2022 01G 0709

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**"); and

AND IN THE MATTER OF the Companies Creditors Arrangement Act R.S.C., 1985 c. C-36 as Amended (the "**CCAA**")

MEMORANDUM OF FACT AND LAW OF APPLICANT

SUMMARY OF CURRENT DOCUMENT

Court File Number(s):	2022 01G 0709
Date of Filing of Document:	May 12, 2023
Name of Party Filing or Person:	Grant Thornton Limited, in its capacity as Court-Appointed Monitor (the "**Applicant**") of the Company
Application to which Document being filed relates:	Notice of Motion filed by the Applicant pursuant to Rule 7.04 (2) (b) of the *Rules of the Supreme Court, 1986* to add CFI Newspar Holdings Inc., as a party to these proceedings and to make changes to the 4th Amended ARIO to extend the stay of proceedings.
Statement of Purpose in filing:	Memorandum in support of the Application
Court Sub-File Number, if any	N/A

FACTS:

1. As of February 21, 2022, the Company was insolvent and was unable to meet its debt obligations as they became due. As a result, PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc., and Bridging Income Fund LP ("PWC") applied for an interim receivership order pursuant to s. 47(1) of the Bankruptcy and Insolvency Act, RSC 1985 c. B-3 (the "**BIA**") over substantially all the assets and undertaking of the Company, which order was issued by this Honourable Court on the 21st day of February, 2022 (the "**Interim Receivership Order**"). Pursuant to the Interim Receivership Order, Grant Thornton Limited ("**GTL**") was appointed as Interim Receiver of all the assets and undertaking of the Company, with the exception of those assets and undertakings that were carved out of the receivership (defined therein as the "**Excluded Property**").

2. On the 8th day of March 2022, GTL as Interim Receiver made an application to this Honourable Court declaring that the Company was a company to which the CCAA applied and requesting protection under the CCAA. As a result of that application, the Court granted an initial CCAA Order on the 11th day of March 2022 (the "**Initial CCAA Order**"), and the Court subsequently granted the Amended and Restated Initial Order (the "**ARIO**"). In both orders GTL was appointed and confirmed as CCAA Monitor.

3. In the Initial CCAA Order, this Honourable Court authorized the Monitor, on behalf of the Company, to enter into a DIP Financing Agreement with the DIP Lenders referenced in the Initial CCAA Order (the "**DIP Lenders**").

4. Since the 18th day of March 2022, the Monitor had been running a SISP as contemplated in the order of this Honourable Court issued on the same day as the ARIO (the "**SISP Order**").

5. On the 31st day of May 2022, the Monitor made an application to this Honourable Court seeking an extension of the stay period until the 2nd day of September 2022 and amending the SISP procedures to extend the dates of the Phase 2 Bid Deadline and each date thereafter in order to correspond with the CCAA stay period (the "**Amended SISP Order**"). The extension was requested to allow the Monitor to arrange the completion of a National Instruments 43-101 Technical Report with the expectation that it would assist in increasing the purchase price for the Company's assets. The court granted these amendments by Order dated the 10th day of June 2022.

6. As outlined in the Monitor's Fifth Report, the Monitor received multiple bids on the Company's assets through the SISP process. The Monitor made a recommendation to the DIP Lenders as to its preferred choice with respect to the bids received. The DIP Lenders were in support of the Monitors recommendation and the Monitor therefore notified the successful bidder (the "**Successful Bidder**") on August 18, 2022.

7. On the 30th day of August 2022, this Honourable Court issued the 2nd Amended ARIO extending the CCAA stay period until the 17th day of October 2022 and amended the SISP procedures in order to allow time to (i) complete the SISP; (ii) enter into a definitive agreement with the Successful Bidder; and (iii) obtain court approval.

8. As outlined in the Monitor's Fifth Report, the Monitor completed the SISP and awarded, with the consent and the agreement of the DIP Lenders, the sale of the Company's assets to the Successful Bidder.

9. As outlined in the Monitor's Sixth Report, the Monitor and the Company worked diligently to complete the definitive agreement. However, the Successful Bidder failed to top up the agreed upon deposit as required by the SISP, and therefore failed to complete a key deadline as outlined in the SISP. As a result of this material adverse change, the agreement with the Successful Bidder was terminated. The Monitor then filed with this Court a Material Adverse Change Report.

10. On the 12th day of October 2022 this court issued the 3rd Amended ARIO extending the CCAA stay period until the 26th day of February, 2023 to allow the senior secured creditors and the DIP Lenders time to determine next steps as it related to the Company assets, including the possibility of another SISP or a different type of sale or liquidation process.

11. Since the 12th day of October 2022, the Monitor and the Company had been diligently working to solicit bids from parties that previously submitted proposals during the SISP. As of January 26, 2023, the Monitor selected, and the DIP Lenders approved a new successful bidder (the "**Purchaser**").

12. On the 13th day of February 2023, the Monitor entered into a Letter of Intent with the Purchaser.

13. On the 21st day of February 2023, this court issued the 4th Amended ARIO extending the CCAA stay period until the 31st day of May, 2023 to allow the Purchaser to (i) complete its due diligence; (ii) enter into a Definitive Agreement; and (iii) obtain court approval and close the transaction.

14. The Monitor and the Purchaser have been diligently working to complete the Definitive Agreement. During the negotiation, the Purchaser confirmed its intention to acquire the assets of Newspar, a general partnership, and maintain the existing corporate structure of Canada Fluorspar Inc., Canada Fluorspar (NL) Inc., and Newspar. CFI Newspar Holdings Inc. ("**CFI Newspar**") is one of the partners of Newspar, with the other partner being Canada Fluorspar (NL) Inc., which is already a party to these proceedings. Newspar holds assets that the Purchaser would like to acquire, including an environmental indemnity from the Province of Newfoundland and Labrador in relation to the activities of the mine, certain mining licenses and leases, and certain legacy equipment. The Purchaser therefore requires that CFI Newspar be added to these proceedings so that the Purchaser can acquire all of the assets of both partners in Newspar.

15. CFI Newspar is insolvent and is an entity to which the CCAA applies. The claims against CFI Newspar exceed Five Million Dollars ($5,000,000.00).

16. The Monitor is therefore requesting that CFI Newspar be added to these CCAA proceedings.

17. As set out in the Clarke Affidavit, the Monitor believes that the addition of CFI Newspar to the within proceedings would be in the best interest of the Company and its stakeholders, including the senior secured creditors as it will allow for the completion of the proposed transaction, and that it would not materially prejudice any stakeholder or creditor.

18. In addition, the Monitor and the Purchaser require additional time to complete the Definitive Agreement, obtain court approval and close the proposed transaction.

19. As set out in the Clarke Affidavit, the Monitor believes that the extension to the stay of proceedings would be in the best interest of the Company and its stakeholders, including the senior secured creditors, and that it would not materially prejudice any stakeholder or creditor.

20. The senior secured creditors and the DIP Lenders have consented to the addition of CFI Newspar to these proceedings pursuant to Rule 7.04(2) (b) of the *Rules of the Supreme Court, 1986* and have also consented to the extension of the stay of proceedings under section 11 of the CCAA.

ISSUES:

21. The issues before this Court are as follows:

(a) Whether CFI Newspar meets the criteria for protection under the CCAA;

(b) Whether CFI Newspar should be added to these proceedings; and

(c) Whether the requested amendment to the 4th Amended ARIO to extend the stay of proceedings should be granted.

LAW AND ARGUMENT

Whether CFI Newspar meets the criteria for protection under the CCAA

22. The CCAA applies to a "debtor company" with liabilities exceeding Five Million Dollars ($5,000,000.00). A "debtor company" is defined as, among other things, a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the BIA.

23. A "company" and a "debtor" are defined under the CCAA to include a company incorporated by or under an Act of the legislature of a province. Section 2 of the CCAA provides as follows:

> **2 (1)** In this Act
>
> **company** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies; (compagnie).
>
> **debtor** company means any company that:
>
> (a) is bankrupt or insolvent,
>
> (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

> (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
>
> (d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (compagnie débitrice)

Reference: *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, s. 2(1) [TAB 1]

24. As CFI Newspar Holdings Inc., is incorporated pursuant to the *Corporation Act* (Newfoundland and Labrador), RSNL 1990, c C-36, it qualifies as a "company" for the purposes of the CCAA.

25. Application of the CCAA is set out in Section 3 of the CCAA, which provides as follows:

> **3 (1)** This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Reference: *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, 3(1) [TAB 2]

26. The Financial Statements of Newspar and Canada Fluorspar (NL) Inc. (and including Canada Fluorspar Inc.), show liabilities in an amount of Two Hundred Eighty-Five Million Seven Hundred Seventy Eight Thousand Seven Hundred and Sixty Dollars ($285,778,760.00), which greatly exceeds the Five Million Dollar ($5,000,000.00) threshold. CFI Newspar is owned One Hundred percent (100%) by Canada Fluorspar (NL) Inc., which this Honourable Court has already determined to be insolvent pursuant to the Initial Order. CFI Newspar owns a partnership interest in Newspar, which this Honourable Court has also determined to be insolvent pursuant to the Initial Order.

27. As Newspar is a partnership, each individual partner is responsible for the debts and obligations of the partnership. Newspar is a guarantor of the amounts due and owing under the Bridging Finance Inc. debt which exceeds well over Five Million Dollars ($5,000,000.00) and makes the CCAA applicable in this instance. Each of Canada Fluorspar (NL) Inc., and CFI Newspar are co-covenantors to the Newspar guarantee and the Bridging Finance Inc., debt. Bridging Finance Inc. demanded payment of the Bridging Finance Inc. loan in February, 2022.

28. The insolvency of a debtor is assessed at the time of the filing of the CCAA application. The CCAA does not define *"insolvent"*, but the definition of "insolvent *person*" under BIA, is commonly referenced by Courts in assessing whether an applicant is a debtor company in the context of the CCAA.

29. In addition to the test under the BIA, it has consistently been held that a corporation is insolvent if there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity crisis that will result in the debtor company not being able to pay its debts as they become due without the benefit of a stay of proceedings. Section 2(1) of the BIA provides:

> **2(1)** insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (personnel insolvable) [...]
>
> **Reference:** *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3, as amended, section 2(1) [TAB 3]

30. In *McEwan Enterprises Inc.*, the court confirmed that the CCAA does not define insolvency and that when interpreting the meaning the courts have take guidance from the BIA, in particular section 2(1). The court stated as follows:

> The CCAA applies to a "debtor company" where the total claims against such company exceeds $5 million. The terms "debtor company" is defined in Section 2 of the CCAA. In essence, a debtor company is an insolvent company.
>
> The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B–3, as amended (the "BIA"), which defines an

> "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests: (a) is for any reason unable to meet his obligations as they generally become due; (b) has ceased paying his current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due. (See: Stelco Inc., Re (2004), 48 C.B.R. (4th) 299 at paras. 21–22 (Ont. Sup. Ct. J. [Commercial List]), leave to appeal to C.A. refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 336 [Stelco];).
>
> The test for "insolvent person" under the BIA is disjunctive. A company satisfying any one of the above criteria is considered insolvent for the purposes of the CCAA.
>
> A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in MEI being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court. (see: Stelco, at para. *40*).
>
> **Reference:** *McEwan Enterprises Inc.,* 2021 ONSC 6453 at paragraphs 24-30 [TAB 4]

31. CFI Newspar is insolvent as a result of the following;

    (a) CFI Newspar's current liabilities exceed its current assets;

    (b) The partnership, being Newspar, is insolvent; and

    (c) The sole shareholder of CFI Newspar and the other partner of Newspar, being Canada Fluorspar (NL) Inc., is insolvent;

32. Section 9(1) of the CCAA provides that an application under the CCAA may be made to the court that has jurisdiction in the province where the debtor company has its *"head office or chief place of business"*:

> **9 (1)** Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no

> place of business in Canada, in any province within which any assets of the company are situated.
>
> **Reference:** *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, s. 9(1) [TAB 5]

33. CFI Newspar has its head office located in the Province of Newfoundland and Labrador. Additionally, CFI Newspar was incorporated to hold a 0.001% partnership interest in Newspar, which also has its head office in the Province of Newfoundland and Labrador. Therefore, this Court has jurisdiction to hear this application for relief under the CCAA.

Whether CFI Newspar should be added to these proceedings

34. The current parties to these proceedings are Canada Fluorspar Inc., Canada Fluorspar (NL) Inc., and Newspar which is a partnership with two partners, one being Canada Fluorspar (NL) Inc. and the other being CFI Newspar. Newspar and Canada Fluorspar (NL) Inc., have already been deemed debtor companies to which the CCAA applies as per the Initial Order of this Honourable Court.

35. The Monitor is requesting that CFI Newspar be added to these proceedings to allow the Purchaser to acquire the partnership interests in both partners of Newspar. The acquisition of Newspar by the Purchaser is key to the proposed transaction as Newspar currently holds assets which are valuable to the Purchaser including an environmental indemnity from the Province of Newfoundland and Labrador as well as certain mining and surface rights.

36. In *New Skeena Forest Products Inc., Re,* the British Columbia Supreme Court approved the addition of a company to CCAA proceedings where it was wholly owned by a number of subsidiaries who were already deemed debtor companies pursuant to the CCAA. In making its determination the British Columbia Supreme Court relied on the rules of court;

> 5 The first application today is to add Kitwanga as a respondent in these proceedings. As I stated earlier, at the time of the filing, Kitwanga, although a wholly-owned subsidiary of New Skeena Forest Products Inc., was not included since, at the time of that filing, Kitwanga was not insolvent. In order to facilitate this transaction, the parties seek an order from the court that Kitwanga be added as a respondent. Relied upon is Rule 15 of the *Rules of Court*. In that rule, it appears that the court has jurisdiction to add a party where it would be just and convenient to do so.

> 6 In the *Canadian Airlines Corp., Re* [2000 CarswellAlta 622 (Alta. Q.B.)] restructuring overseen by Paperny, J. of the Alberta Court of Queen's Bench (as she then was) an application was brought by the secured lenders to the Canadian Airlines subsidiary, Canadian Regional, to enforce their security. Paperny J in that case decided that the solvent subsidiary, Canadian Regional Airlines, could be included in the *CCAA* protection according to the parent company and refused the attempt by the secured lenders to enforce their security.
>
> 7 In the case at bar, the addition of Kitwanga is not opposed. Following the reasoning in *Canadian Airlines Corp., Re*, I conclude that the addition of that company as a respondent in the *CCAA* proceeding is just and convenient and that order will go.

Reference: *New Skeena Forest Products Inc, Re, 2004 CarswellBC 3620* at paragraphs 5-7 [TAB 6]

37. The *Rules of the Supreme Court, 1986* allow for parties to be added to ongoing proceedings as per Rule 7. In particular Rule 7.04 (2) provides;

> (2) At any stage of a proceeding the Court may, on such terms as it thinks just and either of its own motion or on application of any party to the proceeding,
>
> (a) order any party who is not a proper or necessary party, to cease to be a party; or
>
> (b) order any person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added as a party,
>
> but no person shall be added as a plaintiff without the plaintiff's consent signified in writing or in such other manner as the Court may order.

Reference: *Rules of the Supreme Court, 1986*, Rule 7.04 (2) [TAB 7]

38. CFI Newspar is one of the partners of Newspar, the other partner Canada Fluorspar (NL) Inc., is already a party to these proceedings. CFI Newspar is insolvent. The Purchaser requires the acquisition of Newspar as part of the proposed transaction so that it can acquire the environmental indemnity and mining and surface rights. To add CFI Newspar to the proceedings would be just and necessary as it would allow the Monitor to complete the Definitive Agreement with the Purchaser, seek court approval and close the proposed transaction.

39. In *Tucker v Unknown Person*, the Supreme Court of Newfoundland and Labrador discussed the considerations in adding a new party to an existing proceeding:

> 1. Adding a new party to an existing proceeding is achieved through the exercise of a jurisdiction found in the Rules of Court. Underlying the rule — and perhaps its genesis — is the need to ensure that the proceeding is fully constituted in the legal sense and that any remedy granted or order made by a court in a proceeding is not rendered ineffective or incapable of performance because it does not bind all persons whose legal interests are affected by the order.
>
> 2. The fact that a limitation period may have intervened is no bar to the addition of a party in accordance with the applicable rule. The connection with the subject matter of the proceeding — subsec. 11(1) of the *Limitations Act* — is a necessary condition in such circumstances but not a sufficient one.
>
> 3. In this province, the rule governing the addition of a new party to an existing proceeding is r. 7.04(2)(b). Adding a new party to an existing proceeding (Rule 7) is qualitatively and analytically different from an amendment to a pleading or the change or substitution of a party. (Rule 15)
>
> 4. To ground an entitlement to add a new party to an existing proceeding under r. 7.04(2(b), one of the following conditions must be satisfied:
>
> > (i) that the proposed party ought to have initially been joined as a party; this condition, derived from the common law courts, addresses the relationship between an existing party and the proposed party and considers whether or not the existing party — in a legal sense — is fully constituted in the absence of the proposed party, thus avoiding dismissal (abatement) of the proceeding and ensuring the enforceability of any potential remedy; or
> >
> > (ii) that the participation of the proposed party is necessary to enable the court to adjudicate the proceeding as it stands between the existing parties; this condition, developed by the courts of equity, primarily addresses the *legal* effectiveness of the remedies claimed in a proceeding and considers whether or not all those whose legal interests may be affected by any potential order are before the court. It is the presence of all such persons — those with legal interests in the proceeding as framed — that enables proper adjudication or determination of the proceeding.

Reference: *Tucker v Unknown Person*, 2012 NLTD(G) 132 paragraph 88 [TAB 8]

40. The addition of CFI Newspar as a party to these proceedings is necessary so that the Monitor is able to convey all of the partnership interests of Newspar. The Purchaser has made it clear that it requires CFI Newspar to be added to these proceedings so that it can acquire all of the assets of both partners in Newspar. CFI Newspar's participation in these proceedings is therefore necessary in order to complete the Definitive Agreement and seek court approval for the proposed transaction which will see the mine sold as a going concern.

41. Another factor supporting the addition of CFI Newspar to these proceedings is the fact that the DIP Lenders have consented to the proposed addition of CFI Newspar.

Whether the requested amendment to the 4th Amended ARIO to extend the stay of proceedings should be granted.

42. The current stay period expires on the 31st day of May, 2023. The Applicant is now requesting an extension of the stay until the 16th day of June, 2023.

43. Section 11.02(2) of the CCAA provides that a court has discretion to grant a requested stay of proceedings, on any terms it may impose;

> 11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> > (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> **Reference:** CCAA s., 11.02(2) [TAB 9]

44. The requested stay is necessary as it allows the Monitor time to complete the Definitive Agreement, seek court approval and close the proposed transaction with the Purchaser. The DIP Lenders have consented to the stay extension.

45. Section 11.02 (3) of the CCAA outlines when a court should make an order to extend a stay;

> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Reference: CCAA s., 11.02(3) [TAB 10]

46. The Applicant submits that the request is appropriate in these circumstances, as it will allow for the necessary time needed to complete and close the proposed transaction with the Purchaser. Again, as noted above, the DIP Lenders have consented to the proposed extension.

47. Further, the Applicant has acted in good faith and with due diligence in its attempts to complete the Definitive Agreement with the Purchaser. Unfortunately, as a result of issues raised by the Purchaser through the due diligence process, and the necessity to add CFI Newspar to these proceedings, the Monitor requires additional time.

48. In Harte Gold Corp (Re), 2022 ONSC 653, the Ontario Supreme Court of Justice discussed the test for extending a stay of proceedings under s. 11.02 of the CCAA.

> The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.
>
> Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.
>
> No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

For these reasons the stay is extended to March 29, 2022

Reference: *Harte Gold Corp (Re)*, 2022 ONSC 653 at paragraphs 87-90 [TAB 11]

49. As outlined above, the Monitor requires additional time to complete the Definitive Agreement, obtain court approval for the sale and close the proposed transaction.

50. No creditors will suffer prejudice as a result of the extension. In fact, the senior secured creditors and DIP Lenders have all consented to the extension.

51. Finally, as outlined in the updated Cash Flow, the Company will have sufficient liquidity to continue operations in the care and maintenance mode if the extension is approved.

CONCLUSION:

52. The Applicant respectfully requests that this Honourable Court grant the Order attached to the within Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 12th day of May, 2023

Geoffrey Spencer
McInnes Cooper
Solicitors for the Applicant
Whose address for service is:
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St. John's, NL A1C 5X4

TO: **Supreme Court of Newfoundland & Labrador**
General Division (In Bankruptcy)
P.O. Box 937
313 Duckworth Street
St. John's, NL A1C 5M3

AND TO: **The Service List attached as Schedule "A" to the Application**

List of Authorities:

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 2(1)
2. *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, s. 3(1)
3. *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3, as amended, s. 2(1)
4. *McEwan Enterprises Inc.,* 2021 ONSC 6453, 2021 CarswellOnt 13630
5. *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, s. 9(1)
6. *New Skeena Forest Products Inc., Re,* 2004 CarswellBC 3620
7. *Rules of the Supreme Court, 1986,* Rule 7.04 (2)
8. *Tucker v Unknown Person,* 2012 NLTD(G) 132
9. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 11.02(2)
10. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 11.02(3)
11. *Harte Gold Corp (Re)*, 2022 ONSC 653

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Interpretation

Most Recently Cited in: Conexus Credit Union 2006 v. Voyager Retirement II Genpar Inc., 2021 SKQB 273, 2021 CarswellSask 638, 338 A.C.W.S. (3d) 139, 94 C.B.R. (6th) 190 | (Sask. Q.B., Oct 19, 2021)

R.S.C. 1985, c. C-36, s. 2

s 2.

Currency

2.
2(1)Definitions
In this Act,

"aircraft objects" [Repealed 2012, c. 31, s. 419.]

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a company; *("agent négociateur")*

"bond" includes a debenture, debenture stock or other evidences of indebtedness; *("obligation")*

"cash-flow statement", in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; *("état de l'évolution de l'encaisse")*

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; *("réclamation")*

"collective agreement", in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; *("convention collective")*

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; *("compagnie")*

"court" means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench, and

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice;

("tribunal")

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of thecompany have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

("compagnie débitrice")

"director" means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act;

("fiducie de revenu")

"initial application" means the first application made under this Act in respect of a company; *("demande initiale")*

"monitor", in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company; *("contrôleur")*

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

"prescribed" means prescribed by regulation; *("Version anglaise seulement")*

"secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; *("créancier garanti")*

"shareholder" includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"Superintendent of Bankruptcy" means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*; *("surintendant des faillites")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

"title transfer credit support agreement" means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issue under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. *("creancier chirographaire")*

2(2)Meaning of "related" and "dealing at arm's length"

For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

Amendment History

R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 3); 1990, c. 17, s. 4; 1992, c. 27, s. 90(1)(f); 1993, c. 28, s. 78 (Sched. III, item 20) [Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1993, c. 34, s. 52; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 120; 1998, c. 30, s. 14(c); 1999, c. 3, s. 22; 1999, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15; 2005, c. 47, s. 124 [Amended 2007, c. 36, s. 105.]; 2007, c. 29, s. 104; 2007, c. 36, ss. 61(1), (2), (4); 2012, c. 31, s. 419; 2015, c. 3, s. 37; 2018, c. 10, s. 89

Judicial Consideration (2)

Currency

Federal English Statutes reflect amendments current to February 15, 2022
Federal English Regulations Current to Gazette Extra Vol. 156:2 (February 23, 2022)

End of Document

TAB 2

Canada Federal Statutes
Companies' Creditors Arrangement Act
Interpretation

Most Recently Cited in: Conexus Credit Union 2006 v. Voyager Retirement II Genpar Inc., 2021 SKQB 273, 2021 CarswellSask 638, 338 A.C.W.S. (3d) 139, 94 C.B.R. (6th) 190 | (Sask. Q.B., Oct 19, 2021)

R.S.C. 1985, c. C-36, s. 3

s 3.

Currency

3.

3(1)Application

This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

3(2)Affiliated companies

For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

3(3)Company controlled

For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

3(4)Subsidiary

For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one ore more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

Amendment History

1997, c. 12, s. 121; 2005, c. 47, s. 125

Currency

Federal English Statutes reflect amendments current to February 15, 2022
Federal English Regulations Current to Gazette Extra Vol. 156:2 (February 23, 2022)

TAB 3

Canada Federal Statutes
Bankruptcy and Insolvency Act
Interpretation

Most Recently Cited in: Ali (Re) , 2022 BCSC 169, 2022 CarswellBC 270 | (B.C. S.C., Feb 3, 2022)

R.S.C. 1985, c. B-3, s. 2

s 2. Definitions

Currency

2.Definitions
In this Act

"affidavit" includes statutory declaration and solemn affirmation; *("affidavit")*

"aircraft objects" [Repealed 2012, c. 31, s. 414.]

"application", with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; *(Version anglaise seulement)*

"assignment" means an assignment filed with the official receiver; *("cession")*

"bank" means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

("banque")

"bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; *("failli")*

"bankruptcy" means the state of being bankrupt or the fact of becoming bankrupt; *("faillite")*

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a person; *("agent négociateur")*

"child" [Repealed 2000, c. 12, s. 8(1).]

"claim provable in bankruptcy,""provable claim" or **"claim provable"** includes any claim or liability provable in proceedings under this Act by a creditor; *("réclamation prouvable en matière de faillite"* ou *"réclamation prouvable")*

"collective agreement", in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent; *("convention collective")*

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; *("conjoint de fait")*

"common-law partnership" means the relationship between two persons who are common-law partners of each other; *("union de fait")*

"corporation" means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies or loan companies; *("personne morale")*

"court", except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act; *("tribunal")*

"creditor" means a person having a claim provable as a claim under this Act; *("créancier")*

"current assets" means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets; *("actif à court terme")*

"date of the bankruptcy", in respect of a person, means the date of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("date de la faillite")

"date of the initial bankruptcy event", in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(a) an assignment by or in respect of the person,

(b) a proposal by or in respect of the person,

(c) a notice of intention by the person,

(d) the first application for a bankruptcy order against the person, in any case

(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or

(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,

(e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d); or

(f) proceedings under the *Companies' Creditors Arrangement Act*;

("ouverture de la faillite")

"debtor" includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt; *("débiteur")*

"director" in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"executing officer" includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor; *("huissier-exécutant")*

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"General Rules" means the General Rules referred to in section 209; *("Règles générales")*

"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event;

("fiducie de revenu")

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

("personne insolvable")

"legal counsel" means any person qualified, in accordance with the laws of a province, to give legal advice; *("conseiller juridique")*

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

("localité")

"Minister" means the Minister of Industry; *("ministre")*

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

"official receiver" means an officer appointed under subsection 12(2); *("séquestre officiel")*

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person; *("personne")*

"prescribed"

(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules;

("prescrit")

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; *("bien")*

"proposal" means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement; *("proposition concordataire"* ou *"proposition")*

"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services; *("entreprise de service public")*

"resolution" or **"ordinary resolution"** means a resolution carried in the manner provided by section 115; *("résolution"* ou *"résolution ordinaire")*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

("créancier garanti")

Editor's Note: S.C. 2001, c. 4, s. 25 replaced the definition of "secured creditor". S.C. 2001, c. 4, s. 177(1) provides as follows:

(1) The definition of "secured creditor" in subsection 2(1) of the Bankruptcy and Insolvency Act, *as enacted by section 25 of this Act [i.e. 2001, c. 4], applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.*

Immediately before the replacement, the definition of ***"secured creditor"*** *read as follows:*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.

"settlement" [Repealed 2005, c. 47, s. 2(1).]

"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"sheriff" [Repealed 2004, c. 25, s. 7(3).]

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; *("résolution spéciale")*

"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1); *("surintendant")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

"time of the bankruptcy", in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("moment de la faillite")

"title transfer credit support agreement" means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; *("opération sous-évaluée")*

"trustee" or **"licensed trustee"** means a person who is licensed or appointed under this Act. *("syndic"* ou *"syndic autorisé")*
R.S.C. 1985, c. 31 (1st Supp.), s. 69; 1992, c. 27, s. 3; 1995, c. 1, s. 62(1)(a); 1997, c. 12, s. 1; 1999, c. 28, s. 146; 1999, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25; 2001, c. 9, s. 572; 2004, c. 25, s. 7(1), (3)-(8), (10); 2005, c. 3, s. 11; 2005, c. 47, s. 2(1), (3)-(5); 2007, c. 29, s. 91; 2007, c. 36, s. 1; 2012, c. 31, s. 414; 2018, c. 10, s. 82

Note:

S.C. 2000, c. 12, s. 8, amended s. 2(1) by repealing the definition of "child", and adding definitions of "common law partner" and "common law partnership". Pursuant to S.C. 2000, c. 12, s. 21, the amendments apply only to bankruptcies, proposals and receiverships commenced after the coming into force of S.C. 2000, c. 12, s. 21 on July 31, 2000. Prior to its repeal, the definition of "child" read as follows:

"child" includes a child born out of marriage;

Judicial Consideration (7)

Currency
Federal English Statutes reflect amendments current to February 15, 2022
Federal English Regulations Current to Gazette Extra Vol. 156:2 (February 23, 2022)

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TAB 4

2021 ONSC 6453
Ontario Superior Court of Justice

McEwan Enterprises Inc.

2021 CarswellOnt 13630, 2021 ONSC 6453, 336 A.C.W.S. (3d) 618, 93 C.B.R. (6th) 80

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MCEWAN ENTERPRISES INC.

G.B. Morawetz C.J. Ont. S.C.J.

Heard: September 28, 2021
Judgment: October 1, 2021
Docket: CV-21-00669445-00CL

Counsel: Robert J. Chadwick, Caroline Descours, Trish Barrett, for Applicant
Sean Zweig, Joshua Foster, for Monitor
Virginie Gauthier, for The Cadillac Fairview Corporation Limited

Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote
Bankruptcy and insolvency

Table of Authorities

Cases considered by *G.B. Morawetz C.J. Ont. S.C.J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List])

Cinram International Inc., Re (2012), 2012 ONSC 3767, 2012 CarswellOnt 8413, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List])

JTI-Macdonald Corp., Re (2019), 2019 ONSC 1625, 2019 CarswellOnt 3653, 69 C.B.R. (6th) 285 (Ont. S.C.J. [Commercial List])

Laurentian University of Sudbury (2021), 2021 ONSC 659, 2021 CarswellOnt 1224, 87 C.B.R. (6th) 278 (Ont. S.C.J.)

Performance Sports Group Ltd., Re (2016), 2016 ONSC 6800, 2016 CarswellOnt 17492, 41 C.B.R. (6th) 245 (Ont. S.C.J. [Commercial List])

Sherman Estate v. Donovan (2021), 2021 SCC 25, 2021 CSC 25, 2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 458 D.L.R. (4th) 361, 72 C.R. (7th) 223 (S.C.C.)

Stelco Inc., Re (2004), 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299, [2004] O.T.C. 284 (Ont. S.C.J. [Commercial List])

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.)

Stelco Inc., Re (2004), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201, 338 N.R. 196 (note) (S.C.C.)

Tamerlane Ventures Inc., Re (2013), 2013 ONSC 5461, 2013 CarswellOnt 12213, 6 C.B.R. (6th) 328 (Ont. S.C.J. [Commercial List])

Statutes considered:

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

Generally

s. 2 "insolvent person"

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

Generally

s. 2(1) "debtor company"

s. 11

s. 11.02 [en. 2005, c. 47, s. 128]

s. 11.02(1) [en. 2005, c. 47, s. 128]

s. 11.51 [en. 2005, c. 47, s. 128]

s. 11.52 [en. 2005, c. 47, s. 128]

s. 23(1)(a)

***G.B. Morawetz C.J. Ont. S.C.J.*:**

1 The initial hearing of this matter took place on September 28, 2021. At the conclusion of the hearing, I granted an Initial Order with reasons to follow. These are the reasons.

A. OVERVIEW

2 McEwan Enterprises Inc. ("MEI") is a full-service restaurant, catering, gourmet grocery and events company (the "Business") based in the Greater Toronto Area (the "GTA"). MEI was founded in 1987 by Mark McEwan, who leads the development, preparation and delivery of the culinary aspects of the Business.

3 Capitalized terms used but not defined herein have the meanings given to such terms in the Affidavit of Dennis Mark McEwan sworn September 27, 2021 (the "McEwan Affidavit").

4 MEI brings this application for an initial order (the "Initial Order") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C–36, as amended (the "CCAA"). Counsel to MEI submits that the principal objectives of these CCAA proceedings are to ensure the ongoing operations of the McEwan Group for the benefit of its many stakeholders and to effectuate a restructuring of MEI and its Business. As part of its restructuring efforts pursuant to these CCAA proceedings, MEI intends to seek to complete the sale and transfer of the Business pursuant to the proposed Transaction (as defined below).

5 MEI has been experiencing financial challenges for an extended period of time as a result of certain unprofitable McEwan Locations (as defined below), and the McEwan Group has not been profitable since 2017. MEI's financial challenges have been exacerbated by the impacts of the COVID-19 pandemic over the last approximately 18 months.

6 Counsel submits that MEI has made extensive efforts to seek consensual arrangements with its landlords in respect of its leases, but has been unable to achieve a comprehensive out-of-court resolution.

7 After extensive review and consideration of its circumstances, and its options and alternatives, and following efforts to reach consensual arrangements with landlords, MEI determined that the best available alternative in the circumstances would be a sale of substantially all of the McEwan Group's assets and the Business (the "Transaction") to the current owners of MEI, and the continuation of the Business with a reduced number of McEwan Locations. The continued involvement of Mr. McEwan as chef and operator of the Business, is premised on a continuation of Mr. McEwan's partnership with Fairfax (as defined below) as co-owners of the McEwan Group.

8 Having regard to its financial circumstances and ongoing challenges, MEI determined that it is necessary to seek protection under the CCAA in order to provide stability for the Business and preserve value, while MEI advances its efforts to restructure and right-size the Business, including pursuing the proposed Transaction.

9 Counsel advises that MEI intends to bring a subsequent motion to seek Court approval of the Transaction.

B. CURRENT CHALLENGES

10 The McEwan Group conducts the Business out of six restaurants (the "McEwan Restaurants"), as well as two food-hall locations and one gourmet grocery location (collectively with the McEwan Restaurants, the "McEwan Locations").

11 MEI is a private company incorporated under the laws of Ontario and is headquartered in Toronto. MEI is owned by Fairfax Financial Holdings Limited ("Fairfax"), through one of its subsidiaries, which holds a 55% equity interest in MEI, and by Mr. McEwan, through McEwan Holdco Inc., which owns a 45% equity interest in MEI.

12 Many of the McEwan Locations have been historically successful and profitable; however, certain locations have been underperforming for a number of years, causing an overall significant strain on MEI's profitability and liquidity. As a result of these financial challenges, in March 2020, MEI's shareholders provided approximately $1.1 million of additional equity financing to support the operations of the Business.

13 In an effort to address the COVID-19 pandemic challenges, MEI implemented extensive cost-saving and cash conservation measures, negotiated various rent concessions, and obtained various government subsidies and support. Those efforts were insufficient to address MEI's liquidity needs during the COVID-19 pandemic. As a result, MEI needed to obtain additional financing, which it was able to obtain from one of its shareholders, Fairfax, by way of a number of unsecured loans provided in 2020 and 2021.

14 MEI has advised that it will also need further funding to continue operations while the impacts of the COVID-19 pandemic on the Business persist.

15 Counsel submits that after extensive review and consideration of its circumstances and following efforts to reach consensual arrangements with landlords, MEI determined that the best available alternative that could be implemented in the circumstances that would preserve the value of the Business for the benefit of MEI's many stakeholders, would be the Transaction. On September 27, 2021, MEI entered into a purchase agreement with 2864785 Ontario Corp. (the "Purchaser"), pursuant to which, subject to Court approval, the parties would complete the Transaction (the "Purchase Agreement").

16 MEI believes that the implementation of the Transaction will result in a sustainable Business going forward for the benefit of MEI's many stakeholders, including its 268 employees whose jobs will be preserved, its secured creditors whose obligations will be unaffected and assumed by the Purchaser, and its many suppliers and service providers whose contracts and obligations will also all be assumed. The Transaction also provides for the necessary funding for MEI's operations by way of the Transaction Deposit of up to $2.25 million for the period up to the closing of the Transaction.

17 MEI and its board of directors have determined that it is in the best interests of MEI and its stakeholders for MEI to file for protection under the CCAA in order to preserve the value of the Business and continue as a going concern while seeking to implement a restructuring of the Business, including the proposed Transaction.

18 Counsel submits that the commencement of these CCAA proceedings and the granting of a stay of proceedings (the "Stay of Proceedings") are necessary to provide stability to the Business, to preserve value and to permit MEI to restructure its affairs, and are in the best interests of MEI and its stakeholders.

19 MEI is also requesting that this Court exercise its discretion to extend the Stay of Proceedings in respect of the personal guarantees, indemnities and security granted by Mr. McEwan in his personal capacity in connection with certain of MEI's obligations, as well as in favour of 2860117 Ontario Limited (the "McEwan Subsidiary"), a wholly-owned subsidiary of MEI

which holds MEI's 50% interest in the ONE Restaurant Partnership. The McEwan Subsidiary and Mr. McEwan are collectively referred to herein as the "Non-Filing Parties".

20 As set out in the Cash Flow Forecast, with the remaining availability under the Secured Credit Facilities and the funding from the Transaction Deposit (if approved by the Court), MEI is expected to have sufficient funding through the period of the Cash Flow Forecast.

21 Alvarez & Marsal Canada Inc. ("A&M") has consented to act as the monitor of MEI in these proceedings (in such capacity, the "Monitor").

22 In connection with A&M's appointment as the Monitor, it is contemplated that a Court-ordered charge will be granted over MEI's assets, property and undertaking (the "Property") in favour of the Monitor, its counsel, and MEI's counsel in respect of their fees and disbursements incurred prior to and following the commencement of these proceedings at their standard rates and charges (the "Administration Charge").

C. ISSUES

23 The issues to be considered on this application are whether:

(a) MEI is a "debtor company" to which the CCAA applies;

(b) the relief sought in the proposed Initial Order is available under the CCAA;

(c) the stay of proceedings under the Initial Order should be extended to the Non-Filing Parties; and

(d) the Charges (as defined below) should be granted.

D. ANALYSIS and FINDINGS

24 The CCAA applies to a "debtor company" where the total claims against such company exceeds $5 million. The terms "debtor company" is defined in Section 2 of the CCAA. In essence, a debtor company is an insolvent company.

25 The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B–3, as amended (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests: (a) is for any reason unable to meet his obligations as they generally become due; (b) has ceased paying his current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due. (See: Stelco Inc., Re (2004), 48 C.B.R. (4th) 299 at paras. 21–22 (Ont. Sup. Ct. J. [Commercial List]), leave to appeal to C.A. refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 336 [Stelco];).

26 The test for "insolvent person" under the BIA is disjunctive. A company satisfying any one of the above criteria is considered insolvent for the purposes of the CCAA.

27 A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in MEI being unable to pay its debts as they generally become due if a stay or proceedings and ancillary protection are not granted by the court. (see: Stelco, at para. *40*).

28 Having reviewed the McEwan Affidavit and hearing submissions, I am satisfied that MEI meets both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition.

29 As at August 31, 2021, MEI has aggregate liabilities exceeding $10 million. Thus, total claims against MEI exceed the $5 million threshold amount under the CCAA.

30 Accordingly, I am satisfied MEI is a "debtor company" to which the CCAA applies.

31 Subject to the terms of the Initial Order, MEI intends to honour all of its obligations in respect of its employees, suppliers and service providers in the ordinary course, as well in respect of its customer gift cards and the Customer Program. Pursuant to the proposed Transaction, any and all outstanding amounts owing in respect of MEI's employee, trade or customer obligations will be assumed by the Purchaser upon implementation of the Transaction.

32 I am also satisfied that the Court has the jurisdiction to permit payment of pre-filing obligations in a CCAA proceeding, including where such payments are critical to the ongoing operations of a debtor company or the maintenance of its customer, supplier and employee relationships. (See: Canwest Global Communications Corp., Re (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) at paras. *41, 43*; Cinram International Inc., and Sch. C at paras. 66-71; and Performance Sports Group Ltd., Re, 2016 ONSC 6800 at para.).

33 In arriving at this conclusion, I have taken into account a number of factors in authorizing the payment of pay pre-filing obligations, including: (a) whether the goods and services were integral to the business of the applicant; (b) the applicant's need for the uninterrupted supply of the goods and services; (c) whether the applicant had sufficient inventory of the goods on hand to meet its needs; (d) the effect on the applicant's operations and ability to restructure if it could not make pre-filing payments; and (e) the fact that no payments would be made without the consent of the Monitor. (See: Cinram, at para. *37* and Sch. C at paras. 66-71; Performance Sports, at para. *25*; and JTI–Macdonald Corp., Re, 2019 ONSC 1625 at para.).

34 Pursuant to the proposed Initial Order, it is proposed that the Monitor not be required to comply with the notification requirements of Section 23(1)(a) of the CCAA to: (a) publish a newspaper notice in respect of the CCAA proceedings; (b) send a notice to known creditors; or (c) make publicly available a list showing the names, addresses and estimated claim amounts of those creditors.

35 I am satisfied that pursuant to Section 23(1)(a) of the CCAA, the Court has the jurisdiction to grant an order not requiring compliance with the applicable notice provisions and/or varying those requirements. The question is whether it is appropriate for the court to exercise its jurisdiction.

36 MEI believes that the issuance of a newspaper notice and the public posting of a list of individual creditors and their claims will not serve to provide any material benefit to the relevant parties, who are intended to not be impacted by these CCAA proceedings, and will add unnecessary costs. MEI believes that a notice issued by MEI to its creditors will be a more efficient and less disruptive means of notifying such parties in these circumstances.

37 I have not been persuaded that it is appropriate or necessary, in these circumstances to deviate from the notice provisions prescribed by the CCAA.

38 CCAA proceedings are public proceedings. The Supreme Court, in the recent decision Sherman Estate v. Donovan, 2021 SCC 25 at paras. 37–38, confirmed that court proceedings are presumptively open to the pubic. It seems to me that, absent extenuating circumstances, any attempt to limit the publication of CCAA proceedings by altering the prescribed notice provisions is not consistent with the open court presumption which must be respected.

39 It is necessary to recognize that it is MEI that is seeking court protection from its creditors and has resorted to the CCAA to achieve its objectives. It does not lie with MEI to alter the notice provisions to suit its purposes.

40 The CCAA sets out notice provisions, which I do not consider to be onerous. Further, the costs associated with a newspaper notice are, in my view, inconsequential when one considers the assets and liabilities of MEI.

41 However, in an effort to eliminate any possible confusion surrounding the publication of individuals whose claims are expected to be unaffected in these proceedings, I have authorized minor adjustments to the notice provisions which are reflected in the signed order.

Extending the Stay of Proceedings to the Non-Filing Parties

42 Courts have the authority under the broad jurisdiction granted under Sections 11 and 11.02 of the CCAA and the Court's inherent jurisdiction to grant a stay of proceedings in favour of third parties that are not themselves applicants in a CCAA proceeding. (See: CCAA, Sections 11 and *11.02(1);* Tamerlane Ventures Inc., Re, 2013 ONSC 5461 at para. ; Laurentian University of Sudbury, Re,2021 ONSC 659 at para. ; and *Lehndorff, supra* at paras. 5, 16, 21; BOA, Tab 3).

43 The Court has considered the following non-exhaustive list of factors in determining whether to extend a stay of proceedings to non-applicant third parties:

(a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

(b) extending the stay to the third party would help maintain stability and value during the CCAA process;

(c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;

(d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;

(e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party. (See: JTI–Macdonald, at para. 15; Laurentian, at para. 40; Cinram, at para. 37 and Sch. C at paras. 63-64; *Lehndorff, supra* at para. 21).

44 MEI submits that it is appropriate to extend the Stay of Proceedings to the Non-Filing Parties given:

(a) Mr. McEwan has granted certain personal guarantees, indemnities and/or security in respect of certain of MEI's obligations, and the McEwan Subsidiary holds MEI's interests in the ONE Restaurant Partnership, an important part of the overall Business of MEI;

(b) if any enforcement proceedings were commenced against any of the Non-Filing Parties, it would cause significant disruption to MEI, would have a detrimental effect on MEI's restructuring efforts, and there could be a significant erosion of value to the Business to the detriment of all stakeholders; and

(c) the obligations which Mr. McEwan has guaranteed, indemnified and/or secured are not anticipated to be impacted by the CCAA proceedings and would be assumed as part of the proposed Transaction, thus MEI believes there would be no prejudice in granting the requested extension of the Stay of Proceedings.

45 I accept that the extension of the Stay of Proceedings in favour of the Non-Filing Parties is appropriate in these circumstances while MEI works to implements a restructuring of the Business, including the proposed Transaction, for the benefit of its many stakeholders.

46 MEI is also seeking approval of the Administration Charge in respect of certain administrative costs of these proceedings and the Directors' Charge in respect of the indemnification of its directors and officers (the "Charges"). Pursuant to the proposed Initial Order, the Charges would rank in priority to all Encumbrances in favour of any person, except for any secured creditor of MEI. At the Comeback Hearing, MEI intends to seek an Order granting priority of the Charges ahead of all Encumbrances of those secured creditors given notice of the Comeback Hearing, other than the Encumbrances granted by MEI in favour of RBC.

47 The proposed Initial Order provides that the priority of the Charges, as among them, shall be as follows: (a) First — the Administration Charge; and (b) Second — the Directors' Charge.

48 MEI is seeking the granting of the Administration Charge over the Property to secure the fees and disbursements of the Monitor and its counsel, and MEI's counsel, in each case incurred at their standard rates and charges in the amount of $225,000, at this time.

49 Section 11.52 of the CCAA provides the Court with the jurisdiction to grant an administration charge.

50 MEI submits that it is appropriate in the circumstances for this Court to exercise its jurisdiction and grant the Administration Charge given that:

(a) the proposed restructuring of MEI will require the involvement of professional advisors;

(b) the proposed beneficiaries of the Administration Charge have each contributed and will continue to contribute to MEI's restructuring efforts;

(c) there is no unwarranted duplication of roles; and

(d) the amount of the requested Administration Charge reflects the estimated costs of these proceedings to be incurred in the period up to the Comeback Hearing and has been reviewed with the proposed Monitor.

51 MEI is seeking the Directors' Charge over the Property to secure the indemnification of the Directors and Officers pursuant to the Initial Order for any liabilities they may incur during the CCAA proceedings in their capacities as directors and officers in the amount of $600,000, at this time.

52 Section 11.51 of the CCAA provides the Court with the authority to grant a charge relating to directors' and officers' indemnification on a priority basis.

53 MEI submits that it is appropriate in the circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge given that:

(a) it is possible for the Directors and Officers to be held personally liable for certain of MEI's obligations during the course of these CCAA proceedings;

(b) MEI's D&O Policy contains several exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage for the Directors and Officers under such D&O Policy;

(c) the proposed Directors' Charge would apply only to the extent that the Directors and Officers do not have coverage under the D&O Policy;

(d) the Directors' Charge would only cover liabilities that the Directors and Officers may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;

(e) the Directors and Officers have been actively involved in MEI's efforts to address the current circumstances of MEI, including the review and consideration of MEI's financial circumstances, efforts to manage and address MEI's challenging liquidity position, overseeing MEI's negotiations with landlords, the pursuit of restructuring alternatives, and the preparation for and commencement of these CCAA proceedings;

(f) to carry on business during the CCAA proceedings and to complete a successful restructuring for the benefit of MEI and its stakeholders, MEI requires the active and committed involvement of the Directors and Officers; and

(g) the amount of the Directors' Charge has been calculated based on the estimated exposure of the Directors and Officers in the period up to the Comeback Hearing and has been reviewed with the proposed Monitor.

54 MEI believes that that the proposed amounts of each of the Charges are appropriate for the period from and after the granting of the Initial Order (if approved) until the date of the Comeback Hearing. MEI expects to request at the Comeback Hearing that the Administration Charge be increased to $350,000 and that the Directors' Charge be increased to $1.45 million.

55 I accept these submissions and accordingly I am satisfied that the Administration Charge and the Directors' Charge should be included in the Initial Order.

DISPOSITION

56 I am satisfied, for the foregoing reasons, that MEI meets all of the qualifications established for relief under the CCAA. An Order has been signed to reflect the foregoing. The comeback hearing has been scheduled for Thursday, October 7, 2021 at 9:00 a.m.

TAB 5

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

Most Recently Cited in: Canada v. Canada North Group Inc., 2019 ABCA 314, 2019 CarswellAlta 1815, 437 D.L.R. (4th) 122, 11 P.P.S.A.C. (4th) 157, 72 C.B.R. (6th) 161, 95 B.L.R. (5th) 222, 93 Alta. L.R. (6th) 29, [2019] A.W.L.D. 3632, [2019] A.W.L.D. 3690, 309 A.C.W.S. (3d) 464, 2019 D.T.C. 5111, [2019] 12 W.W.R. 635 | (Alta. C.A., Aug 29, 2019)

R.S.C. 1985, c. C-36, s. 9

s 9.

Currency

9.

9(1)Jurisdiction of court to receive applications

Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

9(2)Single judge may exercise powers, subject to appeal

The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

Currency

Federal English Statutes reflect amendments current to February 15, 2022
Federal English Regulations Current to Gazette Extra Vol. 156:2 (February 23, 2022)

End of Document

TAB 6

2004 CarswellBC 3620
British Columbia Supreme Court

New Skeena Forest Products Inc., Re

2004 CarswellBC 3620, [2006] B.C.W.L.D. 5535, [2006] B.C.W.L.D. 5537, [2006] B.C.W.L.D. 5538, 24 C.B.R. (5th) 145

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

In the Matter of the Canada Business Corporations Act R.S.C. 1985, c. C-44, as amended

In the Matter of the Company Act R.S.B.C., 1996, c. 62 as amended

In the Matter of New Skeena Forest Products Inc. Orenda Forest Products
Ltd. Orrenda Logging Ltd. and 9753 Acquitistion Corp., Petitioners

Brenner CJ.B.C.

Heard: January 28, 2004
Judgment: January 28, 2004
Docket: Vancouver L0332200

Counsel: D. Knowles, Q.C., M. Buttery, S.A. Dubo for Petitioner
J. Milton for City of Prince Rupert, City of Terrace, District of Port Edward, District of New Hazelton
K. Moller for NWBC Timber & Pulp Ltd.
R. Patryluk for Pulp, Paper & Woodworkers of Canada, Local 4
P. Rearson for 646325 B.C. Ltd.
Marcel Peerson for The Monitor
D. Rogers for Communications, Energy & Pulpworkers' Union of Canada (CEP), Local 404
P. Grant, D. Schultz for Gitanyow Hereditary Chiefs and members of the Houses of the Gitanyow Nation
D. Nygard for Canada Customs and Revenue Agency
P. Pearlman, Q.C. for Ministry of Forests (Attorney General)

Headnote

Bankruptcy and insolvency --- Proposal — Practice and procedure

Addition of respondent — N Inc. and number of subsidiary companies entered into proceedings under Companies' Creditors Arrangement Act ("CCAA") — K Ltd. was wholly-owned subsidiary of N Inc. but was not included in filing — K Ltd. operated sawmill and was solvent at time of filing — As part of restructuring plan, N Inc. negotiated agreement to sell K Ltd. sawmill to arms-length third party — N Inc. and K Ltd. entered into asset purchase agreement — Petitioners applied to add K Ltd. as respondent in proceedings — Application granted — Addition of K Ltd. was not opposed — Addition of K Ltd. as respondent in CCAA proceeding was just and convenient.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

N Inc. and number of subsidiary companies entered into proceedings under Companies' Creditors Arrangement Act — K Ltd. was wholly-owned subsidiary of N Inc. but was not included in filing — As part of restructuring plan, N Inc. negotiated agreement to sell K Ltd. sawmill to arms-length third party — N Inc. and K Ltd. entered into asset purchase agreement — Petitioners applied for approval of sale of certain property and assets of K Ltd. and certain assets of N Inc. to W Ltd. in connection with asset purchase agreement that had been entered into by parties — Application granted — Application had been opposed by Chiefs of First Nation — Asset that triggered matter were forest tenures which were in part contained within lands of First Nation — W Ltd. and First Nation had been in discussions and negotiations which had not yet reached fruition — First Nation had established prima facie case supporting their aboriginal title claims and strong prima facie case supporting their aboriginal rights claims — If tenure was transferred to W Ltd., transfer would take place subject to those claims and, in particular, subject to judicial determination in earlier decision — First Nation would be at liberty to apply in event they wanted to challenge validity of tenure or nature or extent of consultations conducted by any of parties or W Ltd.

Aboriginal law --- Aboriginal rights to natural resources — Aboriginal rights — Timber rights — General principles

Opposition to asset purchase agreement under Companies' Creditors Arrangement Act — N Inc. and number of subsidiary companies entered into proceedings under Companies' Creditors Arrangement Act — K Ltd. was wholly-owned subsidiary of N Inc. but was not included in filing — As part of restructuring plan, N Inc. negotiated agreement to sell K Ltd. sawmill to arms-length third party — N Inc. and K Ltd. entered into asset purchase agreement — Petitioners applied for approval of sale of certain property and assets of K Ltd. and certain assets of N Inc. to W Ltd. in connection with asset purchase agreement that had been entered into by parties — Application granted — Application had been opposed by Chiefs of First Nation — Asset that triggered matter were forest tenures which were in part contained within lands of First Nation — W Ltd. and First Nation had been in discussions and negotiations which had not yet reached fruition — First Nation had established prima facie case supporting their aboriginal title claims and strong prima facie case supporting their aboriginal rights claims — If tenure was transferred to W Ltd., transfer would take place subject to those claims and, in particular, subject to judicial determination in earlier decision — First Nation would be at liberty to apply in event they wanted to challenge validity of tenure or nature or extent of consultations conducted by any of parties or W Ltd.

Table of Authorities

Cases considered by *Brenner CJ.B.C.*:

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 622, 19 C.B.R. (4th) 1 (Alta. Q.B.) — followed

Gitxsan Houses v. British Columbia (Minister of Forests) (2002), 2002 BCSC 1701, 2002 CarswellBC 2928, 10 B.C.L.R. (4th) 126, 48 Admin. L.R. (3d) 225, (sub nom. *Gitxsan First Nation v. British Columbia (Minister of Forests))* [2003] 2 C.N.L.R. 142 (B.C. S.C.) — followed

Guerin v. R. (1984), [1984] 6 W.W.R. 481, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Canada)* 55 N.R. 161, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1, 59 B.C.L.R. 301, 1984 CarswellNat 813, 1984 CarswellNat 693 (S.C.C.) — referred to

Haida Nation v. British Columbia (Minister of Forests) (2002), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.) — considered

Haida Nation v. British Columbia (Minister of Forests) (2002), 2002 BCCA 462, 2002 CarswellBC 2067, 216 D.L.R. (4th) 1, 5 B.C.L.R. (4th) 33, [2002] 10 W.W.R. 587, [2002] 4 C.N.L.R. 117, 172 B.C.A.C. 75, 282 W.A.C. 75 (B.C. C.A.) — considered

Skeena Cellulose Inc., Re (2002), 2002 BCSC 597, 2002 CarswellBC 1021, 34 C.B.R. (4th) 298 (B.C. S.C. [In Chambers]) — referred to

Statutes considered:

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

Generally — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 15 — referred to

***Brenner CJ.B.C.* (orally):**

1 The petitioners apply to add Kitwanga Lumber Company Limited as a respondent. They also seek court approval for the sale of certain property and assets of Kitwanga and certain assets of New Skeena Forest Products Limited to Westex Alberta Ltd. in connection with an asset purchase agreement that has been entered into by the parties.

2 New Skeena Forest Products Inc. and a number of its subsidiary companies entered *CCAA* proceedings last fall. Kitwanga is a wholly-owned subsidiary of New Skeena but was not included in the filing at that time. Kitwanga operates a sawmill near the town of Kitwanga, B.C. and it was solvent at the time of the filing, although the parent company and the other subsidiaries were not.

3 New Skeena, as part of its overall restructuring plan negotiated an agreement to sell the Kitwanga sawmill to an arms-length third party in December of 2003. New Skeena and Kitwanga entered into an asset purchase agreement for the purchase and sale of the assets used at the Kitwanga sawmill. Included in that transaction are certain assets of New Skeena.

4 There are also some other contractual arrangements having to do with log supply, a wood chip sales agreement and a lease covering certain wood drying kilns located at New Skeena's Caryier mill site. It appears from the material before me that there is intended to be an ongoing relationship to be mutually beneficial between the ongoing operation at Kitwanga, which is to be owned by Westex and New Skeena.

5 The first application today is to add Kitwanga as a respondent in these proceedings. As I stated earlier, at the time of the filing, Kitwanga, although a wholly-owned subsidiary of New Skeena Forest Products Inc., was not included since, at the time of that filing, Kitwanga was not insolvent. In order to facilitate this transaction, the parties seek an order from the court that Kitwanga be added as a respondent. Relied upon is Rule 15 of the *Rules of Court*. In that rule, it appears that the court has jurisdiction to add a party where it would be just and convenient to do so.

6 In the *Canadian Airlines Corp., Re* [2000 CarswellAlta 622 (Alta. Q.B.)] restructuring overseen by Paperny, J. of the Alberta Court of Queen's Bench (as she then was) an application was brought by the secured lenders to the Canadian Airlines subsidiary, Canadian Regional, to enforce their security. Paperny J in that case decided that the solvent subsidiary, Canadian Regional Airlines, could be included in the *CCAA* protection according to the parent company and refused the attempt by the secured lenders to enforce their security.

7 In the case at bar, the addition of Kitwanga is not opposed. Following the reasoning in *Canadian Airlines Corp., Re*, I conclude that the addition of that company as a respondent in the *CCAA* proceeding is just and convenient and that order will go.

8 The more contentious part of the application is for the court approval of the asset sales agreement. The application is opposed by counsel representing the Gitanyow Chiefs on the basis that the duty of consultation and accommodation has not been met. It is their position that this application for approval ought to be adjourned for three weeks to facilitate the discussions and negotiations which have been occurring between the purchaser Westex and the Gitanyow Chiefs.

9 The petitioners in this action say that there is no obligation for such consultations to occur but even if there are, the concerns of the Gitanyow chiefs are premature insofar as those negotiations and accommodations can take place after Westex acquires the assets in question.

10 The asset that triggers this matter are forest tenures which are at least in part, contained within the lands of the Gitanyow. The current state of the law in British Columbia in this area is derived from the decisions of the Court of Appeal in *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 6 W.W.R. 243 (B.C. C.A.) "*Haida No. 1*" and *Haida Nation v. British Columbia (Minister of Forests)* (2002), 216 D.L.R. (4th) 1 (B.C. C.A.) "*Haida No.2*". That case had to do with a tree farm licence which was transferred from MacMillan Bloedel to Weyerhauser. The contention of the Haida Nation was that the transfer was invalid because there was a failure on the part of the provincial Crown and the involved corporations to consult with them. The failure to consult arose from the fact that the Haida Nation has pending a claim to the lands that comprised, at least in part, the tree farm licence.

11 *Haida No. 2* sets out the duties on third parties other than the Crown Federal or Crown Provincial. In *Haida No. 2* there were separate judgments from each of the three justices of the Court of Appeal. Mr. Justice Lambert, in his reasons, identified the fiduciary duty owed by the Federal Crown to the Indian Peoples arising from *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.). That duty also extends to the Crown provincial. At page 136, paragraph 62, he outlined the nature of that duty.

12 In that case, the issue was the extent of the duty, if any, owed by, Weyerhauser, the purchaser of the tree farm licence, to be cognizant of the aboriginal land claims extant on the lands. Mr. Justice Lambert found that both the seller, MacMillan Bloedel and the purchaser, Weyerhauser, must have been aware of the Provincial Crown's fiduciary duty to the Haida. Having had that knowledge, Weyerhauser as the purchaser, in Mr. Justice Lambert's words at paragraph 72:

> [M]ust be regarded as a constructive trustee, owing a third party fiduciary duty to the Haida people ...

13 In the result, Mr. Justice Lambert concluded that not only the Provincial Crown but also Weyerhauser had an obligation to consult with the Haida people in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Haida people and the interest of the Crown and Weyerhauser.

14 Chief Justice Finch wrote separate concurring reasons. His analysis differed somewhat from that of Mr. Justice Lambert. In the result, he concluded that Weyerhauser had a duty to consult because of the circumstances of the particular case. He concluded that to simply declare that the Crown had a duty to consult without anything more would not provide an effective remedy to the Haida.

15 Mr. Justice Low wrote dissenting reasons.

16 This case is on appeal to the Supreme Court of Canada.

17 *Haida No. 2* was applied in *Gitxsan Houses v. British Columbia (Minister of Forests)*, [2002] B.C.J. No. 2761 (B.C. S.C.), a decision of Mr. Justice Tysoe of our court, released December 10, 2002. That decision arose from the earlier *Skeena Cellulose Inc., Re* [2002 CarswellBC 1021 (B.C. S.C. [In Chambers])] proceedings, in which the court, as part of a restructuring plan, approved the transfer of a forestry licence. The Gitxsan First Nation objected to that on the basis that there had been inadequate consultation between the Gitxsan and the Crown Provincial. They brought proceedings to set aside the transfer of that tenure, after the *CCAA* proceedings had been completed.

18 In his reasons, Mr. Justice Tysoe applied *Haida No. 2*, and concluded that there was an obligation on the Crown Provincial to consult. Mr. Justice Tysoe considered the nature of the Gitxsan's claims. He concluded that the Gitxsan had made out a *prima facie* case in support of their claims for aboriginal title and a strong *prima facie* case for their claim of aboriginal rights to at least part of the areas covered by the Skeena Forestry licence. The Gitanyow were also parties in that case. Hence his finding applies equally to the lands under claim by the Gitanyow.

19 The Gitanyow rely on Mr. Justice Tysoe's finding with respect to the establishment of their *prima facie* case and say that in the case at bar there was an obligation to consult and to reach an accommodation or seek an accommodation under the principle pursuant to *Haida No. 2* and that this has not occurred.

20 In the case at bar, Westex and the Gitanyow have very commendably been in discussions and negotiations. The evidence sets forth the communications that have taken place over the last four weeks. Unfortunately, these have not yet reached fruition. As I said at the outset of these reasons, the Gitanyow chiefs ask that the application be adjourned for three weeks so that the consultations can continue so an accommodation can be reached.

21 The position of the plaintiffs is that the sale of these assets was always a critical part of this restructuring and is necessary to provide the petitioners with the funds to continue. They say that they will shortly be out of cash and if the sale does not complete, the restructuring will be jeopardized.

22 In the *Gitxsan*, case, *supra*, Mr. Justice Tysoe was mindful of the balance that the court must strike. He did not declare the tenure invalid, nor did he impose a formal obligation on Skeena as opposed to the Crown Provincial, to consult. What he did observe was the practical reality, saying at paragraph 112:

> If the licences do have a legal defect, Skeena will be practically motivated to participate in the process in order to facilitate the removal of the defect.

23 The case at bar follows *Gitxsan, supra*. In particular, it comes after Mr. Justice Tysoe's finding, that is the Gitxsan in that case, and the Gitanyow in this case, have established a *prima facie* case supporting their aboriginal title claims and a strong *prima facie* case supporting their aboriginal rights claims.

24 In the case at bar, it seems to me that if this tenure is transferred to Westex, that transfer will take place subject to those claims and in particular, subject to Mr. Justice Tysoe's judicial determination in his earlier decision. The consequences that flow from that determination are set out in *Haida No. 2*. This, no doubt, helped to motivate the discussions that have already occurred between the Gitanyow and Westex.

25 In the circumstances, I am prepared to allow the application to approve the proposed sale transfer of the Kitwanga assets and the New Skeena assets to Westex. The Gitanyow will be at liberty to apply to the court in the event that they wish to challenge the validity of the tenure or the nature or extent of the consultations conducted by any of the parties or by Westex.

Applications granted.

TAB 7

RULE 7
CAUSES OF ACTION AND PARTIES

Analysis

RULE 7
CAUSES OF ACTION AND PARTIES

Joinder of causes of action

7.01. Subject to rule 7.03, a party, whether suing in the same or different capacities, may join several causes of action in the same proceeding.

1986 c42 Sch D rule 7.01

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Joinder of parties

7.02. (1) Subject to rule 7.03, two or more persons may be joined together in one proceeding as plaintiffs or defendants where,

(a) if separate proceedings were brought by or against each of them, some common question of law or fact would arise in all the proceedings; and

(b) all rights to relief claimed in the proceeding, whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions; or

(c) the Court grants leave to do so.

(2) Subject to the provisions of any statute and unless the Court otherwise orders, a plaintiff, who claims any relief that any other person is entitled to jointly with the plaintiff, shall join all persons so entitled as parties to the proceeding, and any of them who do not consent to be joined as a plaintiff shall be made a defendant.

(3) Where relief is claimed against a defendant who is jointly liable with some other person and also severally liable, the other person need not be made a defendant to the proceeding; but where persons are jointly, but not severally, liable under a contract and relief is claimed against some but not all of those persons in a proceeding in respect of the contract, the Court may stay the proceeding until the other persons so liable are added as defendants.

(4) It is not necessary that every co-defendant be interested in every cause of action or in all the relief sought in a proceeding against the co-defendant, but the Court may order the co-defendant be compensated for being required to attend, or be relieved from attending, any part of the trial or hearing in which the co-defendant has no interest.

1986 c42 Sch D rule 7.02

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Court may order separate trials, etc.

7.03. (1) Where a joinder of causes of actions or parties in a proceeding may embarrass or delay the trial or hearing of the proceeding or is otherwise inconvenient, the Court may order separate trials or hearings, or make such other order as is just.

(2) Where a counterclaim or a third party proceeding ought to be disposed of by a separate proceeding, the Court may order the counterclaim or third party proceeding to be struck out or tried separately, or it may make such other order as is just.

1986 c42 Sch D rule 7.03

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Misjoinder and nonjoinder of parties

7.04. (1) No proceeding shall be defeated by reason of the misjoinder or nonjoinder of any party or person, and the Court may determine any question or issue in dispute in a proceeding so far as it affects the rights and interests of any party, saving the rights of any person who is not a party.

(2) At any stage of a proceeding the Court may, on such terms as it thinks just and either of its own motion or on application of any party to the proceeding,

(a) order any party who is not a proper or necessary party, to cease to be a party; or

(b) order any person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added as a party, but no person shall be added as a plaintiff without the plaintiff's consent signified in writing or in such other manner as the Court may order.

1986 c42 Sch D rule 7.04

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Intervenor becoming a party

7.05. (1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto if

(a) that person claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the order therein, or otherwise;

(b) that person's claim or defence and the proceeding have a question of law or fact in common; or

(c) that person has a right to intervene under a statute or rule.

(2) The application for leave to intervene shall be supported by an affidavit containing the grounds thereof and shall have attached thereto, when practical, a pleading setting forth the claim or defence for which intervention is sought.

(3) On the application, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just.

1986 c42 Sch D rule 7.05

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Intervenor as amicus curiae

7.06. Any person may, with the leave of the Court and without becoming a party to a proceeding, intervene in the proceeding as a friend of the Court for the purpose of assisting it.

1986 c42 Sch D rule 7.06

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Change of parties

7.07. (1) Where a party dies or becomes bankrupt, or a corporate party is wound up or otherwise ceases to exist, but the cause of action survives, the proceeding shall not abate by reason of the death or bankruptcy or the corporate party having been wound up or ceasing to exist.

(2) Where at any stage of a proceeding the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, on *ex parte* application, if it thinks it necessary in order to ensure that all matters in the proceeding may be effectually adjudicated upon, order the other person to be made a party to the proceeding in substitution for the party and the proceeding to be carried on upon such other terms and conditions as the Court thinks just.

(3) Where an order is made under rule 7.07(2), the Court may order that, unless the other person becomes a party within the time specified in the order, the applicant, if the plaintiff in the proceeding, may enter such judgment as is just and any counter claim dismissed, or, if the defendant, may have the proceeding dismissed for want of prosecution and enter judgment on a counterclaim.

(4) Any person served with an order made *ex parte* under this rule, may within ten days after service of the order on that person, apply to the Court to have the order discharged or varied.

1986 c42 Sch D rule 7.07

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Provisions consequential on making of order under rule 7.04 or 7.07

7.08. Where an order is made under rule 7.04 or 7.07,

(a) the originating document in the proceeding shall be amended accordingly within the time specified in the order, or, if no time is specified, within ten days after the making of the order, and a reference to the order and the date on which the amendment is made shall be endorsed upon the amended document;

(b) the person added or made a party under the order shall not become a party until the amended originating document is served upon that person;

(c) the rules as to service of an originating document and filing a defence or appearing on the application shall apply, with any necessary modification, to the amended originating document; and

(d) when a person becomes a party in substitution for another party, all things done in the course of the proceeding before the making of the order shall, unless the Court otherwise orders, have effect in relation to the new as they had to the former party, except that filing a defence by the new party shall not be dispensed with.

1986 c42 Sch D rule 7.08

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Actions for possession of land

7.09. (1) The Court may at any stage of a proceeding for possession of land permit any person, who is in possession of land, whether in actual possession or by a tenant, and who is not a party, to be added as a defendant.

(2) An application by any person for an order under this rule may be made *ex parte* supported by an affidavit showing that the person is in possession of the land in question or, if by a tenant, naming the person.

(3) A person added as a defendant under this rule shall serve a copy of the order on the plaintiff and file a defence within the period specified in the order or, if no period is so specified, within ten days after the making of the order.

1986 c42 Sch D rule 7.09

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Relator actions

7.10. Before the name of any person is used in a proceeding as a relator, that person shall give a written authorization to that person's solicitor to use that person's name and the authorization shall be filed with the Court.

36/14 s11

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Representative proceeding

7.11. (1) Where numerous persons have the same interest in a proceeding, not being a proceeding mentioned in rule 7.12, the proceeding may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of a proceeding under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons to represent all, or all except one or more, of the persons having the same interest in the proceeding, and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 7.04 adding that person as a defendant.

(3) An order given in a proceeding under this rule is binding on all persons represented in the proceeding as parties, but the Court may

(a) make it binding on any person not a party to the proceeding; and

(b) exempt any person represented as a party on the proceeding from any liability under an order in the proceeding.

1986 c42 Sch D rule 7.11

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Representation of interested persons who cannot be ascertained, etc.

7.12. (1) In a proceeding concerning

(a) the administration of the estate of a deceased person;

(b) property subject to a trust; or

(c) the construction of a written instrument, including a statute,

the Court may appoint one or more persons to represent any person, including any unborn or unascertained person, or the members of a class of persons who have a present, future, contingent, or unascertained interest in, or who may be affected by the proceeding, and who, or some of whom, cannot be readily ascertained or found.

(2) Where the person or persons appointed under rule 7.12(1), are parties to the proceeding, any order in the proceeding is binding upon any person or class so represented.

(3) Where in a proceeding under rule 7.12(1), a compromise is proposed, and any person or member of the class referred to in the paragraph and interested in the compromise is not a party to the proceeding, but

(a) there is another person in the same interest who is a party and who assents to the compromise or on whose behalf the Court sanctions the compromise; or

(b) the absent person or member of the class is represented by a person appointed under rule 7.12(1) who so assents,

the Court, if satisfied that the compromise will be for the benefit of the absent person or member of the class and that it is expedient to exercise the power, may approve of the compromise and order that it shall be binding on the absent person or member of the class, and unless the order has been obtained by fraud or non-disclosure of material facts, the person or member of the class shall be bound accordingly.

1986 c42 Sch D rule 7.12

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Representation of beneficiaries by trustees, etc.

7.13. (1) A proceeding may be brought by or against trustees, executors or administrators in their capacity as such without joining any person having a beneficial interest in the trust or estate; and any order granted or made in the proceeding shall be binding on those persons, unless the Court otherwise orders, on the ground that the trustees, executors or administrators could not or did not represent the interests of these persons.

(2) Rule 7.13(1) shall not limit the power of the Court to order any person having such a beneficial interest to be made a party or to make an order under rule 7.12.

1986 c42 Sch D rule 7.13

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Representation of deceased person interested in a proceeding

7.14. (1) Where it appears to the Court that a deceased person had an interest in a matter in question in a proceeding and has no personal representative, the Court may proceed in the absence of a person representing the estate of the deceased person or appoint a person to represent the estate for the purposes of the proceeding, and any order made or granted in the proceeding shall bind the estate of the deceased person to the same extent as it would have been bound had a personal representative of that person been a party to the proceeding.

(2) Before making an order under this rule, the Court may require notice of the application to be given to any person having an interest in the estate.

(3) Unless otherwise ordered by the court, the provisions of rule 7.14(1) do not impose a duty on the person appointed to represent an estate to spend money for the benefit of the estate of which such person has been appointed representative where money is not available in the estate to meet the expenses.

1986 c42 Sch D rule 7.14; 3/94

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Parties to mortgage proceedings

7.15. It shall not be necessary to make subsequent encumbrancers defendants in a proceeding for foreclosure, possession or sale, but the Court may direct notice to be given to subsequent encumbrancers , by mailing by ordinary mail a copy of any order made in the proceeding and a copy of any advertisement of sale made pursuant to an order, and after mailing the copies any subsequent encumbrancer shall be bound by the proceeding in the same manner as if the subsequent encumbrancer had originally been made a party, and any person so notified may within one month thereafter apply to the Court to discharge, vary or add to the order, or for such other relief in the proceeding as he is entitled to, and the Court may make such order as is just.

1986 c42 Sch D rule 7.15

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Declaratory judgment

7.16. No proceeding shall be open to objection on the ground that only a declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

1986 c42 Sch D rule 7.16

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Conduct of a proceeding

7.17. The Court may give the conduct of a proceeding to such person as it thinks fit.

1986 c42 Sch D rule 7.17

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Public Officers: Death or separation from Office

7.18. (1) When a public officer is a party to a proceeding in his or her official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, his or her successor automatically becomes the party with no abatement of the proceeding, and unless the Court otherwise orders any further step in the proceeding shall be taken in the name of the substituted party, and any misnomer not affecting the substantive rights of the parties shall be disregarded.

(2) When a public officer brings or opposes a proceeding in his or her official capacity, the public officer may be described as a party by his or her official title rather than by name, but the Court may require his or her name to be added.

1986 c42 Sch D rule 7.18

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Waiver or reduction of fees

7.19. (1) A person may apply to the Court to have the fees payable pursuant to the *Supreme Court Fees Regulations* waived or reduced.

(2) An application pursuant to this rule shall be in Form 7.19A and may be accompanied by an affidavit or supporting documents.

(3) An application pursuant to this rule may be made without notice to any other party.

(4) No fee shall be charged for an application pursuant to this rule or for any affidavit or documents filed in support of it.

(5) No document filed in support of an application pursuant to this rule may be used for any other purpose unless any required fees are paid or waived.

(6) Upon receipt of an application pursuant to this rule, the registrar shall

(a) waive the fees payable if the registrar is satisfied that the applicant is in receipt of income support under the *Income and Employment Support Act*, or

(b) forward the application to a judge.

(7) The Court may allow an application summarily at any time.

(8) The Court may allow an application in whole or in part if

(a) paying the fee would

(i) constitute an undue hardship for the applicant, and

(ii) prevent the applicant from advancing a non-frivolous and non-vexatious claim or defense; or

(b) the fee for accessing or copying documents would prevent the applicant from pursuing studies, reporting, or research in the public interest.

(9) In exercising its discretion under this rule, the Court may consider whether

(a) the applicants claim, application, notice, defense, or filing

(i) discloses no reasonable claim or defence,

(ii) is scandalous, frivolous, or vexatious,

(iii) may prejudice, embarrass, or delay the course of a proceeding, or

(iv) is otherwise an abuse of the Court's process;

(b) the applicants claim, application, notice, defense, or filing is pursued in good faith in the public interest;

(c) the applicants claim, application, notice, defense, or filing raises a question of public importance;

(d) the applicants proposed studies, reporting, or research is pursued in good faith in the public interest;

(e) the Court has already waived fees for the applicant; and

(f) the applicant has filed every document in the applicants control that might support the applicants claim.

(10) Where a person files an application under rule (1), the person may file a document without paying the associated filing fee where the filing is necessary to meet a time limit set out in legislation or these rules.

(11) Where a person files a document under rule (10), the filing will be voided by the Court, unless

(a) the fee for filing the document is waived by order of the Court; or

(b) the person filing the document pays the fee payable within 10 days of the dismissal of the application made pursuant to this rule or the filing of an order of the Court reducing the fee normally payable.

(12) Despite rule (10), time limits in these rules which begin to run from the date the document is filed do not start until either the date on which

(a) the order waiving the applicable fee is filed; or

(b) any required filing fee is paid.

43/15 s1; 2/17 s1

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Exemption from costs

7.20. (1) A party may apply to the Court, with notice to all other parties, for an order that the party is to pay no costs in the proceeding.

(2) An application pursuant to this rule

(a) shall be in Form 7.20A;

(b) may be accompanied by an affidavit or supporting documents; and

(c) shall be filed no later than 30 days following the close of pleadings.

(3) The Court may allow the application where

(a) the party is unable to afford to pay an award of costs;

(b) the risk of an award of costs being made against the party would prevent the party from advancing a non-frivolous and non-vexatious claim or defense; and

(c) the Court is satisfied that the order would be in the best interests of justice.

(4) An order made pursuant to this rule may be varied if the circumstances of the party change.

(5) An order made pursuant to this rule does not apply to proceedings initiated pursuant to rule 53.

<u>43/15 s2</u>

TAB 8

2012 NLTD(G) 132
Newfoundland and Labrador Supreme Court (Trial Division)

Tucker v. Unknown Person

2012 CarswellNfld 318, 2012 NLTD(G) 132, 1015 A.P.R. 240, 13 C.C.L.I. (5th) 210, 221 A.C.W.S. (3d) 543, 327 Nfld. & P.E.I.R. 240

Ian Tucker, Plaintiff and Unknown Person, Defendant

David B. Orsborn C.J.T.D.

Heard: August 28, 2012
Judgment: September 25, 2012
Docket: 200901T4612

Counsel: Alexander D. MacDonald, Q.C., for Ian Tucker
Edward J. Vanderkloet, for AXA General Insurance

Headnote

Civil practice and procedure --- Parties — Adding or substituting parties — Adding defendant

Plaintiff claimed he was struck by unidentified truck that left scene — Driver, truck and owner remained unidentified — Plaintiff issued statement of claim against unknown defendant in 2009 — Three years later plaintiff brought application to add as party his own insurer in order to claim Section D benefits — Application dismissed — Rules of the Supreme Court, 1986 govern entitlement to add party and applicable rule was R. 7.04(2)(b) given that limitation period had expired — Statement of claim involved tort claim against unknown person and made no reference to contract of insurance or plaintiff being owner of motor vehicle — Nature of cause of action was damages claim for negligence of another person and there was no reason to find that it was contractual or statutory entitlement claim against insurer — Nothing in nature of cause of action required as matter of law that plaintiff's Section D insurer be added as defendant under ought to branch of rule — Addition of insurer was not necessary as what was required was adjudication of tort claim between plaintiff and defendant — That defendant was unknown did not demand addition of insurer Insurer's addition was not necessary to adjudicate matter.

Insurance --- Automobile insurance — Unidentified motorist — Miscellaneous

Plaintiff claimed he was struck by unidentified truck that left scene — Driver, truck and owner remained unidentified — Plaintiff issued statement of claim against unknown defendant in 2009 — Three years later plaintiff brought application to add as party his own insurer in order to claim Section D benefits — Application dismissed — Rules of the Supreme Court, 1986 govern entitlement to add party and applicable rule was R. 7.04(2)(b) given that limitation period had expired — Statement of claim involved tort claim against unknown person and made no reference to contract of insurance or plaintiff being owner of motor vehicle — Nature of cause of action was damages claim for negligence of another person and there was no reason to find that it was contractual or statutory entitlement claim against insurer — Nothing in nature of cause of action required as matter of law that plaintiff's Section D insurer be added as defendant under ought to branch of rule — Addition of insurer was not necessary as what was required was adjudication of tort claim between plaintiff and defendant — That defendant was unknown did not demand addition of insurer Insurer's addition was not necessary to adjudicate matter.

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G & R Trucking Ltd. v. Walbaum (1983), [1983] 2 W.W.R. 622, 22 Sask. R. 22, 144 D.L.R. (3d) 636, 1983 CarswellSask 125, 36 C.P.C. 160 (Sask. C.A.) — considered

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s. 11(1)(d) — considered

s. 11(2) — considered

s. 11(3) — considered

s. 11(3)(b) — considered

s. 11(4) — considered

Survival of Actions Act, R.S.N. 1990, c. S-32

Generally — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 15(5)(a)(ii) — considered

R. 15(5)(a)(iii) — considered

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Generally — referred to

R. 7 — considered

R. 7.04 — considered

R. 7.04(1) — considered

R. 7.04(2) — considered

R. 7.04(2)(b) — considered

R. 15 — considered

R. 15.01 — considered

R. 15.02 — considered

R. 15.02(1) — considered

R. 15.02(2)(a) — considered

R. 15.02(3) — considered

Words and phrases considered:

effectual adjudication

. . . 'effectual adjudication' does not mean an adjudication which improves the plaintiff's prospect of successful recovery.

ought

. . . "ought" [as found in Rule 7.04(2)(b) of the Rules of Court] is used not in the sense of preferable or desirable, but rather of being mandatory in the sense of common law necessity — ensuring that the (e.g.) contracting party is fully constituted in the proceeding before the court. To put it another way, the legal integrity of the proceeding requires that another party be added.

***David B. Orsborn C.J.T.D.*:**

Introduction

1 This is an application to add a defendant.

2 Ian Tucker says that while walking in downtown St. John's on October 13, 2007, he was struck and injured by a vehicle that left the scene. To date neither the driver, the vehicle, nor the owner of the vehicle, have been identified.

3 On October 13, 2009, Tucker issued the statement of claim in this matter naming an "Unknown Person" as the sole defendant. He has now applied to add AXA General Insurance as a defendant in this proceeding. AXA is Tucker's own automobile insurer; Tucker's policy includes the statutory 'Section D' benefits — recovery of damages caused by an at-fault unidentified or uninsured driver. As is appropriate, AXA was given notice of the application and appeared by counsel.

4 (In a related proceeding — 2011 01T 7191 — Tucker has claimed directly against AXA. In that proceeding, AXA has applied to the Court to dismiss the proceeding as being out of time. A decision in that matter is being issued concurrently.)

5 The issue for determination is whether Tucker is entitled to add AXA as a defendant in this 2009 proceeding. Tucker wishes to add AXA in order to pursue his Section D claim in this proceeding.

6 Tucker asserts that since the driver in question was unidentified, and since the statement of claim makes it clear that the driver was unidentified, it is obvious that AXA ought to have been added as a defendant at the outset. He says that there is no prejudice to AXA since it was notified of the potential claim very soon after the accident. Said counsel for Tucker — 'this has always been about Section D coverage from the outset and the issues have been known to everyone for a long time'.

7 Referring to the recent decision of the Court of Appeal in *10475 Newfoundland Ltd. v. Houston*, 2012 NLCA 34 (N.L. C.A.), counsel for Tucker says that a decision to add a new party is completely within the discretion of the court and that all factors point to an exercise of discretion in Tucker's favour.

8 AXA argues that the entitlement and jurisdiction to add a new party is in the first instance a question of law and that certain threshold requirements must be established before any exercise of discretion may be considered. It takes the position that the conditions before a party may be added pursuant to the *Rules of the Supreme Court, 1986*, SNL 1986, c.42, Sch. D — particularly Rule 7 — have not been met since AXA is not a party who ought to have been joined in the proceeding nor a party whose participation is necessary for the adjudication of the proceeding as pleaded. AXA also takes the position that this proceeding, started as it was against an unknown person, is a nullity and that therefore there is no jurisdiction in the court to add a party even if the entitlement were otherwise established.

Issues

1. Is the proceeding as commenced a nullity?

2. If not, is Tucker entitled to add AXA as a defendant and if so, to the extent that discretion is engaged, should the court exercise its discretion in favour of Tucker and add AXA as a defendant?

Discussion

Nullity

9 In view of my conclusion on the second issue, it is not necessary to decide this point.

Adding AXA as a party defendant

10 A decision on this issue requires consideration of a line of authority culminating in *Houston*, the most recent relevant appellate decision in this province.

11 However, some background to start.

Statement of claim — filed October 13, 2009

. . .

2. The defendant is an unknown person or persons who at all times material hereto was the operator or owner of a motor vehicle (the "Defendant's Motor Vehicle").

3. ... The Plaintiff, having first ascertained that the way was clear to proceed, entered the crosswalk traversing Prescott Street in a cautious and prudent manner in a generally westerly direction. The Defendant, traveling in the Defendant's Motor Vehicle, caused or permitted the Defendant's Motor Vehicle to enter the said crosswalk and strike the Plaintiff, knocking him to the ground, thereby causing serious personal injury to the Plaintiff.

4. The Plaintiff alleges that the aforesaid collision was caused by the negligence of the Defendant the particulars of which are as follows: ...

6. As a result of the aforementioned negligence of the Defendant, the Plaintiff suffered serious bodily injuries ...

9. The Plaintiff repeats the foregoing and claims against the Defendants:

a) Special damages;

b) General damages for, but not limited to diminished and/or loss of earning capacity, diminished housekeeping capacity, future care, pain, suffering and loss of amenities of life, ...

12 It is evident from this pleading that the action is a tort (negligence) claim seeking damages against an unknown driver.

13 Tucker tendered evidence in support of his application, presumably going to the insurer's knowledge of the accident and the presence or absence of prejudice.

14 After Tucker's then counsel requested a copy of Tucker's insurance policy on October 22, 2007, counsel wrote to the insurer (broker) on November 1, 2007:

> We are the solicitors for Ian Tucker and write to you in that capacity.
>
> On October 13, 2007, between 11:30 p.m. and midnight, Mr. Tucker was struck by a vehicle at Water Street and Prescott Street. The incident was reported to the Royal Newfoundland Constabulary, but to date, the party responsible for the accident remains unidentified.
>
> Our client sustained very serious injuries as a result of the accident including significant facial injuries and a broken leg. It is anticipated that he will miss work, at the very minimum, for six months. We are seeking to recover, on his behalf, costs incurred related to this accident, including recovery of lost wages pursuant to Section D of his insurance policy with Action Insurance.
>
> We request that the correspondence be forwarded to an adjuster as soon as possible and that the adjuster contact the undersigned. ...

15 Following a meeting on November 14 with AXA's claims adjuster, counsel provided AXA with Tucker's statement of the particulars of the accident, the names and telephone numbers of persons in Tucker's company immediately following the accident and a completed 'Physician's Questionnaire'.

16 In July 2008 the insurer asked whether there were any medical reports from Tucker's treating physician. Counsel replied on July 14 — "I will check and get back to you". Nothing further happened until January 16, 2009 when the adjuster wrote counsel:

> ... as it appears we are having a difficult time obtaining medical reports from your client's treating physician, I request at this time that you issue and serve your statement of claim to which we will file our defense and arrange discoveries of your client's treating physician.

17 There was no reply.

18 On October 13, 2009, counsel issued the statement of claim in this proceeding. Lacking a known defendant, it has not yet been served.

19 A little over two years later, on November 18, 2011, counsel issued another statement of claim in proceeding 2011 01T 7191, this time against AXA claiming Section D benefits — damages caused by the still unidentified driver.

20 This is the context in which Tucker has brought an application to add AXA as a defendant to this "Unknown Person" proceeding and to make consequential amendments to the statement of claim. The requested amendments set out that Tucker has Section D coverage from AXA, that he has been injured by an unidentified driver, thus triggering Section D entitlement, and that:

> 12. The Plaintiff, on or about November 18, 2010, presented a claim to the Defendant for compensation for bodily injuries resulting from the accident, which claim was denied by the Second Defendant on or about February 2011.
>
> 13. The Plaintiff therefore claims against the Second Defendant as a result of its breach of its contract with the Plaintiff.

14. The Plaintiff has as a result of the Second Defendant's breach of contract incurred and continues to incur expenses due to the aforesaid breach of contract, including but not limited to, expenses relating to necessarily procured prescription drugs and other medical devices and services.

15. The Plaintiff has suffered loss of income, diminished and/or loss of earning capacity, diminished housekeeping capacity and loss of amenities of life for which he has not been compensated by the Second Defendant as required of the Second Defendant pursuant to the Policy.

Legislation and Rules of Court

21 Entitlement to add a party to an existing proceeding is found in the *Rules of the Supreme Court, 1986*. In this instance, the application is brought after the expiration of the limitation period in which to start a new proceeding against AXA. I will set out certain provisions of the *Limitations Act*, SNL 1995 c.L-16.1, although it is clear from the *Act* and from the authorities that the expiration of a limitation period is of no consequence to the jurisdiction or the entitlement to add a party to a proceeding started within the limitation period.

Limitations Act

11.(1) Notwithstanding section 17, where an action to which this or another Act applies has been commenced, the lapse of time limited for bringing an action is no bar to ...

(d) the addition of a new party under the Rules of the Supreme Court, 1986

respecting a claim relating to or connected with the subject matter of the original action.

(2) Subsection (1) does not operate so as to interfere with a judicial discretion to refuse relief on grounds unrelated to the lapse of time for bringing an action.

(3) Where an application for an amendment to an action to which this or another Act applies is made after the expiration of the limitation period for that action, the court may allow that amendment

(a) to change the pleading or originating process; or

(b) to substitute or change the plaintiff or defendant,

provided that

(c) that amendment involves a non-prejudicial error and that it arises out of the facts set out in the original pleadings.

(4) The court may allow an amendment under subsection (3) on terms as to costs that the court considers just, notwithstanding that between the issuance of the originating documents and the application for amendment, a new cause of action disclosed by the amendment would have been barred by a lapse of time.

(my emphasis)

22 This section — in particular para. 11(1)(d) — confirms that the entitlement to add a party is governed by the Rules of Court and that the intervention of a limitation period is of no relevance to that determination. I would however note that s. 11, read as a whole, also recognizes the distinction between amending a proceeding or substituting or changing the name of a party (para. 11(3)(b)) and adding a new party (para. 11(1)(d)).

Rules of Court

23 I take from the authorities — of which more later — that the governing rule is Rule 7 - in particular r. 7.04(2)(b); however, given the references in argument and in some of the authorities to Rule 15, I will set out below the relevant extracts of Rule 7 and the sections of Rule 15 referred to in argument and in some of the authorities:

Rule 7 — Causes of Action and Parties

7.04.(1) No proceeding shall be defeated by reason of the misjoinder or nonjoinder of any party or person, and the Court may determine any question or issue in dispute in a proceeding so far as it affects the rights and interests of any party, saving the rights of any person who is not a party.

(2) At any stage of a proceeding the Court may, on such terms as it thinks just and either of its own motion or on application of any party to the proceeding,

(a) order any party who is not a proper or necessary party, to cease to be a party; or

(b) order any person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added as a party,

but no person shall be added as a plaintiff without the plaintiff's consent signified in writing or in such other manner as the Court may order.

Rule 15 — Amendment (Note: Rule 15 was amended May 2012)

15.01.(1) On such terms as it thinks just and in accordance with Rule 7, the Court may at any time, on application or on its own motion, grant an amendment which:

(a) adds, substitutes or corrects the name of a party to a proceeding; or

(b) alters the capacity of a party to a proceeding.

(2) A proceeding may be discontinued against a party in accordance with Rule 19.

(3) Notwithstanding the expiry of a relevant period of limitation, the Court may allow an amendment under paragraph (1) to rectify a mistake even if the effect of the amendment will be to add a new party if the Court is satisfied that the mistake was genuine and not misleading or such as to cause any reasonable doubt as to the identity of the party intending to bring or oppose the proceeding.

15.02.(1) If an amendment does not include the addition, deletion, substitution or correction of the name of a party to a proceeding, a party may amend a pleading filed by that party other than an order:

(a) once without the leave of the Court if the amendment is made not later than 20 days from the date the pleadings are deemed to be closed or 5 days before the hearing under an originating document;

(b) at any time with the written consent of all of the parties filed with the Court; or

(c) at any time with leave of the Court on such terms as it thinks just.

(2) The Court may allow an amendment notwithstanding the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of the same or substantially the same facts as the original cause of action.

24 This amended rule does not make a substantive difference to the law to be applied when considering an application to add a new party. The amendment is directed at clarifying which amendments require an application and which do not.

25 For ease of reference, I set out the relevant rule as it was before the amendment:

> 15.02.(1) The Court may grant an amendment under rule 15.01 at any time, in such manner, and on such terms as it thinks just.
>
> (2) Notwithstanding the expiry of any relevant period of limitation, the Court may allow an amendment under rule 15.02(1)
>
> > (a) to correct the name of a party, notwithstanding it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake was genuine and not misleading or such as to cause any reasonable doubt as to the identity of the party intending to bring or oppose the proceeding; and
> >
> > (b) to alter the capacity in which a party brings or opposes a proceeding if the capacity, after the amendment is made, is one in which at the date of issue of the originating document, third party notice, or the making of the counterclaim, the party might have brought or opposed the proceeding.
>
> (3) The Court may allow an amendment under rule 15.02(2) notwithstanding the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of the same or substantially the same facts as the original cause of action.

26 As already mentioned, after consideration of the authorities I have concluded that the rule applicable in this situation — the addition of a new party defendant to an existing proceeding — is r. 7.04(2)(b).

Authorities

27 Prior to the 2012 decision in *Houston*, a number of decisions — including at least two appellate decisions in this province — had explicitly or implicitly reviewed the law on the addition of new parties and had set out the rules and principles to be applied. I propose to review those decisions — and the authorities referred to with approval in those decisions — and to then set out what I take to be the governing law as it stood before *Houston*. I will then review *Houston* to determine to what extent, if any, it has changed the applicable law and principles.

Mandavia v. Central West Health Care Institutions Board *(2003), 222 Nfld. & P.E.I.R. 265 (N.L. T.D.).*

28 At issue was the addition of a new plaintiff. The court concluded that the operative rule was r. 7.04(2)(b) and that subsection 11(1) of the *Limitations Act* rendered the expiry of any limitation period irrelevant to the determination of entitlement to add a party under the rule. There followed a review of authorities from other jurisdictions, particularly *Enterprise Realty Ltd. v. Barnes Lake Cattle Co.* (1979), 101 D.L.R. (3d) 92 (B.C. C.A.); *Amon v. Raphael Tuck & Sons Ltd.* (1955), [1956] 1 Q.B. 357 (Eng. Q.B.); *Vandervell Trusts, Re* (1970), [1971] A.C. 912 (U.K. H.L.).

29 The decision noted the narrow ambit of the first jurisdictional or entitlement avenue under r. 7.04(2)(b) — "... ought to be joined ..." with its common law origin, and contrasted the second branch of the rule "... whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon ..." with its equitable emphasis on the effectiveness of the remedies claimed in the proceeding as it stands.

30 The analysis in *Mandavia* of the "necessary" avenue confirms that necessary does not mean simply more convenient but rather necessary in the sense of avoiding abatement (dismissal) of the proceeding — in essence an absence of jurisdiction — because the proper parties were not before the Court. Inquiry into necessity looks not at the facts and circumstances surrounding the litigation but rather only at the pleadings in order to determine whether or not the proceeding *as presently framed* could be "effectually adjudicated upon" without adding the proposed party. In this context, of course, 'able to be adjudicated upon' means that the Court has the ability (jurisdiction) to decide the matter and that any potential orders will be effective; it does not mean, looking at it from a plaintiff's point of view, providing an opportunity for a potentially more favourable determination on the merits of the matter.

31 The reasoning and analysis in *Mandavia* were specifically approved by the Court of Appeal in *Vardy v. Dufour*, 2008 NLCA 22 (N.L. C.A.).

Clearwater Fine Foods Inc. v. Day & Ross Inc., ***2003 NLSCTD 106 (N.L. T.D.); aff'd 2004 NLCA 3 (N.L. C.A.)***

32 The plaintiff applied to add a new defendant and make consequential amendments. At first instance the court adopted the reasoning in *Mandavia*. The following extract from the trial court's decision summarizes the applicable principles and confirms that a decision to add a new party is not simply an amendment to a pleading between existing parties, but rather one which engages the specific provisions of r. 7.04(2)(b).

33 At paras. 14 — 16:

> The right to bring a third party claim is not qualified [by s. 11 of the *Limitations Act*], but the right to add a new party is modified by the requirement that any application must satisfy the Rules of Court - here r. 7.04.
>
> If Clearwater is able to satisfy the requirements of the rule, the expiry of any limitation period - in the circumstances of this case - will not preclude the addition of Argentia Freezers as a defendant. In Mandavia v. Central West Health Care Institutions Board I canvassed in some detail the authorities which have considered r. 7.04(2) or its equivalent. I do not propose to repeat that analysis here and I adopt and incorporate the reasoning and conclusions in that decision. I note only that, to refer to the wording of the rule, "ought to have been joined as a party" has a common law origin and applies in limited situations to allow a party such as a joint contractor to be added. A person "whose participation in a proceeding is necessary to ensure that all matters in a proceeding may be effectually adjudicated upon" is one whose participation as a party is necessary to ensure complete adjudication of the claims in the existing (original) proceeding or to ensure that all relief requested in the existing proceeding can in fact be awarded.
>
> . . .
>
> A defendant is not added simply to avoid a multiplicity of actions; there are avenues by which a separate action, if started in time, can be joined with another proceeding. Practically speaking, the addition of a defendant only becomes an issue when the plaintiff is otherwise out of time in which to start a separate proceeding. <u>Thus an application to add a defendant is not treated simply as an application to amend the pleading. The specific requirements of r. 7.04 are engaged, and those requirements are only met when the adjudication of the claims made and the relief requested in the existing proceeding can only be fully and effectually accomplished if the proposed party is added as a party. In other words, it must be determined that, as a matter of law, there cannot be a final determination of the issues raised as between the plaintiff and the defendant unless the proposed party is added as a defendant and is subject to the final and binding effect of the court's decision.</u>
>
> (my emphasis)

34 The Court rejected the argument that the fact that the proposed defendant may have been a joint tortfeasor triggered an entitlement under either the "ought to" or "necessary" branch of r. 7.04. The proceeding as framed could be readily adjudicated without the addition of the new party. The decision also addressed and rejected the argument that the plaintiff might not recover its loss if the party were not added — at para. 23:

> ... The addition of Argentia Freezers as a defendant may provide another party from whom Clearwater can recover if Clearwater's claim can be made out, but this opportunity cannot be equated to the necessity of Argentia Freezers being added as a defendant in order to ensure the complete adjudication of the issues between Clearwater and Day & Ross as those issues are raised and framed by the existing proceeding.

35 This confirms that 'effectual adjudication' does not mean an adjudication which improves the plaintiff's prospect of successful recovery.

36 The Court of Appeal, in a short memorandum of disposition, dismissed the appeal without hearing from the respondents and concluded that the trial judge's finding that there was no entitlement to add a new party under either the "ought to" or "necessary" branch of r. 7.04(2)(b) did not demonstrate any error in law.

37 I take this as appellate approval of the trial decisions and analyses in both *Mandavia* and *Clearwater*.

Vardy v. Dufour, ***2008 NLCA 22 (N.L. C.A.)***

38 The plaintiff applied to add additional defendants in a medical malpractice proceeding. The applicants succeeded at first instance and the newly added defendants appealed.

39 The Court of Appeal decision in *Vardy* provides a detailed and comprehensive analysis of the procedure and legal principles to be followed when dealing with an application to add a new party.

40 The Court first discussed the procedure and differentiated between the rules governing the amendment of pleadings (Rule 15 (as it then stood)), and the rule for the addition of a new party (Rule 7). At para. 14 there is reference to the discussion in *Petten v. E.Y.E. Marine Consultants* (1994), 120 Nfld. & P.E.I.R. 313 (Nfld. T.D.) which points out the distinction between *changes* or *corrections* to names — properly considered under Rule 15, and *substantive* substitution or addition of parties — properly considered under r. 7.04(2)(b):

> 14. The interaction of these rules is discussed in **Petten et al. v. E.Y.E. Marine Consultants et al.** (1994), 120 Nfld. & P.E.I.R. 313 (NLTD). Green J., as he then was, wrote:
>
> > [48] The **Rules of Court** provide for a number of instances where the names of parties can be added to, or changed in, an existing proceeding. They can be categorized as follows: (i) nominal correction (rule 15.02(1)(a)); (ii) substitutional correction (rule 15.02(1)(a)); (iii) capacital correction (rule 15.02(1)(b)); (iv) <u>substantive substitution</u> (rule 7.07(2)); (v) <u>substantive addition</u> (rule 7.04(2)(b)). This last category would appear to be directed, not at amendment or correction of names of contemplated existing parties, but to the addition of completely new persons outside the guise of the notion of amendment.
> >
> > [49] The instant application appears to be truly an application to add a new party and hence it is rule 7.04(2)(b) which governs.
> >
> > (my emphasis)

41 Welsh, J.A., speaking for the Court, continued at paras. 14 — 15:

> The difficulties arising from the incorrect use of rule 15.02 are apparent from the discussion below.
>
> <u>In summary, it is clear that rule 7.04(2) is the applicable rule when the requested order is for the addition of a party after expiration of the limitation period</u>. The nature of the issue engages the requirement for notice to be given to the proposed party.
>
> (my emphasis)

42 I do not see any lack of clarity in this direction nor in the delineation of the circumstances addressed by the two different rules.

43 *Vardy* then recites para. 11(1)(d) of the *Limitations Act* and says, at para. 17:

> Accordingly, applying section 11(1)(d) of the Act, a new party may be added if permitted under the Rules.

44 Again, I do not see any lack of clarity in this conclusion. Paragraph 11(1)(d) of the *Limitations Act* does not add to whatever entitlement or jurisdiction there may be under r. 7.04(2)(b) to add a party; it simply removes an intervening limitation period as an obstacle and renders it irrelevant.

45 In paras. 18 — 25, the Court addresses directly the interpretation of the requirements of r. 7.04(2)(b) — in particular the "necessary" avenue in the second branch of the rule. It recognizes that two different interpretations of "necessary" had been advanced — one broader than the other.

46 After setting out the interpretations used in *Mandavia* and *Clearwater* — both espousing the narrower interpretation — the Court set out the wider interpretation — an interpretation which tends towards the 'just and convenient' and which considers factors extraneous to the present proceeding as defined by the pleadings. At para. 22:

> This interpretation of rule 7.04(2)(b) [**Mandavia** and **Clearwater**] differs from the approach taken in **Petten et al. v. E.Y.E. Marine Consultants et al.**, *supra*. In **Petten**, Green J. identified factors to be considered in applying the rule, including: the avoidance of multiplicity of actions, the addition of issues that might complicate or lengthen the trial, and the point in the proceedings when the issue of adding parties is raised. The final factor listed by Green J. is:
>
> > [57] ...
> >
> > 5. Whether joinder would embarrass or delay the trial or is otherwise inconvenient or prejudicial to the other parties.

47 The Court continued, at para. 23:

> In **Mandavia,** Orsborn J. discussed these two approaches:
>
> > [11] The authorities indicate that the second condition ["necessary that all matters in the proceeding be effectually adjudicated"] is amenable to two interpretations. The broader interpretation contemplates the addition of parties primarily to prevent a multiplicity of actions — the desirability of having in one proceeding those whose rights or economic interests may be affected by the outcome. The narrower view was espoused by Devlin J., in **Amon v. Raphael Tuck & Sons Ltd.**, [1956] 1 Q.B. 357 at p. 378:
> >
> > > "... The primary object of the rule I believe to be to replace the plea in abatement. The object of that plea was to abate an action in which all the proper parties were not before the court. The rule is more flexible than the plea, but its object is fundamentally the same. It is not to marry a future action to an existing one, but to ensure that all the necessary parties to the existing one (using necessary in the broad sense of being necessary to effectual and complete adjudication in the existing action) are before the court. It does, of course, incidentally keep down multiplicity of actions, ... but that appears to me to be a desirable consequence of the rule rather than its main objective."
> >
> > (emphasis added by Court of Appeal)

48 Speaking for the Court, Welsh, J.A.'s conclusion and formulation of the appropriate test is set out at paras. 24 — 25:

> I am satisfied that the narrow interpretation of a "necessary" party in rule 7.04(2) espoused in the **Mandavia** and **Clearwater** decisions, and adopted by the Trial Division judge, is the correct interpretation, and that it applies to both paragraphs (a) and (b). As noted by Orsborn J., the language of the rule clearly requires an assessment of necessity. This stands in contrast to the rule in some other jurisdictions that use language such as "just and convenient" (**Mandavia v. Central West Health Care Institutions Board et al.**, *supra*, at paragraph 17). Where the limitation period for adding a defendant has expired, the purpose of rule 7.04(2)(b) is not to allow for the joining of a separate action to an existing one, even if the actions may be related. <u>Rather, the rule is directed to the adjudication of the original proceeding.</u> These principles apply equally to an application to remove a party under paragraph (a).

The test, then, is whether the existing action as commenced, as between the original plaintiffs and defendants, can be effectually and completely adjudicated without the addition of the proposed party. It is the matters and issues in the proceeding as framed before adding the proposed party that must be considered.

(my emphasis)

49 Again I do not see any lack of clarity in the Court's conclusion on the applicable rule and the proper principles to be applied when considering an application to add a new party.

50 The Court repeated its conclusion in its summary and disposition — at para. 34:

In summary, rule 7.04(2), including notice to the proposed party, is the applicable rule when the requested order is for the addition of a party after expiration of the limitation period. ...

51 There are authorities cited with approval in *Vardy* — and in the preceding decisions — which inform the conclusions and analysis in *Vardy*. I now turn to discussion of some of those authorities.

Letvad v. Finley ***(2000), 82 B.C.L.R. (3d) 296 (B.C. C.A.); sub nom Letvad v. Fenwick, 2000 BCCA 630 (B.C. C.A.) (Referred to in Vardy at para. 32)***

52 Additional defendants were added in a malpractice action. The applicable British Columbia rule contains the "ought to" and "necessary" provisions, but goes on to add a broader "just and convenient" provision. The rule, as set out at para. 13:

The application to add parties was made under Rule 15 (5)(a)(ii) and (iii) which provide:

At any stage of a proceeding, the court on application by any person may

ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and

iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected

A) with any relief claimed in the proceeding, or

B) with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and the party.

53 Of interest for present purposes is the Court's discussion of para. (ii) of the rule.

54 The trial judge had considered and accepted the argument that adjudication of the claims *against the proposed defendants* required that they be added as parties. From the trial decision — as reproduced at para. 14 of the Court of Appeal judgment:

Given the nature of the claims, and the role that the proposed Defendants had in the medical care of the Plaintiff, the adjudication of the claims against these doctors will naturally arise in the course of this trial. In other words, their participation "may be effectually adjudicated upon" in the trial of this action. Furthermore, given the position of Vancouver Hospital the claims against the proposed Defendants can only be adjudicated upon if they are added as parties.

(my emphasis)

55 The Court of Appeal referred to this conclusion as a "truism" which had no relevance in assessing the entitlement to add a new party. At para. 15:

I take that to be a finding that Drs. Fenwick and Evans could properly have been joined in the action at the outset and that their presence as defendants would be potentially useful to the plaintiff. With respect to the last sentence in the passage it is, of course, true that the claims against the proposed defendants can only be adjudicated upon if they are added as parties. That truism cannot assist in establishing that they should be added as parties.

(my emphasis)

56 Esson, J.A. then noted the limited and perhaps quasi-jurisdictional nature of the analysis — at para. 16:

Whatever the exact meaning of the passage, it demonstrates in my view that the chambers judge erred in principle in failing to have regard to the fundamental limitation on subrule (ii) which is that it is intended only to remedy defects in the "proceeding" as it stood prior to the application to add parties.

(my emphasis)

57 The Court then turned to a discussion of the authorities — references to *Enterprise Realty Ltd.* and *Amon* also appear in the decisions from this province discussed earlier in these reasons. At para. 17 of *Letvad*:

The leading authority on this rule is *Enterprise Realty Ltd. v. Barnes Lake Cattle Co. Ltd.* (1979), 13 B.C.L.R. 293 (C.A.), which settled the question whether the rule should be given a broad or a narrow construction. Lambert J.A. for the court held that the narrow construction must continue to prevail. In so doing, he applied the reasoning of Devlin J. (as he then was) in *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357. Lambert J.A. said at 298:

> I propose to turn first to the English cases. In *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357, [1956] 1 All E.R. 273, in a most thorough historical analysis of the jurisprudence, Devlin J. concluded that the first condition, "ought to have been joined", had its origin in common law, with its relatively simple remedies, and applied to cases such as joint contractors and that the second condition, "necessary that all matters in the proceeding be effectually adjudicated", had its origin in equity, with its more complex remedies, and that it covered cases where a remedy such as specific performance could not be awarded without additional parties being added to make the remedy effective. Devlin J. then traced the two lines of authority and decided that the narrow construction was to be preferred. He did so for what I consider to be five reasons. ...

That passage illustrates the kind of issues which may be taken into account in deciding whether the application is within subrule (ii). The gist of the matter is that the plaintiff must establish either that the persons sought to be added "ought to have been joined as a party" or that their "participation in the proceeding is necessary" in order to permit the issues between the existing parties to be effectually adjudicated.

(my emphasis)

58 Esson, J.A. then confirmed the analytical distinction between the ability to name a party when litigation starts and the question of law of whether, when later considering matters in the context of the existing pleadings, a party ought to have been joined or whose participation was necessary. At para. 18:

That is not to say that if Drs. Fenwick and Evans had been joined as defendants at the outset, that would have been an improper joinder. But that is an entirely different question from that as to whether they ought to have been joined or whether their joinder was necessary in order for the issues between the original parties to be adjudicated upon. The chambers judge having erred in holding that subrule (ii) applied, no element of discretion arises. That finding must be set aside on the basis that there was no jurisdiction to add the parties under subrule (ii).

59 In my view, such reasoning points out that "ought to have been joined" is an issue involving only a question of law and not one that considers mistakes by counsel or other context and circumstances. This view is confirmed by the reasoning in *Amon*, of which more below.

60 It is useful to note that in its consideration of the applicability of para. (iii) of the British Columbia rule — "just and convenient" — the Court considered it appropriate to consider factors outside the four corners of the pleadings. At para. 29:

> ... It was held in Teal that the guidelines to which the chambers judge is required to have regard include these:
>
> • the extent of the delay;
>
> • the reasons for the delay;
>
> • any explanation put forward to account for the delay;
>
> • the degree of prejudice caused by delay; and
>
> • the extent of the connection, if any, between the existing claims and the proposed new cause of action.
>
> McEachern C.J.B.C. in his concurring reasons said at p. 300:
>
> > [74] Applying the same principles regardless of whether the application is to add new defendants, as in Ricketts or new causes of action, as in Med Finance, I believe the most important considerations, not necessarily in the following order, are the length of the delay, prejudice to the respondents, and the overriding question of what is just and convenient.

61 The use of such factors in determining whether to add a party was espoused in *Petten* but specifically rejected by the Court of Appeal in *Vardy*. The entitlement to add a new party under the rule in effect in this province is limited to meeting the legal test of "ought to" or "necessary" and does not extend to a wider factual inquiry under "just and convenient".

Amon v. Raphael Tuck & Sons Ltd. ***(1955), [1956] 1 Q.B. 357 (Eng. Q.B.) (referred to in Mandavia at para. 11)***

62 This is perhaps the most comprehensive analysis of the rule of court dealing with the addition of parties. The decision has been frequently cited with approval — I note in particular the expression of approval by this province's Court of Appeal in *Vardy* at paras. 22 — 23, quoting and approving *Mandavia* with the recitation of a passage from *Amon*.

63 The English rule considered in *Amon* is the equivalent of r. 7.04(2)(b):

> R.S.C., Ord. 16, r. 11:
>
> ... The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that ... the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added ...

64 Devlin, J. distinguished necessity and convenience (p. 363) and then pointed out the jurisdictional nature of the decision to add a new party to an existing procedure. At pp. 368-9:

> Accordingly, the present case, in my view, really turns upon the true construction of the rule, and in particular the meaning of the words "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter". <u>The beginning and end of the matter is that the court has jurisdiction to join a person whose presence is necessary for the prescribed purpose and has no jurisdiction under the rule to join a person whose presence is not necessary for that purpose. It is not, I think, disputed that "the cause or matter" is the action as it stands between the existing parties.</u>
>
> (my emphasis)

65 The following extract, while lengthy, addresses criticisms of a narrow construction of the rule, discusses the difference between the "ought to" (common law) and "necessary" (equity) branches of the rule, explains that underlying the rule is the court's concern that any remedy be legally effective, and outlines specific situations in which the requirement of necessity may be satisfied. At pp. 369-70:

> The alternative construction treats the opening words as dominant. "All the questions involved" is a phrase that, unless it is cut down, would be impossibly wide. It is cut down, the plaintiff submits, by the opening words. The intervener [new party] must be a party whose presence is necessary to enable all questions in the action to be adjudicated upon and settled, but the question must be one which has to be adjudicated upon in the issue between the existing parties and not in any new issue raised by an intervener [new party].
>
> The criticism that at once suggests itself of its construction is that it is impossibly narrow. If the adjudication is limited to something that lies between the plaintiff and the defendant, what parties can be necessary to it except the plaintiff and the defendant? The court is for this purpose concerned only with actions in personam, and in such actions either the necessary defendant is sued or the action fails. If all the parties who "ought to have been joined" under the first limb of the rule are joined, who are the "necessary" parties contemplated by the second limb?
>
> It is true that in actions in personam the order that the court makes is binding only on the parties. But there is, nevertheless, a distinction between those orders that were formerly made by the courts of common law and those that were made by a court of equity. <u>When a court orders a defendant to pay damages, no other person is, as a rule, legally affected by the order. Someone else may be commercially affected, because if there is a similar cause of action pending against him, he may have good reason to think that another court may make him liable to pay damages in another action. Nevertheless, until that other action is decided his legal rights are unimpaired.</u>
>
> <u>But when a man is ordered to do or refrain from doing something, the legal repercussions are far wider.</u> A plaintiff may, for example, claim that goods held by a warehouseman are his goods and may obtain an injunction to prevent the warehouseman from parting with them. Suppose that a third party says that the goods are his. It is true that he is not in law bound by the order against the warehouseman, but in practice he would not be able to get possession of them. <u>So long as the order stands, he cannot effectually exercise his legal right.</u> It is in this way, I think, that the three classes enumerated in the *White Book* have been developed.
>
> (my emphasis)

66 Devlin, J. went on to identify the three classes of cases in which the legal rights of a non-party may be affected by an existing proceeding; actions for specific performance, claims involving proprietary rights and representative actions. I note that none of these classes involves a simple claim by a plaintiff for damages.

67 Devlin, J.'s conclusion as expressed at p. 371:

> If this is the line of authority that is the correct one to apply, then I think the test is: "May the order for which the plaintiff is asking directly affect the intervener [new party] in the enjoyment of his legal right?" <u>It is not, on this view, enough that the plaintiff's rights and the rights which the intervener [new party] wishes to assert should be connected with the same subject-matter. Nor is it enough that the intervener's [new party] commercial interests may be affected by an order made in the action.</u>
>
> (my emphasis)

68 He then at pp. 374-375 directly addressed dicta of Lord Esher M.R. from *Byrne v. Brown* (1889), 22 Q.B.D. 657 (Eng. C.A.) which suggest that factors extraneous to the legal structure of the proceeding as it stands (the pleadings) are relevant to a decision to add a new party.

> But Lord Esher M.R. dealt with the object of the rule. He said:

> One of the chief objects of the Judicature Acts was to secure that, whenever a court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the court shall have power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence, and the main inquiry, will be the same, and the court then has the power to bring in the new parties, and to adjudicate in one proceeding upon the rights of all the parties before it. Another great object was to diminish the cost of litigation. That being so, the court ought to give the largest construction to those Acts in order to carry out as far as possible the two objects I have mentioned.

69 But in *Amon*, Devlin, J's review of the authorities satisfied him that this was not an accurate statement of the law. He said at p. 377:

> If the dicta of Lord Esher M.R. represented the law, Mr. Aldous is right in his submission at least to the extent that this summons cannot be dismissed for want of jurisdiction. But in my judgment they cannot be reconciled with the other line of authorities interpreting the rule.

70 His conclusion at p. 378:

> If I may express with diffidence my own view of the rule, apart from the authorities, I would support the narrower construction. I do not, with deference to those who have thought otherwise, agree that the main object of the rule is to prevent multiplicity of actions, though it may incidentally have that effect. The court has other ways of doing that which are amply sufficient for the purpose — by ordering consolidation or the bringing of actions on together or third party proceedings and so on. The primary object of the rule I believe to be to replace the plea in abatement. The object of that plea was to "abate" an action in which all the proper parties were not before the court. The rule is more flexible than the plea, but its object is fundamentally the same. It is not to marry a future action to an existing one, but to ensure that all the necessary parties to the existing one (using "necessary" in the broad sense of being necessary to effectual and complete adjudication in the existing action) are before the court. It does, of course, incidentally keep down multiplicity of actions, because if the necessary parties cannot get before the court in an existing action, they will naturally try to do so in another action, but that appears to me to be a desirable consequence of the rule rather than its main objective.
>
> (my emphasis)

71 Of interest is Devlin, J.'s immediately following comment on the first part of r. 7.04 — 7.04(1):

> 7.04.(1) No proceeding shall be defeated by reason of the misjoinder or nonjoinder of any party or person, and the Court may determine any question or issue in dispute in a proceeding so far as it affects the rights and interests of any party, saving the rights of any person who is not a party.

72 He said of the English equivalent at p. 378:

> In *Moser v. Marsden* Lindley L.J. said:
>
>> In order to properly understand the rule we must look at the whole of it. It beings by saying, 'No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties' — that is the key to the whole section: if the court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the court.
>
> I do not think that the words which I have to construe represent any addition to the powers of the court initiated by the Judicature Acts. I do not think that the necessary parties contemplated by it are other than those who would have been considered by a Court of Equity to be necessary before the passing of the Judicature Acts. It had always been the practice in equity to join as parties not merely those who in strictness "ought to have been joined" but also those whose presence

was necessary to complete and effectual justice. The practice stated in Mitford, Pleadings in Suits in the Court of Chancery, 5th ed. (1987), p. 190, as follows:

> It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigations may be prevented.

The words in the rule which I have to construe are really no more than a condensation of this statement.

(my emphasis)

73 This passage, in my opinion, points out that r. 7.04(1) — "no proceeding shall be defeated ..." - does not add to the substantive entitlement to add a party to an existing proceeding; rather it simply confirms that a party may — and perhaps should be added — in order to avoid having a proceeding dismissed ("abated") on the basis that no adjudication of the matter as pleaded is legally possible without the addition of the party.

74 Devlin, J. goes on to refer to the strictness of the "ought to" branch of the rule, and points out that the "necessary" branch is somewhat wider. In other words, he recognizes that the "ought to" branch of the rule is of common law origin while the "necessary" branch found its creation in equity. At p. 380:

> At common law, I think, the old practice was only to join parties "who ought to have been joined" in the strict sense, such as joint contractors; I dare say that was because the order of a common law court rarely, if ever, affected the legal interests of any third party. The provision in the rule relating to necessary parties is therefore primarily designed, I think, to give effect to the old practice in equity, though, of course, it is now available in any kind of suit. It is interesting to note that the common law had meanwhile been handling in its own way the problem of a multiplicity of actions. Consolidation is a common law device, as is shown by the terms of Ord. 49, r. 8.

(my emphasis)

75 The conclusion in *Amon* is taken from a number of passages:

> p. 380: Of course, whatever the object, it is the words of the rule that now govern the matter, and it is true that the words "all the questions involved in the cause or matter" are very wide. They are so wide that no one suggests that they can be read without some limitation. The limitation is not something that is left to be settled by the court in its discretion. It is there in the earlier words of the rule. The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the construction of a clause in a common form contract many parties would claim to be heard, and if there were power to admit any, there is no principle of discretion by which some could be admitted and others refused. The court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it is *necessary* to hear them for that purpose. The only reason which makes it *necessary* to make a person *a party* to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party. ...
>
> p. 381: It is not enough that the intervener [new party] should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can

say that it may lead to a result that will affect him legally — that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested. ...

Of course, it is desirable, if it can be managed, that actions about the same invention should be tried together. If Ord. 16, r. 11, were the only way in which that could be done, one might be tempted to enlarge its application. But that can be achieved just as well in a proper case by an order to consolidate. ...

But I do not think that Ord. 16, r. 11, is designed to offer a slightly cheaper alternative to consolidation.

(my emphasis) ...

p. 386: As I have said, I think the test is: "May the order for which the plaintiff is asking directly affect the intervener [new party] in the enjoyment of his legal rights?"

(my emphasis)

76 The comprehensive discussion in *Amon* is helpful in appreciating the purpose of the rule which facilitates the adding of parties to a proceeding. The purpose is not to refine or reformulate the proceeding; it is not to graft another proceeding onto an existing one. The rules of court provide processes for dealing with such issues. Further, the proper application of the rule does not change according to whether or not a limitation period has passed or at what stage of the proceeding the question of adding a party arises.

77 Rather, the purpose and application of the rule is directed to the integrity of the existing proceeding and, similarly, to the legal efficacy of the potential remedies. That the intention is to ensure that the legally necessary parties are before the court is, I think, confirmed by the fact that rule contemplates that the court may of its own motion, and over the objections of the parties, add a defendant (adding a plaintiff requires the consent of that party). The court is concerned that any potential orders will be legally effective; hence the ability to ensure that all parties whose legal interests may be affected are properly before the court. This focus on the effectiveness of the remedies sought is also reflected in the comments of Lambert, J.A. in *Enterprise Realty Ltd.* — as quoted in the passage from *Letvad* reproduced at para. 57 of these reasons.

78 The reference to "joint contractors" in *Amon* reinforces the view that joinder because of the "ought to" requirement is based on the nature of the relationship between the parties in question (i.e., the existing and proposed party) rather than on any relationship with the plaintiff or opposing party. It illustrates that the issue being addressed is the fact that two or more persons may make up a single legal entity or structure in the context of particular litigation and that it is necessary to name all of the constituent elements of the structure in order to have the party in question properly before the court.

79 Thus "ought" is used not in the sense of preferable or desirable, but rather of being mandatory in the sense of common law necessity — ensuring that the (e.g.) contracting party is fully constituted in the proceeding before the court. To put it another way, the legal integrity of the proceeding requires that another party be added.

80 It is thus apparent that this element of necessary legal structure is missing from situations involving (e.g.) joint tortfeasors or co-guarantors. Even though a particular circumstance may give rise to a potential for joint and several liability to a plaintiff, that prospect does not make the addition of all tortfeasors or guarantors necessary to the integrity of a proceeding as it stands. Clearly a plaintiff may choose to sue only one of a number of potential defendants. The fact that the defendant may seek to bring in others by means of third party proceedings or otherwise goes to the ability to share any losses; it does not go to the integrity of the proceeding as initially structured. Further, the fact that the court has the jurisdiction to add a defendant over the objections of the plaintiff reinforces the fact that the purpose of having a party is to complete the building of the necessary legal structure of the proceeding.

81 *Amon* explains that the "necessary" branch of the rule is simply the "ought to" branch as adapted by the courts of equity, designed to enable remedies such as specific performance to be effective if and when ordered. The focus is again on the integrity of the legal structure of the proceeding and any potential orders. There is no suggestion anywhere in *Amon* — indeed there is

comment to the contrary — that the jurisdiction to add a party to a proceeding should be extended to situations of an already completely and properly constituted proceeding.

Vandervell Trusts, Re ***(1970), [1971] A.C. 912 (U.K. H.L.) (Referred to in Mandavia at para. 12)***

82 This decision was referred to in *Mandavia* as endorsing Devlin, J.'s analysis in *Amon*.

83 In *Vandervell*, the House of Lords reversed a decision of the Court of Appeal, and held that the circumstances were not such as to permit the addition of a new party defendant, *notwithstanding that the proposed defendant consented to the addition*.

84 In his judgment, Viscount Dilhorne referred to *Amon* and specifically rejected the "just and convenient" interpretation advanced by Lord Denning in the Court of Appeal. He reaffirmed that the entitlement or jurisdiction to add a new party to an existing proceeding depends on whether, as a matter of law, the conditions of either "ought to" or "necessary" are met. At pp. 935-6:

> If, under this rule, the Inland Revenue can be added as a party, their consent to that is not a condition precedent to that being done unless it is proposed to add them as a plaintiff. Their refusal of consent would be no bar to the exercise by the High Court of its jurisdiction to add them as a defendant.
>
> The many reported cases in which this rule has been considered were comprehensively reviewed by Devlin J. (as he then was), in *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 K.B. 357. He said, at p. 361:
>
>> There are two views about its scope; and authority can be cited for both. One is that it gives a wide power to the court to join any party who has a claim which relates to the subject-matter of the action ... if it is right, it really kills any submission about jurisdiction. The court is hardly likely in the exercise of its discretion to join as a party somebody who has no claim relating to the subject-matter of the action; and if its powers extend to joining anyone who has, the question whether a particular intervener should be joined becomes virtually one of discretion.
>
> In this case the Court of Appeal held that there should be a wide interpretation of the rule. Lord Denning said [1970] Ch. 44, 56-57:
>
>> We will in this court give the rule a wide interpretation so as to enable any party to be joined whenever it is just and convenient to do so. It would be a disgrace to the law that there should be two parallel proceedings in which the self same issue was raised, leading to different and inconsistent results. It would be a disgrace in this very case if the special commissioners should come to one result and a judge in the Chancery Division should come to another result as to who is entitled to these dividends.
>
> Whether this interpretation is wider than that stated by Devlin J in the passage cited above, it is not necessary to consider. My difficult about accepting Lord Denning's wide interpretation is that it appears to me wholly unrelated to the wording of the rule. I cannot construe the language of the rule as meaning that a party can be added whenever it is just or convenient to do so. That could have been simply stated if the rule was intended to mean that. However wide an interpretation is given, it must be an interpretation of the language used. The rule does not give power to add a party whenever it is just or convenient to do so. It gives power to do so only if he ought to have been joined as a party or if his presence is necessary for the effectual and complete determination and adjudication upon all matters in dispute in the cause or matter. It is not suggested that the revenue ought to have been joined.
>
> (my emphasis)

85 Lord Morris of Borth-y-Gest expressed a similar opinion — at p. 930:

> My Lords, although the submissions in this case have ranged extensively the decisions can rest upon a consideration of the rule which is applicable. In agreement with Buckley J. I do not think that this is a case which falls within Ord. 15, r. 6(2)(b). It is not suggested that the commissioners "ought to have been joined as a party". The only question is whether

their presence before the court is "necessary" — that is necessary "to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon." I do not think that any process of giving a wide or liberal interpretation to the rule can be employed to alter it or to give it an enlarged meaning which, on a fair and reasonable interpretation, it does not bear.

... The matters in dispute between the executors and the trustees can be effectively and completely determined and adjudicated upon in the absence of the commissioners. It follows, in my view, that their presence was not shown to be "necessary".

86 The reference to the matters in dispute between the executors and the trustees — leaving out the proposed party, the tax authorities, confirms that the assessment of necessity for the addition of the new party is measured only against the proceeding as it stands and as it calls for adjudication between the existing parties.

87 The above authorities reflect the law relating to the addition of a new party to an existing proceeding as it stood, to my understanding, in this province prior to the recent decision in *Houston*.

88 What follows is my summary of that law:

1. Adding a new party to an existing proceeding is achieved through the exercise of a jurisdiction found in the Rules of Court. Underlying the rule — and perhaps its genesis — is the need to ensure that the proceeding is fully constituted in the legal sense and that any remedy granted or order made by a court in a proceeding is not rendered ineffective or incapable of performance because it does not bind all persons whose legal interests are affected by the order.

2. The fact that a limitation period may have intervened is no bar to the addition of a party in accordance with the applicable rule. The connection with the subject matter of the proceeding — subsec. 11(1) of the *Limitations Act* — is a necessary condition in such circumstances but not a sufficient one.

3. In this province, the rule governing the addition of a new party to an existing proceeding is r. 7.04(2)(b). Adding a new party to an existing proceeding (Rule 7) is qualitatively and analytically different from an amendment to a pleading or the change or substitution of a party. (Rule 15)

4. To ground an entitlement to add a new party to an existing proceeding under r. 7.04(2(b), one of the following conditions must be satisfied:

(i) that the proposed party ought to have initially been joined as a party; this condition, derived from the common law courts, addresses the relationship between an existing party and the proposed party and considers whether or not the existing party — in a legal sense — is fully constituted in the absence of the proposed party, thus avoiding dismissal (abatement) of the proceeding and ensuring the enforceability of any potential remedy; or

(ii) that the participation of the proposed party is necessary to enable the court to adjudicate the proceeding as it stands between the existing parties; this condition, developed by the courts of equity, primarily addresses the *legal* effectiveness of the remedies claimed in a proceeding and considers whether or not all those whose legal interests may be affected by any potential order are before the court. It is the presence of all such persons — those with legal interests in the proceeding as framed — that enables proper adjudication or determination of the proceeding.

5. In each case, the need for the addition of the party is assessed against the existing proceeding — the pleadings — as it stands before the addition of a new party and before any consequential amendments.

6. Factors such as timeliness, prejudice, costs, the intentions of counsel, the carelessness or otherwise of counsel, or the prospect of the plaintiff not succeeding on the merits of the claim against the existing party or parties are not factors that can ground or assist in grounding an entitlement to add a party. Such factors may inform the broader test of what is "just or convenient", as used, for example, in British Columbia, but they are not relevant to the legal determination necessitated by the "ought to" or "necessary" conditions of r. 7.04(2)(b).

7. Whether or not a party ought to be added or is necessary for the adjudication of the existing proceeding is a question of law not involving an exercise of discretion.

8. Where the courts have allowed the addition of a new party, the requested remedies or orders that have informed the question of "necessary" have been in the nature of orders for specific performance, proprietary remedies or representative actions; in other cases involving particular relationships such as joint contractors, a party has been added under the "ought to" condition in order to ensure that a plaintiff or defendant (e.g. contracting party) is fully constituted for the purposes of the proceeding. The authorities do not suggest that an action in which a plaintiff simply seeks damages from a defendant is such as to require the addition of another party to make any award of damages effective as a matter of law. The authorities also do not suggest that in such an action the pre-condition for adding a defendant is satisfied either by providing the plaintiff with an additional and perhaps more successful avenue of recovery or by simply establishing a connection to the subject matter of the proceeding.

9. If one or other of the conditions is established, a party may be added of the court's own motion or on application. Consent of any or all of the parties is not required, at least when contemplating the addition of a defendant. If necessary to protect the integrity of a proceeding, a defendant whom the plaintiff has chosen not to sue may be added as a party.

10. If either of the conditions is satisfied, and a prima facie entitlement to add a party is found, the decision is nonetheless discretionary. However, the discretion is not such as to allow for the addition of a party if one or other of the pre-conditions is not met. No issue of discretion — consideration of factors such as delay, prejudice and the like — arises unless and until one or other of the legal requirements is established. Subsection 11(2) of the *Limitations Act* confirms that subs. 11(1) does not "interfere with a judicial discretion to *refuse* relief ..." thus recognizing, at least implicitly, that the decision to add a party is not grounded or based on an exercise of discretion in the positive sense.

11. The avoidance of a multiplicity of proceedings and other factors extraneous to the existing pleadings are not factors properly considered in deciding whether either of the "ought to" or "necessary" conditions have been satisfied. The Rules of Court provide other mechanisms such as consolidation to join or make more efficient the conduct of properly-brought proceedings.

89 I turn now to the 2012 Court of Appeal decision in *Houston*.

10475 Newfoundland Ltd. v. Houston, ***2012 NLCA 34 (N.L. C.A.)***

90 The proceeding in *Houston* involved a slip and fall accident. The plaintiff initially sued only one defendant, Perennial Management Limited, and asserted in her statement of claim that Perennial was the owner or occupier of the premises in question. She later discovered that Perennial was the property manager and that the premises were in fact owned by 10475 Newfoundland and Crombie Property Holdings, both corporations. The plaintiff sought to amend her statement of claim to describe Perennial as the property manager and to add the two corporations as the owners and occupiers of the premises.

91 The Court of Appeal upheld the decision of the trial judge allowing the requested amendments and additions.

92 At first glance it may appear — and indeed it was so argued in this case, that *Houston* has modified the procedure to be followed and the principles to be applied when application is brought to add a new party to an existing proceeding. However, based on a careful reading of *Houston* and of the authorities referred to in the decision, and given that *Houston* affirms the decisions of the Court of Appeal in *Vardy* and *Clearwater*, it is my conclusion that this is not the case.

93 For the reasons I will outline, the *Houston* decision, in my respectful opinion, does not change the long-standing principles of law endorsed in the line of authority culminating in *Vardy*; to do so would, in my respectful view, require explicit language. *Houston* refers to both Rule 7 and Rule 15, but my assessment is that the Court dealt with the matter primarily as a Rule 15 application to amend the pleadings and to change the name or capacity of the defendants.

94 My discussion of *Houston* commences at para. 21 of the decision. The Court writes:

I am satisfied that there is some uncertainty as to the application of Rules 7.04(2)(b) and 15.02(1) together with s. 11(1)(d) of the *Limitations Act* dealing with the amendment of pleadings affecting the addition of parties as defendants following the expiration of applicable limitation periods which justifies further guidance from this Court.

95 This passage must be read in conjunction with paras. 15, 17 and 34 in *Vardy* — I repeat these for ease of reference:

In summary, it is clear that rule 7.04(2) is the applicable rule when the requested order is for the addition of a party after expiration of the limitation period. The nature of the issue engages the requirement for notice to be given to the proposed party. ...

Accordingly, applying section 11(1)(d) of the Act, a new party may be added if permitted under the Rules. ...

In summary, rule 7.04(2), including notice to the proposed party, is the applicable rule when the requested order is for the addition of a party after expiration of the limitation period.

96 These references from *Vardy* establish that when adding a party, the appropriate rule is 7.04(b) and that para. 11(1)(d) of the *Limitations Act* simply removes the limitation period as an impediment to resort to an application of the rule.

97 Accordingly, I take from the references in para. 21 of *Houston* to r. 15.02(1) and to the amendment of pleadings that the application was considered largely as an application to amend the pleading. This view is fortified by the fact that at para. 22 the Court sets out, with emphasis, certain extracts from r. 15.02 (as it then stood):

15.02.(1) The Court may grant an amendment under rule 15.01 at any time, in such manner, and on such terms as it thinks just.

(2) Notwithstanding the expiry of any relevant period of limitation, the Court may allow an amendment under rule 15.02(1)

(a) to correct the name of a party, notwithstanding it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake was genuine and not misleading or such as to cause any reasonable doubt as to the identity of the party intending to bring or oppose the proceeding;

. . .

(3) The Court may allow an amendment under rule 15.02(2) notwithstanding the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of the same or substantially the same facts as the original cause of action.

. . .

(emphasis by Court of Appeal)

98 In my view, had the Court intended to treat the application as one to add a new defendant, it would have simply referred to r. 7.04(2) as set out in *Vardy*.

99 However, after reciting the provisions of r. 15.02, the Court goes on to point out that r. 7.04 should have been considered. At para. 25:

The submissions of the parties and the reasons of the applications judge concentrated mainly on the necessity test for the joinder of parties set out to [sic]rule 7.04(2)(b). With respect, the granting of an application to add parties involving this particular cause of action involving occupiers' liability should have been based upon section 11(1)(d) of the *Limitations Act* and both grounds under rule 7.04(2)(b) which contemplates the addition of "any person, who ought to have been joined as a party" or was also justified by the second ground of "necessity" in rule 7.04(2)(b).

100 I would observe in passing that I consider it doubtful that by referring to a decision being "based upon s. 11(1)(d) of the *Limitations Act*" the Court was suggesting that the statutory provision was an enhancement of any ability to add a party pursuant to the *Rules of Court*. It is clear from *Vardy* — and from *Marsh v. Imperial Oil Ltd./Cie Petroliere Imperiale Ltée*, 2001 NFCA 32 (Nfld. C.A.) — particularly at paras. 33, 45 and 55 — that s. 11 renders the expiration of a limitation period irrelevant to the application of the *Rules of Court* dealing with amendments to pleadings and the addition of new parties. As previously noted, the reference to a connection to "the subject matter of the original action" in subs. 11(1) of the *Limitations Act* is simply a necessary or limiting pre-condition to the addition of a party after the expiration of a limitation period. It is not a new or independent ground upon which to add a party. Indeed, it is difficult to conceive of a circumstance which would satisfy the requirements of r. 7.04(2)(b) without also satisfying this condition.

101 At para. 32, the Court provides a discussion commenting on pleadings and limitation defences; again I note the specific references to r. 15.02:

> The English practice is that amendments will only be allowed to circumvent limitations defences in three circumstances. They are (i) <u>correcting</u> the name of a party; (ii) <u>altering</u> the capacity in which a party sues; and (iii) allowing the <u>addition or substitution of a cause of action</u>. These permitted exceptions can be found in our *Rules of the Supreme Court, 1986* as rule 15.02(2)(a), rule 15.02(2)(b) and rule 15.02(3). However, our courts have not adopted the restrictive English practice.
>
> (my emphasis)

102 There follows reference to four authorites, all relating to the proper approach to be taken when considering amendments following the expiration of limitation periods. It is helpful to review these authorities to appreciate their context and to perhaps more fully understand the nature of the reliance being placed on these authorities in *Houston*.

Fowlows Wholesale Ltd. v. Canadian National Railway *(1986), 58 Nfld. & P.E.I.R. 13 (Nfld. T.D.) (Referred to in Houston at para. 32)*

103 This decision arose out of an application to change the defendant to CN Marine Inc., a wholly owned subsidiary of the originally named defendant Canadian National Railway Company. Service of the statement of claim had been accepted by solicitors on behalf of CN Marine Inc.

104 My reading of Hickman C.J.T.D.'s decision is that he considered the application as one to permit the substitution of a party because of a misnomer. The substantive addition of a new party was not in issue.

G & R Trucking Ltd. v. Walbaum *(1983), 144 D.L.R. (3d) 636 (Sask. C.A.) (Referred to in Houston at para. 33)*

105 This decision concerned an application to add as a defendant an individual who was a major shareholder in a named defendant. The applicant plaintiff wished to assert that the shareholder and not the corporate defendant was the owner of a vehicle.

106 There are a number of comments in the decision that suggests that Bayda, C.J.S. considered the application as one to amend the pleadings to set up a new cause of action and to change the parties as a result of misnomer — see paras. 10, 15, 21-27, 32, 34 and 36. In the context of discussing the misnomer, Bayda, C.J.S. does recognize that the individual would be a new defendant — at para. 38:

> The last factor favouring the plaintiffs' application pertains to the nature of the misnomer. True, the proposed amendment contemplates the addition or substitution of a different and new party defendant. There is, however, a clear relationship in interest and a substantial connection between the second defendant and Mr. Giesbrecht, the secretary-treasurer of, and major shareholder in, the second defendant.

107 Of interest also is the final decision — a decision not to allow the addition of the individual as a defendant because of potential financial prejudice — see paras. 39 — 41.

108 Overall, the number of references in the decision to "change of parties" or "change of defendants" and "amendment involving a change of parties" suggests that the decision was in the context of an effective change of parties rather than the substantive addition of a new and unrelated party.

Petten v. E.Y.E. Marine Consultants ***(1994), 120 Nfld. & P.E.I.R. 313 (Nfld. T.D.) (Referred to in Houston at para. 34)***

109 *Houston* quotes from *Petten* at paras. 34 — 35:

> Similarly, Green J. affirmed this approach in *Petten v. E.Y.E. Marine Consultants* (1994), 120 Nfld. & P.E.I.R. 313 (Nfld. T.D.):
>
> > I do not subscribe to the view that because a party-amendment is expressly permitted outside a relevant limitation period [Rule 15.02(2)] and a similar provision is not expressed with respect to amendments generally, such a power does not exist in respect of other types of amendments. Rule 15.02(1) must be given a broad and liberal interpretation to ensure that the real matter in controversy between the parties is properly before the court.
>
> In *Petten*, Green J. at paragraph 57 identified relevant factors for consideration within rule 7.04(2)(b) such as (i) avoidance of multiplicity of actions, (ii) the addition of an issue that might complicate or lengthen the trial of the existing action, (iii) the point in the progress of the existing proceeding when the issue of adding parties arises, (iv) whether joinder would embarrass or delay the trial, or (v) whether it would be otherwise inconvenient or prejudicial to the other parties.

110 I note again the reference to Rule 15 — amendment to the pleadings. I note also that in *Vardy*, the Court of Appeal made specific reference to para. 57 in *Petten*, recognized that considering factors such as multiplicity of actions and timeliness (in the context of a s. 7.04(2)(b) application) represented one of two different approaches, and then clearly rejected the broader discretion-based interpretation of r. 7.04(2)(b) advanced in *Petten*. Although set out earlier in these reasons, for ease of reference I repeat the relevant passage from *Vardy* — at paras. 22-24:

> This interpretation of rule 7.04(2)(b) differs from the approach taken in **Petten et al. v. E.Y.E. Marine Consultants et al.**, *supra*. In **Petten**, Green J. identified factors to be considered in applying the rule, including: the avoidance of multiplicity of actions, the addition of issues that might complicate or lengthen the trial, and the point in the proceedings when the issue of adding parties is raised. The final factor listed by Green J. is:
>
> > [57] . . .
> >
> > 5. Whether joinder would embarrass or delay the trial or is otherwise inconvenient or prejudicial to the other parties.
>
> In **Mandavia**, Orsborn J. discussed these two approaches:
>
> > [11] The authorities indicate that the second condition ["necessary that all matters in the proceeding be effectually adjudicated"] is amenable to two interpretations. The broader interpretation contemplates the addition of parties primarily to prevent a multiplicity of actions — the desirability of having in one proceeding those whose rights or economic interests may be affected by the outcome. The narrower view was espoused by Devlin J., in **Amon v. Raphael Tuck & Sons Ltd.**, [1956] 1 Q.B. 357 at p. 378:
> >
> > > "... The primary object of the rule I believe to be to replace the plea in abatement. The object of that plea was to abate' an action in which all the proper parties were not before the court. The rule is more flexible than the plea, but its object is fundamentally the same. It is not to marry a future action to an existing one, but to ensure that all the necessary parties to the existing one (using necessary' in the broad sense of being necessary to effectual and complete adjudication in the existing action) are before the court. It does, of course, incidentally keep down multiplicity of actions, ... but that appears to me to be a desirable consequence of the rule rather than its main objective."

(emphasis added in **Vardy**)

I am satisfied that the narrow interpretation of a "necessary" party in rule 7.04(2) espoused in the **Mandavia** and **Clearwater** decisions, and adopted by the Trial Division judge, is the correct interpretation, and that it applies to both paragraphs (a) and (b). As noted by Orsborn J., the language of the rule clearly requires an assessment of necessity. This stands in contrast to the rule in some other jurisdictions that use language such as "just and convenient" (**Mandavia v. Central West Health Care Institutions Board et al.**, *supra*, at paragraph 17). Where the limitation period for adding a defendant has expired, the purpose of rule 7.04(2)(b) is not to allow for the joining of a separate action to an existing one, even if the actions may be related. Rather, the rule is directed to the adjudication of the original proceeding. These principles apply equally to an application to remove a party under paragraph (a).

111 Accordingly, and since *Houston* goes on to affirm the decision in *Vardy*, I take the references in *Houston* to *Petten* as being indicative of considering the application as a Rule 15 application to amend pleadings or to change or substitute the name of a party.

Marsh v. Imperial Oil Ltd./Cie Petroliere Imperiale Ltée, *2001 NFCA 32 (Nfld. C.A.) (Referred to in Houston at para. 37)*

112 *Houston* refers to *Marsh* for its discussion on the policy underlying s. 11 of the *Limitations Act.*

113 The decision in *Marsh* involved an application to amend a statement of claim to plead new causes of action alleging misrepresentation, breach of an implied term and breach of the duty of good faith. The only rule under consideration in *Marsh* was Rule 15, and Wells, C.J.N. noted at para. 18 that the matter was completely in the discretion of the court.

114 At para. 33, immediately preceding the paragraph quoted in *Houston*, Wells, C.J.N. said:

Obviously, the proviso is expressed in s-s. 11(3) in order to ensure that, as a statutory provision, it is not interpreted so as to override the requirements of Rule 15.02(3) and effectively allow amendments, which did not arise out of the same or substantially the same facts as the original statement of claim, if those amendments were made after the expiration of the limitations period. I am of the view that the whole of the section indicates that expiration of any limitation period, in the context of the timing of the application for leave to amend, in relation to the time when the limitation period or periods in respect of the occurrence or series of events pleaded in the statement of claim started to run, and therefore the question of discoverability of the events that would start that limitation period, are irrelevant to deciding whether or not to grant leave to amend.

115 I note Wells, C.J.N.'s views on the irrelevance of the expiration of a limitation period. There was no issue of adding or changing parties in *Marsh* and I take the reference in *Houston* as again being indicative of treating the application in *Houston* as one of amendment to pleadings rather than a substantive addition of a new party.

Diamond Estate v. Robbins, *2006 NLCA 1 (N.L. C.A.) (Referred to in Houston at para. 41)*

116 *Diamond Estate* involved an application for leave to file a counterclaim and the interplay of the *Limitations Act* and the *Survival of Actions Act*, R.S.N.L. 1990, c.S-32. It did not involve the addition of a new party.

117 In *Houston*, the decision is referred to for its discussion of prejudice. However, in *Diamond Estate*, Mercer, J.A. also discussed the approach to the interpretation of s. 11 of the *Limitations Act* and confirmed that it did not in any way detract from the legal rules applicable to the amendment of pleadings or the institution of, for example, a counterclaim. Referring specifically to s. 11(1) he said at paras. 59-60:

The analysis of s-s. 11(1) must include its context within and without the Limitations Act.

Its internal context obviously includes the other subsections of s. 11. Subsection (2) in particular refers directly to s-s. (1) and provides that the latter does not bar the exercise of judicial discretion to refuse relief on grounds unrelated to the expiry of a limitation period. That is the logical corollary to s-s. (1). The removal of a specified bar, namely a limitation defence, does not mean that other legal issues are not present. There is no entitlement to commencement of a counterclaim, or any of the other claims specified in s-s. (1). All such claims continue to be subject to, for example, the Rules. The continued applicability of other legal rules is also confirmed in s. 3 of the Limitations Act respecting the rules of equity which deny relief on the basis of acquiescence, undue delay or laches.

(my emphasis)

118 He went on to say at para. 61:

> Section 11 also addresses, in slightly different wording, amendments to existing actions. Subsections (3) and (4) provide that, after the expiration of the limitation period for an action, amendments to change pleadings or to substitute or change the plaintiff or defendant are permissible even though the amendment may involve a new cause of action that would have been barred by a lapse of time. The sole proviso is that the amendment must be non-prejudicial and must arise out of the facts set out in the original pleadings. As with s-s. (1) the procedure contemplated in s-s. (3) must arise in "an action to which this or another Act applies."

119 I note the reference to substituting or changing the plaintiff or defendant. These provisions in subsec. 11(3) stand in contrast to the specific provision in subsec. 11(1)(d) — "the addition of a new party under the *Rules of the Supreme Court, 1986*".

120 Overall, *Diamond Estate* was considering whether or not the Court should exercise its discretion to allow a counterclaim to be filed. It was not disputed that the only legal pre-condition was satisfied — that the proposed counterclaim be "related to or connected with the subject matter of the original action". Accordingly, the issue was the exercise of discretion by the judge of first instance.

121 It was in the context of his review of that exercise of discretion that Mercer, J.A. discussed the issue of prejudice — that is, a discussion of the exercise of discretion following satisfaction of the necessary legal pre-condition to allowing the filing of the counterclaim.

122 Immediately following its discussion of *Diamond Estate*, *Houston* refers to the *Working Paper on Limitation of Action* published by the Newfoundland Law Reform Commission in 1985. *Houston* says, at paras. 42-44:

> It is useful to review the principles discussed by the Commission on the matter of the post-limitation amendment of pleadings. The Commission's working paper cited Professor G.O. Watson in 53 Can. Bar. Rev. 237 listing the threefold purpose of limitation statutes as being (i) provision of finality to the commencement of proceedings; (ii) protection of potential defendants from undue delay or passage of time and (iii) promoting effective functioning of the legal system.
>
> The Commission's paper specifically quoted the following passage of Professor Watson's commentary at p. 222:
>
>> While pleadings perform a number of functions, clearly their most important purpose is to give the adversary fair notice of the case alleged against him so that he will be able to prepare his own ...
>>
>> But in modern procedure the device of pleadings does not stand in isolation. An integral and very important aspect of the rules relating to pleadings, and the constitution and conduct of a law suit generally, are the rules relating to amendment. ... Their purpose is primarily twofold. Firstly, to permit the correction of non-prejudicial errors that occur in the constituting or conduct of proceedings. Secondly, to permit an action to be reshaped as it develops so that ultimately it will be decided on the merits on the basis of the real issues between the parties.
>
> With respect to the addition or substitution of parties the Commission made the following recommendation at pages 242-243:
>
>> 2. In any action, the Court should be given a discretion to allow for the amendment of any pleading or other proceedings, or an application for change of party, upon such terms as to costs or otherwise as the Court deems just,

as long as the amendment or change involves a non-prejudicial error and arose out of the facts set forth in the original pleadings, notwithstanding that between the time of the issue of the writ and the application for amendment or change of party, a fresh cause of action disclosed by the amendment or the cause of action against the new party would have been barred by a limitation period.

(my emphasis)

123 Recommendation No. 2 of the Law Reform Commission is directed at the reshaping of a proceeding in order to delineate the real issues between the (existing) parties. It refers to a change of party but does not refer to the addition of a new party. In *Diamond Estate*, Mercer, J.A. also referred to the Commission's Report and Working Paper for assistance in assessing the legislative purpose and textual meaning of s. 11. At para. 66 Mercer, J.A. reproduced Commission recommendation No. 1:

1. In the case of claims by way of set-off, counterclaim, the adding of parties under the Rules of Court, or third party proceedings lapse of time should present no bar so long as the claim is related to or connected with the subject matter of the original cause of action. (NLRC-WP1 p. 242)

(my emphasis)

124 When one reads both recommendations together it is evident that the Commission itself drew a distinction between "... the adding of parties under the Rules of Court ..." (recommendation No. 1) and the amendment of pleadings or an application for a change of party (recommendation No. 2). Further, while there is reference by the Commission to the exercise of judicial discretion in its recommendation No. 2 dealing with amendments and changes of parties — in the context of correction of error and the reshaping of a proceeding - there is no such reference in recommendation No. 1 dealing with the addition of parties.

125 Accordingly, I conclude that the references in *Houston* to *Diamond Estate* and to recommendation No. 2 of the Working Paper indicate that the application to add the two defendants was considered as an application to amend the pleading or change a party, the decision on which would be one involving primarily the proper exercise of judicial discretion rather than the establishment of the legal pre-conditions required by r. 7.04(2)(b).

126 *Houston* goes on, at para. 49:

The scheme of the *Limitations Act* mandates a purposive approach to an exercise of discretion which includes considerations of necessity and prejudice including undue delay. An underlying principle remains as to whether the addition of parties like any other substantive amendment can be found to be related to or arising from the original cause of action as pleaded. However, when parties seek to add parties after limitation periods have expired, discoveries have taken place, proceedings are in a trial-ready state and the essential aspects of the original cause of action are in place, the existence of proper grounds for an amendment to add parties becomes elusive. The ultimate decision by an applications judge will nevertheless be based on an exercise of discretion.

127 With respect, I find this passage does not fit comfortably with statements in earlier authorities (that intervention of a limitation period is irrelevant if an applicant is otherwise entitled to add a party) — and with the reference in para. 58 of *Houston* itself where the Court concluded - "accordingly, the expiration of the limitation period is irrelevant". Further, the emphasis on the *Limitations Act* itself as providing the foundational basis for the addition of a new party seems, with respect, to not fit well with the irrelevance of the expiry of a limitation period or with the analyses in the previous authorities, all of which looked only to the rules of court for the jurisdiction to add, and the non-discretionary principles of law to be applied when adding, a party.

128 At paras. 51-56 of *Houston*, there is discussion of the decisions in *Clearwater* and *Vardy*.

129 Of *Clearwater* it says at paras. 52-53:

This Court affirmed the *Clearwater* decision with the following memorandum of disposition:

> The applications judge refused leave after deciding that he could only exercise his discretion if it were shown that the second respondent "ought to have been joined as a party" or that the second respondent's "participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon". The applications judge concluded that the appellant had not established either threshold requirement and it was, therefore, "not necessary to hear further from the parties on the issue of the exercise of the court's discretion".

> The result in *Clearwater* is not surprising. The plaintiff had truly slept on its right to seek indemnity against its own agent and could not expect discretionary relief in its favour. The application by Clearwater to add Argentia Freezers as a defendant was made in 2003, six years after the proceeding was commenced. The proposed amendments were not to add a new party to the action since Argentia Freezers was already joined as a third party. Instead, the application sought to add an additional capacity of defendant to Argentia Freezers, already a third party. However, a new cause of action was being pursued by Clearwater against its own agent against which it had not claimed as a co-defendant from the outset.

130 Following the paragraph quoted above, the Court of Appeal's memorandum of disposition in *Clearwater* went on — at para. 3 of that decision:

> On reading all of the materials filed and upon hearing all argument of counsel for the appellant, the Court concluded that it was not necessary to hear oral argument from counsel for either of the respondents. We were not satisfied that the appellant had demonstrated error in law on the part of the applications judge.

131 This passage does not suggest that in *Clearwater* the Court of Appeal characterized the trial court decision as a refusal to provide discretionary relief.

132 At first instance in *Clearwater* the Court considered the law applicable to r. 7.04(2)(b) and in particular the legal pre-condition of necessity. The conclusion of the trial judge — at paras. 30-31:

> As noted earlier, those requirements - "ought" or "necessary" - have not been met. Whether or not Clearwater succeeds in one or more of its claims against Day & Ross will depend solely on the evidence adduced and the application of the appropriate law to that evidence. If relevant, any relationship between Argentia Freezers and Day & Ross can be fully examined through appropriate witnesses. The absence of Argentia Freezers as a defendant will have absolutely no legal effect on this analysis or on the ultimate determination of the issues as between Clearwater and Day & Ross.

> Since the threshold requirement - the satisfaction of one or other of the elements of r. 7.04 has not been met - it is not necessary to hear further from the parties on the issue of the exercise of the court's discretion.

133 Thus the decision at first instance was based only on issues of law; no exercise of discretion was involved. According to the memorandum of disposition, it was the decision on the issue of law that was confirmed by the Court of Appeal. The Court of Appeal stated that there was no demonstrated "error of law" in the trial decision.

134 The decision in *Vardy* received only brief comment in *Houston*. At paras. 54-55:

> In *Vardy*, the plaintiff sought to join a specialist physician and a medical facility in St. John's to an existing proceeding that was already progressing towards trial. The physicians and the Clarenville medical facility had been sued within the relevant limitation of action period. The patient plaintiff claimed that he had suffered injury resulting from medical negligence at Clarenville but later sought to make a further claim for alleged negligence by physicians in St. John's while attempting to remedy his medical difficulties which arose at the Clarenville facility. The proceeding involving the St. John's physicians and hospital was commenced beyond the expiration of the limitation period.

> An applications judge had allowed an *ex parte* application to add the St. John's physician and hospital as defendants. This Court allowed an appeal and removed the new defendants on the grounds that the "necessity" test had not been met. Once again, the addition of defendants involved a new cause of action based on new factual allegations not related to the liability

of the existing defendants in relation to the original treatment at the Clarenville health facility, which was the subject of the original cause of action.

135 There is nothing in the discussion suggesting that *Vardy* was wrongly decided; however, there is no discussion of the principles set out in *Vardy*, including the direction to apply only r. 7.04(2)(b) to an application to add a new party and the non-applicability of the approach espoused in *Petten*.

136 The final paragraphs in *Houston*:

> 58. This appeal involves a simple issue as to whether the applications judge erred by permitting two additional defendants to be added to an owner/occupiers' liability claim after the expiry of the limitation period. The pleaded cause of action remained substantially unchanged. A party which was incorrectly alleged in the original statement of claim to be "the owner and/or occupier of the Premises" was named as a sole defendant. The obvious intention of the respondent was to sue all parties associated with ownership of two abutting properties. The cause of action, as reframed, continues to arise out of the originally pleaded fact scenario and in s. 11(1)(d) of the *Limitations Act* is "related to or connected with the subject matter of the original action". Accordingly, the expiration of the limitation period is irrelevant.
>
> . . .
>
> 61. The applications judge's decision to allow the addition of the appellants as defendants should have been based upon (i) the nature of amendment to add defendants who ought to have been joined in the proceeding based on the nature of the cause of action; (ii) the necessity to have the property owners as parties to the litigation accepting that the plaintiff had justification for failing to identify them before the limitation period expired; (iii) the lack of prejudice to the additional defendants who had received prior timely notice of the claim in relation to the date of occurrence, which allowed them to investigate and defend their position on a timely basis; and (iv) the prejudice to be suffered by the respondent if the property owners were not before the court in order to be accountable for any proven negligence on their part.
>
> . . .
>
> 64. The appellants asserted a rather specious argument to the applications judge that the claim as pleaded against Perennial, a property management company, stands on its own because it outlined a fully developed cause of action against an "owner/occupier" reflected by "the location of the fall, the duty of care owed by the defendant and whether the duty of care was breached and caused the injury to the plaintiff". They say that the claim could be tried with regard only to whether the claimant had a valid claim at law against Perennial without the participation of the actual owners of the two properties.
>
> 65. However, I am satisfied that the defendants "ought to have been added" after the limitation period has expired given that (i) the facts show that the plaintiff clearly intended to name all of the proper parties to the pleaded occupier's liability cause of action and (ii) the amendment was not so late in the litigation that it created actual prejudice to the original defendant. This factor was mentioned by the applications judge in one sentence of his reasons as being applicable. He did not elaborate on the application of the rule to the facts surrounding this application. Nevertheless, he was correct to consider that this ground under rule 7.04(2)(b) as being applicable to the facts.
>
> 66. Additionally, I am also satisfied that the addition of the two defendants by the applications judge meets a purposive interpretation of the words "necessary to ensure that matters in the proceeding may be effectually adjudicated upon ..." found in rule 7.04(2)(b) of the Rules which is discussed in these reasons.
>
> 67. The fact that this application and this subsequent appeal were based on rather tenuous grounds raises concern that there is misunderstanding of how Rule 7.04(2)(b) is intended to operate in the conjunction of s. 11(1)(d) of the *Limitations Act*. The underlying principle is a simple one. The expiration of a limitation of actions period does not preclude the future participation of an unnamed party. Parties may be added whether they are plaintiffs or defendants, third parties or counter-claimants outside the relevant limitation period as long as their participation relates to or is connected with the subject matter of the original proceeding. Their participation must be necessary so that the matters arising in the original proceeding

as pleaded, can be fully adjudicated upon. Parties ought to be added when the nature of the cause of action, makes it clear that they ought to have been joined at the commencement of the proceeding. Consideration of factors such as necessity for the participation of previously unnamed parties along with the presence or absence of actual prejudice are relevant to the decision of an applications judge when dealing with similar requests for amendments.

137 As I have already noted, Tucker's counsel argued that these concluding passages represent a change in the approach to be taken when considering an application to add a new party. For the following reasons, I have concluded that they do not.

138 Much of para. 67 clearly endorses and restates the law set out in *Vardy*. Specifically:

> The underlying principle is a simple one. The expiration of a limitation of actions period does not preclude the future participation of an unnamed party. Parties may be added whether they are plaintiffs or defendants, third parties or counter-claimants outside the relevant limitation period as long as their participation relates to or is connected with the subject matter of the original proceeding. Their participation must be necessary so that the matters arising in the original proceeding as pleaded, can be fully adjudicated upon.

139 This is the necessity branch of r. 7.04(2)(b).

140 The passage refers to the original proceeding as pleaded and to the need to ensure that it is that proceeding that can be fully adjudicated or decided.

141 The paragraph continues:

> Parties ought to be added when the nature of the cause of action, makes it clear that they ought to have been joined at the commencement of the proceeding. Consideration of factors such as necessity for the participation of previously unnamed parties along with the presence or absence of actual prejudice are relevant to the decision of an applications judge when dealing with similar requests for amendments.

142 This is the "ought to" branch of r. 7.04(2)(b). The reference to the "nature of the cause of action" is, I believe, a reference to the common law principle set out in *Amon* and *Vardy* that the cause of action may be of a type that requires the addition of parties in order to ensure that any resulting order will be effective. Earlier, at para. 47, the Court had said this of the "ought to" branch of the rule:

> While this first portion of Rule 7.04(2)(b) has been narrowly construed to apply in rare cases such as those involving joint contractors, following the reasoning of Lord Devlin in the *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357, [1956] 1 All E.R. 273, I see no reason why, by analogy, this ratio could not also apply to an occupiers' liability case where owners and occupiers at common law can be held to be jointly and generally liable for a breach of duty of care respecting dangerous premises.

143 I take this as an indication that, insofar as the decision in *Houston* rests on the "ought to" branch of r. 7.04(2)(b), it is simply an application of existing law to the circumstances of *Houston* and the particular relationship of the proposed defendants as between themselves.

144 Finally on this point, my conclusion that *Houston* has not changed the law on the principles applicable to the addition of a new party pursuant to the Rules of Court is informed by the fact that there is no explicit statement in *Houston* that the decision in *Vardy* should no longer considered to be good law. In view of the very clear statements in *Vardy* and in view of the longevity of the legal principles comprehensively reviewed and endorsed in *Vardy* and in other authorities, it would, in my view, require a clear statement had the Court intended that those principles were to be changed.

145 I do not read into the statement of principle at para. 67 of *Houston* that there is now another independent avenue for adding a party — an avenue that involves simply the exercise of discretion (once the connection with the subject-matter is established). That is, I do not read *Houston* as standing for the proposition that, for example, an absence of prejudice is a basis

on which to grant an order to add a party. The last sentence in para. 67 perhaps confirms this when it refers to the consideration of prejudice *after* the reference to satisfying the condition of "necessary" or "ought to".

146 In summary, my reading of *Houston* is that it considered the application to add defendants as an application pursuant to Rule 15 to amend the pleadings and change the name of a party from the company originally named and asserted to be the owner of the premises to the actual owner of the premises. These changes would thus be either a "substitutional" correction or "capacital correction" as referred to in *Petten* and *Vardy*. The statement of claim showed a clear intention from the outset to sue the owner and occupier; the Court considered the reference to Perennial as a misnomer which was subject to correction.

147 But to the extent, if at all, the decision in *Houston* is based on the application of r. 7.04(2)(b) — on either or both branches of the rule, I do not see in the decision — as previously noted — any suggestion that the legal principles to be applied have been changed. For the reasons set out in *Houston*, the Court concluded that the applicant had satisfied both the common law and equitable branches of the rule, but the interpretation of r. 7.04(2)(b) and the principles appropriate to its application as set out in *Vardy* were left untouched.

Application to the Present Case

148 The application of r. 7.04(2)(b) to the present case is not complex.

149 The statement of claim — reproduced earlier — sets out a tort claim against an unknown person. It is straightforward. It makes no reference to a contract of insurance, nor to an insurer, nor to Section D. There is no reference to the plaintiff's being the owner of a motor vehicle.

150 The nature of the cause of action is a claim for damages by one person because of the alleged negligence of another person. I am not prepared to infer from the assertion that the defendant is said to be an unknown person operating or owning a vehicle the conclusion that the nature of the cause of action is therefore a contract/statutory entitlement claim against the Section D insurer. It would have been possible for the plaintiff, had the owner of the vehicle been identified after the proceeding was started, to apply to change the name of the defendant, thus confirming the nature of the action as a straightforward *in personam* tort/damages action between two individuals.

151 To use the phrase from *Houston*, there is nothing in the nature of the cause of action that requires, as a matter of law, that Tucker's Section D insurer be added as a defendant under the "ought to" branch of the case.

152 With respect to the necessity branch of the rule, the matter as pleaded requires an adjudication of the tort claim between the plaintiff and the defendant. The adjudication of the matter may be complicated by the fact that the defendant is unknown, but this does not render it necessary to add AXA as a defendant. The adjudication of the tort claim — for or against the plaintiff — can quite comfortably stand on its own and does not require for its adjudication and determination the addition of AXA as a party. Neither of the threshold legal requirements having been established, it is not necessary to consider the issue of discretion.

Conclusion

153 The application to add AXA as a party defendant and to make consequential amendments to the statement of claim is dismissed. AXA is allowed its column 3 costs.

Application dismissed.

Tab 9

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

Most Recently Cited in: Harte Gold Corp. (Re) , 2022 ONSC 653, 2022 CarswellOnt 1698 | (Ont. S.C.J. [Commercial List], Feb 4, 2022)

R.S.C. 1985, c. C-36, s. 11.02

S 11.02

Currency

11.02

11.02(1)Stays, etc. — initial application

A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(2)Stays, etc. — other than initial application

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(3)Burden of proof on application

The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.02(4)Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Amendment History

2005, c. 47, s. 128; 2019, c. 29, s. 137

Judicial Consideration (1)

Currency

Federal English Statutes reflect amendments current to February 15, 2022

Federal English Regulations Current to Gazette Extra Vol. 156:2 (February 23, 2022)

End of Document

TAB 10

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II – Jurisdiction of Courts (ss. 9-18.5)

Most Recently Cited in: Harte Gold Corp. (Re) , 2022 ONSC 653, 2022 CarswellOnt 1698 | (Ont. S.C.J. [Commercial List], Feb 4, 2022)

R.S.C. 1985, c. C-36, s. 11.02

S 11.02

Currency

11.02

11.02(1)Stays, etc. — initial application

A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(2)Stays, etc. — other than initial application

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(3)Burden of proof on application

The court shall not make the order unless

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(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.02(4)Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Amendment History

2005, c. 47, s. 128; 2019, c. 29, s. 137

Judicial Consideration (1)

Currency

Federal English Statutes reflect amendments current to February 15, 2022

Federal English Regulations Current to Gazette Extra Vol. 156:2 (February 23, 2022)

TAB 11

2022 ONSC 653
Ontario Superior Court of Justice [Commercial List]

Harte Gold Corp. (Re)

2022 CarswellOnt 1698, 2022 ONSC 653

THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (Applicant) and A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP. (Applicant)

Penny J.

Heard: January 28, 2022
Judgment: February 4, 2022
Docket: CV-21-00673304-00CL

Counsel: Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais, for Applicant
Joseph Pasquariello, Chris Armstrong, Andrew Harmes, for Court appointed Monitor
Leanne M. Williams, for Board of Directors of the Applicant
Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji, for 1000025833 Ontario Inc.
Stuart Brotman, Daniel Richer, for BNP Paribas
Sean Collins, Walker W. MacLeod, Natasha Rambaran, for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited
David Bish, for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates
Orlando M. Rosa, Gordon P. Acton, for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)
Timothy Jones, for Attorney General of Ontario

Headnote
Bankruptcy and insolvency
Business associations
Civil practice and procedure
Table of Authorities
Cases considered by *Penny J.*:

Arrangement relatif à Nemaska Lithium inc. (2020), 2020 CarswellQue 10601, 2020 QCCS 3218 (Que. Bktcy.)
Arrangement relatif à Nemaska Lithium inc. (2020), 2020 QCCA 1488, 2020 CarswellQue 11925 (C.A. Que.)
Lydian International Limited (Re) (2020), 2020 ONSC 4006, 2020 CarswellOnt 9768, 81 C.B.R. (6th) 218 (Ont. S.C.J. [Commercial List])
Plasco Energy, Re (July 17, 2015), Doc. Toronto CV-15-10869-00C (Ont. S.C.J. [Commercial List])
Quest University Canada (Re) (2020), 2020 BCSC 1883, 2020 CarswellBC 3091, 85 C.B.R. (6th) 41 (B.C. S.C.)
Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.)
Sino-Forest Corp., Re (2012), 2012 ONSC 4377, 2012 CarswellOnt 9430, 92 C.B.R. (5th) 99 (Ont. S.C.J. [Commercial List])
Southern Star Developments Ltd. v. Quest University Canada (2020), 2020 BCCA 364, 2020 CarswellBC 3252, 85 C.B.R. (6th) 96 (B.C. C.A.)
Stelco Inc., Re (2006), 2006 CarswellOnt 863, 18 C.B.R. (5th) 173 (Ont. S.C.J. [Commercial List])
Target Canada Co., Re (2015), 2015 ONSC 1487, 2015 CarswellOnt 3261, 23 C.B.R. (6th) 314 (Ont. S.C.J.)

Victor Cantore v. Nemaska Lithium Inc. (Formerly Nemaska Lithium Inc., Nemaska Lithium Whabouchi Mine Inc., Nemaska Lithium Shawinigan Transformation Inc., Nemaska Lithium P1p Inc. and Nemaska Lithium Innovation Inc.), et al. (2021), 2021 CarswellQue 4589, 2021 CarswellQue 4590 (S.C.C.)

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.)

Statutes considered:

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

Generally

Business Corporations Act, R.S.O. 1990, c. B.16

Generally

s. 168

s. 168(1)(g)

s. 186(1) "reorganization"

s. 186(2)

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

Generally

s. 5.1(2) [en. 1997, c. 12, s. 122]

s. 6(2)

s. 6(8)

s. 11

s. 11.02 [en. 2005, c. 47, s. 128]

s. 11.3 [en. 1997, c. 12, s. 124]

s. 11.3(4) [en. 2005, c. 47, s. 128]

s. 22(1)

s. 23(1)(k)

s. 36

s. 36(1)

s. 36(3)

Penny J.:

1 This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

2 Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

Background

3 Harte Gold is a public company incorporated under the Business Corporations Act (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.

4 Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.

5 It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.

6 Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated $7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

7 At the time of its initial application to the court, Harte Gold's assets were valued at $163.8 million. Its liabilities were valued at $166.1 million. On a balance sheet basis, therefore, Heart Gold was insolvent.

8 Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.

9 This prefiling strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.

10 In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.

11 In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a

result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.

12 The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.

13 Only one competing bid was received — a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.

14 This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that the $10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the prefiling cure costs; and, (c) the undertaking to pay an additional cash deposit of US$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

15 In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

• the cancellation of all Harte Gold shares and the issue of new shares to the purchaser

• payment by the purchaser of all secured debt

• payment by the purchaser of virtually all prefiling trade amounts (estimated at $7.5 million but with a $10 million cap) and postfiling trade amounts

• certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contacts and liabilities include a number of agreements involving ongoing or future services in respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction The emplyment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority

• retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and

• releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

16 I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and postfiling trade amounts, interim financing and the like, totals well over $160 million.

Issues

17 There are three principal issues:

(1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;

(2) Whether the stay should be extended; and,

(3) Whether the Monitor's mandate should be extended to included additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

18 Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".

19 Section 36(1) of the CCAA provides:

> A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

20 Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

21 The s. 36(3) criteria largely correspond to the principles articulated in Royal Bank v. Soundair Corp, 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

(a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process:

see Target Canada Co. (Re),2015 ONSC 1487, at paras. 14-17.

22 The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

23 In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:

(a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,

(b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

24 The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re)*, (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found "the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise."

25 A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.

26 More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.

27 In Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218at paras. 52 and 71 (leave to appeal to QCCA refused, Arrangement relatif à Nemaska Lithium Inc,2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à* Nemaska Lithium Inc,2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently

- The efficacy and integrity of the process followed

- The interests of the parties, and

- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

28 In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that "the terms 'sell or otherwise dispose of assets outside the ordinary course of business' under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*": *Nemaska* QCCA at para 19.

29 Similarly, in Quest University Canada (Re),2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court's authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on CCAA jurisdiction in 9354-9186 Québec Inc. v. Callidus Capital Corp.,2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.

30 In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.

31 Fitzpatrick J. relied on *Callidus* to the effect that:

- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence". On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances"

- the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company"

- Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context

- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence

- Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. The supervising judge is best positioned to undertake this inquiry.

32 The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

33 Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.

34 The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not "meritorious", also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. "reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings": Southern Star Developments Ltd. v. Quest University Canada, 2020 BCCA 364.

35 It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

36 The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets

outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

37 I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

38 Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

39 With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

40 Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

41 Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

42 Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and

is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

43 The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

44 I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

45 Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

Comparison with Sale in Bankruptcy

46 The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.

47 The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.

48 In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.

49 Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

Consultation with Creditors

50 Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately $28 million in respect of its hedge agreements. Silver Lake has claims of approximately $95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.

51 BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.

52 While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

53 The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.

54 I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

55 The proposed transaction affords the following benefits to the creditors and to stakeholders generally:

(a) the retention and payment in full of the claims of almost all creditors of Harte Gold;

(b) continued employment for all except four of the Harte Gold's employees;

(c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and

(d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.

56 The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.

57 Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional "compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.

58 The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).

59 Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

60 The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

61 Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

62 Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides

that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

63 Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.

64 Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: Sino-Forest Corporation (Re), 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: Stelco Inc. (Re), 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.

65 Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

Fairness of Consideration

66 Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable. [1]

67 A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational — both payments being made to bring about the acquisition of the Mine as a going concern.

68 It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the prefiling strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

69 The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

70 As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

71 The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

72 It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

73 The position of the purchaser is, not unreasonably, that it will not *both* continue to fund ongoing operations and the CCAA process *and* undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

74 The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

75 In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

76 For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

77 In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

78 Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

79 CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

80 I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from Lydian International Limited (Re), 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

81 *Whether the claims to be released are rationally connected to the purpose of the restructuring*: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

82 *Whether the releasees contributed to the restructuring:* The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

83 *Whether the Release is fair, reasonable and not overly broad*: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

84 *Whether the restructuring could succeed without the Release*: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

85 *Whether the Release benefits Harte Gold as well as the creditors generally*: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

86 *Creditors' knowledge of the nature and effect of the Release*: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

87 The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

88 Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

89 No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

90 For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

91 The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

92 The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

93 I approve the grant of the requested powers to the Monitor.

Conclusion

94 For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Footnotes

1 The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.