proceedings that limits the claims of employees in respect of their pension plan to only be prosecuted as claims in the *CCAA* proceedings in the event that a purchaser fails to complete a transaction with the debtor company and set-up a new pension plan for such employees, does not have the effect of preventing the British Columbia Superintendent of Pensions from performing its statutory duties under the *Pension Benefits Standards Act* (British Columbia) ("*PBSA*"), or requiring a pension administrator to comply with the reporting provisions under the *PBSA* in respect of the partial termination of a pension plan: *British Columbia (Superintendent of Pensions) v. Western Forest Products Inc.* (2006), 2006 CarswellBC 1536, 2006 BCSC 912, 24 C.B.R. (5th) 195, 53 C.C.P.B. 309, 2006 C.E.B. & P.G.R. 8204 (B.C. S.C.).

The court under *CCAA* proceedings has granted limited representation orders, and the courts have lifted the stay of proceedings to allow certification hearings to continue: *Re Air Canada*, Court File No. #03-CL-4932, Endorsement of Justice Farley dated

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September 24, 2003). In some cases, the court has denied such relief: *Re Canadian Red Cross Society/Société Canadienne de la Croix-Rouge* (1999), 1999 CarswellOnt 3234, 12 C.B.R. (4th) 194, 39 C.P.C. (4th) 362 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice held that although representative claims had not been recognized in *CCAA* proceedings to date, a court may have the discretion to permit the filing of representative class proofs of claim in the context of *CCAA* proceedings. However, such discretion ought not to be exercised where: (a) the claims process established in the *CCAA* proceedings adequately protects the interests of all potential individual claimants, who were entitled to avail themselves of the process; (b) the representative claimants do not, in fact, represent the purported class of claimants, i.e. the prospective class is uncertified; and (c) it is so late in the *CCAA* proceedings that to permit the representative claims may prejudice the eventual success of the *CCAA* process. The court further held that Rule 10 of the Ontario Rules of Civil Procedure is principally used in estates and trust cases and is not intended to be utilized in *CCAA* proceedings to permit the filing of representative claims. Approval for the filing of representative claims ought to have been sought at the time that the call for claims process was approved by the court. The court held that to permit the class claims so late in the *CCAA* proceedings would potentially prejudice the eventual success of the *CCAA* process: *Re Muscletech Research & Development Inc.* (2006), 2006 CarswellOnt 4929, 25 C.B.R. (5th) 218 (Ont. S.C.J. [Commercial List]); additional reasons at (2006), 2006 CarswellOnt 5484, 25 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]). In dismissing an appeal from this judgment, the Ontario Court of Appeal held that the factors considered by the judge were properly considered by her in the exercise of her discretion under the *CCAA* and that the weight to be assigned to the various factors was a matter for her determination. The Court held that it could see no realistic possibility of success were it to grant leave to appeal; the proposed representative claims appeared individually very modest and were at a very early stage whereas the claims in the *CCAA* proceeding appeared to be nearing final resolution; and these factors all weighed strongly in favour of the disposition made by the motion judge: *Re Muscletech Research and Development Inc.*, [2006] O.J. No. 4583 (Ont. C.A.).

The Ontario Superior Court of Justice held that it is premature to challenge the settlement and release of claims against third parties as part of a restructuring plan prior to the sanction hearing when the restructuring plan will be considered for approval by the court. Additionally, an order granted under the *CCAA* ought not be varied or set aside unless it is established that there has been fraud in obtaining the order in question; a fundamental change in circumstances since the granting of the order making the order no longer appropriate; an overriding lack of fairness; or the discovery of additional evidence between the original hearing and the time when a review is sought that was not known at the time of the original hearing that could have led to a different result. The court further held that where creditors have sufficient information with which to consider and vote in respect of a restructuring plan, it is inappropriate and unnecessary to permit such creditors to require further investigation or additional information in respect of pre-*CCAA* transactions involving the *CCAA* debtors, and the court will not approve the appointment of an investigator to that end: *Re Muscletech Research & Development Inc.* (2006), 2006 CarswellOnt 6230, 25 C.B.R. (5th) 231 (Ont. S.C.J.).

In dealing with turnover proceeds entitlement arising out of a *CCAA* plan, the Ontario Superior Court held that the distributions received by the debenture holders were to be valued as at the plan implementation date; and that the common shares and warrants were to be valued using the volume weighted average prices that common shares and warrants were trading on the TSX on a specified date: *Re Stelco Inc.* (2006), 2006 CarswellOnt 4857, 24 C.B.R. (5th) 59, 20 B.L.R. (4th) 286 (Ont. S.C.J.).

The Ontario Superior Court of Justice held that a monetary penalty under the *Aeronautics Act* issued against the debtor company prior to its *CCAA* proceedings was a claim in the *CCAA* proceedings and was thus a compromised debt after the plan had received court sanction: *Re Air Canada* (2006), 2006 CarswellOnt 8175, 28 C.B.R. (5th) 317 (Ont. S.C.J. [Commercial List]).

Where debtors in a *CCAA* proceeding had obtained an order permitting them to market debentures they owned with provisions requiring them to identify and process claims purporting to differentiate rights, privileges and entitlements associated with the debentures ("bond differentiation claims"), the court dismissed an application by U.S. debtors to vary the order. The court held that the amendments proposed by U.S. debtors were not refinement or clarification, but would result in real change in effect and scope of the order by exempting from its application any defences the U.S. debtors may have to any proof of claim in U.S. court proceedings. The U.S. debtors were seeking unlimited options in the U.S. proceedings relating to guarantees of certain debentures. The court held that it had jurisdiction to make determinations relating to bond differentiation claims and the order

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was for identifying claims so that their validity might be the subject of later proceedings; and that claims and possible defences in other jurisdictions did not lessen the appropriateness of the court to administer the bond differentiation claims process and adjudicate those claims under the *CCAA* proceeding in respect of the *CCAA* debtors, including the U.S. debtors. There was no evidence before it that a jurisdictional issue had arisen, and the court held that it must necessarily make determinations regarding the status and enforceability of the principal claims outstanding in the *CCAA* proceeding. The court also noted that there was a lack of specificity in the U.S. debtors' claims that the automatic stay under the U.S. *Bankruptcy Code* acted as a bar to determination of the U.S. claims and that the U.S. debtors had not sought recognition of ancillary orders in Canada in respect of the U.S. stay. The court held that it extends to the U.S. court respect and the full benefits of comity, and that if and when real questions of jurisdiction surface, they will be dealt with directly and thoroughly: *Re Calpine Canada Energy Ltd.* (2006), 2006 CarswellAlta 1313, 2006 ABQB 743, 26 C.B.R. (5th) 77 (Alta. Q.B.). For a discussion of cross-border protocols in this case, see N§207 "Cross-Border Insolvencies Generally".

In a *CCAA* proceeding, the Québec Superior Court held that the debtor companies could satisfy the claims of a strategic buyer of distressed debt by paying the distressed debt buyer the sums that the distressed debt buyer had paid to acquire the distressed debt. The court held that the distressed debt buyer had acquired the debt at a significant discount in order to gain strategic control of the *CCAA* proceedings, and that the court had jurisdiction to take into account the circumstances under which distressed debt is acquired in insolvency proceedings, especially in situations where the purchaser of such distressed debt is pursuing a hidden agenda, is acting in bad faith, or "tramples on the rights and expectations of others". The debtors had sought a "white knight" to buy out the bank's interest at a steep discount in order to allow the debtor to seek permanent financing to fund a plan of arrangement and complete construction of its project. The white knight was found among three shareholders and another party, and the debtor had the expectation that the white knight would support the debtor's restructuring efforts and not assert claims for the full value of the debt that it had acquired. A falling out among the principals resulted in the white knight purchasing the rights of the mezzanine lender and numerous construction liens in order to control the class of creditors and defeat the debtor's restructuring efforts. In finding that the distressed debt buyer was a "rogue white knight", the court held that "threatening to hijack the project and frustrate a plan intended to bring a measure of relief to many creditors, including the purchasers of units, does not square with the good faith conduct required of contracting parties by article 1375 C.C.Q." Based on the particular facts, the court decided to treat the claims of the white knight as if they were "litigious rights" because that was what the parties intended at the time that the bank debt was acquired at a discount. In Québec, the person from whom litigious rights are claimed is fully discharged by paying to the buyer of such rights the sale price, the costs related to the sale, and interest on the price computed from the day on which the buyer paid it. Consequently, in finding the white knight's interest to be akin to litigious rights, the court ordered that the debtor could satisfy and discharge all claims owing to the white knight by paying it, in the context of its plan of arrangement, the amount that the white knight had itself paid to acquire the subject debt claims. On such payment, the white knight would be deemed to have accepted Minco's plan of arrangement: *Minco-Division Construction Inc. v. 9170-6929 Québec Inc.* (2007), 2007 CarswellQue 420, 29 C.B.R. (5th) 165, 2007 QCCS 236 (Que. S.C. (Commercial Div.)); leave to appeal to C.A. refused (29 January 2007), Montréal 500-09-017423-070 and 500-09-017419-078 (Que. C.A.). For a discussion of this judgment, see article by Mark Meland, "Rogue White Knights and Strategic Buyers of Distressed Debt in Canadian Insolvency Proceedings" and Janis Sarra, "Distressed Debt Purchasers in Canadian Restructuring Proceedings — The Québec Court's Recent Consideration of Rogue White Knights", INSOL Newsletter, July 2007.

The British Columbia Court of Appeal granted the debtor's leave to appeal motion where the lower court judge held that the claim of an employee for damages arising from termination of employment was not a claim that was compromised in the plan. The court held that there was an arguable question as to whether the chambers judge erred in finding that the employee's claim for damages for wrongful dismissal at common law constituted a contingent liability of the debtor that existed at the time of filing under the *CCAA* and therefore could not be regarded as a post-filing claim within the meaning of the *CCAA* plan. The employee also had an arguable ground of appeal in alleging that the judge erred in the application of relevant factors in exercising her discretion to refuse to grant the employee an extension of time to file a proof of claim: *Re West Bay SonShip Yachts Ltd.* (2007), 2007 CarswellBC 1868, 60 C.C.E.L. (3d) 21, 35 C.B.R. (5th) 104, 2007 BCCA 419 (B.C. C.A. [In Chambers]).

A franchisor that was a subsidiary of a group of companies that filed under the *CCAA* had a general security agreement (GSA) over the assets of its franchises. The franchisor's parent corporation in the same proceeding had a subordination agreement

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with the bank, but the franchisor itself had never made an agreement. During the *CCAA* proceeding, the debtor parent sold the franchise agreements and the GSA to a purchaser pursuant to approval and a vesting procedure free and clear of any security interests. The court granted a motion by the purchaser for a declaration that the GSA had priority over the bank's GSA on the basis that the order was clear, the bank was party to the proceedings two years' prior and had failed to claim priority at the time, and the matters resolved by the order were *res judicata*. The court held that the *CCAA* objective of providing a mechanism for the efficient restructuring of insolvent companies would be seriously undermined if parties that fail to assert their rights at the time are permitted to subsequently return to court to undo past transactions: *Extreme Retail (Canada) Inc. v. Bank of Montréal* (2007), 2007 CarswellOnt 5520, 12 P.P.S.A.C. (3d) 26, 37 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]).

The British Columbia Supreme Court held that, in determining the validity and quantum of a claim in a *CCAA* proceeding, the opinion of the monitor should be considered, but the monitor is not entitled to deference in the sense that it would alter the burden of proof ordinarily imposed on the claimant. Here, the *CCAA* application did not disclose an inter-company debt; all financial reporting was done on a consolidated basis and only when the monitor requested unconsolidated statements was the inter-company debt revealed. The court held that the function of the monitor was to determine the validity and amount of a claim on the basis of the evidence submitted. However, the creditor has the burden of proving its claims: *Re Pine Valley Mining Corp.* (2008), 2008 CarswellBC 579, 41 C.B.R. (5th) 43 (B.C. S.C.). In supplementary reasons, the British Columbia Supreme Court also discussed the question of the admissibility of a monitor's report. In this case, the report was found to be admissible for the purposes of the trial, but the conclusion as to the characterization of the payments as debts or equity were not admissible as expert opinion. The court held that it would be guided by the following principles: 1) presumptively, a monitor's report is admissible in evidence at a hearing concerning the subject matter of the report; 2) in unusual circumstances, an officer of the court, such as the monitor, may be cross-examined on its report; 3) the monitor must remain neutral as between the various stakeholders in a *CCAA* proceeding; and 4) the court should strive to protect the monitor from close involvement in the adversarial process between the claimants: *Re Pine Valley Mining Corp.* (2008), 2008 CarswellBC 712, 41 C.B.R. (5th) 49 (B.C. S.C.).

Related companies filed a consolidated plan that included two classes: a secured class, comprised of all creditors of both companies, and an unsecured class, comprised of all unsecured creditors of both companies. The proposed plan allowed all secured claims to be recognized in accordance with their face amount, not their actual value and a meeting was ordered to permit a vote on that basis. A secured creditor with a first charge over equipment objected to the classification on the basis that consolidation all the creditors and the face amount of their claims would serve to swamp the creditor's vote. Glennie J. noted that the *CCAA* process in this case essentially involved two differing interests, the stakeholders, including the province of New Brunswick, as well as the hundreds of employees, and the secured creditor, which had sufficient security at the time of filing to cover its claims. On the issue of voting, Glennie J. held that the amount of a secured claim is the amount admitted by the company governed by the *CCAA* after receiving a proof of claim. Glennie J. concluded that given the overall purpose of the *CCAA*, the relief sought was not fair and reasonable. In the result, the creditor's request that the claims of the companies' secured creditors be allowed to the realizable value of the property of the companies subject to the security was denied. In determining classification, the court considered the following: commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test; the interests to be considered are the legal interest that a creditor holds *qua* creditor in relationship to the debtor company prior to and under the plan as well as liquidation; the commonality of interests are to be viewed purposively, bearing in mind the object of the *CCAA*; in placing a broad and purposive interpretation on the *CCAA*, the court should be careful to resist classification approaches that would potentially jeopardize viable plans; absent bad faith, the motivations of creditors to approve or disapprove of the plan are irrelevant; the requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner; since the *CCAA* is to be given a liberal interpretation, classification hearings should be dealt with on a fact specific basis and the court should avoid rigid rules of general application; and finally, in determining commonality of interests, the court should also consider factors such as the plan's treatment of creditors, the business situation of the creditors, and the practical effect on them of a failure of a plan. On the evidence, the court concluded that all of the companies' secured creditors had commonality of interest, and that the relief the creditor sought, namely to be placed in its own class, stemmed from its goal to position itself to veto power in order to defeat the proposed plan: *Re Atlantic Yarns Inc.* (2008), 2008 CarswellNB 195, 42 C.B.R. (5th) 107, 2008 NBQB 144 (N.B. Q.B.).

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The Ontario Superior Court held that it was appropriate that all creditors be placed in a single class as the plan was, in essence, an offer to all investors that must be accepted by or made binding on all investors. The plan treated all asset backed commercial paper (ABCP) holders equitably, and while the risks differed among traditional assets, ineligible assets, and synthetic assets, the calculation of the differing risks and corresponding interests had been taken into account consistently across all of the ABCP in the plan. Campbell J. was also satisfied that fragmentation of classes would have rendered it excessively difficult to have obtained approval of a *CCAA* plan, which was contrary to the purpose of the *CCAA*. He also took into account the commonality of interest approach in deciding that the proposed classification was, at this stage, appropriate: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]).

In a subsequent judgment, Campbell J. considered the monitor's report, which calculated the vote both on the basis previously approved and on the basis of dollar value and was satisfied that a reclassification would not alter the strong majority voting in favour of the plan: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List]).

Two parties that were judgment creditors moved for directions as to whether the terms of the "Release," which was part of a *CCAA* plan sanction order of the Ontario Superior Court, was part of the approval of a plan of compromise and arrangement for what was known as the Asset-Backed Commercial Paper ("ABCP") market. The Ontario Superior Court held that the Ontario Court did not have the jurisdiction to deal with the real issue as between the parties, namely whether the bailiff was authorized or negligent in turning property proceeds in a Québec proceeding into asset-backed commercial paper, as that was a matter for the Québec court. It was, however, appropriate that the Ontario Court address the narrow issue of whether the parties were covered by the release terms in the ABCP plan sanction order. The parties who had bargained for ABCP releases were those who could be sued by noteholders. Neither judgment creditor had had any dealings with the company that purchased the ABCP and Campbell J. held that it would be inequitable to preclude them from pursuing a claim against the bailiff for failure to pay over amounts owing on a court-ordered process: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5255, 46 C.B.R. (5th) 195 (Ont. S.C.J. [Commercial List]).

In the context of a *CCAA* plan, the British Columbia Court of Appeal held that an employment contract was an executory contract and therefore a "claim" that was compromised in the plan of arrangement. Levine J.A. held that the first step in determining whether a claim for damages for breach of an employment contract represented a contingent liability was to consider the meaning of that term. The Supreme Court of Canada in *McLarty v. R.* (2008), 2008 CarswellNat 1380, 2008 CarswellNat 1381, [2008] 4 C.T.C. 221, *(*sub nom. *McLarty v. Minister of National Revenue)* 374 N.R. 311, *(*sub nom. *Canada v. McLarty)* [2008] 2 S.C.R. 79, 46 B.L.R. (4th) 1, 293 D.L.R. (4th) 659, 2008 SCC 26, *(*sub nom. *R. v. McLarty)* 2008 D.T.C. 6366 (Fr.), 2008 D.T.C. 6354 (Eng.) (S.C.C.) referred to the "well-accepted test for a contingent liability" as described by Lord Guest in *Winter v. Inland Revenue Commissioners* (1961), [1963] A.C. 235, [1961] 3 All E.R. 855 (U.K. H.L.), as an event that may or may not occur, and the contingent liability is a liability that depends for its existence on an event that may or may not happen. In this case, the question was whether the existence of a contractual obligation, and the corresponding potential for a claim for damages for its breach, was a contingent liability of the party who may commit the breach. Levine J.A. concluded that, although there is the potential of a claim for damages, there can be no liability, contingent or otherwise, where there is no present cause of action. Until there is a breach of contract, there is no legal basis for any claim or any corresponding liability. Levine J.A. concluded that the liability to pay damages if an employment contract was breached for failing to give reasonable notice of termination was not a contingent liability within the ordinary meaning of that term. Until the termination of employment without adequate notice, there was no injury. The applicants claim was not a pre-filing claim on the basis that it was a contingent liability. Justice Levine also held that an ongoing employment contract, under which an employee has promised to render services in return for the employer's promise to pay for those services, was an executory contract, as there were obligations on both parties that were yet to be completed. Thus, the applicant's employment contract was, at the filing date, an executory contract that fell within the definition of "claim" in the plan. Consequently, his rights arising on termination of his employment contract were compromised under the plan, an outcome consistent with the purpose of the *CCAA*. The plan permitted the debtor to rationalize its business affairs with a view to a reorganization that would make it viable in the future: *Re West Bay SonShip Yachts Ltd.* (2009), 2009

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CarswellBC 139, 49 C.B.R. (5th) 159, 71 C.C.E.L. (3d) 45, 2009 BCCA 31 (B.C. C.A.). For a more general discussion on contingent claims under the *BIA*, see G§37 "Contingent or Unliquidated Claims".

Three members of a group of *CCAA* debtors applied for an order authorizing an interim distribution of funds to a banking syndicate, their major secured creditor under a guarantee of the indebtedness of the entire corporate group, including debtors engaged in Chapter 11 proceedings in the United States, one of which was the parent company for which they were indirect wholly-owned subsidiaries. The financial problems of the debtors arose from a failed trading strategy and the volatility of petroleum products pricing, which led to margin calls resulting in a severe liquidity crisis. The credit facilities were insufficient to accommodate its capital needs, and the corporate group sought protection under Chapter 11 and the *CCAA*. The Alberta Court of Queen's Bench denied the debtors' motion authorizing the interim distribution. Romaine J. held that while orders allowing interim distributions to creditors are not without precedent, an application for an interim distribution to one creditor must be carefully scrutinized and found to be justifiable for good and sustainable reasons, recognizing that it may create a preference. Here, it appeared that the debtors' right of subrogation and indemnity may not be enforceable against other borrowers or guarantors unless all indebtedness to the lenders was paid in full and it appeared that the right to contribution from other members of the enterprise group may be limited under U.S. law. Romaine J. held that an interim distribution would give rise to the possibility that unsecured creditors may be prejudiced and that such potential for prejudice outweighed the benefits of an early payment on the guarantee to the lenders. It is not necessarily the case that a distribution of funds from the Canadian estate must await the resolution of the Chapter 11 proceedings; as *CCAA* proceedings may advance at a different pace if the court is satisfied by the evidence before it that it is appropriate to do so. The application was adjourned *sine die* with leave to the applicants and the lenders to reapply with more current information if it became apparent that the potential prejudice identified by the unsecured creditors was unlikely to materialize or could be avoided by other measures or that the balance of prejudice and benefit had shifted: *Re SemCanada Crude Co.* (2009), 2009 CarswellAlta 167, 52 C.B.R. (5th) 131, 2009 ABQB 90 (Alta. Q.B.).

The Alberta Court of Queen's Bench held that any claims of holders of flow-through common shares pursuant to an indemnity from the *CCAA* debtor should be treated as equity obligations rather than debt obligations: *Re EarthFirst Canada Inc.* (2009), 2009 CarswellAlta 1069, 56 C.B.R. (5th) 102 (Alta. Q.B.). For a discussion of the case, see N§152 "Creditors Having Equity Claims".

The British Columbia Court of Appeal upheld two decisions in proceedings under the *CCAA* involving a development. The appeals were brought by "pre-sale purchasers" of residential condominiums. The appellants argued that they had certain remedial rights under the *Real Estate Marketing and Development Act*, which were sufficient to give them status as creditors in the *CCAA* proceeding, and which could not be overridden by orders under the *CCAA*. The Court held that there was nothing in the *Real Estate Marketing and Development Act* that suggested that the legislature intended that the "identity of the developer" changes if corporate ownership and control change. The appellant also claimed they were creditors under the plan on the basis that they were entitled to rights and remedies under the *Real Estate Marketing and Development Act*. Levine J.A. held that the appellants had no rights of rescission or to return of their deposits because their pre-sale agreements were unenforceable under the *Real Estate Marketing and Development Act*; thus, there was no basis for them to claim that they were creditors. The appellate court found no error in the supervising judge's approval of an extension of the completion date of the pre-sale agreements because of construction delays, observing that the customary way of determining delay claims is after the project has been completed. In this case, there was not that luxury, and the court proceeded to decide them and ordered the extension: *Re Jameson House Properties Ltd.* (2009), 2009 CarswellBC 1904 (B.C. C.A.).

An issue arose during *CCAA* proceedings as to whether a document constituted a promissory note within the meaning of the *Bills of Exchange Act*. The Alberta Court of Appeal held that it was not a promissory note as it was not unconditional in nature; and the provision that was entitled "promissory note" was included as part of a contract, the terms of which conditioned payment of obligation. The provision could not be construed independently from other provisions of the purchase contract. Hence the court found that the chambers judge was correct in her determination that the document did not contain an unconditional promise to pay: *Re Fairmont Resort Properties Ltd* (2009), 2009 CarswellAlta 1589, 60 C.B.R. (5th) 55 (Alta. C.A.).

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See N. MacParland, "How Close is Too Close? The Treatment of Related Party Claims in Canadian Restructurings", *Annual Review of Insolvency Law, 2004* (Carswell, 2005) 355-398; Howard Gorman, "Calpine: Cross-Border Review and Approval of Inter-Debtor Claims"; and Jeffrey Carhart, "Some Reflections on the MuscleTech Case", in J. Sarra, ed. *Annual Review of Insolvency Law, 2007* (Carswell, 2008); Ari B. Kulidjan, "Potential Creditors under the *Companies' Creditors Arrangement Act*", 13 Nat. Insol. Rev. 51.

The Ontario Superior Court of Justice held that a consulting agreement entered into between the former CEO and the debtor company, years prior to the *CCAA* filing, constituted a pre-filing obligation of the debtor. Since the execution of the agreement, the debtor had paid the former CEO approximately $2.625 million. The debtor also complied with its obligations to pay the monthly consulting fee to him, until the initial order was made under the *CCAA*. Justice Morawetz held that the benefits conferred on the former CEO under the original agreement, as amended, were, in substance, termination and/or retirement benefits and thus unsecured claims. The court found the amounts were a "top up" to other retirement and pension benefits; the "consulting" term was to commence on the first day of the month following retirement; under the agreement, the former CEO was not entitled to any retirement or pension benefits from the debtor following his retirement other than the payments; the agreements did not provide for any minimum amount of consulting to be provided; all other employment benefits and provision of services to enable him to provide employment services to the debtor were terminated by an agreement; and he had not provided any consulting services following his retirement. Justice Morawetz held that termination and/or retirement benefits are pre-filing unsecured obligations of debtor companies undergoing *CCAA* proceedings. In this case, the debtor entities were insolvent and not able to honour their obligations to all creditors. If the benefits conferred on the former CEO were not stayed, he would, in effect, receive an enhanced prior over other unsecured creditors, which would be contrary to the scheme and purpose of the *CCAA*. Morawetz J. stated that, in the event that he was in error in his conclusion, the debtor was entitled to disclaim the agreement pursuant to s. 32. Morawetz J, was satisfied that the scope of the *CCAA* and the various protections it affords debtor companies should not be interpreted so narrowly so as to apply only in the context of a restructuring process leading to a plan of arrangement for a newly restructured entity. He was satisfied that, in the circumstances, the disclaimer of the agreement was necessary, fair, reasonable, advantageous and beneficial to the restructuring process. With respect to the issue of financial hardship, Morawetz J. held that the test of whether a disclaimer of an agreement will cause significant hardship to the counterparty depends on an examination of the individual characteristics and circumstances of such counterparty. Morawetz J. was unable to conclude that the disclaimer would likely cause significant financial hardship to the former CEO: *Re Timminco Ltd.*, 2012 CarswellOnt 10568, 93 C.B.R. (5th) 326, 2012 ONSC 4471 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice lifted the stay of proceedings in a *CCAA* proceeding to permit a class action that had not been filed by the claims bar date, to be dealt with on its merits. The class action focused on alleged public misrepresentations that the debtor possessed a proprietary metallurgical process that provided a significant cost advantage in manufacturing solar grade silicon for use in manufacturing solar cells. Justice Morawetz commenced held that both the claims-bar order and lifting the stay were discretionary. This discretion should be exercised in light of the purposes of both claims-bar orders and stays under the *CCAA*. A claims-bar order and a stay are intended to assist the debtor in the restructuring process, which may encompass asset realizations. Here, the debtor's assets had been sold, distributions made to secured creditors, no *CCAA* plan had been put forward, and there was no intention to advance a *CCAA* plan. Accordingly, Morawetz J. was of the view that neither the stay nor the claims-bar order continued to serve their functional purpose in the *CCAA* proceedings by barring the class action. Justice Morawetz held that it is necessary to return to first principles with respect to claims-bar orders. The *CCAA* is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in a restructuring under the *CCAA*, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders that establish a deadline for filing claims. Adherence to the claims-bar date becomes even more important when distributions are being made, in this case, to secured creditors, or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of arrangement. These objectives are recognized by s. 12 of the *CCAA*, in particular the references to "voting" and "distribution". In such circumstances, Morawetz J. was of the view that stakeholders are entitled to know the implications of their actions. By establishing a claims-bar date, the debtor can determine the universe of claims of the potential distribution to creditors, and

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creditors are in a position to make informed choices as to the alternatives. Stakeholders in this context can also include directors and officers, as it is not uncommon for debtor applicants to propose a plan under the *CCAA* that compromises certain claims against directors and officers. Here, there had been distributions to secured creditors, which were not subject to challenge. The class action claim is subordinate in ranking to the claims of the secured creditors, and has no impact on distributions made to secured creditors. Further, there was no *CCAA* plan and there would be no compromise of claims against directors and officers. In the absence of a plan, Morawetz J. was of the view that the purpose of the claims-bar procedure was questionable. The court observed that a claims-bar order should not be used as a tool to bar the class action claims in circumstances where no plan was being presented to creditors: *Re Timminco Ltd.*, 2014 CarswellOnt 9328, 14 C.B.R. (6th) 113, 2014 ONSC 3393 (Ont. S.C.J.).

(1) — Definition of Claim

"Claim" under the *CCAA* means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*: s. 12(1).

(2) — Proof of Claim

Section 12 specifies that the court has the authority to fix a deadline for creditors to file claims, often referred to as a claims bar date, for the purposes of voting and for distribution under a compromise or arrangement: s. 12. Under s. 20(1), for purposes of the *CCAA*, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows: the amount of an unsecured claim is the amount (i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with the *WURA*; (ii) in the case of a company that has made an assignment or against which a bankruptcy order has been made under the *BIA*, proof of which has been made in accordance with the *BIA*; or (iii) in the case of any other company, proof of which might be made under the *BIA*. If the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor. The amount of a secured claim is the amount, proof of which might be made under the *BIA* if the claim were unsecured; but if not admitted by the company the amount is, in the case of a company subject to pending proceedings under the *WURA* or the *BIA*, to be established by proof in the same manner as an unsecured claim under the *WURA* or the *BIA*, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor: s. 20(1).

A debtor company may admit the amount of a claim for voting purposes and reserve its right to contest liability on the claim for other purposes: s. 20(2).

In the context of a *CCAA* proceeding, the Alberta Court of Queen's Bench held that a secured creditor's interest that had lapsed under the British Columbia *PPSA* ranked behind that of another secured creditor that registered its security after the lapse and before the security was reregistered. To determine priorities, the court held that it must decide which party holds the earliest perfected interest. The only way that the secured creditor could have priority was if it had perfected its possession before the second creditor filed under the *PPSA*. Here, the creditor gave up actual physical possession to another company to secure credit advances and thus was not in possession at the relevant time: *Re Fairmont Resort Properties Ltd.* (2009), 2009 CarswellAlta 1210, [2009] A.J. No. 867, 2009 ABQB 479, 56 C.B.R. (5th) 235 (Alta. Q.B.); leave to appeal refused (2009), 2009 CarswellAlta 1725, 2009 ABCA 360 (Alta. C.A.).

(3) — Claims Barring Procedure

Section 12 specifies that the court has the authority to fix a deadline for creditors to file claims, often referred to as a claims bar date, for the purposes of voting and for distribution under a compromise or arrangement: s. 12. In *CCAA* proceedings, a claims bar order is often made by the judge in charge of the proceedings. Prior to the amendment, there was no provision in the *CCAA* for the making of such an order, the order being made under the general authority of the court. The jurisdiction to make the order and to amend it was not challenged in *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 192, 250 A.R. 239, 213 W.A.C. 239, 2000 CarswellAlta 30, [2000] A.J. No. 31 (C.A. [In Chambers]).

The purpose of the order is, among other things, to enable creditors to meaningfully assess and vote on a plan of arrangement and to ensure a timely and orderly completion of the *CCAA* proceedings: *Re Blue Range Resource Corp.*, *supra*.

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Under a claims bar order, creditors are required to file their claims by a fixed date. The debtor company is directed to send notice of the order to all creditors. The court may also order publication in a newspaper.

It is usual to appoint a claims officer who will be given power to adjudicate disputed claims with the right of appeal to the judge administering the *CCAA* proceedings.

In *Re Canadian Airlines Corp.* (2001), 14 B.L.R. (3d) 258, 2001 ABQB 146, [2001] 7 W.W.R. 383, 92 Alta. L.R. (3d) 140, 2001 CarswellAlta 240, Paperny J. (then) of the Alberta Court of Queen's Bench held that, in Alberta, a decision of a claims officer is not a true appeal but a hearing *de novo* so that the court is free to substitute its discretion for that of the claims officer.

In some orders, a creditor is given the right to by-pass the claims officer and to apply directly to the judge for a ruling on its claim.

In *Re Blue Range Resource Corp.*, *supra*, a claims bar order was made by the court. Two creditors did not file their claims in the time period fixed by the order. The creditors applied for and were granted an extension of time for filing their claims. A large creditor applied for leave to appeal. A judge of the Alberta Court of Appeal granted leave to appeal on the issue whether the lower court judge had erred in exercising the discretion to extend the time for creditors to file their claims. The Court of Appeal dismissed the appeal: see *Re Blue Range Resource Corp.* (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, [2000] A.J. No. 1232, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 7 Alta. L.R. (3d) 352 (C.A.); additional reasons at 2001 CarswellAlta 1059, 281 A.R. 351, 248 W.A.C. 351, 202 D.L.R. (4th) 523, [2001] 10 W.W.R. 406, 93 Alta. L.R. (3d) 236 (C.A.); leave to appeal refused (2001), 2001 CarswellAlta 1209, 2001 CarswellAlta 1210, 283 N.R. 391 (note) (S.C.C.). The Court of Appeal held that in determining whether or not to grant permission for late filing of claims, the court should apply the following tests:

1. Was the delay in filing caused by inadvertence and if so, was the creditor acting in good faith? Inadvertence includes carelessness, negligence and accident but the conduct must be unintentional.

2. What is the effect of extending the time for filing in terms of the existence and impact of any relevant prejudice caused by the late filing? The test for prejudice is: did the creditors who filed on time lose as a result of the late filing a realistic opportunity to do anything that they might otherwise have done? The fact that the amount available for distribution to creditors has been reduced does not constitute prejudice.

3. If the late filing has caused relevant prejudice, can it be alleviated by attaching appropriate conditions to the order permitting the late filing?

4. If relevant prejudice has been caused that cannot be alleviated, are there any other consideration that could nonetheless warrant an order for late filing?

A pre-*CCAA* claim for arrears of rent under a lease is not barred and may be asserted in full against a reorganized *CCAA* company following its emergence from *CCAA* proceedings where: (a) the lease in question was not repudiated as part of the *CCAA* proceedings; (b) the claimant, whose claim should have been known to the debtor company and documented in the debtor company's books, never received formal notice of the *CCAA* proceedings or of a claims procedure order providing for a claims bar date; (c) the claimant did not see the claims bar notice published in the newspaper; and (d) the provisions of the order sanctioning the debtor company's plan of reorganization and the plan itself make it clear that: (1) a real property lease that has not been repudiated or terminated and in respect of which there has been no written agreement to allow a claim is an "unaffected obligation" under the plan; (2) the debtor company is deemed to have ratified each unexpired lease to which it is a party, unless such lease was previously repudiated or terminated or previously expired or terminated pursuant to its own terms; and (3) any agreement to which the debtor company is a party as at the effective date of the plan shall be and remain in full force and effect unamended and the debtor company is obliged to perform such agreement and is prohibited from repudiating it by reason of the fact that the debtor company has sought and obtained *CCAA* relief or that a reorganization has been implemented: *Ivorylane Corp. v. Country Style Realty Ltd.* (2005), 2005 CarswellOnt 2516, 11 C.B.R. (5th) 230, 7 B.L.R. (4th) 15, 199 O.A.C. 1, 256 D.L.R. (4th) 38 (Ont. C.A.).

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In *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)* (2001), 21 C.B.R. (4th) 222, 2001 CarswellNB 21, 233 N.B.R. (2d) 111, 601 A.P.R. 111 (N.B.Q.B.), the claims bar order delegated to the registrar in bankruptcy the supervision of the claims bar process. Prior to the expiration of the time fixed for the filing of a proof of claim, a creditor mailed a proof of claim to the trustee by certified mail. Although there were 8 days before the time for filing a proof of claim expired, the letter was not delivered until 15 days had expired. In imposing the duties on the registrar, the court instructed the registrar to follow the procedure relating to proofs of claim set out in the *Bankruptcy and Insolvency Act*. The registrar found that this gave it the power to determine whether the time for filing a proof of claim should be extended and concluded that it was a proper case in which to make such an order. In deciding to extend the time, the registrar applied the tests given in *Re Blue Range Resource Corp.*, *supra*.

The court refused to extend the claims bar date where the effect of that order would be to postpone the consideration and implementation of the plan of arrangement indefinitely, and the delay would cause financial difficulty in view of tight timelines: *Re Vicwest Corp.* (2003), 45 C.B.R. (4th) 149, 2003 CarswellOnt 2802 (Ont. S.C.J.).

Leave to file a late dispute notice may be granted where it will not cause hardship to any interested party or prejudice the debtor's reorganization. This discretion to grant an extension will not usually be granted. Corrective action must be taken forthwith to address delays on the error being realised, and lying in the weeds is not an option: *Re Air Canada [Late Dispute Notice]* (2004), 49 C.B.R. (4th) 175, 2004 CarswellOnt 1843 (Ont. S.C.J. [Commercial]).

Where a sanctioned *CCAA* plan required "a process to *determine on a timely basis* entitlements to the turnover proceeds", the court held that a determination on a timely basis does not mean that matters be dealt with at breakneck speed with all manner of corners cut. Given that the debtor had a claims bar order to flush out claims, the court held that it was unnecessary to have newspaper advertising or a further claims bar order for turnover proceeds. It was sufficient that notice be given by the debtor under the supervision of the monitor to the service list, expanded to include all proven creditors, the trustees under the various bonds, trust indentures and to CDS to ensure that notice is received by the beneficial holders. The court held that most of the disputes could be dealt with on the basis of affidavit evidence, subject to cross-examination. To the extent that *viva voce* evidence was truly required, it should be restricted to the truly material portions that were in dispute so that there would be limited direct and cross-examination in court: *Re Stelco Inc.* (2006), 2006 CarswellOnt 1505 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice considered the question of whether plaintiffs in an uncertified class action could file claims in a *CCAA* proceeding on behalf of themselves and all other similarly situated plaintiffs. Products liability actions had been stayed in both the *CCAA* and U.S. Chapter 15 proceedings. There was a claims process set up, which involved a first assessment of claims by the monitor; a process for resolving disputed claims; and a claims bar date. The court held that while a representative claim may be possible, the question was whether the case before it was a proper one to permit this kind of representative claim, without the necessity of the individual members of the class filing claims. The court held that the *CCAA* process and notice adequately protected the interests of the potential claimants and they chose not to utilize the process. The court declined to exercise its discretion to allow the representative claims or lift the stay to permit certification motions to proceed in the U.S. The court held that changing and increasing the landscape of claimants after the claims bar date and after the settlement of 30 claims could cause prejudice to the eventual success of the *CCAA* process. The arguments by the representative plaintiffs should have been made when the Call for Claims order was made. The process gave adequate opportunity for anyone with a claim to file a proof of claim; the forms were accessible and in plain language; the products liability claimants all managed to make individual claims, even where they were involved in class actions; and hence the court concluded that to allow representative or class claims at this date would be prejudicial to the entire claims process and would impair the integrity of the *CCAA* process: *Re Muscletech Research & Development Inc.* (2006), 2006 CarswellOnt 4929, 25 C.B.R. (5th) 218 (Ont. S.C.J. [Commercial List]).

Where an approved plan of arrangement under the *CCAA* gave creditors five years from the plan implementation date to resolve disputed claims and the vice-president of the debtor had begun a wrongful dismissal action against the debtor and the action was not resolved at the drop dead date, the court declined to allow the action to continue or to allow a counterclaim. The court held that timely resolution of claims is an important aspect of the statute and the drop dead date had passed and the claim should not be allowed to proceed. The court also held that allowing a counterclaim to be filed would be tantamount to allowing the

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wrongful dismissal action to proceed by another route: *Komarnicki v. Hurricane Hydrocarbons Ltd.* (2007), 2007 CarswellAlta 121, 29 C.B.R. (5th) 231 (Alta. Q.B.). On appeal, the Alberta Court of Appeal held that to further the goal of enabling a company to deal with creditors in order to carry on business, the *CCAA* proceedings seek to resolve matters and obtain finality without undue delay. A drop dead date is one means of bringing disputed claims to an end and allowing a company to move forward. The requirement for leave to appeal similarly reinforces the finality of orders made under a *CCAA* proceeding and prevents continuing litigation where there are no serious and arguable grounds of significance to the parties. The plaintiff was required leave to appeal the decision of the chambers judge; and here, there was no proper application for leave before the Court of Appeal and no decision was made in that regard and the appeal was struck: *Hurricane Hydrocarbons Ltd. v. Komarnicki* (2007), 2007 CarswellAlta 1521, 2007 ABCA 361, 37 C.B.R. (5th) 1 (Alta. C.A.).

In considering whether claims could be considered given the submission of claims after a claims barred date, the Newfoundland and Labrador Supreme Court extended the time for the filing of certain claims in a proposal. In considering the factors that should be taken into account, the court held that 1) the trustee had not set out any real prejudice that would arise if the claims were allowed and the possibility of additional creditors diluting the assets to be distributed does not constitute prejudice; 2) the trustee had not indicated that there was any lost opportunity by virtue of the late filing, which might give rise to prejudice; 3) the court will look at the substance of the matter in trying to reach a decision based on substantive concerns and not be hamstrung by the procedure that the applicants chose to follow; 4) the proposal itself contemplated that there would be additional claimants; 5) there was evidence of an overall intent in the proposal to determine and assess the claims of unknown victims of abuse; 6) there was no inordinate delay by each of the applicants that in and of itself could prejudice the process; and 7) the trustee had not pointed to anything greater than the inadvertence claimed by the claimants that would minimize the existence of good faith on their behalf: *Re Roman Catholic Episcopal Corp. of St. George's* (2007), 2007 CarswellNfld 198, 2007 NLTD 20, 801 A.P.R. 309, 264 Nfld. & P.E.I.R. 309, 32 C.B.R. (5th) 302 (N.L. T.D.).

The Ontario Superior Court of Justice held that the court has the jurisdiction to admit late-filed, or otherwise irregular, claims in a previously approved *CCAA* plan. Pursuant to the plan, a trust was established for the purpose of holding, administering and distributing an "HIV Fund" in satisfaction of claims of persons ("HIV Claimants") who were infected with the HIV virus from receiving blood supplied by the debtor. As a result of problems and litigation, no distributions had been made from the HIV Trust in the eight years since the plan had been approved. Late applications were received from persons who were either infected persons, or persons with derivative claims as members of the families of infected persons, where they did not receive notice. The court's considerations in the exercise of its jurisdiction in this case were: the structure of the *CCAA* plan with its provision of a separate Fund for HIV Claimants; the fact that no distributions had been made; the absence of prejudice that would be suffered by the debtor and other claimants; the uncertainty created by the limitations issues; the circumstances of the claimants that distinguish them from commercial creditors; the fact that adequate notice to them was essential if the plan was to be effective; the application forms provided to the HIV Claimants were not clear; and the methods of disseminating notice of the deadline may have been affected, and unduly limited, by a misapprehension as to the number of potential claimants: *Re Canadian Red Cross Society/Société Canadienne de la Croix-Rouge* (2008), 2008 CarswellOnt 6105, 48 C.B.R. (5th) 41 (Ont. S.C.J.).

Where a chambers judge had denied an application to extend the time for the filing of a proof of claim, the appellate court held that the applicant had not shown that the chambers judge's decision was clearly wrong and concluded that there was no basis to interfere with her decision not to extend the time to file the proof of claim: *Re West Bay SonShip Yachts Ltd.* (2009), 2009 CarswellBC 139, 49 C.B.R. (5th) 159, 71 C.C.E.L. (3d) 45, 2009 BCCA 31 (B.C. C.A.).

The monitor brought a motion seeking directions as to whether it has the necessary authority to allow a revision of a claim after the claims bar date but before the date set for the monitor to complete its assessment of claims. The monitor was of the view that errors in the proofs of claim were due to inadvertence and for all of the claims it issued a notice of revision, allowing the claims as revised if the court determined that it had the power to do so. The court held that s. 12 of the *CCAA* defines a claim to mean any obligation that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *BIA*; however, the *CCAA* does not set out a process for identification or determination of claims, instead, the court orders a claims process. The monitor as an officer of the court, is obliged to ensure that the interests of the stakeholders are considered, including all creditors, the

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company and its shareholders; and the monitor had the necessary authority to revise the claims, either as to classification or amount: *Re ScoZinc Ltd.* (2009), 2009 CarswellNS 229, 53 C.B.R. (5th) 96, 2009 NSSC 136 (N.S. S.C.).

The Ontario Superior Court of Justice declined to establish a claims bar date in respect of claims made under special purpose provincial legislation. The court concluded that there would be no prejudice to the claimant if the motion was dismissed on a without prejudice basis to request similar relief at a time in the future if and when the relief was necessary to protect rights and to achieve a fair and equitable result. British Columbia had enacted the *Tobacco Damages and Health Care Cost Recovery Act (TDHCCRA)* and delivered a notice of claim to the debtor company and the monitor, seeking the present value of the past and future costs of government health care benefits on an aggregate basis provided for its population resulting from tobacco related disease as a result of smoking cigarettes. The proposed order would fix a claims bar date. Justice Cumming held that those provinces that have enacted and proclaimed in force TDHCCRA-type legislation, have a cause of action and consequently, have claims "provable in bankruptcy". Justice Cumming was of the view that it was inappropriate to attempt to determine "provable claims" at this early stage. He concluded that the claims arising out of allegations of smuggling of contraband tobacco products were distinguishable from the situation with the putative health care cost recovery (HCCR) claims. The claims bar order simply required that any such existing smuggling claims of governments be filed by a fixed date so as to give notice to preserve their existing claims for purposes of the *CCAA* proceedings. Justice Cumming concluded that there was no prejudice to BC or to any other province that may choose to advance an HCCR claim, in dismissing this motion. The existing HCCR claims were proceeding having been unaffected (with the stay lifted) by these *CCAA* proceedings. Justice Cumming noted that the existing and anticipated HCCR claims would involve multiple defendants, both domestic and foreign, and would necessarily have to proceed in the civil courts. It might well unnecessarily complicate and delay the HCCR proceedings, as well as the *CCAA* proceeding, to make a Crown HCCR claims bar order at this time relating to HCCR claims against the company. Justice Cumming concluded it was premature to set a bar date and establish a procedure for the determination of HCCR claims. He noted that the existing BC claim was proceeding before the Supreme Court of British Columbia and was being case managed. It was obvious that it would be both efficient and expeditious to have a single trial in respect of all HCCR claims rather than one in each of 9 or 10 provinces: *Re JTI-MacDonald Corp.* (2009), 2009 CarswellOnt 6614 (Ont. S.C.J. [Commercial List]).

See Vern DaRe, "Risks Inherent in the Settlement of Tort Claims: Recent Direction from the Red Cross Case", in J. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009); David Moore "Claims Bar Dates: The Debate Continues", 13 Comm. Insol. R. 37; K. Kraft "The *CCAA* and the Claims Bar Process", 13 Comm. Insol. R.1; Vern DaFe, "The Treatment of Late Claims Under the *CCAA*", 26 C.B.R. (4th) 142.

(4) — Negotiation and Mediation of Claims

The Ontario Superior Court of Justice noted that an experienced mediator under a *CCAA* proceeding should be given the highest degree of flexibility in his or her approach to and handling of a mediation between all stakeholders of an insolvent corporation. The court noted that if the monitor feels it appropriate, it may recommend a third party's proposal for the stakeholders' consideration, in addition to the monitor's proposal. The court noted that if any stakeholder does not voluntarily participate in the mediation then the monitor, at the mediator's request, may move for an order that such participation be directed and ordered by the court: *Re Stelco Inc.* (2005), 2005 CarswellOnt 2010, 11 C.B.R. (5th) 163 (Ont. S.C.J. [Commercial List]).

(5) — Claims not Compromised by Plan

Section 19 contains provisions in respect of compromise of claims that align with provisions under the *BIA*. Claims that may be dealt with by a compromise or arrangement in respect of a debtor company are claims that relate to debts or liabilities, present or future, to which the company is subject or may become subject on commencement of *CCAA* proceedings or proposal proceedings under the *BIA*: s. 19(1) in force September 18, 2009. Unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for acceptance of a compromise or arrangement, the *CCAA* plan may not deal with any claim that relates to any fine, penalty, restitution order or similar order imposed by a court in respect of an offence; any award of damages by a court in civil proceedings in respect of bodily harm intentionally inflicted, sexual assault, or wrongful death; any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Québec, as a trustee or an administrator of the property of others; any debt or liability

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resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim: s. 19(2).

The Ontario Superior Court of Justice held that it is not necessary to amend a *CCAA* claims procedure order to redefine "restructuring claim" to specifically exclude a claim arising under an agreement entered into with the debtor company subsequent to the *CCAA* proceedings where the debtor company has previously acknowledged that such creditor's claim is a post-filing claim that is stayed until the *CCAA* proceedings are terminated. In such circumstances, the debtor company is not to treat the creditor's claim as a "restructuring claim" subject to the claims procedure order and thereby subject to compromise under a *CCAA* plan; rather, such claim is stayed to be addressed in the ordinary course of litigation after termination of the *CCAA* proceedings: *Re Stelco Inc.* (2005), 2005 CarswellOnt 5024, 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]).

Where British Columbia had enacted the *Tobacco Damages and Health Care Cost Recovery Act (TDHCCRA)* and other provinces followed suit, the court held that the existing health care cost recovery claims were proceeding having been unaffected, with the stay lifted, by the *CCAA* proceedings. There are no limitation of action issues in respect of the claims. Justice Cumming went on to note that the existing and anticipated claims would involve multiple defendants, both domestic and foreign, and would necessarily have to proceed in the civil courts: *Re JTI-MacDonald Corp.* (2009), 2009 CarswellOnt 6614 (Ont. S.C.J. [Commercial List]). For a discussion of this case, see N§126(3) "Claims Barring Procedure".

(6) — Claims Process

Where a claims procedure under the *CCAA* involved a full consideration of the issues, including evidence, expert testimony and oral and written submissions, the court held that it would not interfere with the claims officer's findings of fact or inferences of fact unless it could be shown that the officer made a palpable and overriding error; and the court further held that with respect to questions of law or mixed fact and law, the standard of review is one of correctness: *Triton Tubular Components Corp. v. Steelcase Inc.* (2005), 2005 CarswellOnt 4439, 14 C.B.R. (5th) 264 (Ont. S.C.J.).

Where an individual filed a complaint that he was not served in French as required by the *Official Languages Act (OLA)*, and the company subsequently filed under the *CCAA*, the Federal Court held that it was specifically authorized to deal with matters under the *OLA* and that the claims dealt with more than monetary issues; hence the monetary claims process under the *CCAA* was not appropriate and the court ordered that the claims be stayed until the final order was made by the *CCAA* judge, at which time, they could be brought before the Federal Court: *Thibodeau v. Air Canada [Action under the Official Languages Act]* (2004), 2004 CarswellNat 5988, 2004 CarswellNat 1647, 2004 FC 800, 14 C.B.R. (5th) 247, 2004 CF 800 (F.C.).

The Ontario Superior Court of Justice, in dismissing an appeal from the decision of a claims officer appointed in respect of *CCAA* proceedings, held that where proceedings before a claims officer are similar to trial proceedings involving pleadings, document production, discoveries and full *viva voce* testimony: (a) an appeal court should not conduct a hearing de novo since in such circumstances, the appellant is essentially requesting a second trial; and if the threshold for permitting appeals to be heard on a *de novo* basis is set too low, it will encourage such reviews and thereby add significantly to the costs and length of proceedings, which is inconsistent with the fundamental purposes of the *CCAA*; (b) the appropriate test to be applied in reviewing a claims officer's factual findings is the usual standard of review in appellate proceedings whereby substantial deference should be accorded to the factual findings made by the claims officer at first instance; and (c) the claims officer's interpretation of the evidence should not be overturned absent palpable and overriding error: *Triton Tubular Components Corp. v. Steelcase Inc.* (2005), 2005 CarswellOnt 4439, 14 C.B.R. (5th) 264 (Ont. S.C.J.).

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TAB 3

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ONTARIO

SUPERIOR COURT OF JUSTICE

2008 CanLII 53855 (ON SC)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENTS ACT, R. S. C. 1985, c. C - 36	***Risa Kirshblum*** - for the Trustee under the Plan of Arrangement
IN THE MATTER OF A PLAN OF ARRANGEMENT OF THE CANADIAN RED CROSS SOCIETY/LA SOCIETE CANADIENNE DE LA CROIX ROUGE	***Harvey T. Strosberg QC, Heather Rumble Peterson, Dawna Ring Q.C., Peter I. Waldmann, Thomas Sheppard, Kenneth Arenson*** and ***John Plater*** - for Claimants under the Plan of Arrangement
THE CANADIAN RED CROSS SOCIETY/LA SOCIETE CANADIENNE DE LA CROIX ROUGE	**HEARD:** September 3, 2008

REASONS FOR DECISION

CULLITY J.

[1] The issues in this motion for advice and directions were previously raised in a motion heard on May 22 and 23 of this year. In my reasons, and in an endorsement, released on May 28, 2008, consideration of the issues was deferred pending the delivery of further material by the parties.

[2] The advice now requested relates to the jurisdiction of the court to relieve against late-filed, or otherwise irregular, applications for a determination of damages by the Referee appointed in the Amended Plan of Compromise and Arrangement (the "Plan") of the Canadian Red Cross Society (the "Society"). The Plan was approved by an order (the "Approval Order") of this court dated September 14, 2000 under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA").

2008 CanLII 53855 (ON SC)

Background

[3] Pursuant to the Plan, a Trust was established for the purpose of holding, administering and distributing a fund ("HIV Fund") in satisfaction of the claims of persons ("HIV Claimants") who were infected with the HIV virus from receiving blood, blood derivatives or blood products collected or supplied by the Society prior to September 28, 1998. Funds were also established to be administered by the Trustee for persons who contracted Creutzfeld-Jacob Disease and Hepatitis C. I will refer to the trusts attaching to the HIV Fund and the Hepatitis C Fund as the "HIV Trust" the "HCV Trust" respectively.

[4] A Trust Agreement that sets out the powers and responsibilities of the Trustee was made as of September 24, 2001 with the Honourable Peter Cory as sole Trustee. On June 26, 2006, following Mr Cory's resignation, the Honourable John W. Morden was appointed by an order of Blair J. to replace him. Payments from the HIV Fund are to be made in accordance with damages assessments by a Referee - the Honourable Robert S. Montgomery, Q.C. - appointed pursuant to the provisions of the Plan.

[5] The HIV Trust has been bedevilled by problems and litigation since its inception, with the result that no distributions from the Trust have been made in the eight years since the Plan was approved. Several motions have been decided by the court. The most substantial of these raised limitations issues that could have a significant effect on the size of the class of HIV Claimants. This has been a matter of concern not only to those whose claims might be barred, but also to other Claimants whose entitlement would be reduced if the total damages awarded exceed the amount of the HIV Fund – an amount that was originally approximately $14 million but will have since been eroded by administration expenses and the costs of the litigation. It will undoubtedly be depleted further if the disputes continue.

[6] Independently of the limitations issues, it appears that the number of potential HIV Claimants was underestimated by at least some of the creditors involved in negotiating, and voting for, the relevant provisions of the Plan – including the amount of the HIV Fund. These creditors had filed Proofs of Claim within time limits imposed by the court. Those who did not do so were barred from voting on the Plan but their claims against the Society were not thereby extinguished. Pursuant to paragraph 5.13 (b) of the Plan, this occurred on the Plan Implementation Date (October 5, 2001), when the rights of such Claimants against the Society were, in effect, converted into, or replaced by, rights to receive damages from the HIV Fund.

[7] The same concern about the number of HIV Claimants who may be entitled to share in the HIV Fund was reflected in the submissions of counsel in this motion. Each of them supported the existence of the jurisdiction to relieve against what were described as irregularities in applications, but they were not unanimous on the extent, if any, to which it extended beyond such cases. In Mr Strosberg's submission all of the other late-filed applications should be disallowed. It is tragic that a plan designed to provide

compensation for innocent victims should be tied up in disputes over whether all, or only some of them, are to receive it – disputes that many and, perhaps, most of the eligible HIV Claimants must find mystifying, and disheartening. Much of the impetus for the litigation has stemmed from an initial misapprehension that the number of the potential Claimants was significantly less than has since appeared to be the case.

2008 CanLII 53855 (ON SC)

The issues

[8] The Plan provides for the Referee to receive and dispose of applications by HIV Claimants for an assessment of their damages. Article 5.10 provides in part:

> HIV Claimants may apply to the Referee within 4 months following the Plan Implementation Date for a determination of damages with respect to their respective HIV Claim.

[9] Although that language is, in form, permissive, it is provided later in the same article as follows:

> Any surplus remaining after disposition of all references filed within the four month period following Plan Implementation Date shall be paid to the HCV Fund.

[10] Read literally - and without regard to the possibility that the court could grant relief to Claimants whose applications were filed outside the deadline – the Plan provides that any surplus would be computed without reference to late applications. The disposition of surplus appears to be analogous to a gift over under a traditional testamentary trust, or trust *inter vivos*.

[11] The four months' deadline referred to in article 5.10 expired on February 5, 2002. I am advised that timely applications were received in respect of the Claims – or derivative of the Claims – of 89 infected persons. I am now asked by the Trustee to advise whether the court has jurisdiction to extend the deadline or, otherwise to direct that additional late, or irregular, applications should be accepted. In paragraph 18 of his helpful affidavit, the Trustee's counsel, Mr Michael Royce, stated:

> As previously indicated, we do not yet have information from all "Late Claimants" explaining why their applications were made after the deadline. For the purposes of this motion, however, which is simply to determine without reference to any particular case, the question of whether the court has the power to extend or otherwise relieve against the effect of the deadline, the Trustee assumes that among the Claimants there exist at least some whose reasons for submitting their applications after the deadline are compelling and represent circumstances that were entirely beyond their control.

[12] Having been advised that the existence of the jurisdiction would be disputed by other Claimants – I endorsed this two-stage approach.

[13] In his affidavit, Mr Royce refers to a variety of explanations provided by HIV Claimants whose applications were irregular or out of time. The Trustee's records reveal that late applications have been received relating to the Claims of 38 persons who were either infected persons, or persons with derivative Claims as members of the families of infected persons. On the basis of communications from various haemophilia societies and other organisations, the Trustee believes that further late applications may be made in the future. In addition, there are a number of applications - described by the Trustee's counsel as "irregular" in which timely applications for damages assessments were made on behalf of some, but not all, HIV Claimants of the same family. It appears that at least some of the omissions were the result of inadvertence, or a misunderstanding of the language of the application forms provided.

[14] Some of the Claimants whose applications were received after the deadline state that they did not receive notice of the HIV Fund before the deadline expired. This may have been due to inadequacies of the notice dissemination caused by what appears, with hindsight, to have been an initial erroneous assumption that there were no more than 35-40 infected Claimants and that these could be identified, and contacted, through various federal and provincial agencies. In addition, it is alleged that that one such agency did not send out notices it had agreed to provide. Other late-filed applications were made by, or on behalf of, individuals who state that they were unable to comply with the deadline as their HIV infection was discovered after the deadline had expired.

[15] The notice that informed HIV Claimants of the deadline stated that persons who decided to make "a claim on the **HIV Fund**", must do so by February 5, 2002. One Claimant who had previously provided a Proof of Claim to the Monitor appointed under the CCAA has stated that he believed that nothing further was required from him.

[16] In considering whether the court has jurisdiction to legitimise late and irregular applications, there are number of special features of the HIV Trust that distinguish it from trusts of a more traditional kind, and even the more closely analogous provisions of settlements of class proceedings under which – because of the inevitable imperfection of notice-dissemination programs - late-filed claims have been allowed from time to time.

[17] Most fundamentally, the Trust was created pursuant to the CCAA and was part of a compromise of the claims of the HIV Claimants and the Society that was approved by the order of September 14, 2000. Paragraph 12 of the Approval Order contemplates a continuing role for the court while the Plan is being implemented.

> THIS COURT ORDERS that any interested party may apply to this court for directions or to seek relief in respect of any matter arising out of or

2008 CanLII 53855 (ON SC)

> incidental to the Plan or this Order, including, without limitation, the interpretation of this Order and the Plan, the implementation of the Plan, and for any further Order that may be required for implementation of the Plan, on notice to any party likely to be affected by the Order sought.

[18] Although the Trust Agreement provides that its provisions are subject to those of the Plan to the extent of any inconsistency, the Plan does not purport to deal with the terms of the HIV Trust except to the extent that it provides for the distribution of the HIV Fund. Paragraph 1.01 states:

> "Trust Agreement" means that agreement among the Society, the Plan Participants and the Trustee, to be entered into on the Plan Implementation Date subject to the terms of this Plan, pursuant to which the Trust shall be established and governed.

[19] The terms of the Trust Agreement were evidently to be settled between the parties without any other assistance from the provisions of the Plan and without any requirement in it for court approval. The Agreement was, however, approved, and incorporated in the order of this court made in *McCarthy v. The Canadian Red Cross Society,* [2001] O.J. No. 2474 in a proceeding relating to the HCV Fund.

[20] Having imposed what is, in effect, a four-month limitation period for applications for damages assessments, the Plan does not address whether, or how, notice of this was to be given to HIV Claimants. The question of notice is dealt with under paragraph 8 (f) of the Trust Agreement that empowers the Trustee:

> to authorize, prescribe, publish and distribute, at the cost of the Trust Fund, all forms and notices necessary for the administration of the Distribution Scheme including, without limitation, any advertising to potential beneficiaries as to the existence of the Trust Fund and the call for claims relating thereto.

[21] Again, unlike the position under section 17 - 19 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, there is no requirement for the Trustee to obtain the approval of the court for notices informing HIV Claimants of their rights.

[22] More generally, in addition to the detailed powers given to the Trustee for the purpose of administering the trust property, paragraph 8 of the Trust Agreement confers extensive powers and authority on the Trustee in connection with the administration of the "Distribution Scheme" in Article 5 of the Plan. These include power to decide all questions concerning the administration of the Distribution Scheme, to determine the persons who are to receive payments from HIV Trust, and to authorise such payments. In the exercise of these powers, the Trustee is, again, subject to the controlling jurisdiction of the court.

2008 CanLII 53855 (ON SC)

[23] Finally, I note that, In his reasons disposing of another motion, Blair J. opined that, for the purpose of providing access to the HIV Fund, the Plan should be given a liberal interpretation: [2005] O.J. No. 4177 (S.C.J.), para 15. In a subsequent motion he emphasised that the Plan was intended to be effective: [2006] O.J. No. 2675 (S.C.J.), para 24. The learned judge has also referred to the fact that the circumstances of the HIV Claimants are very different to those of commercial creditors affected by CCAA proceedings. While, as a general rule, the latter can be presumed to be knowledgeable, and ready and willing to assert their claims, the same cannot be said of the HIV Claimants who did not personally retain lawyers and did not participate in the CCAA proceeding. This was, I believe, reflected in the bar order that disqualified them from voting but did not purport to bar their Claims. Some, and perhaps most of them, prepared applications without professional assistance.

2008 CanLII 53855 (ON SC)

Heads of jurisdiction

[24] I do not believe there is any doubt that the court has jurisdiction to intervene to give relief in at least some of the cases described by Mr Royce. To the extent that the responsibility to determine how potential HIV Claimants are to be notified - and to supervise this process - is that of the Trustee, there is, *first*, the general jurisdiction of the court to exercise control over the administration of the trust and the exercise of a trustee's discretionary powers. If, as was suggested in the material filed on this motion, the application forms lacked clarity in material respects, or if the dissemination of notice was manifestly inadequate, the court would not be powerless to intervene.

[25] The jurisdiction in such cases is extended by paragraph 12 of the Approval Order which reserved to the court the authority to make orders required for the purpose of implementing the plan. In reasons delivered on a previous motion, I held that "required" for this purpose meant "reasonably required" and I accepted Ms Ring's submission that the paragraph was intended to continue the overall supervision of the court over proceedings under the CCAA: [2008] O.J. No. 2102, at para 29.

[26] Authorities under the CCAA support the existence of a third head of jurisdiction that is grounded in the supervisory role of the court under the statute. I do not think it matters whether the interpretation of paragraph 12 is considered to be informed by the existence of this more general jurisdiction, a reflection of it, or as supplemented by it.

[27] The question whether the general jurisdiction under the CCAA can be applied to relieve against late-filed, or otherwise irregular, claims or applications made in the course of negotiating – or after - an arrangement under the CCAA is not novel. The existence of the jurisdiction has been accepted by this court, as well as in the courts of other provinces. It is a discretionary jurisdiction that is, I believe, appropriately described as an equitable jurisdiction as it involves an extension of familiar principles of equity to cases under the statute.

[28] In *Re Blue Range Resources Corp.*, [2000] A.J. No. 1232 (C.A.) - the decision that has been most influential in the later cases - all counsel conceded that the jurisdiction existed notwithstanding that an arrangement under the CCAA had been approved by creditors who had filed Proofs of Claim, and an unqualified provision in a claims bar order that claims filed out of time would be "forever barred".

[29] Although most of the discussion in the reasons for judgment was directed at the criteria to be applied in exercising the jurisdiction, I do not understand the discussion to be premised on counsel's agreement that it existed. The tenor of the reasons of the Court of Appeal suggests to me that it considered the concession to be correct. Having found assistance in authorities under the United States bankruptcy rules, the approach taken under the *Bankruptcy and Insolvency Act* (Canada), the application of procedural rules governing delays in the prosecution of actions, and the principles applied in dealing with applications for relief from forfeiture under insurance statutes, Wittmann J.A. concluded:

> 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 for delays in particular processes.
>
> 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 it is the effect of permitting a 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? (paras 26 and 41)
>
> In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional.

[30] Leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal was denied.

2008 CanLII 53855 (ON SC)

[31] I note that, in permitting a number of late-filed claims, the court in *Blue Range Resources* did not purport to amend the provisions of the bar order by imposing a new deadline. The jurisdiction supported was limited to determining whether, in individual cases, equitable relief should be given to those who for some reason had not filed in time.

[32] *Blue Range Resources* was cited and the court's apparent recognition of the jurisdiction was expressly accepted by Cumming J. in *Ivorylane Corp v. Country-Style Realty Ltd*, [2004] O.J. No. 2662 (S.C.J.), at para 47 - where the jurisdiction was described as limited to "exceptional circumstances", and there is no suggestion that the point had been conceded by counsel. The analysis of Wittmann J.A. was applied – again without any such suggestion - by Cameron J. in *Re Noma*, [2004] O.J. No. 4914 (S.C.J.), in which a late-filed claim was rejected.

[33] The jurisdiction was also discussed, and its exercise considered, in three unreported endorsements of Farley J. of September 20, 1999 in respect of a CCAA arrangement for Royal Oaks Inc. (relief granted); of December 1, 2000 on a motion in the liquidation of T. Eaton Company Limited (relief granted); and of July 22, 2003 in a CCAA application involving Algoma Steel Inc. (relief denied).

[34] Other cases in which the reasoning in *Blue Range Resources* was accepted, or was cited with apparent approval, include *Ontario v. Canadian Airlines Corp.*, [2000] A.J. No. 1321 (Q.B.); *West Bay SonShip Yachts Ltd v. Esau*, [2007] B.C.J. No. 2287 (S.C.), leave to appeal granted from the exercise of the discretion: [2007] B.C.J. No. 1813 (C.A.); and *Carlen Transport Inc. v. Juniper Lumber Co. Ltd*, [2001] N.B.J. No. 20 (Q.B.); see, also, *Re Roman Catholic Episcopal Corp. of St George's*, [2007] No. 32 (N. & L.S.C.) (bankruptcy); and *Pangea Pharma Inc. v. Ernst & Young*, [2004] J.Q. No. 706. (S.C.Q.). The earlier authorities are discussed in a helpful annotation by Mr Vern DaRe in 26 C.B.R. (4^{th}) 142.

[35] Contrary to the submission of Mr Strosberg, I do not consider that the reasoning of the Court of Appeal in *Algoma Steel Corp v. Royal Bank of Canada*, [1992] O.J. No. 889 precludes an application of the analysis in *Blue Range Resources,* and the cases in which it has been accepted, to the facts of this case. In *Algoma Steel*, the court gave leave to a creditor to bring proceedings against the appellant notwithstanding unambiguous language in a plan of arrangement that extinguished the claims of the creditor as a known designated unsecured creditor of the appellant. In the course of its reasons, the court stated, at paras 6-7:

> The plan of arrangement is a matter of contract, it is argued, and the court's jurisdiction is limited to sanctioning or refusing to sanction the arrangement arrived at contractually. There is much merit in this argument but, in our view, it is not a complete answer.

2008 CanLII 53855 (ON SC)

> [The creditor] does not deny that if the language of the plan of arrangement quoted above, extinguishing the claims of designated unsecured creditors is unambiguous, as we believe it is, to grant the relief which it seeks would require an amendment by the court of the plan arrangement. We accept the submission that, generally speaking, the plan of arrangement is consensual and the result of agreement and that if it is fair and reasonable (an issue for the court to decide) it is not to be interfered with by the court unless (a) the Act authorises the court to affect the plan and (b) there are compelling reasons justifying the court's action. ...
>
> The CCAA must be the authority for the jurisdiction and the critical issue is whether there is any provision in the Act that fairly gives rise to a power in the court to amend. In our view there is such a provision and that provision, s.11 (c), depending on the language of the plan itself, may by necessary inference, in an appropriate case, enable the court to make an order, the technical effect of which is that the plan is amended.

[36] In *Algoma Steel*, the creditor was seeking leave to proceed against a corporation that had been the subject of a plan of arrangement, and not simply seeking to enforce its rights under the plan. The extinguishment of claims against the corporation was an essential part of the plan that had been sanctioned by the court under the CCAA. The finding that the relief sought by the creditor would involve an amendment to the plan of arrangement which would require statutory authority does not, in my judgment, necessarily extend to late-filed applications to enforce the rights of claimants to share in a fund created pursuant to the provisions of a CCAA plan – the only scenario that I am concerned with. Any analogy between the two sets of fact is, I believe, tenuous. In the absence of any indication that the Court of Appeal intended to address issues such as those in this motion, I do not believe that I am obliged to conclude that the jurisdiction discussed in *Blue Range Resources* requires explicit statutory justification for its existence in the circumstances of this case.

[37] The words of the Plan indicate that the "surplus" to be paid to the HCV Trust is to be computed without reference to claims that were out of time. I believe it is implicit in *Blue Range Resources* that such provisions of the Plan are not to be understood as ousting the equitable jurisdiction of the court to relieve against late, or irregular, applications but, rather, are to be read as subject to it. Immediately after his reference to counsel's concession, Wittmann J.A. stated, at para 10:

> 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.

2008 CanLII 53855 (ON SC)

[38] I emphasise, however, that, in the exercise of the jurisdiction, the provisions of a Plan that has been approved by the creditors and the court are to be respected. The jurisdiction is essentially a discretionary jurisdiction to grant relief from a strict application of those provisions. As Wittmann J.A. accepted, it involves an application of equitable principles analogous to those that - in other situations and subject to other limitations - enable the court to relieve against forfeiture.

[39] To the extent that some of the irregularities, and omissions, in otherwise timely applications submitted in this case were caused by inadequacies in the application forms provided, I agree with counsel that these could be remedied by an exercise of the authority in paragraph 12 of the Approval Order to make orders implementing the Plan without reference to any wider jurisdiction. I do not, however, accept that paragraph 12 is to be read as limited to such cases, or that a narrow interpretation of the concept of "implementation" should be considered to exclude the court's inherent equitable jurisdiction imposed on the bare-bones legislative scheme under the CCAA. If no notice had been given - or if its dissemination and reach are now, with the benefit of hindsight, seen to have been inadequate - the court must, in my opinion, be able to intervene. If the Plan was, as I believe, intended to make damages available to all persons who would be able to establish that they were HIV Claimants within the four months period, adequate notice to such persons was essential. Independently of the jurisdiction under the CCAA, the requirement of adequate notice could be enforced in the exercise of the court's supervisory jurisdiction over trustees and the consequences of failing to give such notice would not, in my opinion, be outside the control of the court.

[40] Cases where a Claimant was not diagnosed with HIV until after the deadline are more difficult. The jurisdiction to relieve against untimely applications is, in my opinion, limited to applications by persons who could have established their eligibility within the four months period. It would not apply to persons whose infection was not discovered before the expiration of the period. The intention to withhold damages from such persons is inherent in the imposition of the deadline and is not affected by deficiencies in, and the imperfection of, notice dissemination that, in a case such as this and in class proceedings, underlie the jurisdiction to relieve against untimely applications. The necessity for some cut-off date in respect of the time of a diagnosis is reinforced by the likelihood that the HIV Fund will prove to be inadequate to satisfy all of the qualified HIV Claimants, with the result that distributions might need to be deferred until the maximum number of Claimants was ascertained. In my judgment, it is one thing to grant relief to persons who might have - but, for some reason, did not - claim within the four months' period and something fundamentally different to extend the class to persons who would not have been able to establish a claim within the period. The exclusion of the latter should, in my opinion, be considered to be part of the compromise effected by the Plan, and to that extent its provisions are to be respected.

Prejudice

2008 CanLII 53855 (ON SC)

[41] In *Blue Range Resources*, prejudice to other creditors was recognised as an important factor that would militate against an exercise of the court's discretionary jurisdiction under the CCAA. At paragraph 40 of his reasons for judgment, Wittmann J.A. stated:

> 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. Reorganisation under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share cannot be characterised as prejudice: ... Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal .... 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.

[42] In affidavits delivered for the purpose of this motion, Mr Strosberg's client relied on negotiations that preceded the acceptance of the plan by the HIV creditors voting as a separate class for that purpose. He stated that Mr Strosberg was instrumental in persuading other creditors represented by Mr Arenson to vote in support of the Plan and that without this it would have been defeated. He stated further that, at that time, he believed that there were no more than 34 eligible Claimants.

[43] Paragraph 18 of the client's original affidavit and paragraph 6 of a supplementary affidavit read as follows:

> 18. Fundamental to my decision to support the plan of arrangement and to persuade Mr Arenson 's clients to support the plan was the limited number of HIV Claimants who could come forward to claim and the short period of time these HIV Claimants had to apply under the plan of arrangement. Had I believed that there were more than 34 HIV claimants or that the period of time that potential HIV claimants had to pursue their claims by making application under the plan of arrangement would be extended, I would not have instructed Mr Strosberg to enter into negotiations with Mr Arenson and I too would have voted against the plan of arrangement thereby causing its rejection. It was for good reason that potential HIV claimants were required to apply under the plan of arrangement within four months.
>
> 6. If the plan was rejected, I would have been in a position to bargain for a greater share of the available monies to compensate for the risk of an extension of the four-month period and the risk that additional claimants

2008 CanLII 53855 (ON SC)

> who would dilute the HIV Fund might claim after the expiration of the four-month period.

[44] I do not believe that the consequences of the client's mistake about the number of potential HIV Claimants should be regarded as the kind of prejudice that might weigh against an exercise of the court's jurisdiction. On the basis of the evidence - such as it is - and the findings made in earlier motions, I am prepared to accept that a number, and perhaps all, of the HIV Claimants who filed Proofs of Claim, and thereby were entitled to vote on the Plan, underestimated the number of persons with eligible HIV Claims. I am also prepared to accept that this may have influenced the decisions of the voting Claimants to approve the Plan, and the amount of the HIV Fund to be established according to its terms. Even if there was evidence that their misapprehension was reasonable, it would not affect the eligibility of HIV Claimants to share in the Fund. This being the case, I do not consider that it is a factor that should militate against a discretionary decision to allow late-filed applications for payment out of the Fund if, for example, they would otherwise be allowed on the ground that the notice of the deadline provided to Claimants was found to be materially inadequate. In short, in applying the test of prejudice accepted in *Blue Range Resources,* the loss of an opportunity to vote against the Plan by reason of an erroneous belief that there were only 34 eligible Claimants is not a loss that would occur "by reason of the late filings".

[45] Similarly, while, as in *Blue Range Resources* (at para 40, quoted above), knowledge of the possibility that late claims might be permitted may militate against a finding of prejudice, I do not think ignorance of this, of and by itself, is sufficient to establish it in the present circumstances. The client's statement that – even on the assumption that there were only 34 eligible Claimants - he would have voted against the Plan if he had known of the possibility that late-filed applications would be permitted appears to be based on his expectation that the short deadline would have the practical effect of excluding a number of eligible HIV Claimants. This expectation contemplated that the underlying purpose of the Plan would be frustrated. As mentioned earlier in these reasons, the bar order that restricted voting rights to Claimants who filed Proofs of Claim did not purport to extinguish the HIV Claims of others – known or unknown. All HIV Claimants who had not released the Society, and whose Claims were not barred by limitations defences, were intended to be eligible to file applications for damages assessments under the provisions of the Plan. Thus, in a motion in these proceedings, Blair J. - who had previously supervised the CCAA application and made the Approval Order – stated:

> As I read the Plan, the reason for establishing the HIV Fund was not to provide recourse to a limited number of HIV Claimants. The reason was to make the HIV Fund available to *all* those who had an HIV Claim existing against the Society on July 20, 1998: [2005] O.J. No. 4177 (S.C.J.), at para 15 (*italics* in the original).

2008 CanLII 53855 (ON SC)

[46] In my judgment, a creditor who hopes, and bargains on the basis of a belief, that a plan of arrangement and compromise under the CCAA will not achieve its intended effect does not suffer material prejudice for the purpose of the court's equitable jurisdiction when the belief turns out to have been unfounded.

[47] In *Blue Range Resources*, the focus of the analysis was directed at prejudice to other creditors. Prejudice to the insolvent debtor corporation was not treated as in issue, and it is not in issue in this case in which the Society was released from all HIV Claims on the Plan Implementation Date. In another unreported case, prejudice to the debtor was emphasised by Blair J. where, in the course of a reconstructuring of T. Eaton Company Limited, a bar order had been made extinguishing the claims of creditors who did not file proofs of claim on or before a particular date. A creditor moved for leave to file a Proof of Claim after an arrangement had been approved by the court and implemented. She relied on her solicitor's failure to advise her of the bar order, and the fact that she filed a proof of claim as soon as she became aware of it and its effect. In an endorsement of May 5, 1999, Blair J. declined to grant an extension of time. The bar order specifically reserved to the court's jurisdiction to waive it, but it was held that to permit the creditor to have access to the debtor corporation's post-arrangement assets would be prejudicial to it, and – citing *Algoma Steel* - that the case was:

> ... not one for the "sparing" and "exceptional" jurisdiction to make such an order.

In contrast, the issue before me is confined to rights of claimants to share in the HIV Fund, and is not for recourse against the Society and its remaining assets.

[48] Any prejudice that beneficiaries of the HCV Trust would suffer by the elimination, or reduction, of surplus in the Fund as a result of accepting late-filed applications appears now to be entirely theoretical.

.Conclusion

[49] I am satisfied that the court has the discretionary jurisdiction discussed in *Blue Range Resources* and the cases that have followed the reasoning of the Alberta Court of Appeal. I accept also that it is a jurisdiction to be exercised sparingly in the light of the particular circumstances of each case. It is very much fact specific. The considerations that I consider will justify its exercise in this case can be summarised as follows:

(a) the structure of the Plan with its provision of a separate Fund for HIV Claimants;

(b) the fact that no distributions from the HIV Fund have yet been made;

(c) the absence of prejudice that would be suffered by the Society and other Claimants;

2008 CanLII 53855 (ON SC)

(d) the uncertainty created by the limitations issues;

(e) the circumstances of the Claimants that distinguish them from commercial creditors;

(f) the fact that adequate notice to them was essential if the Plan was to be effective;

(g) the application forms provided to Claimants did not clearly indicate that they were required to identify each Claimant in a family group that included an infected person. Similarly, I am of the opinion that it was not unreasonable for a Claimant who had filed a Proof of Claim to understand that this would be considered to be a claim against the HIV Fund to which the deadline was said to apply in the notice provided by the Trustee; and

(h). the selection of appropriate methods of disseminating notice of the deadline for applications may have been affected, and unduly limited, by the misapprehension as to the number of potential Claimants. It appears, also, that, as in the case of those in Nova Scotia, the chosen method may not have been completely successful in reaching Claimants whose identities were ascertainable.

[50] I have considered whether my decision should be simply that the jurisdiction exists, and that the manner of its exercise is to be determined by the court on the facts relating to each late or irregular application. I am satisfied that in, providing advice and directions to the Trustee, it is unnecessary to adopt such a restricted approach. The process of dealing with late and irregular applications will involve a degree of fact finding that is within the powers of the Trustee under paragraph 8 of the Trust Agreement. Those powers can be exercised with less formality and more expedition than the practice and procedure of the court would permit. I believe that the approach that most appropriately engages the jurisdiction of the court and the powers of the Trustee is for the Trustee to receive and dispose of late and irregular applications in accordance with the guidelines I will provide in an Appendix to these reasons.

[51] The guidelines do not address every possible situation and may be supplemented, or amended, by further orders of the court from time to time. If the Trustee is uncertain as to the application of the guidelines to particular cases - or if particular applications are, in the opinion of the trustee, not covered by the guidelines - they may be referred to the court in writing to be dealt with summarily. HIV Claimants whose applications are disallowed by the Trustee are to be informed of their right to have the decision reviewed by filing a motion record in the court for the purpose within 30 days, or such longer period as the court may order.

2008 CanLII 53855 (ON SC)

[52] Any further procedural issues that may arise - including the question whether notice to HIV Claimants who have not filed applications is required - can be disposed of at a case conference to be arranged as soon as practicable.

[53] As has been the case on previous motions, not all of the potential HIV claimants were served with the motion record and the counsel who appeared did not represent all of them. On motions for directions by a trustee in a case like this, it is unnecessary to name all beneficiaries as parties unless the court orders otherwise. This is provided by rule 9.01 of the Rules of Civil Procedure and it is reinforced by paragraphs 1 (f) and 17 of the Trust Agreement that require notice of applications to the court to be given only to Ms Ring and Mr Arenson. Despite these provisions, the Trustee attempted to notify as many of the Claimants as was practicable, and the issues on the motion were comprehensively addressed by his counsel and the other counsel appearing. In these circumstances, I did not find it expedient to deplete the HIV Fund further by ordering service of the motion record on the unrepresented claimants, to add them as parties, or to make a representation order pursuant to Rule 10. By virtue of section 60 (2) of the *Trustee Act* (Ontario), the Trustee will be protected in acting on the directions I have given.

[54] I appreciate the assistance that counsel have provided. The Trustee is to be fully indemnified out of the HIV Fund for his costs of the motion. Other parties represented at the hearing – including Mr Plater's client – are to have a substantial indemnity for their costs. Submissions in writing with respect to quantum may be made within 21 days of the release of these reasons.

"CULLITY J."

Released: September 29, 2008

2008 CanLII 53855 (ON SC)

2008 CanLII 53855 (ON SC)

APPENDIX

Guidelines for Late and Irregular Applications

1. Applications made by one member of a family of an infected person are to be treated as applications by, and on behalf of, all members of the family who are HIV Claimants, and the personal representatives of deceased HIV Claimants.

2. Late applications by persons who had filed timely Proofs of Claim are to be allowed;

3. Applications by persons who did not receive notice of the deadline until after it had passed should be allowed if, in the opinion of the trustee, the applications were made within a reasonable time after notice was acquired;

4. Applications by HIV claimants whose failure to meet the deadline was due to matters that, in the opinion of the Trustee, should reasonably be considered to be beyond their control should be allowed;

5. Other late applications made by persons who had notice of the deadline before it expired should be disallowed unless, in the opinion of the Trustee, the timing of the receipt of such notice was inadequate for the purpose of making an application;

6. Late applications are to be allowed only if they are from, or in respect of, persons who, being aware of their infection during the four months period, could have established their eligibility as HIV Claimants before it expired; and

7. Any other late or irregular applications – and those where the Trustee is uncertain as to the appropriate application of the above guidelines - should be referred in writing to the court to be dealt with summarily.

2008 CanLII 53855 (ON SC)

COURT FILE NO.: 98-CL-002970
DATE: 20080929

2008 CanLII 53855 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

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

IN THE MATTER OF A PLAN OF ARRANGEMENT OF THE CANADIAN RED CROSS SOCIETY/LA SOCIETE CANADIENNE DE LA CROIX ROUGE

THE CANADIAN RED CROSS SOCIETY/LA SOCIETE CANADIENNE DE LA CROIX ROUGE

REASONS FOR DECISION

CULLITY J.

Released: September 29, 2008

TAB 4

COUR SUPÉRIEURE

2004 CanLII 14941 (QC CS)

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.

2004 CanLII 14941 (QC CS)

[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

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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 ;

2004 CanLII 14941 (QC CS)

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 ?

2004 CanLII 14941 (QC CS)

[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

2004 CanLII 14941 (QC CS)

TAB 5

Court of Queen's Bench of Alberta

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

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

2011 ABQB 223 (CanLII)

Between:

Royal Bank of Canada

Plaintiff

- and -

Cow Harbour Construction Ltd. and 1134252 Alberta Ltd.

Defendant's

And Between:

Docket: 1003 05560
BKCY Action No: 24-115359

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

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

And in the Matter of a Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.

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

I. Introduction

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

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

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

II. Facts

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

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

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

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

2011 ABQB 223 (CanLII)

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

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

2011 ABQB 223 (CanLII)

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

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

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

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

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

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

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

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

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

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

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

III. Issue

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

IV. Discussion

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

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

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

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

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

2011 ABQB 223 (CanLII)

1. Inadvertence and Good Faith

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

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

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

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

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

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

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

2011 ABQB 223 (CanLII)

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

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

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

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

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

2011 ABQB 223 (CanLII)

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

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

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

2. Prejudice

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

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

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

2011 ABQB 223 (CanLII)

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

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

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

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

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

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

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

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

2011 ABQB 223 (CanLII)

V. Conclusion

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

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

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

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

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

2011 ABQB 223 (CanLII)

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

Appearances:

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

2011 ABQB 223 (CanLII)

No. 450-11-000167-134

SUPERIOR COURT
(COMMERCIAL DIVISION)
DISTRICT OF ST-FRANÇOIS

(Sitting as a court designated pursuant to the Companies' Creditors Arrangement Act, R.S.C. C. C 36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

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

Debtor

and

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

Monitor

BL0052

NOTES AND AUTHORITIES OF MONTREAL, MAINE & ATLANTIC CANADA CO. REGARDING MOTIONS FOR AUTHORIZATION TO FILE LATE CLAIMS

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