CANADA

SUPERIOR COURT
(Commercial Division)

PROVINCE OF QUEBEC
DISTRICT OF ST-FRANÇOIS

N°: 450-11-000167-134

(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

and

GUY OUELLET, **SERGE JACQUES** and **LOUIS-SERGES PARENT**

Court Appointed Representatives of the Class Members-PETITIONERS

PLAN OF ARGUMENT OF THE COURT APPOINTED REPRESENTATIVES OF CLASS MEMBERS ON THEIR FRESH AS AMENDED MOTION FOR AN ORDER AUTHORIZING THE FILING OF ADDITIONAL/LATE CLAIMS
(Sections 10 and 19 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36)

PART I. OVERVIEW

1. In this motion, Guy Ouellet, Serge Jacques and Louis-Serges Parent, the Court Appointed Representatives of the Class Members (the "**Class Representatives**") seek:

(a) an order authorizing the filing of certain additional claims produced as Exhibit R-1 (the "**June 2014 Claims**") , and

(b) advice and direction of the court in respect of the treatment of the claims produced as appended as Exhibit R-2 (the "**January 2015 Claims**" and the " **April 2015 Claims**") [collectively with the June 2014 Claims, the "**Additional Claims**"].

2. On April 4, 2014, this Court made orders requiring the filing of claims by June 13, 2014 and appointing the Class Representatives.

3. In spite of the extensive efforts of the Class Representatives and their counsel, to alert individuals to the bar date of June 13, 2014, and the importance of filing their claims in a timely way, as described in the affidavit of Daniel Larochelle sworn April 20, 2015, a number of creditors did not file claims prior to June 13, 2014.

4. The Class Representatives submit that the June 2014 Claims were not filed due to inadvertence and that the claimants acted in good faith. The filing of the June 2014 Claims will cause no prejudice to the creditors, given the structure of the Plan of Arrangement.

5. It is respectfully submitted that the Court should thus allow the filing of the June 2014 Claims, and establish an efficient process for dealing with the Additional Claims. Specifically, the Class Representatives propose that the court make an order:

(a) directing and authorizing the Class Representatives to interview Class Members who have sought to file additional claims and to prepare an affidavit for them briefly describing the reason for the delay in filing;

(b) authorizing the Monitor to accept the claim without further order if, after reviewing the supporting affidavit and, if deemed necessary, interviewing the claimant, the Monitor (or a claims officer appointed by the court) is satisfied that:

(i) the claimant has been and is acting in good faith;

(ii) if the claim was intentionally not filed, extraordinary circumstances exist that justify the acceptance of the claim, such as a diminished mental capacity; and,

(iii) the admission of the claim is not otherwise prejudicial to the process; and,

(c) directing that where the Monitor is not prepared to admit a claim then the claimant shall be at liberty to bring the claim before the court for consideration, with the assistance of the Class Representatives, or, alternatively, at the Claimant's own expense.

PART II. FACTS

A. Procedural background to the motion

6. On March 31, 2014, this Court rendered judgment granting a motion by Montreal, Maine & Atlantic Canada Co. ("MM&A" or "Debtor") an order approving a process to solicit claims and requiring claims to be filed by June 13, 2014, unless otherwise authorized by this Court (the "Claims Process").[1]

7. On April 4, 2014, the Honourable Mr. Justice Gaétan Dumas J.S.C. made the following orders:

(a) an order requiring claims to be filed by June 13, 2014, unless otherwise authorized by this Court (the "Claims Process Order").

(b) an order appointing the Class Representatives (the "Representation Order"). [2]

8. The Claims Process Order established June 13, 2014 as a claims bar date, but contemplates that this Court maintains jurisdiction over the process as a whole.[3]

9. Indeed, the Claims Process Order specifically states as follows:

> ORDERS that, unless otherwise authorized by this Court, a Creditor who does not file an individual Proof of Claim before the Claims Bar Date shall not be entitled to […][4]
>
> [emphasis added]

[1] Affidavit of Daniel Larochelle, sworn April 20, 2015 ("Larochelle Affidavit") at para 2.
[2] Larochelle Affidavit at para 3.
[3] Larochelle Affidavit at para 4.
[4] Claims Procedure Order, dated April 4, 2014.

10. The Representation Order appointed the Class Representatives as representatives of the Class Members (as defined in the Representation Order) and, among other things, authorized the Class Representatives to:

(a) assist Class Members and their representatives with the completion of their individual proof of claim;

(b) deal, on behalf of the Class Members, with any government ministry, department or agency;

(c) file such proof of claim (in addition to the representative claim on behalf of wrongful death victims) as may be permitted by further order of the court; and,

(d) seek advice and direction of the court in respect of the discharge of their powers, responsibilities and duties.[5]

B. Efforts by the Class Representatives and counsel to facilitate the Claims Process

11. The Class Representatives and their counsel undertook extensive efforts to reach the public:

(a) A mailing was sent to 3,000 addresses in the city of Lac-Mégantic and surrounding villages regarding the Claims Process, including advice as to the claims bar date;

[5] Larochelle Affidavit at para 5; Representation Order, dated April 4, 2014.

(b) Four (4) individuals were hired on a full-time basis to provide information and assistance to the local population in filling out the claims forms;

(c) A website was established to provide information and an online version of the claims forms;

(d) On April 22, 2014, the Class Representatives' counsel, Me Larochelle, Me Joel Rochon, and Me Jeff Orenstein conducted a press conference attended by RDI, TVA, La Tribune, Journal MRG, Journal L'Echo de Frontenac, Radio-Canada and CTV Montreal, where they detailed the Claims Process;

(e) The Claims Process was detailed on the Facebook page of the Lac-Mégantic class action;

(f) Families of known deceased persons were notified;

(g) Calls were made offering information and support to businesspersons, property owners, and commercial and residential tenants in the "zone rouge";

(h) A meeting was held on May 15, 2014 with local businesspersons and the Monitor;

(i) An informational advertisement was on local television between April 28 and June 13, 2014;

(j) A mailing was sent to owners of residential and commercial properties in the "zone rouge" between May 8 and 15, 2014; and

(k) The Claims Process in general received extensive local and regional newspaper coverage.[6]

12. The result of these efforts appeared very positive: approximately 3,800 claims were filed in a town having a population of less than 6,000 residents.[7]

13. However, in spite of the diligent efforts of the Class Representatives to advise of the Claims Process, including the need to file claims prior to June 13, 2014, a number of claims were not filed with the Monitor prior to the bar date.[8]

C. The Additional Claims

14. The Additional Claims can be divided into three main categories:

(a) **The June 2014 Claims**. Approximately 102 relating to economic loss and moral damages,

(i) 32 of these claims are dated on or before the claims bar date but were not delivered to the Monitor until after the claims bar date;

(ii) the balance of the claims are dated between June 18, 2014 and June 30, 2014.

[6] Larochelle Affidavit at para 6.
[7] Larochelle Affidavit at para 7.
[8] Larochelle Affidavit at para 8.

(b) **The January 2015 Claims**. Approximately 81 advanced contemporaneously with MMA's disclosure of the existence of a sizeable settlement fund.

(c) **The April 2015 Claims**. Approximately 25 claims in respect of moral damages (including certain evacuation claims) advanced after MMA's presentation of potential distributions under the plan.[9]

15. The creditors having Additional Claims are virtually all unsophisticated individuals without personal legal representation.[10]

16. The Class Representatives have yet to conduct a structured interview of each of the persons seeking to advance the January 2015 Claims and the April 2015 Claims, but the reasons provided for the failure to advance the claim prior to the bar date have included:

(a) a lack of understanding about the Claims Process, the role of the Monitor and the possibility of a Plan of Arrangement with the participation of third parties;

(b) previous denial of the impact of the disaster and/or a desire not to think about it;

(c) the complexity and sophistication of the claims forms, which total more than 100 pages;

[9] Larochelle Affidavit at para 10.
[10] Larochelle Affidavit at para 11.

(d) criticisms of the process leveled by a lawyer involved in the U.S. proceedings, which tended to suggest that persons would be better served by not filing a claim;

(e) At the time of this Court's order on April 4, 2014, there were minimal funds available for an eventual Plan of Arrangement, which led many to forego completing the claims forms.[11]

17. The June 2014 Claims that were dated prior to the claims bar date were not filed with the Monitor due to inadvertence. It appears as though these claims were not filed with the Monitor due to the surge of claims going through Me Larochelle's office. Unfortunately, these claims were misplaced and Me Larochelle's office was unable to file them prior to the claims bar date.[12]

18. In addition, Me Larochelle's office was working with Quatorze Communication to assist with the filing of claims. There was a technical error with the database that Quatorze Communication was using and thus some claims, although dated prior to the claims bar date, were not filed before the Claims Bar Date. These claims were received by the Monitor after the claims bar date[13]

[11] Larochelle Affidavit at para 9.
[12] Larochelle Affidavit at para 12.
[13] Larochelle Affidavit at para 13.

19. These claimants believed that their claims were filed in accordance with the Claims Process. It would only serve to unnecessarily prejudice the claimants who fall into this category if leave to file these claims was denied.[14]

20. Once Me Larochelle was made aware of these claims, he made every effort to ensure the June 2014 Claims were completed, and prepared to be filed, within two weeks of the claims bar date.[15]

D. Extraordinary circumstances surrounding the January 2015 Claims and April 2015 Claims

21. Approximtaely 106 claims were received in January 2015 and April 2015. A number of these claims have been completed by first responders to the train derailment, and they are seeking to have their claims considered in light of the extraordinary circumstances surrounding their experiences.[16]

22. These claimants did not file claims for moral damages, including traumatic stress prior to the Claims Bar Date. This was, in part, because the traumatic stress injury had not yet presented itself and the fire fighters and other first responders attempted to deny the existence of these severe injuries.[17]

23. These claimants, who were present in the "Red Zone" immediately following the train derailment, not only underwent significant hardship to do their jobs and rescue other individuals from the "Red Zone," but appear to have developed symptoms of serious Post-Traumatic Stress Disorder symptoms that are only now presenting

[14] Larochelle Affidavit at para 14.
[15] Larochelle Affidavit at para 15.
[16] Larochelle Affidavit at para 17.
[17] Larochelle Affidavit at para 18.

themselves. These individuals are in need of ongoing medical treatment to alleviate their severe psychiatric traumatic stress, caused by their presence in the “Red Zone” during the tragedy.[18]

E. The categories for distribution in the Plan of Arrangement

24. The Plan of Arrangement contemplates distinct categories for distribution, such as "Wrongful Death Claims", "Bodily Injury and Moral Damages Claims", and "Property and Economic Damages Claims", among others.[19]

25. The vast majority of the Additional Claims fall within the category of "Moral Damages Claims", with only a limited number of "Property and Economic Damages Claims". The structure of the Plan of Arrangement is such that there is no possibility of dilution of the claims of creditors having claims in the other categories of claimants, although the filing of the Additional Claims may dilute recoveries in the categories in which they are filed.[20]

26. The Additional Claims appear to be otherwise meritorious in the sense that they satisfy the criteria for the receipt of a distribution under the proposed restructuring plan, but they remain subject to disallowance in the event that they do not.[21]

27. The Plan of Arrangement has not yet been voted on by the creditors or approved by the Court.[22]

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[18] Larochelle Affidavit at para 19.
[19] Larochelle Affidavit at para 21.
[20] Larochelle Affidavit at para 22.
[21] Larochelle Affidavit at para 23.
[22] Larochelle Affidavit at para 24.

PART III. ISSUES AND ARGUMENT

A. Issues

28. The issues to be decided on this motion are:

(a) Should the Court authorize the filing of the June 2014 Claims?

(b) What advice and direction should the Court provide with respect to the treatment of the January 2015 Claims and the April 2015 Claims?

29. A preliminary issue raised by the Court is whether the Class Representatives (and Class Counsel) are in a conflict of interest in bringing a motion to admit late claims, having regard to the dilutive effect that the admission of the claims will have on certain class members.

B. The Absence of a Conflict of Interest

30. The Class Representatives and their counsel are not conflicted as a result of the potential dilutive effect of the late claims. This is because the jurisprudence makes clear that the reduction in the amount available for distribution to creditors is not a factor to be considered by the Court in deciding whether to admit the late claims.[23]

> 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: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31.[24]

31. Indeed, the issue of dilution of creditor recoveries is an issue that is entirely independent from the passage of the claims bar date. The Plan of Arrangement

[23] *Blue Range* at para 40.
[24] *Blue Range* at para 40.

negotiated as part of the CCAA Proceedings always contemplated the distribution of a limited pool of funds, such that as the number of claims increased, the potential for full recovery (generally) decreased. As a result, dilution of creditor recoveries was as much an issue in respect of each additional creditor assisted prior to the passage of the claims bar date, as after.

32. In this case, the Representation Order appointed the Class Representatives and their counsel as representatives of all Class Members (as defined in the Representation Order) in the CCAA Proceedings, requiring counsel to facilitate the filing of claims. The essential scope and character of that mandate did not change merely because of the passage of the Claims Bar Date, and that mandate has never been altered.

C. The principles applicable to granting leave to file late claims

33. The CCAA provides courts with the authority to fix a deadline for creditors to file claims.[25] The purpose of a claims bar order is "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."[26] Even when courts fix a claims bar date, however, courts retain discretion to extend the time for creditors to file their claims or to permit the filing of late claims.[27]

34. Courts have recognized that a CCAA court has the authority to permit the filing of late claims. *Re Blue Range Resource Corp.*[28], a decision of the Court of Appeal of

[25] Lloyd W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Analysis (Companies' Creditors Arrangement Act*) at N§143(1) ("Houlden").
[26] *Ibid.*
[27] *Ibid*.
[28] *Blue Range Resource Corp., Re*., 2000 ABCA 285 (CanLII) ("*Blue Range*"); Houlden at N§143(1).

Alberta, is widely cited as the governing jurisprudential authority for the exercise of a court's discretion to grant permission for the late filing of claims. In *Blue Range,* the court considered creditors who filed their claims in time but sought to have them amended, and creditors who did not file their claims prior to the claims bar date.[29] Justice Wittmann, having canvassed jurisprudence under the *Bankruptcy and Insolvency Act,* as well as U.S. case law and legislation, elaborated the following criteria to apply in determining whether to grant permission for the late filing of claims:

(a) **Was the delay caused by inadvertence and if so, did the claimant act in good faith?** Inadvertence includes carelessness, negligence and accident, and is unintentional. The claimant must have acted in good faith and not to circumvent the process, delay or avoid participation, or "lie in the weeds" to gain an advantage unavailable to other creditors. Considerations under this factor include length of the delay, the reason for the delay and whether it was within the control of the claimant, corrective measures brought by the claimant upon discovering its tardiness and whether these measures were brought in a timely manner, and the original intent of the claimant to pursue its claim.

(b) **What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?** Did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Materiality is relevant to the issue of prejudice. The fact that creditors will receive less money as a

[29] *Blue Range* at para 4.

result of allowing the late filing (that is, their claims will be diluted) does not constitute prejudice. The nature and stage of the CCAA proceedings are key elements in determining the existence of any relevant prejudice.

(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?**[30]

35. Justice Wittmann described his approach as "blended" in that it integrated the requirement that the claimant show inadvertence and good faith according to the *BIA* jurisprudence, but also an explanation for the delay and the lack of relevant prejudice according to the U.S. jurisprudence and the (U.S.) Bankruptcy Rules.[31]

36. Justice Wittmann ultimately allowed the late filing of the claims, notwithstanding the fact that the meeting to vote on the Plan of Arrangement had already taken place, finding that there would be no prejudice to the other creditors or to the debtor company.[32]

37. In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, a case stemming from the tainted blood scandal, the trustee brought a motion for advice and directions regarding late-filed or otherwise irregular applications for a determination

[30] *Blue Range* at para 26; Vern DaRe, "The Treatment of Late Claims under the CCAA" *Canadian Bankruptcy Reports* 26 CBR (4th) 142.
[31] *Blue Range* at paras 14, 19.
[32] *Blue Range* at para 42.

of damages by the referee.[33] Pursuant to the CCAA Plan, which had been approved eight years earlier, a trust was established to distribute funds to persons who were infected with HIV (the "**HIV Trust**").[34] Distributions from the HIV Trust had not been made in the eight years since the approval of the CCAA Plan.[35] The reasons for the delay in filing applications included not having received notice of the HIV Trust and not discovering the claim until after the claims bar date.[36] Importantly, the court commented on the circumstances of the claimants:

> [t]he 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.[37]

The court ultimately allowed the late claims where they were made within a reasonable time after notice was acquired, where there were circumstances beyond the control of the claimants and where notice was inadequate. Late applications were not allowed for claims stemming from persons who could not establish their eligibility as HIV claimants prior to the deadline, finding that it was part of the compromise affected by the Plan of Arrangement.[38]

38. More recently, in *Pangeo Pharma Inc., Re,* Justice Journet of the Superior Court of Quebec cited the *Blue Range* criteria approvingly. He reached the same conclusion

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[33] *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, 2008 CarswellOnt 6105, [2008] O.J. No. 4114 at para 2 ("*Canadian Red Cross*").
[34] *Canadian Red Cross* at paras 2-3.
[35] *Canadian Red Cross* at para 5.
[36] *Canadian Red Cross* at paras 14-15.
[37] *Canadian Red Cross* at para 23.
[38] *Canadian Red Cross* at para 40, Appendix.

as the Alberta court regarding the relevance of the more approach taken under American law :

> 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.[39]

39. He also remarked that "la bonne foi se présume et qu'aucune preuve de mauvaise foi n'a été faite" and that "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."[40]

40. In the absence of evidence of bad faith, the good faith of all of the claimants is presumed (art. 2805 C.c.Q.)

D. Application of the Blue Range criteria to this case

1. Reason for the delay and good faith

41. The first criterion emanating from *Blue Range* and subsequent jurisprudence and doctrine is the cause of the delay and whether or not the claimants were acting in good faith.

42. Regarding the June 2014 Claims, 32 of the claims were advanced prior to the claims bar date but not delivered to the Monitor. These claims were misplaced in the office of Me Larochelle in the context of a frenzy of activity in the days approaching the

[39] *Pangeo Pharma Inc., Re,* 2004 CarswellQue 292 at para 27
[40] *Ibid.,* at paras 22, 24.

Claims Bar Date. The balance of the June 2014 Claims were not filed due to a technical error with the database employed by Quartorze Communication.[41]

43. The delay with respect to the June 2014 Claims was not within the control of the claimants, as they believed that they were filed in accordance with the Claims Process. In *Royal Bank v. Cow Harbour Construction Ltd.*, the creditor Hertz did not file its claim due the inadvertence of its solicitors until six months after the claims bar date. The court accepted that this constituted inadvertence on the part of Hertz.[42]

44. At all times the original intent of the claimants with June 2014 Claims was to participate fully in the CCAA process.

45. The January 2015 Claims were advanced contemporaneously with MMA's disclosure of the existence of a sizeable settlement fund. The January 2015 Claims were brought soon after the claimants' discovery that there would be funds available for distribution, indicating prompt action. While the original intent of some of these claimants was perhaps not to file their claims, the claims may be valid and there may be mitigating factors, such as a justified misunderstanding of the process or misapprehension of facts, questions regarding the mental capacity of the decision maker, and/or their awareness of their claim or the extent of their claim.[43]

46. For example, a number of the January 2015 Claims and April 2015 Claims are from first responders. Their explanation for the delay is that they either denied the

[41] Larochelle Affidavit at para 15.
[42] *Royal Bank v. Cow Harbour Construction Ltd.,* 2011 ABQB 223, 2011 CarswellAlta 533 at para 33.
[43] Larochelle Affidavit at para 10.

existence of injury stemming from post-traumatic stress disorder or that the injuries had not yet materialized in an appreciable way.

47. There is no indication that the claimants sought to "lie in the weeds" or gain some advantage unavailable to other creditors.

2. The absence of prejudice

48. The second criterion requires the court to consider the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay.

49. As noted above, the dilution of creditor recoveries by the admission of the additional claims does not constitute prejudice.[44] The Class Representatives are not aware of any cases where the dilution of funds available to creditors was considered as prejudice in the CCAA or analogous context.

50. The test for prejudice is: "did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done?"[45]

51. In this case, the Plan of Arrangement contemplates distinct categories for distribution based on agreed claims valuations. The vast majority of the Additional Claims fall within the category of "Moral Damages Claims", while some fall under "Economic Loss Claims". The Plan is structured such that the claims of creditors in any of the other categories will not be diluted by the addition of the Additional Claims.

[44] *Blue Range* at para 40.
[45] *Blue Range* at para 24.

52. The admission of the June 2014 Claims is not prejudicial. In the words of Justice Journet, the June 2014 Claims are a **"**goutte d'eau dans la mer de réclamations contre la débitrice".

53. The impact of admitting the January 2015 Claims and April 2015 Claims remains to be considered. To the extent that the claims would have a material impact, the court may need to consider whether, if the Additional Claims had been filed sooner, a larger settlement fund or a different CCAA plan may have been negotiated. However, the court's assessment will have to be weighed against the fact that the actual size of the claims pool remains undetermined inasmuch as claims for economic loss are still being reviewed by the Monitor, the fact that the allocation of the funds among the claims pools remains the topic of some discussion among stakeholders, and the fact that creditors still retain the ability to vote against the plan if they are not satisfied with their proposed allocation.

3. The Court can attach conditions to ensure that the CCAA process is not delayed

54. In the event that the Court is concerned that the date of the meeting will be further delayed by the filing of the Additional Claims, it could attach a condition whereby the Additional Claims are admitted only for the purposes of distribution and not for voting. This will ensure that the Plan of Arrangement will not be delayed whatsoever.[46]

[46] CCAA, s. 11.

4. The nature of the claims and the proceedings may warrant an order for late filing

55. Even in the event that this Court determines that relevant prejudice is caused by the late filing of the Additional Claims, it may still order their filing. A number of considerations militate in favour of the Court exercising its residual discretion to allow the filing of the Additional Claims.

56. The claimants are by and large unsophisticated individuals with little legal knowledge and experience and no individual legal representation. As the Court stated in *Canadian Red Cross*, individuals, unlike commercial creditors, cannot be presumed to be knowledgeable and ready and willing to assert their claims.[47] The lack of sophistication of the claimants militates in favour of greater lenience, both with regard to the length and reason for the delay.

57. It is not surprising that the "take-up" rate is low in light of the nature of the claims, the sophistication of the claimants, and the widely-held view [until MMA's announcement in December 2014] that there would not be only limited funds available for distribution. Indeed, in the class actions context, an important criticism leveled at "opt-in" processes is that only a small percentage of the total class will participate. As stated by Justice Perell in *McSherry v. Zimmber GMBH*:

> The major problem with an opt-in regime is that it is inconsistent with the access to justice rationale that was the basic justification for class action legislation. Class members, particular those with small claims that were not economical to litigate, might not know that they had the opportunity to participate and thus they would not take the positive step of opting-in. Moreover, class members with notice of the class action option might not participate (to quote the Report at p.

[47] *Canadian Red Cross* at para 23.

468) because of "the operation of the ... social and psychological factors that inhibit persons from taking action to redress their injuries."[48]

58. Given that the CCAA process is an analogous “opt-in” process, it is unsurprising that a number of the creditors did not submit claims until some time after the claims bar date, particularly given the lack of meaningful funds available for distribution.

PART IV. RELIEF REQUESTED

59. The Class Representatives respectfully request that this Court:

(a) authorize the filing of the June 2014 Claims, and

(b) provide advice and direction in respect of the treatment of the January 2015 Claims and April 2015 Claims; the Class Representatives propose an order:

(i) directing and authorizing the Class Representatives to interview Class Members who have sought to file additional claims and to prepare an affidavit for them briefly describing the reason for the delay in filing;

(ii) authorizing the Monitor to accept the claim without further order if, after reviewing the affidavit and, if deemed necessary, interviewing the claimant, the Monitor or a court appointed claims officer is satisfied that:

1) the claimant has been and is acting in good faith;

[48] *McSherry v. Zimmer GMBH*, 2012 CarswellOnt 17147 para 113.

2) if the claim was intentionally not filed, extraordinary circumstances exist that justify the acceptance of the claim, such as a diminished mental capacity;

3) the admission of the claim is not otherwise prejudicial to the process; and,

(iii) directing that where the Monitor (or claims officer) is not prepared to admit a claim then the claimant shall be at liberty to bring the claim before the court for consideration, with the assistance of the Class Representatives, or, alternatively, at the Claimant's own expense.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

LAC-MÉGANTIC, April 23, 2015

(S) Daniel E. Larochelle

_____

ME DANIEL E. LAROCHELLE
Attorney for the Court Appointed Representatives

MONTRÉAL, April 23, 2015

(S) Jeff Orenstein

_____

CONSUMER LAW GROUP INC.
Per: Me Jeff Orenstein
Attorneys for the Court Appointed Representatives

CANADA

SUPERIOR COURT
(Commercial Division)

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Court Appointed Representatives of the Class Members-PETITIONERS

LIST OF AUTHORITIES
COURT APPOINTED REPRESENTATIVES OF CLASS MEMBERS

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Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, 2008 CarswellOnt 6105, [2008] O.J. No. 4114	**4**

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LAC-MÉGANTIC, April 23, 2015

(S) Daniel E. Larochelle

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HMANALY N§143
Houlden & Morawetz Analysis N§143

Houlden and Morawetz Bankruptcy and Insolvency Analysis

Companies Creditors Arrangement Act
Section 19

L.W. Houlden and Geoffrey B. Morawetz

N§143 — Scope of Claims

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See s. 19

Section 19 deals with claims. It specifies that the only 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 on the earlier of the day on which *CCAA* proceedings commenced. If the company filed a notice of intention under s. 50.4 of the *BIA* or commenced proceedings under the *CCAA* with the consent of inspectors referred to in s. 116 of the *BIA*, claims dealt with are from the date of the initial bankruptcy event within the meaning of s. 2: s. 19(1). The plan may deal with claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the same dates: s. 19(1)(b). There is an exception for specified claims: s. 19(2), see N§144 "Claims that Cannot be Comprised under a Plan".

Previously, s. 19 specified that ss. 65 and 66 of the *Winding-up and Restructuring Act* did not apply to a compromise or arrangement under the *CCAA*. When the amendments were proclaimed in force, the current s. 19 was repealed and the new provision set out in s. 41. See N§204 "Sections 65 and 66 of *Winding-up and Restructuring Act* Do Not Apply".

The Ontario Superior Court of Justice approved an asset sale, which excluded contaminated property and stayed enforcement proceedings initiated by the Ministry of the Environment (MOE). The sale approval motion had been opposed by the MOE on the basis that its order was regulatory in nature and was not subject to the stay and its order was not a claim within the meaning of the *CCAA*: *Re Northstar Aerospace Inc.*, 2012 CarswellOnt 9607, 91 C.B.R. (5th) 268, 2012 ONSC 4423 (Ont. S.C.J. [Commercial List]). For a discussion of this judgment, see

N§121 “Environmental Conditions or Damage”.

The Alberta Court of Queen’s Bench held that all claims for damages arising from the suspension of an inlet gas purchase agreement (”IGPA”) were affected claims under *CCAA* Proceedings. The court also dismissed the creditor’s application to file a late amended claim. Justice Romaine held that it was clear that the debtor was subject to the possibility of liability under the IGPA before the *CCAA* proceedings were commenced; and that the claims relating to the suspension of the IGPA during the *CCAA* period and beyond were exactly the kind of anticipatory, future claims that are contemplated under the statute. The court held that “liability” is a broad term that is most often used to describe an unliquidated or unspecified legal obligation, and “debt” is a narrower term that means a specific kind of obligation for a liquidated or certain sum; the definition of “claim” under the *CCAA* includes both. Romaine J. did not agree that an alleged refusal to reinstate the IGPA was a fresh breach. She also found that the application to file a claim at this late date was extraordinary; the creditor did not file its application until approximately two and half years after the claims bar date and approximately one and a half years after the plan implementation date. The appropriate criteria to apply to late claims in *CCAA* proceedings was: 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) and if relevant prejudice is found that cannot be alleviated, are there any other considerations that may nonetheless warrant an order permitting late filing? To allow a creditor with full knowledge of the *CCAA* proceedings and the claims process to ignore the claims bar date and file a significant new claim more than two years after such date would throw the entire *CCAA* restructuring process into disrepute: *Re SemCanada Crude Co.* (2012), 2012 CarswellAlta 1399, 93 C.B.R. (5th) 188, 2012 ABQB 489 (Alta. Q.B.).

The British Columbia Supreme Court granted an order that provided unsecured creditors with funding for the purpose of investigating proofs of claim filed by parties related to the debtor in a *CCAA* proceeding. A priority charge to cover such costs was also granted: *Re 0487826 B.C. Ltd.*, 2012 CarswellBC 3079, 2012 BCSC 1501 (B.C. S.C.). For a discussion of this judgment, see N§145 “Determination of Amount of Claims”.

The Ontario Superior Court of Justice issued a claims procedure order that established a process for the identification and determination of claims against the debtor and the debtor’s current and former officers and directors, except for the debt claims of noteholders that were to be addressed in a subsequent order. The draft order provided that the monitor, with the assistance of the debtor, was to review the pre-filing and restructuring claims. The monitor would have the right to accept, revise or disallow any claim less than $100,000. The decision of the monitor regarding any claim over that amount required either the consent of the debtor or court approval. The noteholders contended that for claims over $100,000, of which there appeared to be five ranging from $100,000 to $2.5 million, the consent of the noteholders should also be required, failing

which court approval would be required. Justice Newbould held that the noteholders should not have the right to require their consent; there was sufficient protection to all concerned in the fact that the monitor was central to the claims process. The extra cost and expense of the monitor or the debtor having to deal with the noteholders on these claims was not warranted. However, a compromise provision was agreed to in which the monitor would give notice to the noteholders and any other stakeholder it thought appropriate before accepting any claim in excess of $2.5 million, giving these parties a reasonable time within which to apply to court regarding the claim, failing which the monitor, with the consent of the debtor, could accept the claim. The court declined to include a number of provisions relating to set-off, on the basis that set-off is specifically addressed in s. 21 of the *CCAA* and the proposed provisions could affect the substantive rights of the parties. The draft order sought to allow the debtor, with the consent of the monitor, to appoint the claims officer; the court held that such an appointment would require approval of the court: *Re Crystallex International Corp.*, 2012 CarswellOnt 15588, 2012 ONSC 6812 (Ont. S.C.J. [Commercial List]). For further discussion of the set-off issue, see N§147 "Set-Off".

Debtors and related entities brought a motion for advice and directions regarding the obligations of the provider of the executive and organization liability insurance policy ("D&O policy") to the debtors and their subsidiaries. The Ontario Superior Court of Justice found that the D&O policy provided coverage for various claims made against the debtor, its subsidiaries, or their executives or employees, and extended to reasonable and necessary fees that resulted from defending a claim made against the executives. The D&O policy provided for a total retention amount of U.S. $10 million, but it did not apply in certain circumstances, including in the event that the debtor or its relevant subsidiary had not indemnified nor was permitted or required to indemnify an executive due to law. Justice Morawetz concluded that the retention did not apply and the non-indemnifiable loss provisions of the D&O policy were triggered. He held that the debtors were both permitted and obligated to indemnify the executives before the granting of the initial order. The effect of the initial order was that the debtor was no longer permitted to indemnify the executives, although it did not have the effect of extinguishing or otherwise relieving its obligation to indemnify. A promise or obligation to indemnify is, in effect, a promise of protection against a specific type of future event. Here, the class action alleged misconduct prior to the *CCAA* filing and thus the activity giving rise to the claim and the obligation arising under the D&O policy arose prior to the *CCAA* stay. The claim arising out of the class action was a pre-filing claim and the claim for indemnification was a pre-filing claim. The court held that notification of the claim for indemnification may trigger a response from the insurer, but this response reflects a quantification of liability based on a pre-filing claim. Notification of the claim does not alter the fact that the events that triggered the claim occurred prior to the *CCAA* filing. The debtor had clearly defaulted on its pre-filing obligations and the consequences of such default were specifically addressed in the initial order that provided for the stay. The effect of the stay was to preclude the ability of the debtor to take steps to honour its obligations to indemnify the executives, except in the limited circumstances specified in the initial order. The court held that to permit the insurer to access the D&O trust where the claim

arising in the class action is covered by the D&O policy would improperly elevate the insurer above all unsecured creditors in contravention of the basic priority principles of insolvency law. Further, the use of trust property to pay the fees claimed in the action and other similar legal expenses would subvert the purpose of the D&O trust to the detriment of its beneficiaries. The debtor was not permitted to make payment on the indemnity obligation and the loss was a non-indemnifiable loss. The court held that this contractual default by the debtor may result in a claim of the insurer against the debtor for an amount up to the retention in the CCAA proceedings; however, the insurer could not elevate its status from that of an unsecured creditor of the debtor to the position where it is not a creditor of the debtor for the retention. This objective could only be accomplished at the expense of other parties, a result that was inconsistent with *pro rata* treatment for creditors of equal rank. In the result, an order was granted that the retention did not apply to claims made by the executives against the D&O policy and the insurer was obligated to pay and respond to losses on behalf of the executives without reference to or subtraction for the retention: *Re Nortel Networks Corp.*, 2012 CarswellOnt 14672, 97 C.B.R. (5th) 85, 2012 ONSC 5653 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice approved the settlement of a class action proceeding involving shareholders and noteholders of the debtor and the former auditors of the debtor. The debtor and others became embroiled in investigations and regulatory proceedings with the Ontario Securities Commission (”OSC”), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police for allegedly engaging in a “complex fraudulent scheme”. The debtor also became embroiled in multiple class action proceedings across Canada and in New York, facing allegations that the debtor and others misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors. Throughout the *CCAA* proceedings, the debtor asserted that there could be no effective restructuring of its business if the claims asserted against its subsidiaries arising out of, or connected to, claims against the debtor remained outstanding. Further, the monitor had advised that timing and delay were critical elements that would impact on maximization of the value of the debtor’s assets and stakeholder recovery. In order to identify the nature and extent of the claims asserted, a claims procedure order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, related to a purported claim made against the debtor, to so indicate on their proof of claim. A settlement with the auditors provided for the payment of $117 million as a settlement fund, being the full monetary contribution to settle the claims; however, it remained subject to court approval in Ontario, and recognition in Québec and the United States, and conditional on the granting of the sanction order sanctioning the plan and release; the issuance of a settlement trust order; the issuance of any other orders necessary to give effect to the settlement and release, including a Chapter 15 recognition order; the fulfillment of all conditions precedent to the settlement; and all orders being final orders not subject to further appeal or court challenge. Justice Morawetz commenced his analysis by addressing whether the court had jurisdiction to grant the requested approval. He noted that the auditor settlement was part of a *CCAA* plan process. Claims, including contingent claims, are regularly compromised and settled

within *CCAA* proceedings, including outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and there are no "opt outs" in the *CCAA*. Justice Morawetz concluded that these proceedings were the appropriate time and place to consider approval of the settlement and the court had the jurisdiction. In considering whether the court should exercise its discretion to approve the settlement, he noted that the *CCAA* is a "flexible statute", and the court has "jurisdiction to approve major transactions, including class action settlement agreements, during the stay period". Morawetz J. further stated that third-party releases are not an uncommon feature of complex restructurings under the *CCAA* and the Court of Appeal for Ontario had specifically confirmed that a third-party release is justified when the release forms part of a comprehensive compromise. Parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given". Justice Morawetz reviewed the relevant *CCAA* factors to take into account in assessing a settlement: whether the settlement is fair and reasonable; whether it provides substantial benefits to other stakeholders; and whether it is consistent with the purpose and spirit of the *CCAA*. Where a settlement also provides for release, the court will assess whether there is "a reasonable connection between the third party claim been compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: are the claims to be released rationally related to the purpose of the plan; are the claims to be released necessary for the plan of arrangement; are the parties who have claims released against them contributing in a tangible and realistic way; and will the plan benefit the debtor and the creditors generally? Justice Morawetz held that the auditors' settlement was fair and reasonable, provided substantial benefits to relevant stakeholders, and was consistent with the purpose and spirit of the *CCAA*. Morawetz J. concluded that there was no provision for a conditional opt-out in the *Class Proceedings Act*, and Ontario's single opt-out regime causes no prejudice to putative class members. In the result, the motion was granted and a declaration was issued to the effect that the settlement was fair and reasonable in all respects and that the settlement and release were approved: *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 CarswellOnt 3361, 100 C.B.R. (5th) 30, 2013 ONSC 1078 (Ont. S.C.J. [Commercial List]).

For a discussion of the "interest stops" rule in *CCAA* proceedings, see the discussion of *Re Nortel Networks Corp.*, 2014 CarswellOnt 11369, 121 O.R. (3d) 228, 2014 ONSC 4777 (Ont. S.C.J.) under N§145 "Determination of Amount of Claims".

See also N§152 "Creditors Having Equity Claims".

(1) — Claims Barring Procedure

In considering whether to fix a claims bar date in a *CCAA* proceeding in relation to claims under the British Columbia *Tobacco Damages and Health Care Cost Recovery Act*, S.B.C. 2000, c.

30, the court held that both claims under this legislation and Crown claims relating to smuggling tax related claims were material to the *CCAA* proceeding, but that it was premature to attempt to determine "provable claims" within the meaning of s. 19(1). The court dismissed the motion without prejudice to the Crown to bring a motion requesting relief in the future: *Re JTI-MacDonald Corp.* (2009), 2009 CarswellOnt 6614, 61 C.B.R. (5th) 117 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench determined that dividend claims relating to preferred shares should be excluded from the unsecured creditors' class in a vote on a *CCAA* plan. While the monitor and debtor accepted the dividend claims of the preferred shareholders as being unsecured claims and included them in the unsecured creditors' class, the court had to determine whether the dividend claims were debt or equity. The relevant terms of the preferred shares provided for entitlements to receive dividends calculated at the rate of 10% per annum of the redemption amount, accruing from the date of issuance to the date each such preferred share was converted to a common share or redeemed by the corporation. Dividends were to be paid quarterly. The court held that the substance of the relationship between shareholders and the corporation at the time they purchased their shares was not that of creditor and debtor. They were risk-takers, not creditors. For them to become creditors from the time that they were issued shares would require more explicit wording than was contained in the shares. The application was granted. The preferred shareholders were excluded from the unsecured creditors class and they were not entitled to any distribution within that class: *Re JED Oil Inc.* (2010), 2010 CarswellAlta 861, 68 C.B.R. (5th) 115 (Alta. Q.B.).

The Alberta Court of Queen's Bench denied the motion of a creditor to have a late amended proof of claim accepted in a *CCAA* proceeding. The issue was whether the creditor, having initially filed a claim that it characterized as fully secured, was entitled to file a late amended claim alleging that a large portion of its claim was unsecured. The criteria to accept late claims include: (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 that cannot be alleviated, are there any other considerations that may nonetheless warrant an order permitting late filing? The consequences of the delay in adequately investigating the value of the assets must be borne by the creditor. In this case, the creditor filed a late revised claim after months of relative lack of diligence with respect to the value of its security, at a time when it had become apparent that the distribution to unsecured creditors under a proposed plan would be substantial. The court concluded that, on the facts, it would not be fair or equitable to accept the late amended claim: *Re BA Energy Inc.* (2010), 2010 CarswellAlta 1598, 70 C.B.R. (5th) 24 (Alta. Q.B.).

Where parties entered into an agreement for a shareholder to pay USD 20 million to purchase USD 10million of the debtor company's income tax refund, the agreement required the debtor to

hold the tax refund in trust for the shareholder. The debtor did not deliver the transfer document, in breach of the agreement, and then filed under the *CCAA*. The shareholder successfully argued before the superior court that the funds were held in trust; and on appeal, the appellate court held that the circumstances of the case made it appropriate to apply the equitable maxim that "equity looks on that as done which ought to be done". It would be inequitable for the debtor to take advantage of its own breach of agreement by contending that its failure to deliver the transfer excused it from its contractual obligation. It was not inequitable to require secured creditors to live with the agreement they helped make and that they influenced the debtor company to breach: *Re Grant Forest Products Inc.* (2010), 2010 CarswellOnt 3001, 101 O.R. (3d) 383, 67 C.B.R. (5th) 23 (Ont. C.A.).

The Québec Superior Court determined that, in circumstances where the parties had the benefit of a thorough adversarial proceeding before a claims officer, the standard of review applicable on appeal of the claims officer's determination is that of a true appeal and that the court should only intervene in the case of an error of law or a palpable and overriding error in fact. The role of the court is not to conduct a trial *de novo* and plainly set aside the findings of the claims officer, reassess the matter and substitute its own decision. The claims procedure order provides that a party may appeal a final determination of the claims officer; and the appropriate standard of review for the appeal of the decision of the claims officer with respect to pure questions of law is correctness. With respect to questions of fact, the standard of review is that such findings are not to be reversed unless it can be established that the decision maker made a palpable and overriding error. With respect to questions of mixed fact and law, the standard of review is that in the absence of inextricable legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with. With respect to the assessment of damages, a damage assessment should not be overturned unless it is based on a wrong principle of law or the damage is so inordinately high or low that it must be an erroneous estimate of damages. Here, the relevant record consisted only of the claims officer's determination, which included a summary of facts, reasons and conclusions, as well as the affidavits and exhibits filed before him. No official recording was made of the hearing in front of the claims officer and neither a tape recording of the proceedings nor a transcript of the hearing was part of the record. Gascon J. was of the view that by choosing not to request to have the hearing before the claims officer recorded by an official stenographer, the applicant took the chance that the factual determinations and conclusions of the claims officer did not meet the standard of palpable and overriding errors in case the decision was not favourable to it. He also noted that in similar circumstances, the Québec Court of Appeal ruled that when an appellant failed to put in front of the appellate court all the evidentiary record before the first judge, the factual determinations and conclusions cannot be reviewed. Justice Gascon held that the record was adequate for the court to rule on the claims officer's determination. The findings of the claims officer had to be taken as they were and his assessment thereof had to be accepted as correct; and it would be dangerous and unjust for the court to reassess the probative value of the evidence it had not heard and which was not before it. Justice Gascon then turned to the issue of additional evidence on the motion. The test for the introduction of new evidence on appeal was articulated by the

Supreme Court of Canada in *R. v. Palmer* (1979), 1979 CarswellBC 533, 1979 CarswellBC 541, [1980] 1 S.C.R. 759: a party must convince the court that the evidence was not available at the time of trial; the evidence is relevant in the sense that it bears on a potentially decisive issue; the evidence is credible; and the evidence is expected to have affected the result. Justice Gascon concluded that based on these criteria, the additional evidence sought to be adduced was neither admissible nor probative. He concluded that the applicant had not established a palpable and overriding error on the questions of fact analyzed by the claims officer. In the result, there were no valid grounds to vary the findings of the claims officer and the motion was dismissed: *Re AbitibiBowater inc.* (2011), 2011 CarswellQue 8946, 2011 QCCS 4284 (Que. S.C.).

The Supreme Court of Canada in *Re AbitibiBowater Inc.* held that regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim. The Supreme Court held that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceedings. The Court held that in the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. The Court held that subjecting such orders to the claims process does not extinguish the debtor's environmental obligations; it merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Federal legislation governing the characterization of an order as a monetary claim is valid; and the Court held that because the provisions relate directly to Parliament's jurisdiction, the ancillary powers doctrine was not relevant to the case. It also held that the interjurisdictional immunity doctrine was not applicable, because a finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities; its claim is simply subjected to the insolvency process: *Re AbitibiBowater Inc.*, 2012 CarswellQue 12490, 2012 CarswellQue 12491, [2012] 3 S.C.R. 443, 95 C.B.R. (5th) 200, 2012 SCC 67 (S.C.C.). For a full discussion of this judgment, see N§78 "Regulatory Bodies".

In a dispute over proceeds arising from a litigation portfolio, the Québec Superior Court held that the claims of unsecured creditors should have priority over a government claim for unpaid sales taxes where the government liability arose out of the litigation claim that generated the proceeds. Canada asserted that it had a juridical interest in the proceeds realized from a proceeding established in a plan of arrangement, which proceeds were held in trust by the monitor for the benefit of ordinary creditors of the debtor. Justice Tingley observed that, at best, it was an exercise in tracing. No party realized at the time of the plan that sales taxes might be exigible and that the debtor might be treated as agents of Canada to collect such sales taxes. The awareness of the potential liability to pay sales taxes only arose two years later. The court held

that the transfer was made when the plan was accepted by the creditors and sanctioned by the court. It was a transfer of litigious claims, not just of net proceeds. Canada had no direct claim on any of the proceeds held by the monitor and was now statute barred from asserting any such claim against it by an assessment: *Re 9007-7876 Québec inc. (Steinberg Inc.)* (2011), 2011 CarswellQue 9687, 2011 QCCS 4744 (Que. S.C.).

The British Columbia Supreme Court considered the issue of whether it was appropriate to disallow votes cast by a "vulture fund" at a creditors' meeting held to consider a plan filed pursuant to the provisions of the *CCAA*. The debtor adopted a two-track process in *CCAA* proceedings by which it pursued a restructuring plan and the monitor marketed its assets, providing the debtor with a chance to restructure and giving comfort to unsecured creditors that realization on their security would not be unduly delayed. The monitor sought to disallow votes cast by the fund at a creditors' meeting and to sanction a plan. The court held that although the fund became involved in the *CCAA* proceedings because it wished to acquire the tax attributes of the debtor, the critical question was whether it voted against the plan for an improper purpose. Applying, the test in *Laserworks*, specifically, whether there has been conduct amounting to an abuse of process or other tortious or near tortious character, resulting in a substantial injustice, the court considered whether to exercise its discretion to disallow a vote of a creditor. Here, the evidence indicated that the fund had entered into restructuring discussions with management and believed that it had a viable restructuring plan. Justice Sewell did not find that the fund acted in bad faith by acquiring claims, even if was motivated in part to do so to acquire a blocking position. Justice Sewell was of the view that this case raised squarely the appropriateness of permitting "vulture funds" to participate in insolvency restructurings, finding that there was no compelling argument that the activities of vulture funds are undesirable; and it is the role of Parliament to address what limits, if any, should be placed on the activities of such funds. Here, the terms of the plan were significantly improved after it became apparent that the fund had a substantial position in the claims. The court recognized that creditors are entitled to vote their claims in what they as creditors perceive to be their own economic interests so long as their actions are not unlawful or do not result in a substantial injustice. Moreover, in this case, the liquidation analysis prepared by the monitor did not lead to the conclusion that creditors would be worse off under liquidation. In the result, the application to disallow the fund's vote was dismissed and the application to approve the plan was thus also dismissed: *Re Blackburn Developments Ltd.* (2011), 2011 CarswellBC 3291, 2011 BCSC 1671 (B.C.S.C.).

The Alberta Court of Queen's Bench held that all claims for damages arising from the suspension of an inlet gas purchase agreement ("IGPA") were affected claims under *CCAA* Proceedings. The court also dismissed the creditor's application to file a late amended claim. Justice Romaine held that it was clear that the debtor was subject to the possibility of liability under the IGPA before the *CCAA* proceedings were commenced; and that the claims relating to the suspension of the IGPA during the *CCAA* period and beyond were exactly the kind of anticipatory, future claims that are contemplated under the statute. The court held that "liability" is a broad term that is most often used to describe an unliquidated or unspecified legal

obligation, and "debt" is a narrower term that means a specific kind of obligation for a liquidated or certain sum; the definition of "claim" under the *CCAA* includes both. Romaine J. did not agree that an alleged refusal to reinstate the IGPA was a fresh breach. She also found that the application to file a claim at this late date was extraordinary; the creditor did not file its application until approximately two and half years after the claims bar date and approximately one and a half years after the plan implementation date. The appropriate criteria to apply to late claims in *CCAA* proceedings was: 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) and if relevant prejudice is found that cannot be alleviated, are there any other considerations that may nonetheless warrant an order permitting late filing? To allow a creditor with full knowledge of the *CCAA* proceedings and the claims process to ignore the claims bar date and file a significant new claim more than two years after such date would throw the entire *CCAA* restructuring process into disrepute: *Re SemCanada Crude Co.*, 2012 CarswellAlta 1399, 93 C.B.R. (5th) 188, 2012 ABQB 489 (Alta. Q.B.).

The Supreme Court of Canada in *Re AbitibiBowater* Inc. held that regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim. The Supreme Court held that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceedings. The Court held that in the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. The Court held that subjecting such orders to the claims process does not extinguish the debtor's environmental obligations; it merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Federal legislation governing the characterization of an order as a monetary claim is valid; and the Court held that because the provisions relate directly to Parliament's jurisdiction, the ancillary powers doctrine was not relevant to the case. It also held that the interjurisdictional immunity doctrine was not applicable, because a finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities; its claim is simply subjected to the insolvency process: *Re AbitibiBowater Inc.*, 2012 CarswellQue 12490, 2012 CarswellQue 12491, [2012] 3 S.C.R. 443, 95 C.B.R. (5th) 200, 2012 SCC 67 (S.C.C.). For a full discussion of this judgment, see N§78 "Regulatory Bodies".

The British Columbia Supreme Court dismissed the application of the Province of British Columbia to set aside an initial *ex parte* order granted under the *CCAA*. In considering whether

the debtor was insolvent, the court followed the principles set out in *Re Stelco Inc.*, 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal to C.A. refused 2004 CarswellOnt 2936 (Ont. C.A.); leave to appeal to S.C.C. refused 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.). On the evidence, Grauer J. concluded that the petitioners were affiliated companies, and that the total of claims against them was more than $5 million. The evidence of the chartered accountant was that it could not be conclusively determined from the financial statements that the debtors were insolvent. However, on the totality of the evidence, including support of the monitor, the court found it was an appropriate case for relief under the *CCAA*. The Province argued that the court could not rely on the amounts set out in its letters as these were never crystallized as assessments or penalties and thus could not be valued even as contingent claims. Justice Grauer was not persuaded by this argument, noting that these parties had been battling for three years, during which time there was no hint of any suggestion that the Province would ever consider softening its position. Consequently, an assessment of stumpage and penalties in the amount proposed were a near certainty and qualified as contingent claims. The question remained as to whether the existence of these contingent claims rendered the debtor insolvent. Justice Grauer held that although courts have generally had regard to the *BIA* definition when dealing with insolvency under the *CCAA*, the modern trend was to take into account the different objectives of the *CCAA*, including the interests of a broader group of stakeholders, and a more comprehensive process to preserve the debtor company as a going concern. Justice Grauer concluded that there was a reasonably foreseeable expectation of a looming liquidity crisis that would deprive the debtor of the ability to pay its debts as they generally became due without the benefit of a stay. With respect to the scope and effect of the stay, the Province accepted that, pursuant to s. 11.02 of the *CCAA*, a stay could properly prevent the Revenue Minister from taking enforcement action under s. 130 of the *Forest Act* in order to collect an amount owing pursuant to an assessment. The Province argued, however, that the exception set out in s. 11.1(2) meant that it could not be stayed from making an assessment or taking any steps to obtain information relevant to the proposed assessment. On the evidence, Grauer J. was of the view that it was clear that the Province had already carried out its investigation. Justice Grauer concluded that the proposed assessments and penalties qualified as contingent claims. They were therefore claims that could be dealt with by way of a compromise or arrangement under s. 19(1), subject to s. 19(2). Grauer J. further concluded that under the *Forest Act* scheme, in the circumstances of this case, the issuing of an assessment, which gave rise to lien rights and recovery rights, constituted a step in "the enforcement of a payment ordered by the regulatory body" within the meaning of s. 11.1(2) of the *CCAA*. Grauer J. held that the court was concerned with the financial consequences of past actions, not the regulation of ongoing conduct. Justice Grauer also agreed with the monitor that fairness did not require a modification of the stay to permit the Province to proceed to an assessment. It was for the Province to crystallize its claim, as it was for any creditor with a contingent claim. Grauer J. was satisfied that within the claims process, appropriate provision could be made to facilitate the crystallization in a manner that preserved to the Province the ability to take full advantage of the onus of proof provisions that it would have under the *Forest Act* process: *Re Lemare Holdings Ltd.*, 2012 CarswellBC 3294, 96 C.B.R. (5th) 35, 2012 BCSC

1591 (B.C. S.C.).

The Ontario Superior Court of Justice issued a claims procedure order that established a process for the identification and determination of claims against the debtor and the debtor's current and former officers and directors, except for the debt claims of noteholders that were to be addressed in a subsequent order. The draft order provided that the monitor, with the assistance of the debtor, was to review the pre-filing and restructuring claims. The monitor would have the right to accept, revise or disallow any claim less than $100,000. The decision of the monitor regarding any claim over that amount required either the consent of the debtor or court approval. The noteholders contended that for claims over $100,000, of which there appeared to be five ranging from $100,000 to $2.5 million, the consent of the noteholders should also be required, failing which court approval would be required. Justice Newbould held that the noteholders should not have the right to require their consent; there was sufficient protection to all concerned in the fact that the monitor was central to the claims process. The extra cost and expense of the monitor or the debtor having to deal with the noteholders on these claims was not warranted. However, a compromise provision was agreed to in which the monitor would give notice to the noteholders and any other stakeholder it thought appropriate before accepting any claim in excess of $2.5 million, giving these parties a reasonable time within which to apply to court regarding the claim, failing which the monitor, with the consent of the debtor, could accept the claim. The court declined to include a number of provisions relating to set-off, on the basis that set-off is specifically addressed in s. 21 of the *CCAA* and the proposed provisions could affect the substantive rights of the parties. The draft order sought to allow the debtor, with the consent of the monitor, to appoint the claims officer; the court held that such an appointment would require approval of the court: *Re Crystallex International Corp.*, 2012 CarswellOnt 15588, 100 C.B.R. (5th) 132, 2012 ONSC 6812 (Ont. S.C.J. [Commercial List]). For further discussion of the set-off issue, see N§147 "Set-Off".

The Ontario Court of Appeal interpreted the decision of the Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 CarswellQue 12490, 2012 CarswellQue 12491, [2012] 3 S.C.R. 443, 95 C.B.R. (5th) 200, 2012 SCC 67, in the context of two appeals from the decision of the *CCAA* judge in *Nortel Networks Corp.* and *Northstar Aerospace Inc.* One appeal was allowed and the other was dismissed.

In *Re Nortel Networks*, the Court of Appeal noted that the *CCAA* judge aptly described the issues as arising "from the untidy intersection" of the *CCAA* and the powers of the provincial Minister of the Environment ("MOE") "to make orders with respect to the remediation of real property in Ontario." The *CCAA* judge had determined that, where operations had ceased on a particular property and a company could only comply with the *Environmental Protection Act* (*EPA*) or MOE orders by expending funds, the environmental liabilities involved amounted to financial obligations to pay and were to be addressed as claims in the *CCAA* process. While the MOE's appeal was pending, the *AbitibiBowater* decision was released by the Supreme Court of Canada ("SCC"), finding that a *CCAA* court could determine whether an environmental order

that is not framed in monetary terms is in fact a "provable claim"; that there must be a debt, liability or obligation to a creditor; a claim must be founded on an obligation that falls within the time limit for claims; and "that it be possible to attach a monetary value to the obligation"; the court must look at the substance of the order, not its form and apply its usual approach in dealing with future or contingent claims. The *CCAA* court must assess whether "it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim"; the court in *AbitibiBowater*, identifying four potential factors: "whether the polluting activities are ongoing, whether the debtor is in control of the property, whether the debtor has the means to comply with the order, and the effect that requiring the debtor to comply with the order would have on the insolvency process." The Court of Appeal held that the SCC decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in *CCAA* proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement. Juriansz J.A. rejected the respondents' approach as being too broad; it would result in virtually all regulatory environmental orders being found to be provable claims. Juriansz J.A. held that Parliament has struck a balance between the interests of the stakeholders and that of the public in designing the *CCAA* process. Here, the *CCAA* judge, without the benefit of the *AbitibiBowater* decision, did not explicitly consider the question whether it was sufficiently certain that the MOE would perform the remediation work ordered. Justice Juriansz was unable to read the *CCAA* judge's reasons as implicitly addressing the question whether it was sufficiently certain that the MOE would perform the remediation work. The *CCAA* judge's analysis focused on whether *Nortel* would be required to incur a financial obligation to comply with the remediation orders, without regard to whom the financial obligations would be owed. He focused on the fact that undertaking remedial work would result in the debtor expending money that would be "directed away from creditors participating in the insolvency proceeding". This analysis was in contrast to that of the SCC, which made it clear that the question was "whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order." Justice Juriansz also noted that the *CCAA* judge was well aware that it could not be said that the regulatory body had no realistic alternative but to perform the remediation work itself; the debtor no longer owned most of the properties and the MOE orders were directed to the debtor and the subsequent owners. In the result, Juriansz J.A. concluded that the MOE orders in relation to the impacted sites other than the retained portion of the one property had not been established to be provable claims that must be included in the insolvency process. The appeal was allowed: *Re Nortel Networks Corp.*, 2013 CarswellOnt 13651, 2013 ONCA 599 (Ont. C.A.).

In *Re Northstar Aerospace Inc.*, the Ontario Court of Appeal observed that the *CCAA* judge had granted the motion of the debtor and approved an agreement for the sale of assets, dismissed the MOE's motion for a declaration that a remediation order issued by the MOE under the *EPA* was not subject to the stay of proceedings previously ordered, or, in the alternative, an order lifting

the stay in respect of that remediation order. The *CCAA* judge, Morawetz J., adopted his reasoning in *Nortel*, *supra*, and concluded that, in the circumstances of this case, any financial activity the debtor was required to undertake to comply with environmental orders was stayed by the initial order, and that the MOE order sought to enforce a payment obligation". He concluded that while the MOE was entitled to file a claim for any costs of remedying the environmental conditions at one of the facilities, it was not entitled to use the remediation order "to create a priority that it otherwise does not have access to under the legislation". Justice Juriansz of the court appeal adopted his review of the *AbitibiBowater* decision as set out in *Nortel*, discussed immediately above. Juriansz J.A. was of the view that the *CCAA* judge's reasons showed that the MOE had no realistic alternative but to remediate the property; the property had been contaminated during operations while the debtor owned it, and there was no subsequent purchaser whom the MOE could order to undertake the remediation. Juriansz J.A. was of the view that the *CCAA* judge implicitly found that it was "sufficiently certain" that the MOE would remediate the lands. Further, a review of the fresh evidence supported this conclusion. Insofar as the MOE orders against the debtor were concerned, the court of appeal held that its commencement of the work in the circumstances of this case established that the MOE orders were in substance a claim provable in the bankruptcy; the appeal was dismissed: *Re Northstar Aerospace Inc.*, 2013 CarswellOnt 13653, 8 C.B.R. (6th) 154, 2013 ONCA 600 (Ont. C.A.).

The Ontario Superior Court of Justice dismissed the claim of a plaintiff in a proposed class action against the trustees of the Nortel Health and Welfare Trust ("HWT"). The Court found that the plaintiff had not pleaded a tenable cause of action for fraud. There was a tenable cause of action for constructive fraud, but constructive fraud was encompassed by the *BIA* release that had been approved in 2010. The applicant had been an employee of the debtor Nortel and was on long-term disability ("LTD"), unlikely ever to be able to return to work. Because of the *CCAA*, she and other employees or former employees will no longer receive LTD benefits. The applicant brought the proposed class action on her own behalf and on behalf of all beneficiaries of the HWT. In the *CCAA* proceedings settlement agreement, certain health and welfare benefits would continue to be paid until a specified date and the defendants were released from claims regarding the HWT. The monitor provided information to the court about the proposed settlement, including an analysis of the impact of the settlement on the stakeholders. Justice Perell noted that at the time of the settlement approval motion, a group of LTD beneficiaries under the HWT opposed it. Notwithstanding the objections, Morawetz J. authorized a *CCAA* release from all claims regarding the HWT except with respect to claims of fraud. Perell J. held that, at its core, common law fraud involves dishonest and moral turpitude. The fraud elements of common law fraud are that the defendant has the intent to deceive and makes a false statement that he or she knows is false or the defendant makes a false statement that he or she is indifferent to its truth value. Constructive fraud does not necessarily involve dishonesty or moral fraud in the ordinary sense, but a breach of a sort that would be enforced by a court of conscience. Here, Perell J. held that the release ordered covered the administration of the HWT and the investment of the HWT's assets. Perell J. was of the opinion that Morawetz J. intended

the release to have the utility of barring constructive fraud and other breaches of trust or fiduciary duty by the trustees; and that this interpretation that the *CCAA* release in the case encompassed constructive fraud but not common law fraud was supported by the express language of the release. Justice Perell concluded that the release barred constructive fraud claims, but the common law torts of fraud, deceit or fraudulent misrepresentation were not barred. Justice Perell was satisfied that the applicant had adequately pleaded the claim for constructive fraud; however, the claim was caught by the *CCAA* release. Accepting the material facts as true, there was no dishonesty or moral turpitude of the degree necessary to establish common law fraud. The Court also found that the claims were statute-barred: *Holley v. Northern Trust Co. Canada*, 2014 CarswellOnt 1571, 10 C.B.R. (6th) 1, 2014 ONSC 889 (Ont. S.C.J.). On appeal, the Court of Appeal for Ontario affirmed the decision of the motion judge who had found that a court-approved settlement granted in the debtor's *CCAA* proceedings had released the respondents from all liability and that the claims were, in any event, statute-barred. The Court of Appeal arrived at its conclusion on the basis that the claim was statute-barred: *Holley v. Northern Trust Co., Canada*, 2014 CarswellOnt 14501, 18 C.B.R. (6th) 162, 2014 ONCA 719, 14 C.C.P.B. (2nd) 161 (Ont. C.A.); additional reasons 2014 CarswellOnt 16754, 2014 ONCA 857 (Ont. C.A.).

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 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.).

In long-standing *CCAA* proceedings, the British Columbia Supreme Court reviewed the claims process approved three years earlier and, in the circumstances, determined that it was appropriate to reconsider certain claims that had been filed in accordance with the approved process. Some claims advanced through the claims process were not critically considered by either the petitioners or the monitor. Justice Fitzpatrick noted that the resolution of these issues would significantly impact how any restructuring plan could be crafted and would also impact all stakeholders in terms of how the shares under the plan would be distributed between the various stakeholders. The current proposed plan of arrangement was the only option available to the petitioners so as to avoid a liquidation and bankruptcy. Justice Fitzpatrick held that claims process orders are an important step in most restructuring proceedings, as it is of fundamental importance to determine the quantum of liabilities to which the debtor, and in certain circumstances, third parties are subject. Generally, adherence to the claims-bar date becomes even more important when distributions are made or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. Nevertheless, issues can arise that no one is able to foresee at the time of the claims process order, and the court retains its authority to determine the issues. Here, the monitor did not conduct a critical review of the claims, similar to what a trustee in bankruptcy might have done under s. 135 of the *BIA*. Fitzpatrick J. noted that in these circumstances, and in retrospect, the claims process lacked procedural safeguards that might have avoided the problems. A claims process order is intended to be a fair, reasonable and transparent method of determining and resolving claims against the estate. In certain circumstances, these objectives failed to be achieved through no fault of the participants. That does not preclude the court from considering the issues on their merit, so as to achieve the fundamental objective under the *CCAA* to facilitate a restructuring based on valid claims. Here, if the claims process results in a claim being advanced that is not truly a debt of the petitioners or results in a claim being improperly characterized, the fairness and transparency of these proceedings would be inevitably compromised: *Re Bul River Mineral Corp.*, 2014 CarswellBC 2702, 16 C.B.R. (6th) 173, 2014 BCSC 1732 (B.C. S.C.).

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2000 ABCA 285
Alberta Court of Appeal

Blue Range Resource Corp., Re

2000 CarswellAlta 1145, 2000 ABCA 285, [2000] A.J. No. 1232, [2001] 2 W.W.R. 477, 100 A.C.W.S. (3d) 956, 193 D.L.R. (4th) 314, 234 W.A.C. 138, 271 A.R. 138, 87 Alta. L.R. (3d) 352

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; Enron Canada Corp., and the Creditor's Committee (Appellants/Appellants) and National Oil-well Canada Ltd. et al. (Respondents/Respondents)

Russell, Sulatycky, Wittmann JJ.A.

Heard: June 15, 2000
Judgment: October 24, 2000
Docket: Calgary Appeal 99-18564, 99-18565, 99-18566, 99-18567, 99-18568, 99-18569, 99-18570, 99-18571, 99-18802

Proceedings: affirmed *Blue Range Resource Corp., Re* (1999), 1999 CarswellAlta 1053, 251 A.R. 1 (Alta. Q.B.)

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J.N. Thom, for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

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R. 9006(b)(1) — considered

APPEAL by creditor EC Corp. and creditors committee from judgment reported at (1999), 251 A.R. 1 (Alta. Q.B.), permitting creditors to file notices of claim, or amended claims, after expiry of claims bar date.

The judgment of the court was delivered by *Wittmann J.A.*:

Introduction

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

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

Facts

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

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

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

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

Judgment Below

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

7 Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the *United States Bankruptcy Code*, *Federal Rules of Bankruptcy Procedure*, for Chapter 11 Reorganization Cases, ("*U.S. Bankruptcy Rules*") the chambers judge chose to incorporate the test in place under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Specifically, he found that because

the situation of Blue Range was essentially a liquidation, the approach used in the *BIA* was appropriate. Under the *BIA*, late claims are permitted under almost any circumstance provided no injustice is done to other creditors. A late filing creditor under the *BIA* may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

8 It has been recently held by this court that decisions of a *CCAA* supervising judge should only be interfered with in clear cases. Deference to a *CCAA* supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) (cited with approval by Hunt, J.A. in *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.)) as follows at 272:

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

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

Analysis

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

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

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

> A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be 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

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 Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn. 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. *Specialty Equipment Cos. Inc., Re*, 159 B.R. 236 (U.S. Bankr. N.D. Ill. 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: *Mount James Mines (Que.) Ltd., Re* (1980), 110 D.L.R. (3d) 80 (Ont. Bktcy.). The Canadian standard under the *BIA* is, therefore, less arduous than that applied under the *U.S. Bankruptcy Rules*.

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

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

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

17 In deciding how to exercise her discretion, Huddart, J. applied the following factors: “the extent of the creditor’s actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the *CCAA* and the terms of the plan” (para 56). On these criteria, Huddart, J. found that it would

not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the *CCAA* proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

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

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

20 In *Lethbridge Motors Co. v. American Motors (Can.) Ltd.* (1987), 53 Alta. L.R. (2d) 326 (Alta. 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 (Eng. C.A.) 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 (Alta. C.A.).

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 (Alta. 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 *W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada* (1979), 9 Alta. L.R. (2d) 232 (Alta. Dist. Ct.) 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 (B.C. C.A.) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

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

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

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

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

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

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

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

National-Oilwell Canada Ltd. ("National")

28 National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to

the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

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

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

TransAlta Utilities Corporation ("TransAlta")

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

Petro-Canada Oil and Gas ("PCOG")

31 PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the

result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to secured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

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

Rigel Oil & Gas Ltd. ("Rigel")

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

Halliburton Group Canada Inc. ("Haliburton")

34 Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the *CCAA* proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26, 1999

requesting that its claim be included in the *CCAA* proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

Founders Energy Ltd. (”Founders”)

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

Prejudice

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

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

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

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

40 In a *CCAA* context, as in a *BIA* context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in *312630 British Columbia Ltd*. 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 dismissed.

26 CBR-ART 142
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The Treatment of Late Claims Under the CCAA

Vern DaRe*

For those unfamiliar with the *Companies Creditors' Arrangement Act* (the CCAA), it is often surprising the extent to which the Act is "silent" and dependent upon the vagaries of judicial discretion on some of the more fundamental aspects of the restructuring process. Late claimants, who file claims after a set date ("claims bar date") in an order ("claims bar order") granted under the CCAA, might feel that way about their treatment. The Act provides no guidance[1] and whether such claims are "forever barred" or "excusable" is left to be determined by the courts. Unfortunately, the courts have had little opportunity to address the issue. It is this lack of guidance, both from the legislature and judiciary, that distinguishes the recent series of cases dealing with late claims under the CCAA.

In *Re Blue Range Resources Corp.*,[2] *Canadian Airlines Corp.*,[3] *Re Royal Oak Mines Inc.*,[4] and *Re T. Eaton Co.*,[5] the court canvassed various approaches to a claimant's "lateness". These included the "BIA approach", the "US Chapter 11 approach", a "blended approach" and a "less liberal approach". While agreement was not reached as to which approach governed the treatment of late filings, the cases nonetheless provide some guidance on whether the court will allow a second chance in the circumstances. In this comment, I review these recent "late filing" cases and suggest what guidelines now govern the court's discretion in allowing or disallowing late claims under the CCAA.

Blue Range

Blue Range Resource Corporation sought and obtained court protection from its creditors under the CCAA on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. (the "Monitor") was approved by the court on April 6, 1999 in a claims bar order. May 7, 1999 was set as the date in which all claims had to be filed. This date was extended to June 15, 1999 in a second order. The relevant orders also stated that claims not proven in accordance with the set procedures shall be deemed forever barred. Following this procedure, $270 million in claims were filed. On July 23, 1999, a plan of arrangement sponsored by Canadian Natural

Resources Limited (the "CNRL Plan of Arrangement") was voted upon and approved by the eligible voting creditors of Blue Range Resource Corp. No applications were brought before that date to vary any of the claims bar orders or dates.

The respondent creditors subsequently applied to LoVecchio J. to have their late or amended claims accepted for consideration by the Monitor. He allowed the claims to be filed, thereby extending the claims bar dates and varying the claims bar orders. LoVecchio J. adopted a "flexible approach" analogous to that of the *Bankruptcy and Insolvency Act* (the BIA) on the basis that he was essentially dealing with a liquidation and refused to follow the American approach. Enron Capital Corp., the largest single creditor, and the Creditor's Committee sought leave to appeal the decision.[6] In granting leave,[7] the court provided an appellate court, for the first time in Canada, with the opportunity to decide how to treat late claims in these circumstances.[8] On appeal, the court allowed the claims to be filed, applying a "blended approach" which incorporated elements from the BIA approach, the American approach and other areas where the court has had to deal with late claims.

At first instance, LoVecchio J. was unwilling to accept the finality of the claims bar date. He refused to extinguish the substantive rights of the late claimants by strictly enforcing the claims bar orders. This would deny them any recovery where they had legitimate reasons for missing the deadline. For LoVecchio J., this outcome was too harsh and he was not going to permit it regardless of the specific terms of the Orders, the reliance placed on them by those creditors voting and approving the CNRL Plan of Arrangement and the importance of certainty in the CCAA process. While creditors were expected to compromise in a CCAA proceeding, a discount of 100% on late claims was arbitrary according to LoVecchio J. As to the value of the late claims in relation to total claims, the amount was less than 1.4 million dollars compared to 270 million dollars.

LoVecchio J. acknowledged that the CCAA did not really "give us any guidance"[9] in the matter. Notwithstanding, he was of the view that the process required flexibility and should avoid pitting creditors against one another. The court should exercise its discretion under the CCAA as a "facilitator", in an "even handed manner" that promotes flexibility and fairness in the claims procedure according to LoVecchio J.[10] To achieve this, he adopted the flexible approach under the BIA, on the basis that he was essentially dealing with a liquidation. Under the BIA approach, late claims are permitted in most circumstances provided no injustice occurs to other creditors. However, a late claimant under the BIA may only share in undistributed assets.[11] LoVecchio J. was not persuaded to adopt a more restrictive approach in a liquidation scenario as contained in the United States Bankruptcy Code for Chapter 11 Reorganization Cases (the "US Chapter 11 approach").[12] Under the approach, the creditor is required to show that its neglect in filing the claim in time was "excusable" in the circumstances. Such an approach may be more appropriate under the CCAA in a sale scenario according to LoVecchio J. Applying the less onerous BIA approach, however, he extended the claims bar dates and allowed the filing of the late claims.

Although agreeing with the result, the Alberta Court of Appeal sought to set out an approach or guidelines by which supervising judges under the CCAA could exercise their discretion in the treatment of late claims. Writing for the court, Wittmann J.A. adopted a "blended approach" incorporating elements from various approaches. Unlike LoVecchio J., Wittmann J.A. adopted certain aspects of the US Chapter 11 approach, citing with approval the following considerations made by American courts when deciding whether or not a delay is excusable: the danger of prejudice to the debtor; the length of the delay; the impact of the delay on judicial proceedings; the reason for the delay; whether the delay was within the reasonable control of the claimant; and whether the claimant acted in good faith. The burden of meeting all of these elements under the American approach is with the party attempting to file the late claim.[13] Some guidance could also be derived from the BIA approach, but Wittmann J.A. had some concerns that it was too permissive. Under the BIA, Canadian courts were willing to allow late filings on the basis of mere inadvertence, negligence or incomplete information. Wittmann J.A. concluded, that:

> 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.[14]

The Court then set down the following guidelines for CCAA supervising judges to consider when deciding whether or not to allow claims filed after a claims bar date in a claims bar order:

> 1. Was the delay caused by inadvertence (i.e., carelessness, negligence, accident, unintentionally) 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?[15]

Applying these criteria, Wittmann J.A. held that while the claimants were careless by filing late, they nonetheless acted in good faith and not with an intent to circumvent the CCAA process or gain some advantage over other creditors by "lying in the weeds" waiting for the best time to pounce.[16] Indeed, with some claims, the debtor had contributed to the delay. As to what

constitutes prejudice, the court asked whether the creditors had lost, by reason of the claimants' late filings, a realistic opportunity to do anything they otherwise might have done. The court found no prejudice by the late filings. The creditors already knew about the late claims. It is unlikely they would have voted any differently as a result of allowing the filing of the late claims. Also, the dollar value of the late claims in relation to the total amount of the "timely" claims (representing only .435% of the total amount) was not considered material. Nor was the court swayed by the argument of potentially higher costs and reduced dividends as a result of allowing the filing of the late claims (assuming the claimants were subsequently successful on their claims). For Wittmann J.A., this factor was not relevant to the prejudice criterion. That late claims potentially reduce the amount of money available to creditors in a CCAA proceeding was not prejudicial according to the Court. With the above criteria satisfied, Wittmann J.A. allowed the filing of the late claims.

Canadian Airlines Corp.

In the CCAA proceedings involving Canadian Airlines International Ltd., the province of Ontario missed the claims bar date and relied on *Blue Range* (referred to as *Enron*) to file its late claim. Canadian argued that the Court of Appeal in *Enron (Blue Range)* restricted the application of the above guidelines to liquidation-style CCAA proceedings and therefore had no application to this sale-type reorganization. In rejecting the argument, Paperny J. held that:

> This is a narrow interpretation. In my view the Court of Appeal was providing guidelines generally applicable to late claims in CCAA proceedings. Even if the Court of Appeal did intend to direct its criteria only to liquidation-style CCAA proceedings, I would in any case find the principled approach of the Court of Appeal to be an excellent framework for the exercise of my discretion; ... the prejudice to the funder of the plan, Air Canada, will necessarily need to be considered. However, the criteria described by the Court of Appeal in Enron do not in my view rule out, but instead embrace addressing the interests of such a party. The Enron criteria are consistent with the rationale of the CCAA to consider and attempt to balance the interests of all affected parties, the character of which will vary with each case and type of plan involved. Emphasis on those interests and the appropriate weight to be given to each will also necessarily vary. In my view the criteria in Enron allow for this type of analysis.[17]

Applying the *Enron/Blue Range* criteria, Paperny J. allowed Ontario to file its late claim. The province was not served with the initial order. When the voting package was mailed, it was mailed to the wrong office just three days before the claims bar date. Also, nearly a month passed before Ontario was advised that its late claim was rejected. Under the circumstances, Paperny J. had little difficulty concluding that the delay was due to inadvertence and that Ontario had acted in good faith in filing its claim. Indeed, as in *Blue Range*, Canadian had contributed to the delay according to Paperny J. Under the second criteria of "any relevant prejudice", Paperny J. considered the interests of creditors, the debtor company and the funder of the plan. In a reorganization, as opposed to a liquidation, considering the prejudice to the

funder of the plan deserved particular attention according to Paperny J. The question posed was whether Air Canada lost a realistic opportunity to do anything that it might otherwise have done because of the late filing by Ontario. Air Canada specifically knew about Ontario's claim and following the reasoning in *Blue Range*, Paperny J. held that this knowledge negated any allegation of prejudice. Canadian's tax liability to Ontario had been in dispute for several years and this was known to Air Canada. As to the materiality of the late claim, the late claim of Ontario in the amount of $2 million in relation to Air Canada's total funding cost of approximately $3 billion including anticipated dividends on creditors' claims was not considered material by the court. Having satisfied the *Enron/Blue Range* test, Ontario was allowed seven days to submit its claim.

Eaton's Restructuring, Royal Oak and Eaton's Liquidation

In *Eaton's Restructuring*, Melinda Moss sought relief from the claims bar date in order to file her late proof of claim in Eaton's 1997 restructuring under the CCAA. The claims bar date was July 15, 1997. The Plan of Arrangement was approved and sanctioned by the Court on September 12, 1997 and implemented on October 30, 1997. Blair J. refused to lift the claims bar to allow the late filing in the circumstances. He emphasized the need for certainty and a structured environment in the restructuring process. Without it, a compromise between the debtor company and its creditors so that the company is able to continue in business, was unlikely according to Blair J. Late claims potentially undermined the process at various stages including the negotiating, voting and distribution stages and could negatively impact upon the ongoing stability of the restructured company in the post-arrangement period. In particular, allowing late claims to be filed after the implementation of a Plan was tantamount to altering it according to Blair J. since late claims and others that followed (if valid) would be paid out of the post-arrangement cash and assets of the restructured debtor. At some point, the restructuring process should provide for closure or finality according to Blair J. In this regard, he cited the following passage with approval:

> The Claims Bar Date was an essential element of that process as [Eaton's] had to definitively know what claims existed, and the quantum of such claims, for the purpose of addressing future liquidity and financing requirements associated with the restructuring initiatives.[18]

He also concluded that the permissive BIA approach to late filings should not apply in these circumstances. This was not a bankruptcy or liquidation situation where, the corporate debtor ceased, its assets pooled for distribution and its assets undistributed at the time of the late filing. Rather, this was a non-liquidation CCAA proceeding. The objective was the survival of Eaton's. Its continuity depended on meeting costs in the ordinary course of business and not exposing its post-arrangement cash flow and assets to "surprise" late claims. This prejudice to Eaton's outweighed the rights of late claimants in the circumstances. On this basis, Blair J. concluded that:

> ...a less liberal approach to permitting claims that have been barred to be continued after a

> CCAA Plan has been approved, sanctioned by the Court, and implemented, is justified than is generally the case in bankruptcy situations.[19]

Applying this approach, Blair J. was unwilling to extend the claims bar date to allow Ms. Moss to file her proof of claim.

In the *Royal Oak* and *Eaton's Liquidation* cases, Farley J. distinguished *Eaton's Restructuring*. He pointed out that in *Eaton's Restructuring*, Ms. Moss filed her claim after Eaton's completed its restructuring, as an on-going entity, under the CCAA and to allow the filing of the late claim in these circumstances would have prejudiced Eaton's. This was not the situation in *Royal Oak* and *Eaton's Liquidation*. In the first case, the late claim (a Dispute to the Disallowance of a Proof of Claim) arose before the Plan of Arrangement was completed. If a Plan was subsequently formulated, it would on a *prospective* basis be able to take into account the late claim according to Farley J.[20] He also listed the following factors in support of allowing the late filing: the claimant had always intended to pursue its claim; only through inadvertence and inappropriate reliance on a previous course of conduct had it missed the deadline; no one was prejudiced in a procedural or substantive way by the late filing; and this "corrective" motion was brought forthwith upon the claimant discovering its mistake. The "less liberal approach" to late filings adopted in *Eaton's Restructuring* was not applied in these circumstances.

In *Eaton's Liquidation*, Farley J. not only considered *Eaton's Restructuring* but he also commented on the *Blue Range* decision. This being a liquidation scenario, he distinguished *Eaton's Restructuring* and allowed the filing of the late claim (a Dispute Notice to the Notice of Distribution Claim) on the basis that GE Capital had always intended to pursue its claim for distribution and only by inadvertence had not filed in a timely fashion. The "less liberal approach" to late filings was not adopted in this liquidation-type restructuring under the CCAA. More interesting was Farley J.'s treatment of the "blended approach" adopted in *Blue Range*. After citing the passage outlining the approach, and referring to the test or guidelines applicable to late claims in CCAA proceedings, Farley J. raised the following concerns:

> While I have no quarrel with that test *for that particular case*, I would caution parties and practitioners that it is inappropriate to unthinkingly adopt standards from another jurisdiction whose legislation is a different code from ours and one would think that its constitutional aspects were developed in such a way to meet the evolving needs of that jurisdiction's different culture and business needs.[21]

A General Approach to Late Claims under the CCAA?

Despite Farley J.'s reservations about adopting *Enron/Blue Range* as a test of general application to late claim filings in CCAA proceedings and Paperny J.'s support for such a test (in *Canadian Airlines Corp.*), there is no question that judicial discretion in this area is now governed by these recent "late filing" cases. Regardless of whether the test in *Blue Range* is formally recognized or characterized as one of general application or as limited to "that

particular case", the "late filing" cases provide common guidelines which, in my view, must be considered by CCAA supervising judges when exercising their discretion in relation to late claims. In this section, I outline those guidelines mandated by the "late filing" cases.

Before so doing, I would like to respond to Farley J.'s concerns, and Paperny J.'s enthusiasm for the test in *Blue Range*. In *Eaton's Liquidation*, Farley J. limited the test to the facts of that case and cautioned against adopting, without due consideration, a "blended approach" which incorporated standards from American bankruptcy law. Since those standards originated in another jurisdiction, with its own distinct culture, business needs and bankruptcy code, Farley J. considered it inappropriate to "unthinkingly" adopt foreign standards. Giving the matter some thought, however, these concerns may be overstated. Despite its origins, significant guidance to treating late claims may still be derived from American jurisprudence. As Houlden and Morawetz have pointed out, American jurisprudence and authorities are "of assistance in interpreting" bankruptcy matters.[22] The authors have also noted the increasing convergence of bankruptcy regimes.[23] This development is a likely consequence of the integrating economies of North America.

By limiting the *Blue Range* test to the facts of the case, Farley J. may have downplayed another development. In *Royal Oak* and *Eaton's Liquidation*, he considered several criteria before allowing the late claims. These included asking: Whether the "lateness" was due to the inadvertence and inappropriate reliance of the claimant? Whether the claimant took "corrective"action forthwith upon discovering it was late? Whether any party was prejudiced by the late filing? Whether the CCAA proceeding was a restructuring or liquidation and at what stage in that proceeding was the late claim filed (i.e., before or after implementation of the Plan or distribution)? Interestingly enough, these are virtually the same criteria applied in *Blue Range*, which suggests that they are not limited in application to the facts of that case. In fact, to go further, I would argue that what emerges from the "late filing"cases is a somewhat consistent and general approach to the filing of late claims under the CCAA.[24]

In this regard, I agree with Paperny J. in *Canadian Airlines Corp.* that the test/criteria in *Enron/Blue Range* provides a framework to late claims under the CCAA regardless of whether the proceeding is a liquidation or reorganization. In the latter situation, Paperny J. pointed out that under the second criteria of "any relevant prejudice", a critical consideration is whether there is any prejudice to the funder of the reorganization. However, in her enthusiasm for the test, Paperny J. did not address the situation where there is a restructuring of an on-going entity and the late claim arises after the CCAA Plan has been sanctioned and implemented as in *Eaton's Restructuring*.

In this scenario, under the second criteria of prejudice, the concerns raised by Blair J. in *Eaton's Restructuring* seem appropriate. Do the late claims pose a threat to the continuity and survival of the debtor company? If allowed to be filed (and proven valid), will they deplete post-arrangement funds and assets of the debtor? At the post-arrangement stage (where the

CCAA Plan has been approved, sanctioned and implemented), Blair J. adopted "a less liberal approach" towards late filings. This suggests that in the post-arrangement stage of a reorganization it will be more difficult to prove that the corporate debtor is not prejudiced by the late filings. In my view, the concerns raised by Blair J. under "a less liberal approach" are not inconsistent with a more general approach to late filings and that such concerns may be addressed under the second criteria of prejudice.

What then is the general approach emerging from the "late filing" cases? The following criteria or guidelines appear to govern a CCAA supervising judge's discretion when deciding whether or not to allow the filing of a claim after a claims bar date in a claims bar order:

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

"Inadvertence" may arise by carelessness, negligence, accident and is unintentional. In addition, the late claimant must have acted in good faith and not for the purpose of circumventing the process, delaying or avoiding participation in the CCAA proceedings or "lying in the weeds" to gain advantage unavailable to other creditors. Some of the considerations under the first criteria include the length of the delay; the reason for the delay and whether it was within the reasonable control of the claimant; the "corrective" measures brought by the claimant upon discovering its tardiness and whether these measures were brought in a timely manner; and the original intent of the claimant to pursue its claim.

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

The nature and stage of the CCAA proceeding are key elements in determining whether there is "any relevant prejudice" caused by the late filing. Where the proceeding concerns the reorganization of an on-going entity and the claim is made at the post-arrangement stage (i.e., after the Plan is implemented), it will be more difficult to prove that the late claim is not prejudicial given the courts adoption of "a less liberal approach" in the circumstances and its concern for the continuity of the debtor. In a sale-type scenario, the prejudice to the funder of the plan is an important consideration and in a liquidation-style CCAA proceeding, the interests of creditors are important considerations under this criterion. As pointed out by Paperny J. in *Canadian Airlines Corp.*, the "interests of all affected parties" should be considered by the court. Under this criterion, the court's determination of the existence and impact of any relevant prejudice caused by the late filing will therefore "vary with each case and type of plan involved".

The materiality of the late claim is also relevant to prejudice. When the amount of the claim in relation to the total amount of "timely" claims is low, the cost of the claim is not likely to be considered material. Another consideration under this criterion is whether the late claim was really a "surprise claim". If the debtor company, creditors and funder of the plan (in a non-liquidation scenario) were aware of the potential late claim, any prejudice may be negated

by this knowledge. Finally, the mere fact that less money will be available to other creditors if the late filings are allowed (and subsequently proven valid) is not prejudice relevant to this criterion. Taking these factors into consideration, the question posed under the criteria of prejudice is as follows: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done?

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?

Criteria 3 and 4 are not discussed in the "late filing" cases. The determination of whether or not to allow late filings is fundamentally an equitable one that involves balancing the interests of all affected parties. The final two criteria recognize that there may exceptional circumstances where the prejudice to some parties is outweighed by the equities in favour of a late filing under the CCAA.

Conclusion

With the decision in *Blue Range*, the court provided some guidance on the treatment of late claims under the CCAA. Relying on the *Blue Range* test, as well as additional refinements provided in the other "late filing" cases, it was argued that the court's discretion in this area is now governed by these guidelines.

Footnotes

* Associate, Chaiton & Chaiton. The views expressed are those of the author.

1 Section 12(2)(iii) of the CCAA simply states that claims shall be summarily determined and does not mandate a claims procedure.

2 *Re Blue Range Resource Corp.*, 1999 CarswellAlta 1053 (Alta. Q.B.); affirmed 2000 CarswellAlta 1145 (Alta. C.A.), leave to appeal to S.C.C. [2000] S.C.C.A. No. 648 (note) (S.C.C.). The novel nature of the topic was pointed out in *Blue Range*. One argument advanced in the case was that the "decision is the first of its kind in Canada and there is no appellate authority in Alberta or elsewhere precisely on point", *infra*, note 6, para. 21(3).

3 *Ontario v. Canadian Airlines Corp.*, 2000 CarswellAlta 1336 (Alta. Q.B.).

4 *Re Royal Oak Mines Inc.* (September 20, 1999) (Ont. S.C.J.) [unreported].

5 *Re T. Eaton Co.* (December 1, 2000) (Ont. S.C.J.) [unreported]; *Re T. Eaton Co.* (May 5, 1999) (Ont. S.C.J.) [unreported].

6 *Re Blue Range Resource Corp.*, 2000 CarswellAlta 30 (Alta. C.A. [In Chambers]).

7 Section 13 of the CCAA governs leave applications and generally an appellate court will exercise its power sparingly granting leave only where there are serious and arguable grounds of real and significant interest. For a review of the cases under section 13, see Houlden and Morawetz, *The 2001 Annotated Bankruptcy & Insolvency Act* (Toronto: Carswell, 2000), p. 1001.

8 *Re Blue Range Resource Corp.*, 2000 CarswellAlta 30 (Alta. C.A. [In Chambers]), para. 26. The exact wording of the question before the Alberta Court of Appeal was as follows: "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 claimant, and applying the criteria to each case, what is the result?"

9 *Supra*, note 2, para. 20.

10 *Supra*, note 2, paras. 49-52.

11 The BIA approach is a permissive one. As LoVecchio J. pointed out in para. 82, *supra*, note 2: "In essence, the BIA approach would permit almost any circumstance provided a distribution had not been made, which is really our case, and, even if one had been made, the change would likely still be permitted but without retroactive effect".

12 Chapter 11 of the United States Bankruptcy Code Annotated, section 205 (7)(c) specifically allows for the setting of a claims bar date and for relief from that date. Under the provision, the "judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed may participate except on order for cause shown". The section should be read with Rule 9006 of the U.S. Bankruptcy Rules, which allows for the extension of time in these circumstances "where the failure to act was the result of excusable neglect".

13 *Supra*, note 2, para. 12.

14 *Supra*, note 2, para. 14.

15 *Supra*, note 2, para. 26.

16 *Supra*, note 2, para. 18.

17 *Supra*, note 3, paras. 12, 13.

18 *Supra*, note 5, para. 9 (emphasis added).

19 *Supra*, note 5, para. 15.

20 *Supra*, note 4 (from the endorsement of Farley J. dated September 20, 1999).

21 *Supra*, note 5 (from the endorsement of Farley J. dated December 1, 2000) (emphasis added).

22 *Supra*, note 7, p. 3. See also *Re A. & F. Baillargeon Express Inc.* (1993), 27 C.B.R. (3d) 36 (Que. S.C.).

23 *Supra*, note 7, p. 3.

24 *Blue Range* was recently adopted as a test of general application to late claim filings in CCAA proceedings by Registrar Bray in *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)*, 2001 CarswellNB 21, 21 C.B.R. (4th) 222 (N.B. Q.B.).

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2008 CarswellOnt 6105
Ontario Superior Court of Justice

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re

2008 CarswellOnt 6105, [2008] O.J. No. 4114, 171 A.C.W.S. (3d) 21, 44 E.T.R. (3d) 31, 48 C.B.R. (5th) 41

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

Cullity J.

Heard: September 3, 2008
Judgment: September 29, 2008
Docket: 98-CL-002970

Counsel: Risa Kirshblum for Trustee under the Plan of Arrangement
Harvey T. Strosberg QC, Heather Rumble Peterson, Dawna Ring Q.C., Peter I. Waldmann, Thomas Sheppard, Kenneth Arenson, John Plater for Claimants under the Plan of Arrangement

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

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MOTION by trustee for advice and directions with respect to jurisdiction of court to relieve against late-filed or otherwise irregular applications for determination of damages by referee.

***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").

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.

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 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. Canadian Red Cross Society*, [2001] O.J. No. 2474 (Ont. S.C.J.) 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.

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 (Ont. S.C.J.), para 15. In a subsequent motion he emphasised that the Plan was intended to be effective: [2006] O.J. No. 2675 (Ont. 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.

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 (Ont. S.C.J.), 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 *Blue Range Resource Corp., Re*, [2000] A.J. No. 1232 (Alta. 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.

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 (Ont. S.C.J. [Commercial List]), 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 *Noma Co., Re*, [2004] O.J. No. 4914 (Ont. S.C.J. [Commercial List]), 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 (Alta. Q.B.); *West Bay SonShip Yachts Ltd., Re*, [2007] B.C.J. No. 2287 (B.C. S.C. [In Chambers]), leave to appeal granted from the exercise of the discretion: [2007] B.C.J. No. 1813 (B.C. C.A. [In Chambers]); and *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)*, [2001] N.B.J. No. 20 (N.B. Q.B.); see, also, *Roman Catholic Episcopal Corp. of St. George's, Re*, [2007] N.J. No. 32 (N.L. T.D.) (bankruptcy); and *Pangeo Pharma inc., Re*, [2004] J.Q. No. 706 (C.S. Que.). The earlier authorities are discussed in a helpful annotation by Mr Vern DaRe in 26 C.B.R. (4th) 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*, [1992] O.J. No. 889 (Ont. C.A.) 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.
>
> [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.

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

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 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).

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;

(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.

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.

— 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.

Motion granted.

2004 CarswellQue 292
Cour supérieure du Québec

Pangeo Pharma inc., Re

2004 CarswellQue 292, [2004] J.Q. No. 706, J.E. 2004-515, REJB 2004-54143

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, Intimée — et — Livingston International inc., Requérante

Journet J.C.S.

Audience: 4 février 2040
Jugement: 5 février 2004
Dossier: C.S. Qué. Montréal 500-11-021037-037

Avocat: Me Lewis M. Cytrynbaum, pour la requérante
Me Jacques Darche, pour l'intimée

Sujet: Insolvency

***Journet J.C.S.*:**

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

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

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

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

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

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

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

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

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

10 Le tribunal peut en vertu des pouvoirs qui lui sont conférés par la *Loi facilitant les*

transactions et les arrangements entre les compagnies et leurs créanciers[1]rendre toutes les ordonnances requises aux fins de permettre aux créanciers ainsi qu'à toute partie au litige, d'exercer pleinement les droits qui leur sont conférés par cette loi.

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

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

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

14 C'est ainsi que le tribunal de l'Alberta, confirmé par la Cour d'appel de cette province a établi les principes généraux devant guider les tribunaux dans l'acceptation 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 ?
>
> 3. Si le créancier subit un préjudice, peut-on le compenser par l'imposition de conditions précises rattachées au droit de production tardif ?
>
> 4. Si le créancier subit un préjudice ne pouvant être compensé par des mesures appropriées, peut-on envisager d'autres motifs permettant d'accorder le droit à la production tardive ?

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

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

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

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

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

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

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

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

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

30 *POUR TOUS CES MOTIFS, LE TRIBUNAL :*

31 *ACCUEILLE* la requête ;

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

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

34 *AVEC DÉPENS.*

Solicitors of record:
Borden, Ladner, Gervais, pour l'intimée

Notes de bas de page

1 L.R.C. (1985), ch. C-36;

2 Art. 10, 12 (2) (iii) de la loi précitée;

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 CarswellQue 292, [2004] J.Q. No. 706, J.E. 2004-515, REJB 2004-54143

2011 ABQB 223
Alberta Court of Queen's Bench

Royal Bank v. Cow Harbour Construction Ltd.

2011 CarswellAlta 533, 2011 ABQB 223, [2011] A.W.L.D. 2213, 201 A.C.W.S. (3d) 335, 516 A.R. 125, 76 C.B.R. (5th) 143

Royal Bank of Canada (Plaintiff) and Cow Harbour Construction Ltd. and 1134252 Alberta Ltd. (Defendant's)

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.

K.D. Yamauchi J.

Heard: March 25, 2011
Judgment: April 5, 2011
Docket: Edmonton 1003-11241, 1003-05560, BKCY 24-115359

Counsel: Bryan Maruyama for Applicant, Matthews Equipment Limited, operating as Hertz Equipment Rental
Randall S. Van de Mosselaar for Respondent, PricewaterhouseCoopers Inc., receiver of Cow Harbour Construction Ltd.

Subject: Insolvency; Corporate and Commercial

Table of Authorities

Cases considered by *K.D. Yamauchi J.*:

Air Canada, Re (2004), 2004 CarswellOnt 1843, 49 C.B.R. (4th) 175 (Ont. S.C.J. [Commercial List]) — considered

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Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, [2001] 2 W.W.R. 477, *(*sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — considered

Ivorylane Corp. v. Country Style Realty Ltd. (2004), 2004 CarswellOnt 2567 (Ont. S.C.J. [Commercial List]) — considered

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

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 243(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 11.16 — referred to

R. 11.17 — referred to

R. 11.20 — referred to

APPLICATION by creditor for leave to file proof of claim after claims bar date set out in court order.

***K.D. Yamauchi J.*:**

I. Introduction

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

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

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

II. Facts

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

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

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

7 The Monitor's Fifth Report also recommended that this Court establish a formal claims process pursuant to which those creditors claiming to be Critical Suppliers could assert their claims. By an order dated May 21, 2010 (the "May 21 Order"), this Court established a process by which the Monitor's counsel would circulate a proof of claim form to those claimants who wanted to establish themselves as a Critical Supplier (a "Proof of Claim"). The Monitor's counsel would send the Proof of Claim form to Cow Harbour's equipment lessors and persons to whom Cow Harbour owed money as at April 1, 2010. All recipients had to complete and deliver the Proof of Claim to the Monitor by June 16, 2010 ("Claims Bar Date"). The May 21 Order paras. 11(c) and 11(d) said:

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

8 Hertz retained Parlee McLaws LLP ("Parlee McLaws") in or about April, 2010, to act as its legal counsel in Cow Harbour's *CCAA* proceedings. Marilyn Ann White, Credit Manager for

Hertz ("Ms. White"), was the "sole point of contact" between Hertz and Parlee McLaws. All of Hertz's communications with Parlee McLaws ultimately went through Ms. White. Ms. White filed an affidavit and a supplementary affidavit in support of Hertz's application and subjected herself to questioning on her affidavit. Ms. White's supplemental affidavit specifically responded to the matters arising out of her questioning

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

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

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

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

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

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

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

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

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

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

III. Issue

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

IV. Discussion

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

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

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

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

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

1. Inadvertence and Good Faith

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

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

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

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

subsequently filed a supplemental affidavit.

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

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

27 Hertz's statement that it was not lying in the weeds is not sufficient. Further, the Receiver argues that there is no evidence before this Court to indicate why Hertz did not file its Proof of Claim in a timely manner. While this Court agrees with the Receiver that it is Hertz's onus to show why it requires an extension, Romaine J. in *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.), 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 List]), allowed the claimant to file its late notice when counsel had acknowledged that it was through its inadvertence that the notice had not been filed on time, and that corrective action was taken promptly and that the extension of time would not cause a hardship to any interested party or prejudice the debtor company's reorganization.

31 This Court does not countenance solicitors' negligence, but in the unique circumstances of this case where there are 3 solicitors from the same firm dealing with numerous clients involved in a *CCAA* matter, one can see how the solicitors might be inadvertent. In fact, throughout this Court's involvement in this matter, Parlee McLaws has made submissions which, at the same time, support and contest a particular approach to a matter. One would have

thought that solicitors with the experience of those involved in this matter would never allow something like this to happen.

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

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

2. Prejudice

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

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

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

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

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

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

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

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

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

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

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

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.

Application granted.

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2012 ONSC 4113
Ontario Superior Court of Justice

McSherry v. Zimmer GMBH

2012 CarswellOnt 17147, 2012 ONSC 4113, 226 A.C.W.S. (3d) 351, 36 C.P.C. (7th) 318

Gloria McSherry, Plaintiff and Zimmer GMBH, Zimmer, Inc. and Zimmer of Canada Limited, Defendants

Eric Kenneth Mets and Karen Griffiths, Plaintiffs and Zimmer Holdings Inc., Zimmer, Inc., Zimmer GMBH, and Zimmer of Canada Limited, Defendants

Perell J.

Heard: July 5, 2012
Judgment: July 13, 2012
Docket: 10-CV-408365CP, 10-CV-413110CP

Counsel: David A. Klein, Douglas Lennox, Robert Kugler, for Plaintiffs in McSherry v. Zimmer GMBH
Vincent Genova, Sakie Tambakos, for Plaintiffs in Mets v. Zimmer Holdings Inc.
Peter J. Pliszka, for Defendants

Subject: Civil Practice and Procedure

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Ford v. F. Hoffmann-La Roche Ltd. (2001), 2001 CarswellOnt 3308, 15 C.P.C. (5th) 76 (Ont. S.C.J.) — referred to

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Genier v. CCI Capital Canada Ltd. (2005), 2005 CarswellOnt 1141, 14 C.P.C. (6th) 297 (Ont. S.C.J.) — referred to

Gorecki v. Canada (Attorney General) (2004), 2004 C.E.B. & P.G.R. 8091, 2004 CarswellOnt 1266, 47 C.P.C. (5th) 151 (Ont. S.C.J.) — referred to

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Jones v. Zimmer GMBH (2011), 2011 CarswellBC 2307, 2011 BCSC 1198 (B.C. S.C.) — referred to

Lau v. Bayview Landmark Inc. (2004), 50 C.P.C. (5th) 113, 2004 CarswellOnt 2710, 71 O.R. (3d) 487 (Ont. S.C.J.) — referred to

Nutech Brands Inc. v. Air Canada (2008), 2008 CarswellOnt 1494, 59 C.P.C. (6th) 166 (Ont. S.C.J.) — referred to

Paramount Pictures (Canada) Inc. v. Dillon (2006), 2006 CarswellOnt 3536, 29 C.P.C. (6th) 13, 53 C.C.P.B. 88, 24 E.T.R. (3d) 189, 2006 C.E.B. & P.G.R. 8205 (Ont. S.C.J.) — referred to

Pollack v. Advanced Medical Optics Inc. (2011), 2011 CarswellOnt 4465, 2011 ONSC 1966, 21 C.P.C. (7th) 291 (Ont. S.C.J.) — considered

Ricardo v. Air Transat A.T. Inc. (2002), 2002 CarswellOnt 1394, 21 C.P.C. (5th) 297 (Ont. S.C.J.) — referred to

Ricardo v. Air Transat A.T. Inc. (2002), 22 C.P.C. (5th) 285, 2002 CarswellOnt 1764 (Ont. Div. Ct.) — referred to

Sauer v. Canada (Attorney General) (2010), 2010 CarswellOnt 5814, 2010 ONSC 4399 (Ont. S.C.J.) — referred to

Setterington v. Merck Frosst Canada Ltd. (2006), 26 C.P.C. (6th) 173, 2006 CarswellOnt 506 (Ont. S.C.J.) — referred to

Sharma v. Timminco Ltd. (2009), 99 O.R. (3d) 260, 2009 CarswellOnt 6583 (Ont. S.C.J.) — referred to

Simmonds v. Armtec Infrastructure Inc. (2012), 2012 ONSC 44, 2012 CarswellOnt 1112 (Ont. S.C.J.) — referred to

Smith v. Sino-Forest Corp. (2012), 2012 CarswellOnt 485, 2012 ONSC 24 (Ont. S.C.J.) — referred to

VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. (2000), 4 C.P.C. (5th) 169, 2000 CarswellOnt 4681 (Ont. S.C.J.) — referred to

Whiting v. Menu Foods Operating Ltd. (2007), 2007 CarswellOnt 6726, 53 C.P.C. (6th) 124 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, R.S.B.C. 1996, c. 50
Generally — referred to

s. 16 — considered

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 12 — considered

s. 13 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

s. 38 — considered

s. 106 — referred to

Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

Rules of Practice, R.R.O. 1980, Reg. 540
R. 75 — considered

Carriage and stay motions brought under the *Class Proceedings Act, 1992*.

***Perell J.*:**

A. Introduction

1 There are 4 Ontario, 2 Québec, 1 Alberta, 1 British Columbia, 1 New Brunswick, and 1 Nova Scotia class action that are in play, 10 in all. There was also a Québec action, now discontinued. Now before the court are carriage and stay motions under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6. These motions require an analysis of the problematic of multiple class actions across Canada.

2 The motions explore the problem of how to determine the carriage of an Ontario class action when there are concurrent class actions in several provinces, some of them cohort class actions, some of them rival class actions, some of them regional class actions, some of them

national class actions, some of them opt-in class actions, some of them opt-out class actions, some of them active class actions, and some of them dormant claim-staking class actions. Of particular importance to the motions now before the court is the difference between opt-out class actions and opt-in class actions. Also important is the role of consortiums comprised of class counsel to the problematic of multiple class actions across the country.

3 Gloria McSherry, the plaintiff in *McSherry v. Zimmer et al.*, which is a proposed regional Ontario class action and which is in cohort with *Jones et al. v. Zimmer GMGH et al.*, a certified British Columbia national opt-in class action, moves for an order staying three proposed national Ontario class actions; namely: *Mets et al. v. Zimmer GMBH et al*, *D'Anna v. Zimmer GMBH et al*, and *Ducharme et al. v. Zimmer Inc*. and for an order granting carriage to *McSherry*, whose lawyers of record are Klein Lyons, a British Columbia firm with an Ontario office.

4 Eric Kenneth Mets and Karen Griffiths, the plaintiffs in *Mets* (one of the targets of Mrs. McSherry's motion) move for an order staying *McSherry* and for an order granting carriage to *Mets*, whose lawyers of record are Rochon Genova LLP, who are members of a consortium of four Ontario law firms and one Saskatchewan law firm with an Ontario office. Mr. Mets and Ms. Griffiths submit that *Mets*, their proposed national class action, should not give way to the cohort of *Jones* and *McSherry* and should be granted carriage with *McSherry, D'Anna* and *Ducharme* being stayed.

5 Mr. Mets and Ms. Griffiths submit that *Mets*, their Ontario national class action, has advantages over the cohort of *Jones* and *McSherry*, including the features that: (a) *Mets* is in a national action; (b) *Mets* is an opt-out class action, which, it is submitted, better protects class members from across the country; (c) *Mets* includes valuable causes of action egregiously missing from *Jones* and *McSherry*; (d) *Mets* is much further advanced than *McSherry* and not that far behind the defective *Jones*; and (e) *Mets* is supported by a consortium of law firms, some of whom have started the other proposed class actions across the country.

6 The defendants Zimmer GMBH, Zimmer, Inc., Zimmer of Canada Limited and Zimmer Holdings Inc. (collectively "Zimmer") attended the carriage and stay motions. They did not take sides in the contest between Klein Lyons and Rochon Genova LLP, but the Zimmer defendants did make three requests. The first request is the sensible request that the court should grant carriage to only one Ontario action and should stay the other Ontario actions. The second request is that the Ontario court should make a suggestion to other courts across the country to

stop the piling on of class actions against Zimmer. (I take this request with a grain of salt because Zimmer is opposing certification of any class actions against it.) The third request is that if the Ontario court grants carriage to *Mets*, it should not attempt joint case management with the British Columbia court managing *Jones*, because joint management would be inefficient given that there is no cooperative arrangement between Klein Lyons and Rochon Genova LLP, on the plaintiffs' side of the cases. However, Zimmer would have no objection to a joint case management of *Jones* and *McSherry* given the common denominator of one law firm, Klein Lyons, representing the plaintiffs' side of the actions.

7 As the discussion below will reveal, on the carriage and the stay motions, the parties' evidence and arguments ranged over the broad territory of the problematic of multiple class actions and the factors that the court may or should consider when deciding whether to award carriage to one action over others.

8 For the reasons that follow, I stay *Mets*, *D'Anna*, and *Ducharme* and I grant carriage to *McSherry*.

B. Evidentiary Background

9 Mrs. McSherry supported her motion with her own affidavit and with affidavits from Mark Lyons. Mr. Mets and Ms. Griffiths supported their motion with affidavits from Eric Mets, Karen Griffiths, Steven Aldred, Frank Cristo, and Sonya Diesberger.

10 Mrs. McSherry of Toronto, Ontario, is the proposed representative plaintiff in *McSherry v. Zimmer et al*. Mark Lyons is a partner of Klein Lyons, the lawyer of record in Ontario's *McSherry* and British Columbia's *Jones*.

11 Eric Mets of Etobicoke, Ontario, is a proposed representative plaintiff in *Mets*. Karen Griffiths of Etobicoke, Ontario, is a proposed representative plaintiff in *Mets*. Steven Aldred of Etobicoke, Ontario, is a proposed additional representative plaintiff for *Mets*. Frank Cristo of Sudbury, Ontario, is a putative class member in *Mets*. Sonya Diesberger is an associate lawyer at Rochon Genova LLP, the lawyer of record in *Mets*.

C. Dramatis Personae

12 Zimmer Holdings Inc. is a Delaware corporation and holding company with its principal place of business in Warsaw, Indiana.

13 Zimmer Inc. is a Delaware corporation with its principal place of business in Warsaw, Indiana, where it manufacturers the Metasul Durom Acetabular, a component part of a hip implant known as the Durom Cup. It is licenced by Health Canada as a manufacturer of medical devices.

14 Zimmer GMBH is a Swiss Corporation with its principal place of business in Winterhur, Switzerland, where it manufactures the Durom Cup. It is licenced by Health Canada, as a manufacturer of medical devices.

15 Zimmer of Canada Limited is an Ontario Corporation with its head office in Mississauga, Ontario. It distributes the Durom cup and other Zimmer products.

16 Dennis Jones, a resident of British Columbia, is a proposed representative plaintiff in *Jones*. He was implanted with the Durom Cup.

17 Susan Wilkinson, a resident of British Columbia, is a proposed representative plaintiff in *Jones*. She was implanted with the Durom Cup.

18 Gloria McSherry, a resident of Ontario, is a proposed representative plaintiff in *McSherry*. She was implanted with the Durom Cup.

19 Eric Kenneth Mets, a resident of Ontario, is a proposed representative plaintiff in *Mets*. He was implanted with the Durom Cup.

20 Karen Griffiths, a resident of Ontario, is a proposed representative plaintiff in *Mets*. She is the common law partner of Mr. Mets, and she would represent the class of family members with claims under the *Family Law Act*, R.S.O. 1990, c. F.3 and comparable provincial and territorial statutes.

21 Klein Lyons is a litigation firm focusing on class actions. The firm is based in Vancouver but also has a Toronto office. It is one of the pioneers and veterans of class action litigation in Canada.

22 Rochon Genova LLP is a litigation firm focusing on class actions. The firm is based in Toronto, Ontario. It is one of the pioneers and veterans of class action litigation in Canada.

D. Factual and Procedural Background to the Class Actions Against Zimmer

23 In the various class actions that are the subject of the motions now before the court, it is alleged that the Durom Cup is defective and that if fails to adhere to bone and separates from the hip socket necessitating that those implanted with the device receive remedial surgery. I understand that approximately 5,000 persons from across Canada have been implanted with the Durom Cup.

24 On April 15, 2009, in British Columbia, Mr. Jones, who had hip replacement surgery with a Durom Cup, retained Klein Lyons about a products liability class action against Zimmer. For this action, Klein Lyons came to be retained by the Ontario Ministry of Health and Long Term Care and by the British Columbia Ministry of Health. Klein Lyons has been retained by 48 class members who received Zimmer Durom Cup hip implants. The clients are from across Canada, Alberta-1, Québec-1, and Ontario-4, including Mrs. McSherry, but the bulk of them, 42, are from British Columbia.

25 On July 24, 2009, in British Columbia, with Klein Lyons as lawyer of record, Mr. Jones and Ms. Wilkinson filed a proposed national opt-in class action against Zimmer GMBH, Zimmer, Inc. and Zimmer of Canada Limited. It will be significant to note that under the *British Columbia* legislation, the *Class Proceedings Act, 1992*, R.S.B.C. 1996, c. 50, class members from outside British Columbia participate in a class action by opting-in to it within a prescribed time period. Claimants from outside the province must take an active step to participate in the class action.

26 In *Jones*, Mr. Jones and Ms. Wilkinson advance products liability negligence claims against the defendants with respect to the Durom Cup. As presently drafted, the class members in *Jones* are persons in Canada implanted with the Durom Cup. There, however, are no derivative claims advanced for family members whose lives have been adversely affected by what has happened to the class members. There is no waiver of tort claim and Zimmer Holdings is not a named defendant.

27 Klein Lyons registered the *Jones* statement of claim with the Canadian Bar Association National Database in accordance with the practice direction established by the Canadian Judicial Council and the Uniform Law Conference of Canada. The practice direction was designed as a means to reduce the problems of multiple class actions about the same wrongdoing by giving public notice of the commencement of a class action. Notice of the *Jones* action was also posted to Klein Lyons' firm website.

28 On January 14, 2010, Justice Bowden of the British Columbia Superior Court was appointed to case manage *Jones.* As will be seen below, Justice Bowden has been an attentive and effective manager, and the litigation in British Columbia has made considerable progress.

29 Meanwhile in Ontario, on August 10, 2010, Klein Lyons filed an action for Mrs. McSherry for a proposed products liability class action for Ontario residents with respect to the Durom Cup. *McSherry* is a regional opt-out class action, and it seems to have been commenced out of an abundance of caution. Klein Lyons' focus of attention has been on advancing *Jones* in British Columbia. It appears that the plan of Klein Lyons was to use *Jones* as the main vehicle to pursue the Zimmer defendants and to utilize *McSherry* as an adjunct class action to be activated as and if necessary.

30 On October 27, 2010, with Rochon Genova LLP as lawyer of record, Mr. Mets and Ms. Griffiths commenced a proposed national opt-out class action against Zimmer Holdings Inc., Zimmer Inc., Zimmer GMBH and Zimmer of Canada Limited. In this class action, Mr. Mets would represent those class members implanted with the Durom Cup and Ms. Griffiths would represent family members with derivative claims. Recently, Rochon Genvoa has decided to add Steven Aldred, who was also implanted with a Durom Cup, as a co-plaintiff and as another representative plaintiff.

31 The statement of claim in *Mets* was not posted on the CBA National Database nor was it posted on the Rochon Genova LLP web page.

32 In *Mets*, the proposed class definitions for the national classes are:

> All persons resident in Canada, excluding residents in British Columbia and persons who opt into the Jones Action, who were implanted with the Durom Acetabular Component of the Durom System (the "Class" or "Class Members").
>
> All persons who on account of a personal relationship to a Class Member are entitled to assert a derivative claim for damages pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended, and comparable provincial and territorial legislation. ("Family Class" or "Family Class Members").

33 In *Mets*, Mr. Mets and Ms. Griffiths advance claims of negligence, conspiracy, and waiver of tort. As may be noted from the class definition above, there is also a derivative claim for damages pursuant to the *Family Law Act*, and related legislation in other provinces. Zimmer Holdings, the parent corporation, of the other Zimmer defendants is a named defendant. Rochon Genova LLP submits that the inventory of causes of action in *Mets* is far superior to the causes of action found in *Jones* and *McSherry*.

34 On November 22, 2010, with the Merchant Law Group as lawyer of record, Peggy D'Anna commenced in St. Catherines, Ontario, a proposed class action against Depuy International Ltd., Depuy Orthopaedics Inc., Johnson & Johnson Corporation, Johnson & Johnson Inc. Zimmer Inc., Zimmer GMBH, Zimmer Holdings Inc., Zimmer of Canada Limited, Stryker Canada LP, Stryker Canada Corp. Stryker Corporation, Stryker Canadian Management

Inc., and Howmedica Osteonics Corporation.

35 Ms. D'Anna was implanted with a Stryker Trident Ceramic Acetabular System and sues on behalf of similarly affected persons who were implanted with the Stryker, Depuy, or Zimmer hip implant systems referred to in the statement of claim.

36 The *D'Anna* action is proposed to be a national class action. As part of a consortium agreement, mentioned below, Merchant Law Group will agree to stay, discontinue, or consolidate *D'Anna* with *Mets.*

37 The statement of claim in *D'Anna* was not posted to the National Database, nor was notice of it posted on the Merchant Law Group's firm website. There is no evidence that any progress has been made in prosecuting the action.

38 I pause here in the chronology to say that a great deal of waste of time and money would have been avoided for all concerned if any of Klein Lyons, Rochon Genova LLP, or the Merchant Law Group had not waited two years before asking that a case management judge be appointed for the Ontario actions. Both the successful party and the unsuccessful party on these carriage and stay motions will suffer for their failure to bring the matter of the carriage of the Ontario actions to the attention of the court sooner. They have only themselves to blame for the consequences of this oversight.

39 Returning to the chronology, by the end of 2009, there was the *Jones* action in British Columbia coupled with the *McSherry* action in Ontario and the *Mets, and D'Anna* actions in Ontario. For the better part of the next two years, these actions carried on like litigation ships passing unnoticed in the dark night. Klein Lyons' focus of attention was on *Jones*, and it was apparently unaware or uninterested in what was happening in *Mets* and *D'Anna* in Ontario.

40 By the end of 2009, it was manifest that Klein Lyons was busy suing Zimmer in British Columbia with a proposed national class action, and in the context of this carriage motion, Klein Lyons submits that, in contrast, Rochon Genova LLP was doing next to nothing in advancing

Mets, the rival national proposed class action, apart from attempting to negotiate the consortium agreement, which is discussed further below.

41 As a factual matter, I find this criticism of Rochon Genova LLP to be inaccurate and extreme. It does appear that during 2010 and 2011, Rochon Genova LLP was focusing its attention on avoiding a carriage fight with the Merchant Law Group, but Rochon Genova LLP was not doing nothing to advance *Mets*. The firm was marshalling its evidentiary forces, and, behind the scenes, so to speak, it was preparing to go on stage with its certification motion material for the *Mets* action, which it eventually did deliver in early 2012.

42 I was provided with no evidence about what the Merchant Law Group was doing to advance *D'Anna* between 2010 and 2012.

43 The progress in British Columbia was manifest. On May 11, 2010, Justice Bowden held the first case management conference in *Jones*, and there have been numerous attendances since then, including an attendance on June 25, 2010, when he established a timetable for a certification motion, to be heard within a year.

44 The certification motion in *Jones* was argued in February 2011 (3 days) and April 2011 (1 day).

45 On September 2, 2011, Justice Bowden released his reasons and certified *Jones* as a national opt-in class action. See *Jones v. Zimmer GMBH*, 2011 BCSC 1198 (B.C. S.C.). The class definition for *Jones* is: "All persons who were implanted with the Durom acetabular hip implant in Canada." Justice Bowden's reasons at para. 45 indicate that Zimmer did not dispute that if the case was certified. then a national class was appropriate to allow non-residents of British Columbia to participate in the class action.

46 The Zimmer defendants in the British Columbia action appealed to the British Columbia Court of Appeal, but this did not stop the progress of the *Jones* action, which was not stayed pending the appeal. Under the British Columbia practice, the action is moving forward with

mandatory mediation and preparations for discovery. Justice Bowden has established a schedule for discoveries, exchange of expert reports, and trial. The trial has been set for October 2014.

47 In the late summer of 2011, with *Jones* having been certified, Klein Lyons decided to give some attention to the parked *McSherry*. On September 7, 2011, Doug Lennox of Klein Lyons wrote me (I am the team leader for class actions in Toronto) requesting that a case management judge be appointed for *McSherry*. Mr. Lennox advised me that *Jones* had been certified and that there were rival class actions to *McSherry* in Ontario. Klein Lyons wished directions with respect to the Ontario actions.

48 On September 13, 2011, I wrote Mr. Lennox and advised him that I would be case managing the matter. I suggested that a case conference be arranged. Mr. Lennox sent a copy of my letter to Rochon Genova.

49 Meanwhile, on September 16, 2011, under British Columbia's mandatory mediation rules, A Notice to Mediate was delivered in *Jones*. The parties began discussions to select a mediator.

50 In Ontario, there were communications between Klein Lyons and Rochon Genova during the remaining months of 2011, but no case conference was arranged.

51 On February 16, 2012, Rochon Genova wrote Justice Strathy, another member of Toronto's Class Action team, and requested that a case conference judge be appointed for *Mets*, and on February 17, 2012, Mr. Mets and Ms. Griffiths delivered their certification motion record.

52 Having received a copy of the letter to Justice Strathy, Klein Lyons reminded Rochon Genova LLP that I was already the case management judge. Arrangements were then made for a case conference, but, in the meanwhile, there continued to be activity in *Jones*, some of it taking place in Ontario.

53 On March 7, 2012, in Toronto, Ontario, the Honourable Mr. George Adams presided at a mediation session in *Jones*. Ms. Wilkinson travelled from British Columbia and Mrs. McSherry and her husband James attended. The mediation was adjourned after one day, apparently because of questions about whether Rochon Genova LLP should also be participating in the settlement negotiations.

54 On April 23, 2003, Justice Bowden established a schedule for litigation. Under the timetable, the mediation is scheduled to recommence before October 31, 2012, unless carriage issues have not been resolved by that time.

55 On May 22, 2012, Rochon Genova LLP, Stevenson LLP, Teplitsky Colson LLP, Kim Orr LLP, and Merchant Law Group signed a consortium agreement with respect to litigation against Zimmer and others. The members of the consortium had been contacted by 255 class members, 236 of whom reside outside of British Columbia.

56 The consortium agreement was not filed with the court, although several of its provisions were disclosed for the motions now before the court. The consortium agreement apparently covers claims for clients with claims arising from the Durom Cup and also with respect to the claims against Depuy and Styker, who are Zimmer competitors that manufacture a similarly designed hip implant component. I assume that the consortium members have negotiated a scheme for allocating work and sharing fees among the members of the consortium.

57 Also on May 22, 2012, with the Merchant Law Group as lawyer of record, Gilles and Iris Ducharme commenced another proposed national class action against Zimmer Inc., Zimmer Holdings, Inc. Zimmer GMBH, and Zimmer of Canada Ltd. The statement of claim in *Ducharme v. Zimmer Inc.* has not been served on the defendants. By the *Ducharme* action, it would appear that the Merchant Group was hedging its bets on the consortium agreement and circumventing the problem that Ms. D'Anna does not have a claim against Zimmer having been implanted with a Stryker implant. If carriage is granted to *Rochon Genova LLP* and the consortium, *Merchant Law Group* has agreed to discontinue or stay *Ducharme*.

58 On May 23, 2012, there was a case conference in Toronto, Ontario. A certification motion was not scheduled; all I could accomplish was to set a schedule for the carriage and stay motions

that are now before the court.

59 On May 29 and 30, 2012, the British Columbia Court of Appeal heard the argument in the appeal in *Jones*. The court reserved judgment.

60 In the run-up to the carriage motion, there apparently were unsuccessful negotiations about Klein Lyons joining the Rochon Genova LLP led consortium. It seems that Klein Lyons was prepared to consider partnering with some but not all of the consortium members. In any event, there were disagreements about what euphemistically was called the politics of class counsel consortiums and so no agreement was reached.

61 Before completing the factual background, it is necessary to mention a few things about the other actions against Zimmer with respect to the Durom Cup and, in particular, it is necessary to make some observations about the situation in Québec.

62 The Merchant Law Group has commenced proceedings in Alberta, New Brunswick, and Nova Scotia and two actions in Québec, one of which was discontinued.

63 On November 26, 2010, in Québec, the Merchant Law Group commenced an action against Zimmer and other manufacturers. This action has been discontinued for reasons that were not disclosed to me.

64 On December 10, 2010, in Québec, the Merchant Law Group commenced *Wainberg v. Zimmer Inc.*, an action by Ben Wainberg against Zimmer Inc., Zimmer GMBH, Zimmer Holdings Inc., and Zimmer of Canada Limited.

65 In addition to the two Merchant Law Group's actions, there is one other Québec action. Klein Lyons is working in collaboration with Kugler Kandestin, an experienced class action firm, which is the lawyer of record in *Richard Brunet c. Zimmer Inc. et al*. There is a pending carriage motion between Kugler Kandestin and the Merchant Law Group scheduled in Montreal

for August 15, 2012. Justice Gouin is case managing the Québec actions.

66 On April 4, 2012, the Zimmer defendants in Québec moved for a stay of *Brunet* pending the outcome of the appeal in *Jones* in British Columbia. Justice Gouin dismissed the motion. See *Brunet v. Zimmer of Canada Ltd.*, 2012 QCCS 1461 (C.S. Que.). Justice Gouin concluded that it was not in the best interests of the Québec claimants to stay the action. In paragraphs 18 to 22 of his reasons he stated:

> 18. These are very serious concerns for this Court, and they will not be resolved by the appeal of the BC Order.
>
> 19. The Court is of the opinion that the Québec Members are not adequately protected by the Common Issues to be decided in the Jones Matter and, therefore, the Motion will be dismissed and the Brunet Matter and the Wainberg Matter will not be stayed.
>
> 20. Moreover, the Court is also very concerned that, under the British Columbia *Class Proceedings Act*, 1992, the Quebec Members must be proactive in "opting-in" to belong to a class in the Jones Matter, and that they may have to be in a subclass, with a separate representative plaintiff.
>
> 21. This means, *inter alia*, retaining counsel and experts, travelling to and from British Columbia, translating supporting documents, etc., and incurring substantial fees and expenses.
>
> 22. This is not in the best interests of the Québec Members.

67 To conclude this part of my reasons, it should be noted that under the consortium agreement, if *Mets* is granted carriage and ultimately certified as a national class with the exception of a Québec action, no other actions against Zimmer will be prosecuted by the consortium. Thus, if *Mets* is granted carriage, there will be active parallel actions against Zimmer in British Columbia (*Jones*), Québec (*Wainberg* or *Brunet*) and Ontario (*Mets)*.

68 Finally, if *Mets* is not granted carriage, there apparently will be parallel actions against Zimmer in British Columbia (*Jones*), Québec (*Wainberg* or *Brunet*), Ontario (*McSherry)*, Alberta, New Brunswick, and Nova Scotia.

E. The Competing Carriage Submissions

1. Introduction

69 Relying on various factors that courts may consider when determining a carriage or stay motion, which I will discuss in some detail below, Klein Lyons and Rochon Genova LLP respectively advance arguments to justify granting carriage exclusively to their clients' proposed Ontario class action.

70 In this section of my Reasons for Decision, I will summarize the competing arguments for carriage.

2. The Rochon Genova LLP Argument for Carriage

71 Rochon Genova LLP submit that it should be granted carriage because *Mets* has claims for waiver of tort and conspiracy and derivative claims for family members, and because *Mets* joins Zimmer Holdings as a defendant. Rochon Genova LLP submits the design of its class action is far superior to *McSherry* and *Jones*, which want for these various claims.

72 Indeed, Rochon Genova LLP submits that the missing elements in *Jones* and *McSherry* *are* egregious oversights. And Rochon Genova LLP submits that for the purposes of awarding carriage, the court should judge *McSherry* and *Jones* in their current state and without regard to Klein Lyons' intentions to improve the litigation design of *McSherry* by adding a waiver of tort claim and claims for family members. Simply put, Rochon Genova LLP submit that their proposed class action is superior to *McSherry* and *Jones*.

73 Further, Rochon Genova LLP submits that *Jones* as an opt-in national class is far inferior in protecting extra-provincial class members and in being fair to defendants than is *Mets*, its national opt-out class action. Rochon Genova LLP submits that opt-in regimes are inherently inferior to opt-out regimes, because an opt-in regime requires affirmative action by class members, who may not know that they must act or who, because of practical or psychological

reasons, may fail to take the required affirmative act of opting-in, which is not required in a more inclusive and protective opt-out regime.

74 Put succinctly, Rochon Genova LLP submits that many claimants will miss access to justice if they must opt into the British Columbia action. Opt-out regimes are fairer to defendants because they are more efficient in resolving claims and particularly effective for settlements where more releases become available. Once again, Rochon Genova LLP submit that *Mets*, their proposed class action, is superior to *McSherry* and *Jones*.

75 Moreover, Rochon Genova LLP submits that in terms of progress, *Mets* is further advanced than *McSherry* and not significantly behind the inferior *Jones*. Further, it submits that there is good reason to believe that Klein Lyons will not actively prosecute *McSherry*, because, so far, it has exclusively advanced *Jones* and let *McSherry* languish. Therefore, Rochon Genova LLP submits that *Mets* should be granted carriage.

76 Rochon Genova LLP submits that if it is granted carriage, it will be able to cooperate with Klein Lyons in facilitating the case management of their respective actions and in participating in settlement negotiations with Zimmer. Rochon Genova LLP submits that the harmonious and simultaneous prosecution of class actions in more than one jurisdiction has become common place and is feasible. It submits that "global peace" can be achieved if and only if its consortium is at the bargaining table.

77 If a settlement proves illusive, Rochon Genova LLP extols the advantages of being part of a consortium because of the combined resources and expertise and experience of the members of its consortium, who have extensive experience in medical and pharmaceutical products liability class actions.

3. The Klein Lyons Argument for Carriage

78 Klein Lyons submits *McSherry* should be awarded carriage because *McSherry* when coupled with *Jones* is much further advanced than *Mets* and manifest progress has been made on both the litigation track, which is at the discovery stage with doctors and medical experts briefed

and ready to go, and also on the settlement track, where *McSherry* and *Jones* is ready for the resumption of the mediation before Mr. Adams.

79 Klein Lyons submits that, in contrast, Rochon Genova LLP has achieved very little with *Mets* other than negotiating a consortium agreement and that granting carriage to *Mets* will obstruct the progress of its cohort of *Jones* and *McSherry*. Klein Lyons says that its *Jones* action should not be held back by granting carriage to *Mets* and, practically speaking, joint case management with *Mets* would not work because Klein Lyons is not interested in partnering with the consortium and because confidentiality orders already granted by Justice Bowden make joint case management impractical.

80 Klein Lyons submits that if it is granted carriage, it will fix any deficiencies in its pleading of claims by adding a waiver of tort claim and claims for family members, and it will, if necessary, make *McSherry* a national class action to address any deficiencies in the difference between opt-in and opt-out regimes. Alternatively, it says that any deficiencies in the pleading of claims can be ameliorated by amending the pleadings in *Jones*. Once this housekeeping is done, Klein Lyons says that it will reconvene the mediation before Mr. Adams and attempt to settle the litigation, failing which it will move the *Jones* action to a common issues trial in British Columbia.

81 If there is no settlement, then Klein Lyons will ramp up the *Jones* litigation. It submits that British Columbia is the convenient forum for the main class action because there is good reason to believe that the class members are concentrated in British Columbia. (This last point, which I need not decide, is strenuously contested by Rochon Genova LLP, which insists that class membership is not concentrated in British Columbia).

82 Klein Lyons also submits that the "politics of consortium formation" in class actions has gotten out of hand and that these carriage motions provide the court with an opportunity to fix the problems by not granting carriage to *Mets*. Klein Lyons submits that there is an unjustified expectation in the class action bar that if a law firm files an action in one province and does no work or simply duplicate another's work, then it will be entitled to participate and claim a fee and a share of the global settlement. It submits that the court should discourage such conduct.

83 Putting it another way, Klein Lyons submits that the court should do something to discourage law firms from filing a class action lawsuit, doing nothing with it, and then reviving it when settlement talks begin in order to cash in on the settlement.

84 Klein Lyons main arguments, however, remains that it has earned the right to be assigned carriage of *McSherry* and the consortium has not made a contribution and granting carriage to it is unnecessary and detrimental to the progress that has been and will be made in *McSherry* and *Jones*.

F. Analysis

1. Introduction

85 In order to decide the stay and carriage motions of the case at bar, it is necessary first to say something about the problematic of multiple class actions across the country. In the first section of the analysis, I will discuss some general aspects of the problems that arise when a defendant harms many and more than one class action follows, as has occurred in the case at bar. I will focus my attention on how legislatures and courts have approached the general circumstance of multiple class actions for a mass wrongdoing. In the second section of the analysis, I will discuss the significance to the problematic of multiple class actions of the difference between opt-in class actions and opt-out class actions, both of which type of class actions are present in the case at bar. In the third section of the analysis, I will discuss the law of carriage and stay motions in the context of the problematic of multiple class actions. In the fourth section of the analysis, I will explain my reasons for awarding carriage to Klein Lyons in the case at bar.

2. The Problematic of Multiple Class Actions

86 How should legislatures and courts respond to the circumstances that there may be multiple class actions within a province about the same alleged mass wrongdoing? How should legislatures and courts respond to circumstances, like the case at bar, that there are multiple class actions across the country about the same alleged mass wrongdoing?

87 In its seminal report on class actions, *Report on Class Actions* (Ministry of the Attorney General, Ontario, 1982), the Ontario Law Reform Commission, appreciated that in the circumstances of a mass wrong, there might be more than one class action that would follow. The Commission, however, thought that it was not necessary to address expressly any problems about multiple class actions, because the court's power to stay litigation was already available to resolve any problems associated with multiple class actions. The Commission stated at p. 455 of its report:

> In the case of a mass wrong, it is easy to envisage that more than one class action, seeking similar relief, may be commenced. It is also possible that members of the class may commence individual actions against the defendant, either before a class action is brought or in ignorance of the existence of a class action on their behalf. The question that arises is whether the proposed *Class Actions Act* should contain a specific provision empowering the court to stay other class actions for the same relief or individual actions claiming similar relief. In our opinion, such an express provision is unnecessary, since a court today is able to coordinate related actions under its power to stay litigation pursuant to section 18.6 of the *Judicature Act*, R.S.O. 1980, c. 223.

88 The Ontario Legislature, however, decided that the co-ordination of class actions was worthy of some express treatment. Along with the authority provided by the *Courts of Justice Act*, R.S.O. 1995, c. 45 and the *Rules of Civil Procedure*, the Ontario Legislature enacted sections 12 and 13 of the *Class Proceedings Act, 1992*. Thus, the Legislature conferred on the Superior Court a broad discretion to manage class actions, including the power to stay actions and to grant carriage to one proposed class action and to stay other actions. The Legislatures in other provinces have provided similar powers to their courts.

89 In Ontario, s. 38 of the *Courts of Justice Act*, R.S.O. 1990, c. 43 directs that "as far as possible, multiplicity of legal proceedings shall be avoided." The obvious underlying policy is that multiple legal proceedings are inefficient, uneconomical, and embarrassing when different courts reach inconsistent outcomes and thus more than one action for the same wrongdoing should be avoided. Section 106 of the Act states: "a court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just."

90 Section 13 of the *Class Proceedings Act, 1992*, authorizes the court to "stay any proceeding related to the class proceeding," and s. 12 of the Act authorizes the court to "make

any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination." Sections 12 and 13 of the *Class Proceedings Act, 1992* state:

> **Court may determine conduct of proceeding**
>
> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> **Court may stay any other proceeding**
>
> 13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

91 The courts in Ontario have used these powers to stay Ontario actions and to assign carriage to one class action. Where two or more class proceedings are brought with respect to the same subject matter, a proposed representative plaintiff in one action may bring a carriage motion to stay all other present or future class proceedings relating to the same subject matter: *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (Ont. S.C.J.) at paras. 9-11; *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (Ont. S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (Ont. Div. Ct.); *Simmonds v. Armtec Infrastructure Inc.*, 2012 ONSC 44 (Ont. S.C.J.).

92 There should not be two or more class actions that proceed in respect of the same putative class asserting the same cause(s) of action, and one action must be selected: *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.) at para. 14. See also *Ford v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 3682 (Ont. S.C.J.), aff'd [2002] O.J. No. 2010 (Ont. C.A.). The commencement of multiple class actions in the same or other jurisdictions may be an abuse of process and a multiplicitous class action may be stayed as an abuse of process: *Duzan v. GlaxoSmithKline Inc.*, 2011 SKQB 118 (Sask. Q.B.). When counsel have not agreed to consolidate and coordinate their actions, the courts will usually select one for carriage and stay the other actions: *Lau v. Bayview Landmark Inc.*, [2004] O.J. No. 2788 (Ont. S.C.J.) at para. 19.

93 I will have more to say about the law of carriage and of stay motions below.

94 However, the powers provided to the court by the *Courts of Justice Act*, the *Rules of Civil Procedure* and the *Class Proceedings Act, 1992* - as useful as they may be to address the situation of more than one class action seeking similar relief - are in the main designed to address the problem of more than one Ontario action. Neither the Ontario Law Reform Commission nor the Ontario Legislature appear to have envisioned the problems that might emerge if the duplicative class actions were outside of Ontario.

95 The Ontario Legislature did not foresee the situation of the case at bar, now common in Ontario and other provinces, where there are multiple class actions across the country and the prospect of claimants from many provinces being class members. The *Class Proceedings Act, 1992* does not address multiple class actions across the country, and, unlike the British Columbia statute, it does not provide any special treatment for non-resident class members. In British Columbia, non-resident class members may opt into the class action. In Ontario, resident and non-resident class members are treated the same when a national class action is certified.

96 The circumstance of multiple class actions across the country would appear to be an intense version of the problem that a multiplicity of proceedings should be avoided. Defendants are confronted with defending essentially the same action in more than one province, class members may be included in more than one class action, class counsel and the defendant may be uncertain as to the size and composition of the class, there may be inconsistent determinations, and it may be difficult to determine with certainty which class members will be bound by which result.

97 The Uniform Law Conference of Canada Civil Law Section, *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations* (Vancouver, B.C., March 9, 2005) described the problematic in paras. 17 and 18 of its report as follows:

> 17. Just as the class action is generally superior to a series of individual actions, the national class action may be superior to a series of provincial class actions, even if the latter can be coordinated to a certain extent by plaintiff's counsel. The national class serves judicial economy by avoiding duplication of fact-finding, judicial analysis and pre-trial procedures and eliminates the risk of inconsistent findings. It increases access to justice by

> spreading litigation costs across a larger group of claimants, thus reducing the litigation costs of each claim, increasing both settlement incentives and compensation per claim and increasing the likelihood that valid claims will be brought forward. This in turn serves the goal of behaviour modification, serving efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.
>
> By comparison, multiple provincial class actions work against the interests of absent class members, who are the intended beneficiaries of class action legislation, and frustrate the efforts of class counsel, whose economic interests determine, to some degree, whether or not class actions are brought. Absent class members want quick and effective resolution to their claims. This outcome becomes less likely when there are thirteen overlapping actions with thirteen different counsel. The uncertainty created by the potential for multiple actions may also mean that fewer class actions will be brought, since (1) class counsel in any given jurisdiction will not know the scope of the class that he or she will eventually be granted authority to represent; and (2) this in turn will make some class actions less economically viable, since counsel will have to enter into financial arrangements with multiple counsel, thus reducing both the expected fee and potential compensation to class members.

98 However, the problem is more complex because in the class action context, a multiplicity of class actions across the country may be unavoidable because, as a Canadian constitutional law matter, the legislative power of the provinces is limited to legislating within the province and the courts of one province cannot be empowered to stop class actions in the courts of another province or territory even, if that litigation is redundant, duplicative, or unnecessary. As a matter of constitutional law, it is also very doubtful whether the federal government could impose on the provinces a supervisory tribunal to decide which province should have exclusive jurisdiction when there was more than one class action.

99 Moreover, there is also the argument that legislation to address multiple class actions across the country is, in any event, unnecessary. When the principles of the law of *res judicata* and of issue estoppel and the principles of conflicts of law, including the law of jurisdiction *simpliciter*, *forum conveniens* and the recognition of foreign judgments are added to the mix, the provincial courts may have all the authority they need to address any problems of multiple class actions. This approach was the recommendation of the Uniform Law Conference of Canada Civil Law Section, which stated in para 32 of its report, *supra*.

> 32. .... Finally, it may be possible to resolve the conflicts between competing class actions simply by using the existing structures and adapting the current rules governing jurisdiction to the national class problem. This latter approach, which we recommend, would require

> some modification of existing class proceedings legislation, including with respect to certification processes, and the development of a central class action registry.

100 Further still, apart from constitutional infeasibility precluding a meaningful statutory approach, it may be better for the provincial courts using the principles of comity between courts to address the problems with multiple class actions, because the situations of class actions are multifarious and one solution will not fit every case. Once again, the Uniform Law Conference of Canada Civil Law Section makes the point. It stated at para. 53 of its report:

> 53. While the Canadian jurisprudence on appropriate forum is well developed, its application to class actions is still emerging. However, courts have begun to consider those factors that are relevant to adjudicative efficacy and administrative efficiency in the class actions context. Some of these factors have been identified in decisions on carriage and venue motions. We expect that future decisions will further clarify the special considerations that arise in multijurisdictional situations. There will, for example, be situations in which the law in a particular province creates a cause of action that is not available in other provinces; in that case, it may be appropriate to define the class to exclude that group. There may be occasions when the interests of class members are better served through multiple coordinated proceedings than they would be served through unification in a single proceeding. There may also be competing class actions in different forums, requiring the court to choose the most appropriate forum along the traditional lines often undertaken in non-class litigation. Finally, in cases where a national class would raise so many complicating issues as to render the action impossible to resolve, the court has the residual power under legislation to simply refuse to certify the class action at all.

101 Perhaps the best that the Ontario Legislature can do was what it did; i.e., empower the Ontario Superior Court with s. 106 of the *Courts of Justice Act* and with sections 12 and 13 of the *Class Proceedings Act, 1992*, and then leave it to the court to develop incrementally the law to address any problems associated with a proliferation of class actions in more than one jurisdiction. The argument is that the courts across the country have the tools of the law of carriage motions, the law of *res judicata* and issue estoppel, the conflicts of law principles about jurisdiction *simpliciter*, *forum conveniens*, and the enforcement of foreign judgments to fashion flexible solutions to the problems of multiple class actions in more than one jurisdiction.

102 That the leave-it-to-the-courts-approach may be the best approach may be demonstrated by an illustration from the case at bar. Thus, for example, in the case at bar, Justice Gouin was in

the best position to decide that it was undesirable to have a Québec class action against Zimmer stand down because of the British Columbia action. He rejected the idea that *Jones*, the British Columbia action, should be the exclusive means for Québec class members to obtain access to justice for their claims against Zimmer. If, however, in contrast, the Québec class members had claims only for the cost of purchasing a defective product, it might have been quite appropriate, in effect, to make the Québec class members opt-in to the British Columbia action and wait for a judgment to be distributed.

103 To further complicate these considerations about whether one or more than one class action is appropriate or perhaps necessary, there is the yet unmentioned feature that class actions may involve a bifurcated trial process with a common issues trial followed by individual issues trials. It may be that Justice Gouin had this feature in mind when he decided *Brunet c. Zimmer of Canada Ltd.*, *supra*, because he identified certain matters that would be better decided in Québec and not in British Columbia. There was thus another good reason to reject having the regional action stand down and give way to a national action.

104 Viewed globally, i.e., from a pan-Canadian perspective, fewer class actions for the same relief may be better in terms of efficiency, judicial economy, and fairness to defendants, but they are not categorically better, because fewer class actions may not be the best way to provide access to justice for the class members of any particular province and the efficiencies of fewer class actions will dissipate if individual issues trials are necessary throughout the country or if different regions provide different remedies and causes of action for a particular wrongdoing.

105 My main point here is that the circumstances of each class action will be different, and the courts across the country may be in the best position to decide what is in the best interests of those litigants subject to the particular court's jurisdiction. I will return to this point, which is really about comity between courts, when I discuss the virtues respectively of *Jones* as a national opt-in class action, *McSherry* as a regional opt-out class action, and *Mets* as a national opt-out class action.

106 I move on to my next point about the problematic of multiple class actions, which is to highlight the role of class size. Class definition, which will determine the size of the class, is a very important factor in encouraging class counsel to prosecute class actions and a factor in determining whether more than one class action is desirable or necessary. Where a defendant wrongs persons across the country, a law firm considering a retainer for a class action will

consider whether a regional action with a smaller class size is sufficient or a national class action with a much larger class is necessary to justify taking on the risk of such litigation. The problematic of multiple class actions, thus, includes the problem that a court's decision about staying actions or granting carriage may affect the viability of class actions in any jurisdiction.

107 Using the case at bar as an illustration, it would appear that only Kugler Kandestin is satisfied with a regional class action. In contrast, both Klein Lyons and Rochon Genova LLP have designs on national class actions. In other cases, class counsel may be content to prosecute a regional action.

108 Sometimes, class counsel from across the country arrive at their own solutions, including the formation of consortiums in which one or more class actions are prosecuted sometimes to different degrees. Thus, a common pattern for medical device products liability class actions is for certification to be pursued both in Québec for a regional class action and also in a common law province for a national class that does not include Québec members. Another pattern, which was common in the criminal interest rate class actions, is that there is no national class but discrete regional class actions in the provinces in which the defendant carries on business. For the present purposes of the carriage and stay motions involving actions against Zimmer, the contest for carriage involves the problematic of balancing access to justice elements, including class size, with judicial efficiency elements.

109 Some of these factors and features of the problematic of multiple class actions are engaged in the case at bar and underlie the questions that the court must address in deciding the carriage and stay motions of Klein Lyons and Rochon Genova LLP.

3. Opt-in and Opt-out Class Actions and Multiple Class Actions

110 One more feature of the problematic of multiple class actions and a factor that requires special treatment because of the arguments in the case at bar is the difference between opt-in and opt-out national class actions.

111 With the passage of time since the enactment of the *Class Proceedings Act, 1992*, it may

now be forgotten that the former Rule 75 of the *Rules of Practice* was that: "Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all. In its essence, this is a rule of compulsory joinder, and if the court recognized the action as a representative action under Rule 75, the parties having the same interest were bound by the outcome *without* the right to opt-out.

112 It was in the context of this approach to representative actions that the Ontario Law Reform Commission in Chapter 12 of its *Report on Class Actions*, *supra*, discussed whether to recommend an opt-out or an opt-in regime for Ontario.

113 The Commissioners ultimately recommended against a regime where class members would have to opt-in to a class action after certification. The major problem with an opt-in regime is that it is inconsistent with the access to justice rationale that was the basic justification for class action legislation. Class members, particular those with small claims that were not economical to litigate, might not know that they had the opportunity to participate and thus they would not take the positive step of opting-in. Moreover, class members with notice of the class action option might not participate (to quote the Report at p. 468) because of "the operation of the ... social and psychological factors that inhibit persons from taking action to redress their injuries."

114 In other words, class members with claims worthy of access to justice would through ignorance, inertia, or apathy fail to take the active steps necessary to participate in a class action. Thus, the Commissioners did not favour an opt-in regime.

115 The Commissioners favoured an opt-out regime. However, they recommended that the legislation provide the court with discretion to determine whether class members should be permitted to opt-out. The factors that a court would be directed to consider in exercising its discretion to permit opting-out favoured permitting a class member to opt-out, but, in appropriate circumstances, a court would have the discretion to deny a right to opt-out.

116 The Ontario Legislature did not adopt the recommendation of the Law Reform Commission. It agreed that Ontario should not adopt an opt-in regime, but it enacted an opt-out

regime where class members had an absolute right to opt out. In Ontario, the court does not have a discretion to deny class members the right to opt-out. See: *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (Ont. S.C.J.); *Sauer v. Canada (Attorney General)*, [2010] O.J. No. 3381 (Ont. S.C.J.); *Paramount Pictures (Canada) Inc. v. Dillon*, [2006] O.J. No. 2368 (Ont. S.C.J.).

117 The *Report of the [Ontario] Attorney General's Advisory Committee on Class Actions* (February, 1992) described the merits of an opt-out regime. The report stated:

> The value of such a model is that defendants to class proceedings are assured that they face all potential claimants in one lawsuit. Those who opt-out can be specifically identified and dealt with on that basis. The opt-out model also increases the effectiveness of a class proceeding by not requiring potential litigants to take steps to be in the suit. This is particularly so in cases involving individual claims that are relatively small.

118 An opt-out regime maximizes class member participation in a class action. It is somewhat paternalistic or protectionist because class members are protected from ignorance, inertia, or apathy in pursuing their worthy claims and in achieving the behaviour management of defendants that is another aim of class actions. Opt-out regimes, in turn, maximize class size, which, as already noted above, is a factor in whether class action counsel will take on the risk associated with a class action retainer. Thus, opt-out regimes directly and indirectly facilitate access to justice and encourage class counsel to take on class action retainers.

119 Once again, however, it would appear that the decision made by the Ontario Legislature in favour of an opt-out regime did not contemplate the circumstances that class members might reside outside Ontario. The British Columbia Legislature, apparently because of jurisdictional concerns, did put its mind to the difference between resident and non-resident class members, and it enacted an opt-out regime for its residents and an opt-in regime for non-residents. Section 16 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 states:

> **Opting-out and Opting-in**
>
> 16 (1) A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.
>
> (2) Subject to subsection (4), a person who is not a resident of British Columbia may, in the

> manner and within the time specified in the certification order made in respect of a class proceeding, opt-in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.
>
> (3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.
>
> (4) A person may not opt-in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6 (1) (a), (b) and (c).
>
> (5) If a subclass is created as a result of persons opting-in to a class proceeding under subsection (2), the representative plaintiff for that subclass must ensure that the certification order for the class proceeding is amended, if necessary, to comply with section 8 (2).

120 In British Columbia, opting-in is seen as having the advantage of indicating that the non-resident accepts the jurisdiction of the court such that they would be precluded by the doctrine of *res judicata* from later suing or benefiting from a suit brought in another jurisdiction: *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (B.C. C.A.) at para. 74, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21 (S.C.C.).

121 In the case at bar, in advancing its argument in favour of Ontario's *Mets* over the coupled *Jones* and *McSherry*, Rochon Genova LLP, without going so far as to criticize British Columbia's opt-in approach for non-residents, extolled the virtues of *Mets* as encouraging and facilitating access to justice for class members not only in Ontario but across the country because it is a national opt-out class action. My own opinion is that national opt out class actions, generally speaking, are much better for access to justice than national opt-in class actions; however, in any given case, the superiority of a national opt-out class action over a national opt-in class action may be overstated or negligible.

122 The circumstances of Mr. Cristo, who is a putative class member of the *Mets* action in the case at bar may be used to demonstrate that from the perspective of access to justice, the difference between a national opt-in class action and a national opt out class action may be negligible.

123 Mr. Cristo now knows about the *Jones* action, and it provides him with a vehicle for access to justice. Provided that adequate notice is given to other putative class members, they too will be able to participate in the *Jones* action. It is not likely that many class members with serious claims will miss out on access to justice.

124 Conversely, assuming, that Mr. Cristo does not opt into the certified *Jones* and does not opt-out of a certified *Mets*, he likely would still have to take a positive step to participate in the opt-out class action because assuming that the representative plaintiff is successful at the common issues trial, Mr. Cristo would have to submit a claim form in a settlement or undertake an individual issues trial. Thus, practically speaking, from an access to justice perspective, the difference to Mr. Cristo of being a member of the opt-in *Jones* and the opt-out *Mets* may be negligible. In either case, he must eventually take a positive step in order to participate in the class action.

125 Thus, the point is that the superiority of an opt-out regime over an opt-in regime will depend on variables such as awareness of the class actions, the ability to locate class members to give them notice, the effectiveness of notice programs for the class action, class size, and the nature of the wrongdoing; visualize, in the case at bar, given the seriousness the alleged injuries, class members may be more motivated to opt-in or to submit claims in settlements of opt-out actions.

4. Carriage and Stay Motions as Solutions for the Problematic of Multiple Class Actions

126 In my opinion, the above analysis yields three general conclusions about the problematic of multiple class actions across the country. First, if there are problems with multiple class actions, those problems will be complex problems involving numerous factors, forces, and variables that will have to be balanced to find a solution. Second, the presence of multiple class actions is not always a problem or a serious problem. Third, if multiple class actions for a single wrongdoing are a problem, then the best and perhaps only approach is the one that has already evolved; i.e. to leave it to the courts to use carriage, stay, and certification motions along with developed and developing principles of comity to make decisions about what court is the appropriate venue for a national or multijurisdictional class proceeding.

127 Informed by these general conclusions and the identification of some of the factors,

forces, and variables at work, this brings the discussion again to the law for carriage and stay motions.

128 The primary consideration on a class action carriage motion is arriving at a solution that is in the best interests of all putative class members, is fair to the defendants, and consistent with the policy objectives of the *Class Proceedings Act, 1992*: *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.) at para. 48; *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (Ont. S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (Ont. Div. Ct.); *Gorecki v. Canada (Attorney General)*, [2004] O.J. No. 1315 (Ont. S.C.J.); *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (Ont. S.C.J.); *Sharma v. Timminco Ltd.*, [2009] O.J. No. 4511 (Ont. S.C.J.); *Smith v. Sino-Forest Corp.*, 2012 ONSC 24 (Ont. S.C.J.); *Simmonds v. Armtec Infrastructure Inc.*, 2012 ONSC 44 (Ont. S.C.J.).

129 In determining who should be appointed as lawyer of record in a class action, the court may consider, among other things: (a) the nature and scope of the causes of action advanced; (b) the theories advanced by counsel as being supportive of the claims advanced; (c) the state of each class action, including preparation; (d) the number, size and extent of involvement of the proposed representative plaintiffs; (e) the relative priority of commencing the class actions; (f) the resources and experience of counsel; (g) the presence of any conflicts of interest; (h) funding; (i) definition of class membership; (j) definition of class period; (k) joinder of defendants; (l) the correlation between plaintiffs and defendants; and (m) prospects of certification: *Smith v. Sino-Forest Corp.*, 2012 ONSC 24 (Ont. S.C.J.) at paras. 17-18; *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.) and [2001] O.J. No. 3673 (Ont. S.C.J.); *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (Ont. S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (Ont. Div. Ct.); *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (Ont. S.C.J.); *Whiting v. Menu Foods Operating Ltd.*, [2007] O.J. No. 3996 (Ont. S.C.J.); *Genier v. CCI Capital Canada Ltd.*, [2005] O.J. No. 1135 (Ont. S.C.J.); *Simmonds v. Armtec Infrastructure Inc.*, 2012 ONSC 44 (Ont. S.C.J.).

130 It is interesting and informative that in its report at para. 3, the Uniform Law Conference of Canada Civil Law Section recommended that in deciding whether a class action in another jurisdiction might be preferable for the resolution of the claims of all or some class members; i.e. in deciding whether to defer a class action in one jurisdiction to another jurisdiction's class action, the courts across the country should consider the list of facts that had been developed for carriage motions including: (1) the nature and the scope of the causes of actions advanced, including any variation in the cause of actions available in the various jurisdictions; (2) the theories offered by counsel in support of the claims; (3) the state of preparation of the various

class actions; (4) the number and extent of involvement of the proposed representative plaintiffs; (5) the order in which the class actions were commenced; (6) the resources and experience of counsel; (7) the location of class members, defendants and witnesses; and (8) the location of any act underlying the cause of action;

131 It should be noted that all of the factors identified above are just manifestations of what might be relevant to what is the central question on a carriage motion or stay motion; i.e. what is in the best interests of the putative class members in the particular circumstances of each case. The determination of carriage or of a stay will be the fact specific to the circumstances of each particular case.

5. Application of the Law

132 Applying the above law to the facts of this case, I grant carriage to *McSherry* and not to *Mets.* I do so because this choice is in his best interests of the class members, is fair to Zimmer, and is consistent with the policy objectives of the *Class Proceedings Act, 1992*. At this juncture, I do not think it is a close call. In my opinion, the relevant and active factors overwhelmingly favour granting carriage to *McSherry*.

133 The outcome might or might not have been different two and half years ago when the choice was: (1) between an uncertified *Jones/McSherry* on the one side and an uncertified *Mets* on the other side; or (2) between an uncertified *Jones/McSheery* on the one side and a consortium with *Mets* and other uncertified cases on the other side. But determining what the outcome might or might have been two years ago serves no useful purpose and might rub salt into the self-inflicted wound caused by Rochon Genova LLP and the consortium waiting two and half years before seeking case management and bringing a carriage motion.

134 I will, once again, use the circumstances of Mr. Cristo, who is a putative class member of the *Mets* action, to explain my reasons, for granting carriage to *McSherry* and not to *Mets*.

135 At this juncture, by granting carriage to *Jones*/*McSherry*, Mr. Cristo (or Mr. Mets for that matter) has the benefit of being a class member of a certified class action, which he can opt

into. And, he has the failsafe of the uncertified *McSherry* action should the British Columbia Court of Appeal overturn the certification of the action. Assuming the certification decision is not overturned, it is enormously beneficial and advantageous to class members to have a certified class action. This is obvious, Mr. Cristo has moved from being a putative class member to being an actual one.

136 Rochon Genova LLP argue, however, that *Jones* is an egregiously flawed class action because of the absence of a waiver and tort claim, the absence of derivate claims for family members, and the non-joinder of Zimmer Holdings and, therefore, its certification is to be discounted. That argument, however, only has traction if these flaws cannot be corrected. But, the flaws can be corrected, and then the certification of *Jones* with the failsafe of *McSherry* will be optimized.

137 Rochon Genova LLP then argues that although the flaws of *Jones*/*McSherry* can be remedied, for the purposes of deciding the carriage contest, I should still discount *Jones*/*Sherry* and fault Klein Lyons for not getting it right in the first place. I reject this argument because the primary consideration in awarding carriage is what is in the best interests of class members not what is in the best interests of class counsel attempting to win a carriage fight. I agree that the omission of family member claims is an error, but this error can be fixed, Klein Lyons plans to do so, and, it is in the best interests of class members to allow it to do so.

138 I add here that for what it is worth that, in the particular circumstances of this case, which involves serious personal injury claims, that it is doubtful that it would be appropriate or in the interests of class members to waive the tort assuming the doctrine of waiver of tort applies in the circumstances of a products liability case, which itself remains a matter of uncertainty. Similarly, in the circumstances of this case, it is debatable whether anything is to be gained in terms of defendant liability or defendant solvency by joining Zimmer Holdings or in advancing a conspiracy claim.

139 Rochon Genova LLP submits that *Mets* is to be favoured because it is further advanced than *McSherry*, and it submits that Mrs. McSherry is, in truth, not interested in advancing *McSherry* because of her allegiance and support of the *Jones* action in British Columbia. I am not impressed by this submission.

140 In my opinion, it was quite appropriate in the circumstances of this case for Klein Lyons to commence both *Jones* and *McSherry* and then to focus its attention on *Jones*. In my experience, this approach is not uncommon in class action practice where there are multiple class actions. It is frequently the situation that class actions are commenced in more than one jurisdiction and then class counsel and sometimes consortiums of class counsel agree to drive one of the class actions and park the others. This approach explains why it is common to see a series of consent certifications for settlement purposes involving one national class action and one or two regional class actions.

141 This is not to say that it will always be appropriate when there is more than one class action to park or temporarily or permanently stay one or more of the class actions. In *Pollack v. Advanced Medical Optics Inc.*, 2011 ONSC 1966 (Ont. S.C.J.), on the certification motion, Justice Strathy declined to park an Ontario action where a national class action had already been certified in British Columbia. The national class action for Ontario in *Pollack* excluded residents of Québec and British Columbia and any persons who opted into the British Columbia action.

142 Justice Strathy said there is a superficial attractiveness in terms of judicial economy and fairness to defendants who confront more than one class action to park an uncertified class action to wait for the outcome of a certified class action. He concluded, however, that upon analysis, it would not be just to stay the Ontario action and that doing so would not promote judicial economy and the fair and expeditious determination of all the issues. In *Pollack*, Justice Strathy thought that economy and fairness would be promoted by allowing both actions to proceed subject to judicious case management. Justice Strathy, however, was not being categorical, and in other situations, the attractiveness of parking one or more class actions to achieve efficiencies and judicial economy may be real and substantial and not superficial.

143 I mention the *Pollack* judgment mainly because Rochon Genova LLP relied on it heavily in support of its request for carriage. The *Pollack* judgment, however, does not help it. In granting carriage to *McSherry*, it is not being parked. Whatever action is selected for Ontario may benefit by the certification of the *Jones* action. Klein Lyons is in the best position to maximize this benefit. If the national class action does not settle or if the British Columbia Court of Appeal reverses certification, Klein Lyons can ramp up *McSherry*. Try as it might, Rochon Genova LLP cannot depreciate the value to class members, including the putative class members of *McSherry or Mets*, of the certification of a class action against Zimmer in British Columbia. Usually in a carriage contest, an important and operative factor is the prospects of certification. With *Jones* having been certified, this factor weighs heavily in favour of Klein Lyons because, save for the outstanding appeal, the prospects of certification are a certainty.

144 In deciding to award carriage to Klein Lyons for *Jones*/*McSherry*, I reflected on the fact that Rochon Genova LLP attempted to have Klein Lyons join the consortium. I also noted that Rochon Genova LLP were at pains to emphasize that it had successfully worked together with Klein Lyons and they would be able to work together again if *Mets* was granted carriage. There was no suggestion that the certification of *Jones* would be regarded as a trifling matter. The certification of *Jones* as a national class action is an important achievement for class members and putative class members. If Klein Lyons had joined the consortium or if Rochon Genova LLP had been granted carriage and a *defacto* court-ordered consortium achieved, I have no doubt that the certification of *Jones* would have been optimized and utilized and not undervalued.

145 From the perspective of what is in the best interests of class members, there is an air of unreality in the argument that *McSherry* is not sufficiently advanced in comparison to *Mets* or that Mrs. McSherry is not sufficiently loyal to her own class action. Apparently, Mr. Adams is waiting to attempt to mediate a settlement of whatever class action emanates out of Ontario, and for the purposes of negotiating a settlement, there is no difference between *Mets* and *McSherry*, save for who is at the bargaining table. Both actions are sufficiently advanced for the purposes of settlement negotiations that may be productive for class members in Ontario.

146 In the circumstances of the case at bar, I do not regard the fact that *Jones* is an opt-in national class action as a reason for awarding carriage to *Mets*. The dangers of Ontario residents being left out of *Jones* are sufficiently addressed by the regional *McSherry*. The interests of Québec residents are addressed by the regional *Wainberg* or *Brunet.* The interests of British Columbia residents are addressed by *Jones*, and the interests of class members in other provinces can be protected by a robust notice program in *Jones* or perhaps by the class actions that have been commenced in those other provinces.

147 In certifying national class actions, Ontario courts may be taken to be concerned about the rights of residents of other provinces, but in the circumstances of the case at bar, it would be narcissistic and arrogant to think that an Ontario national opt-out class action is better than *Jones* in protecting the class members of other provinces.

148 In reaching my decision to award carriage to Klein Lyons for *Jones*/*McSherry*, I focused

on what was in the best interests of class members. I do not see how carriage motions can be used to regulate the so-called politics of class counsel consortiums. Just as war may be described as failed diplomacy, a carriage contest typically follows failed negotiations to arrive at an agreement to share remuneration and the burden and cost of the litigation. But it is not the court's role to fashion or force a consortium. See *Setterington v. Merck Frosst Canada Ltd.*, *supra*.

149 Partnerships and joint ventures of various sorts inherently present the problem of finding a measure for sharing the benefits and burdens of the partnership, but I do not see how or why the court should use the occasion of a carriage contest to regulate sharing in the marketplace of class action litigation.

150 If it is true that some law firms file a class action lawsuit, do nothing with it, and then purport to revive it when settlement talks begin to cash in on the settlement, then the deterrent against the poaching is to earn carriage by advancing the interests of the putative class members and winning the carriage contest. The "no-sweat-no-sweet" principle is already a factor in the calculus of factors the courts may consider.

151 In making my last comments, I am not to be taken, even by inference, to suggest that Rochon Genova LLP or any of its consortium partners are poaching on the work of Klein Lyons. As noted above, I am satisfied that Rochon Genova LLP was studying and preparing to go on stage with its class action. Rochon Genova LLP is well qualified to be granted carriage, and it did enough to be awarded carriage. Klein Lyons, however, did more and is in a better position to do more still.

152 In all the circumstances, it is in the best interests of class members to grant carriage to Klein Lyons for *McSherry*. I stay *Mets*, *D'Anna* and *Ducharme*. I declare that no other action may be commenced in Ontario on behalf of individuals implanted with the Durom Cup with respect to the subject matter of *McSherry* or *Jones* without leave of the court.

G. Conclusion

153 For the above Reasons, I grant carriage to Klein Lyons for the *McSherry* action.

154 The convention is that costs are not awarded in a carriage contest. However, if the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Klein Lyons' submissions within 20 days of the release of these Reasons for Decision followed by Rochon Genova's LLP submissions within a further 20 days.

Order accordingly.

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