File No. CI 22-01-38613

THE KING'S BENCH
WINNIPEG CENTRE

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 MANITOBA CLINIC MEDICAL CORPORATION AND THE MANITOBA CLINIC HOLDING CO. LTD.

(the "Applicants")

APPLICATION UNDER: THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., c. C-36, AS AMENDED

MOTION BRIEF OF THE APPLICANTS
(MOTION FOR STAY EXTENSION)
DATE OF HEARING: TUESDAY, SEPTEMBER 26, 2023 AT 2:00 P.M.
THE HONOURABLE MR. JUSTICE CHARTIER

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I. List of Documents to be Relied Upon

1. The Affidavit of Keith McConnell sworn November 28, 2022.
2. The Pre-Filing Report of Alvarez & Marsal Canada Inc. dated November 29, 2022 ("Pre-filing Report").
3. Amended and Restated Initial Order signed December 2, 2022 ("ARIO").
4. The First Report of the Monitor, dated January 20, 2023 ("First Report").
5. The Second Report of the Monitor, dated April 18, 2023 ("Second Report).
6. The Third Report of the Monitor, dated July 31, 2023 ("Third Report").
7. The Fourth Report of the Monitor, to be filed ("Fourth Report").
8. The Affidavit of Craig Frith affirmed August 4, 2023.
8. The Affidavit of Michelle Loftus affirmed September 12, 2023.
9. The Affidavit of Michelle Loftus affirmed September 22, 2023.
10. Such further and other documentation as counsel may advise and this Honourable Court may permit.

II. Statutory Provisions of Authorities to be Relied Upon

1. *The Court of King's Bench Rules* 1.04, 2.03, 3.02(1), 16.04, 16.08, 37.06(6), 37.08(2) and 59.06(1).
2. *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended (hereinafter the "CCAA"), ss. 11 and 11.02.
3. *Worldspan Marine Inc. (Re)* 2011 BCSC 1758.
4. *Target Canada Co. (Re),* 2015 ONSC 7574.
5. *Lantin et al., v. Seven Oaks General Hospital,* 2019 MBCA 115.
6. Such further and other authorities as counsel may advise and this Honourable Court may permit.

III. Overview

1. The Applicants, Manitoba Clinic Medical Corporation ("**Medco**") and The Manitoba Clinic Holding Co. Ltd. ("**Realco**"), were granted protection under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), under the Order granted by this Honourable Court on November 30, 2022 ("**Initial Order**"). Under the Initial Order Alvarez & Marsal Canada Inc. was appointed as Monitor (the "**Monitor**").

2. The Applicants together are the largest private clinic in the Province of Manitoba (the "**Manitoba Clinic**").

3. On December 1, 2022 this Court Amended and Restated the Initial Order (the "**ARIO**") which, *inter alia*:

a) Extended the Stay Period until February 24, 2023;

b) Provided the balance of the restructuring tools contemplated under the Model Order;

c) Provided debtor-in-possession financing ("**DIP Financing**"), enhanced the Monitor's powers, authorized a Key Employee Retention Program ("KERP") and provided authorization to the Applicants with the approval of the Monitor to make certain True-Up Payments.

4. On January 24, 2023, the Applicants returned to Court and this Honourable Court granted the following relief, *inter alia*:

a) an extension of the stay of proceedings to April 28, 2023; and

b) authorized the Monitor, with the consent of CIBC, the secured lender, to sell any part of the Property (as that term is defined in the Initial Order) out of the ordinary course of business, without further approval of the Court, in respect of any

transaction not exceeding $50,000 and provided that the aggregate consideration for all such transactions does not exceed $350,000.

5. On April 21, 2023, both the Applicants and the Monitor filed separate notice of motions and this Honourable Court granted the following relief, *inter alia*:

a) authorized a proposed sale and investment solicitation process (the "**SISP**");

b) authorized proposed retention payments to the physicians who have not given notice terminating their Services Agreements and continue to provide services to Manitoba Clinic;

c) approved the Monitor's, its counsel's, and the Applicants' counsel's fees and costs up to March 31, 2023;

d) approved the Second Report of the Monitor dated April 17, 2023 and the Monitor's actions, activities and conduct described herein; and

e) extended the stay of proceedings to August 31, 2023.

6. On August 2, 2023, the Applicants returned to Court and this Honourable Court granted the following relief, *inter alia*:

a) extended the Stay Period until October 2, 2023;

b) approved an amendment to the DIP Financing Commitment Letter;

c) approved the Third Report of the Monitor provided by Alvarez & Marsal Canada Inc. in its capacity as monitor of the Applicants (the "**Monitor**") and the Monitor's activities, actions and conduct as described therein; and

d) an Order approving the professional fees and disbursements of the Monitor, the Monitor's legal counsel and the Applicants' legal counsel as set out in the Third Report.

7. The Applicants have filed a notice of motion returnable on September 26, 2023, seeking the following relief, *inter alia*:

a) An Order abridging the time for service and/or otherwise validating service of the Notice of Motion such that the motion is properly returnable Tuesday September 26, 2023 and dispensing with further service thereof;

b) an Order extending the Stay Period until December 15, 2023;

c) an Order approving the Fourth Report of the Monitor (the "**Fourth Report**") provided by the Monitor and the Monitor's activities, actions and conduct as described therein;

d) an Order approving the professional fees and disbursements of the Monitor, the Monitor's legal counsel and the Applicants' legal counsel as set out in the Fourth Report; and

e) an Order amending the Order of Justice Kroft signed on August 9, 2023, replacing the reference to the Affidavit of Service of Michelle Loftus, affirmed August 2, 2023, with a reference to the Affidavit of Service of Craig Frith, sworn August 4, 2023.

8. The Applicants submit that such relief is necessary to ensure they continue to be provided breathing room to complete their restructuring efforts and, in particular, complete the SISP.

IV. List of Points to be Argued

9. The following issues are before the Court:

a) Should this Court validate and abridge the time for service of the Notice of Motion and supporting materials such that the motion is properly returnable on Tuesday, September 26, 2023 at 2:00 p.m. and dispensing with further service?

b) Should this Court extend the stay period until December 15, 2023?

c) Should this Court approve the Fourth Report of the Monitor, the activities described therein and the Professional Fees of the Monitor, its counsel and the Applicants' counsel for the period of July 1, 2023 to August 31, 2023?

d) Should this Court approve the amendment of the Order of Justice Kroft signed on August 9, 2023 Order?

10. The key points to be argued in this motion are as follows:

a) *Validating Service*: An Order validating and abridging the time for service should be granted because the service effected and the notice provided has been sufficient to bring the proceedings to the attention of the recipients;

b) *Stay of Proceedings*: An Order extending the Stay Period is appropriate allow the Applicants and Monitor to continue the restructuring efforts,

complete the SISP, and apply to Court to approve any proposed transaction(s) resulting from the SISP;

c) *Approving the Report, Activities and Professional Fees*: The stakeholders have had a reasonable opportunity to review and take issue with the Fourth Report, activities and professional fees itemized within the report. Such report, activities and fees should be approved.

d) *Approving the Amendment of the Order Signed by Justice Kroft on August 9, 2023*: An Order amending the Order of Justice Kroft dated August 9, 2023 is a matter of housekeeping to ensure that the said Order properly reflects the record.

A. Service Should be Validated

11. Notwithstanding the ordinary requirements of service under the King's Bench Rules, this Court has authority to abridge the notice periods, validate defective service or even dispense with service where necessary in the interest of justice.

King's Bench Rules 2.03, 3.02(1) and 16.04, 16.08, 37.06(6) and 37.08(2) (TAB 1)

12. The Notice of Motion, Affidavit of Michelle Loftus affirmed September 22, 2023, the Fourth Report and this Motion Brief were served on all parties listed in the Service List (prepared in accordance with paragraph 47 of the Amended and Restated Initial Order).

13. It is respectfully submitted that the service effected and notice provided has been sufficient to bring these proceedings to the attention of the recipients and is appropriate in the circumstances for this Honourable Court to validate service and proceed with the hearing of the relief requested.

B. The Stay of Proceedings Should be Extended

14. Although the existing stay of proceedings does not expire until October 2, 2023, it will be necessary to extend the stay to enable the Applicants and Monitor to continue with the restructuring efforts contemplated by the Initial Order. The notice of motion requested an extension to the stay of proceedings until January 26, 2024. However, the Monitor has since advised that it is only seeking a stay until December 15, 2023.

15. CCAA 11.02 gives the Court discretion to grant or extend a stay of proceedings. CCAA 11.02(2) applies when a stay of proceedings is requested other than an Initial Application. It provides as follows:

> 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.

CCAA 11.02(2) (TAB 2)

16. According to CCAA 11.02(3), the Court must be satisfied that:

a) The circumstances exist that make the Order appropriate; and

b) The Applicants have acted and continue to act in good faith and with due diligence.

CCAA 11.02(3) (TAB 2)

17. In considering whether circumstances exist that make the Order appropriate, the Court "must be satisfied that an extension of the Initial Order and stay will further the purposes of CCAA".

***Worldspan Marine Inc. (Re)* 2011 BCSC 1758 at paras. 13 and 15 (TAB 3)**

18. As set out in the Fourth Report, the Monitor remains of the opinion that the Applicants have acted and continue to act in good faith and with due diligence.

***The Fourth Report of the Monitor dated September 22, 2023* (the "Fourth Report") at para 45**

19. In addition, since the date of the Initial Order the Applicants, with the assistance of the Monitor, have stabilized business operations and are making significant headway in their restructuring efforts as set out in the Monitor's Fourth Report.

20. The Applicants submit that an Order to extend the Stay Period is appropriate in the circumstances as it will allow for additional time:

a) to satisfy certain conditions under the asset purchase agreements (the "**APAs**") entered into with successful bidders. Such satisfaction must occur before sale approval can be sought from Court. If the conditions are satisfied as planned, the Monitor intends to file a motion returnable on November 23, 2023 to see approval for the APAs respectively. This is a driving factor behind the need to obtain an extension;

b) for the Monitor to work with the Applicants to prepare for the post-closing transition;

c) to finalize negotiations on the sale of Realco's interest in the Dynacare Units;

d) to sell any remaining assets of Medco;

e) the Monitor and Lender support the extension of the Stay Period; and

f) the Monitor is unaware of any creditors who would be materially prejudiced by the proposed extension of the Stay Period.

Fourth Report at paras 27-29 and 45

21. As a result, it is foreseeable that the work needed to complete the steps above will continue into December, 2023. Therefore, the requested extension provides the necessary time to complete the process.

C. The Fourth Report of the Monitor and the Professional Fees Should be Approved

22. Where a Monitor seeks approval of a Monitor Report containing the Monitor's activities, when there is no opposition to such a request, relief is routinely granted.

***Target Canada Co. (Re),* 2015 ONSC 7574 at paras 1-2**
(TAB 4)

23. It is respectfully submitted that the activities and action set out in the Fourth Report have been carried out diligently and in a manner consistent with its powers under the ARIO and in furtherance of the purpose of the CCAA.

Fourth Report at paras 42 and 43

24. Accordingly, it is requested that the Fourth Report and the actions and activities described therein be approved.

25. Second, details of the Professional Fees are set out in "Approval of Professional Fees and Expenses" section of the Fourth Report.

26. The Monitor has confirmed that the invoices from counsel provide sufficient detail for the Court's review and that the invoices are commensurate with the work performed, commercially fair and reasonable and were validly incurred in accordance with the provisions of the ARIO and other Orders of the Court.

Fourth Report at paras 42 and 43

27. In accordance with the practice that has developed, the Applicants' stakeholders have had a reasonable opportunity to review and take issue with the Fourth Report. Absent any significant objection to the Fourth Report and the activities described therein said report and the itemized Professional Fees of those of its counsel as well as the Applicant's Professional Fees and those of its counsel should be approved by this Honourable Court.

D. Approving the Amendment of the August 9, 2023 Order (the "August Order")

28. Where an order contains an error arising from an accidental slip or omission, the error may be amended by the court on a motion of the proceeding.

King's Bench Rules 59.06(1) (TAB 1)

29. The ambit of this "slip rule" is defined by a court's inherent jurisdiction, and the rules of the court and litigation. It allows the Court to amend a formally entered Order where there has been a slip in drafting, or where there was an error in expressing the manifest intentions of the Court.

Lantin et al., v. Seven Oaks General Hospital, 2019 MBCA 115 at para 25 (TAB 5)

30. We note that the content of the Affidavit of Service of Michelle Loftus affirmed August 2, 2023 (the "**Loftus Affidavit**"), was presented at the hearing on August 2, 2023. Specifically, Justice Kroft was advised that Dr. Daljit Gill had been served by email, but an affidavit of service had not been filed. At that hearing, Justice Kroft validated service and gave directions to the Applicants to file an affidavit of service with respect to service of Dr. Daljit Gill and to provide him with the proposed form of Order.

Affidavit of Michelle Loftus affirmed September 22, 2023 (the "ML Affidavit") at paras 3 and 4.

31. On August 4, 2023, counsel for the Applicants sent an email to Justice Kroft attaching the proposed form of Order and a copy of the Loftus Affidavit. Justice Kroft was advised that the Loftus Affidavit was being concurrently sent for filing.

ML Affidavit at para 5

32. However, the Loftus Affidavit was rejected by the Court of King's Bench Registry on August 3, 2023, on the basis that an Affidavit of Service needed to be from the individual who sent the email, Craig Frith, counsel for the Monitor.

ML Affidavit at para 6

33. Before an affidavit of service from Craig Frith was filed and an amended proposed form of Order could be provided to the Court, Justice Kroft signed the original proposed form of Order, which referenced the Loftus Affidavit. It was entered onto the Court docket on August, 11, 2023.

ML Affidavit at paras 8 and 9

34. It is respectfully submitted that the reference to the Loftus Affidavit in the Order signed on August 9, 2023 was in error and said Order should be amended by this Court to remove reference to the Loftus Affidavit and include reference the Affidavit of Service of Craig Frith, sworn August 4, 2023. The content of both affidavits are the same and no party would suffer prejudice from such an amendment.

E. Conclusion

35. It is respectfully submitted that this Honourable Court ought to grant the proposed Order as it is consistent with the underlying purposes of the CCAA and will benefit the Applicants' and their stakeholders.

36. All of which is respectfully submitted.

September 22, 2023

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Tab 1

Court of King's Bench Rules
Manitoba Regulation 553/88

PART I
GENERAL MATTERS

RULE 1
CITATION, APPLICATION AND INTERPRETATION

General principle

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

1.04(1.1) In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:

(a) the nature of the proceeding;

(b) the amount that is probably at issue in the proceeding;

(c) the complexity of the issues involved in the proceeding;

(d) the likely expense of the proceeding to the parties.

M.R. 130/2017

Matters not provided for

1.04(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

Party acting in person

1.04(3) Where a party to a proceeding is not represented by a lawyer but acts in person in accordance with subrule 15.01(2) or (3), anything these rules require or permit a lawyer to do shall or may be done by the party.

RULE 2
NON-COMPLIANCE WITH THE RULES

EFFECT OF NON-COMPLIANCE

Not a nullity

2.01(1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

RULE 3
TIME

EXTENSION OR ABRIDGMENT

General powers of court

3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

Expiration of time

3.02(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Consent in writing

3.02(3) A time prescribed by these rules for serving or filing a document may be extended or abridged by consent in writing.

PART IV
SERVICE

RULE 16
SERVICE OF DOCUMENTS

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where order may be made

16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

Exception

16.04(1.1) Subrule (1) does not apply when service must be made in accordance with the Hague Service Convention.

M.R. 11/2018

Effective date of service

16.04(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.

Service dispensed with

16.04(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date the order is signed, for the purpose of the computation of time under these rules.

M.R. 127/94

VALIDATING SERVICE

16.08(1) Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

M.R. 11/2018

PART IX
MOTIONS AND APPLICATIONS

RULE 37
MOTIONS — JURISDICTION AND PROCEDURE

SERVICE OF NOTICE

Required as general rule

37.06(1) The notice of motion shall be served on any person or party who will be affected by the order sought, unless these rules provide otherwise.

Notice not required

37.06(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice.

Consent order without notice of motion

37.06(2.1) The court may make an order on consent without a notice of motion being filed.

M.R. 121/2002

Interim order without notice

37.06(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice.

Service of order

37.06(4) Where an order is made without notice to a person or party affected by the order, the order, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, shall be served forthwith on the person or party unless the court orders or these rules provide otherwise.

M.R. 6/98

Where notice ought to have been served

37.06(5) Where it appears to the court that the notice of motion ought to be served on a person who has not been served, the court may,

(a) dismiss the motion or dismiss it only against the person who was not served;

(b) adjourn the motion and direct that the notice of motion be served on the person; or

(c) direct that any order made on the motion be served on the person.

Time for service

37.06(6) Where a motion is made on notice, the notice of motion shall be served at least four days before the date on which the motion is to be heard.

SCHEDULING OF CONTESTED MOTIONS

To be adjourned for a hearing date

37.08(1) Subject to subrule (2), where a notice of motion to a judge or master has been served and it transpires that the motion is to be contested, the judge or master shall adjourn the motion and the moving party may obtain a hearing date.

M.R. 130/2017

PART XV
ORDERS

RULE 59
ORDERS

AMENDING, SETTING ASIDE OR VARYING ORDER

Amending

59.06(1) An order that,

(a) contains an error arising from an accidental slip or omission; or

(b) requires amendment in any particular on which the court did not adjudicate;

may be amended on a motion in the proceeding.

Tab 2

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to June 28, 2023

Last amended on April 27, 2023

À jour au 28 juin 2023

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

An Act to facilitate compromises and arrangements between companies and their creditors

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

Interpretation

Definitions

2 (1) 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*)

L.R.C., 1985, ch. C-36

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Titre abrégé

Titre abrégé

1 *Loi sur les arrangements avec les créanciers des compagnies*.

S.R., ch. C-25, art. 1.

Définitions et application

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actionnaire S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie. (*bargaining agent*)

biens aéronautiques [Abrogée, 2012, ch. 31, art. 419]

Court may give directions

7 Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

R.S., c. C-25, s. 7.

Le tribunal peut donner des instructions

7 Si une modification d'une transaction ou d'un arrangement est proposée après que le tribunal a ordonné qu'une ou plusieurs assemblées soient convoquées, cette ou ces assemblées peuvent être ajournées aux conditions que peut prescrire le tribunal quant à l'avis et autrement, et ces instructions peuvent être données tant après qu'avant l'ajournement de toute ou toutes assemblées, et le tribunal peut, à sa discrétion, prescrire qu'il ne sera pas nécessaire d'ajourner quelque assemblée ou de convoquer une nouvelle assemblée de toute catégorie de créanciers ou actionnaires qui, selon l'opinion du tribunal, n'est pas défavorablement atteinte par la modification proposée, et une transaction ou un arrangement ainsi modifié peut être homologué par le tribunal et être exécutoire en vertu de l'article 6.

S.R., ch. C-25, art. 7.

Scope of Act

8 This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

R.S., c. C-25, s. 8.

Champ d'application de la loi

8 La présente loi n'a pas pour effet de limiter mais d'étendre les stipulations de tout instrument actuellement ou désormais existant relativement aux droits de créanciers ou de toute catégorie de ces derniers, et elle est pleinement exécutoire et effective nonobstant toute stipulation contraire de cet instrument.

S.R., ch. C-25, art. 8.

PART II

Jurisdiction of Courts

Jurisdiction of court to receive applications

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.

Single judge may exercise powers, subject to appeal

(2) 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.

R.S., c. C-25, s. 9.

PARTIE II

Juridiction des tribunaux

Le tribunal a juridiction pour recevoir des demandes

9 (1) Toute demande prévue par la présente loi peut être faite au tribunal ayant juridiction dans la province où est situé le siège social ou le principal bureau d'affaires de la compagnie au Canada, ou, si la compagnie n'a pas de bureau d'affaires au Canada, dans la province où est situé quelque actif de la compagnie.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, 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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) 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.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Stays, etc. — other than initial application

(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

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Burden of proof on application

(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.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made,

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la

establishes a *provincial pension plan* as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

2005, c. 47, s. 128; 2009, c. 33, s. 28.

province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 128; 2009, ch. 33, art. 28.

Meaning of *regulatory body*

11.1 (1) In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Définition de *organisme administratif*

11.1 (1) Au présent article, ***organisme administratif*** s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Organisme administratif — ordonnance rendue en vertu de l'article 11.02

(2) Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la compagnie débitrice par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Exception

(3) Le tribunal peut par ordonnance, sur demande de la compagnie et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

a) il ne pourrait être fait de transaction ou d'arrangement viable à l'égard de la compagnie si ce paragraphe s'appliquait;

b) l'ordonnance demandée au titre de l'article 11.02 n'est pas contraire à l'intérêt public.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may,

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à

on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

11.11 [Abrogé, 2005, ch. 47, art. 128]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138.

Facteur additionnel : demande initiale

(5) Lorsqu'une demande est faite au titre du paragraphe (1) en même temps que la demande initiale visée au paragraphe 11.02(1) ou durant la période visée dans l'ordonnance rendue au titre de ce paragraphe, le tribunal ne rend l'ordonnance visée au paragraphe (1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65; 2019, ch. 29, art. 138.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Cessions

11.3 (1) Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Facteurs à prendre en considération

(3) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de cession, le cas échéant;

b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

c) l'opportunité de lui céder les droits et obligations.

Tab 3

2011 BCSC 1758
British Columbia Supreme Court

Worldspan Marine Inc., Re

2011 CarswellBC 3667, 2011 BCSC 1758, [2012] B.C.W.L.D. 2061, 211 A.C.W.S. (3d) 557, 86 C.B.R. (5th) 119

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

And In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 and the Business Corporations Act, S.B.C. 2002, c. 57

And In the Matter of Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products Ltd. (Petitioners)

Pearlman J.

Heard: December 16, 2011
Judgment: December 21, 2011
Docket: Vancouver S113550

Counsel: J.R. Sandrelli, J.D. Schultz for Petitioners, Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products
K. Jackson, V. Tickle for Wolrige Mahon (the "VCO"):
K.E. Siddall for Respondent, Harry Sargeant III
J. Leathley, Q.C. for Ontrack Systems Ltd.
D. Rossi for Mohammed Al-Saleh
G. Wharton, P. Mooney for Offshore Interiors Inc., Paynes Marine Group, Restaurant Design and Sales LLC, Arrow Transportation Systems and CCY Holdings Inc.
N. Beckie for Canada Revenue Agency
J. McLean, Q.C. for Comerica Bank
G. Dabbs for The Monitor

Subject: Insolvency; Corporate and Commercial

APPLICATION by debtor companies for extension of stay under *Companies' Creditors Arrangement Act.*

***Pearlman J.*:**

Introduction

1 On December 16, 2011, on the application of the petitioners, I granted an order confirming and extending the Initial Order and stay pronounced June 6, 2011, and subsequently confirmed and extended to December 16, 2011, by a further 119 days to April 13, 2012. When I made the order, I informed counsel that I would provide written Reasons for Judgment. These are my Reasons.

Positions of the Parties

2 The petitioners apply for the extension of the Initial Order to April 13, 2012 in order to permit them additional time to work toward a plan of arrangement by continuing the marketing of the Vessel "QE014226C010" (the "Vessel") with Fraser Yachts, to explore potential Debtor In Possession ("DIP") financing to complete construction of the Vessel pending a sale, and to resolve priorities among *in rem* claims against the Vessel.

3 The application of the petitioners for an extension of the Initial Order and stay was either supported, or not opposed, by all of the creditors who have participated in these proceedings, other than the respondent, Harry Sargeant III.

4 The Monitor supports the extension as the best option available to all of the creditors and stakeholders at this time.

5 These proceedings had their genesis in a dispute between the petitioner Worldspan Marine Inc. and Mr. Sargeant. On February 29, 2008, Worldspan entered into a Vessel Construction Agreement with Mr. Sargeant for the construction of the Vessel, a 144-foot custom motor yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. In January 2010 Mr. Sargeant ceased making payments to Worldspan under the Vessel Construction Agreement.

6 The petitioners continued construction until April 2010, by which time the total arrears invoiced to Mr. Sargeant totalled approximately $4.9 million. In April or May 2010, the petitioners ceased construction of the Vessel and the petitioner Queenship laid off 97 employees who were then working on the Vessel. The petitioners maintain that Mr. Sargeant's failure to pay monies due to them under the Vessel Construction Agreement resulted in their insolvency, and led to their application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") in these proceedings.

7 Mr. Sargeant contends that the petitioners overcharged him. He claims against the petitioners, and against the as yet unfinished Vessel for the full amount he paid toward its construction, which totals $20,945,924.05.

8 Mr. Sargeant submits that the petitioners are unable to establish that circumstances exist that make an order extending the Initial Order appropriate, or that they have acted and continue to act in good faith and with due diligence. He says that the petitioners have no prospect of presenting a viable plan of arrangement to their creditors. Mr. Sargeant also contends that the petitioners have shown a lack of good faith by failing to disclose to the Court that the two principals of Worldspan, Mr. Blane, and Mr. Barnett are engaged in a dispute in the United States District Court for the Southern District of Florida where Mr. Barnett is suing Mr. Blane for fraud, breach of fiduciary duty and conversion respecting monies invested in Worldspan.

9 Mr. Sargeant drew the Court's attention to Exhibit 22 to the complaint filed in the United States District Court by Mr. Barnett, which is a demand letter dated June 29, 2011 from Mr. Barnett's Florida counsel to Mr. Blane stating:

> Your fraudulent actions not only caused monetary damage to Mr. Barnett, but also caused tremendous damage to WorldSpan. More specifically, your taking Mr. Barnett's money for your own use deprived the company of much needed capital. Your harm to WorldSpan is further demonstrated by your conspiracy with the former CEO of WorldSpan, Lee Taubeneck, to overcharge a customer in order to offset the funds you were stealing from Mr. Barnett that should have gone to the company. Your deplorable actions directly caused the demise of what could have been a successful and innovative new company" (underlining added)

10 Mr. Sargeant says, and I accept, that he is the customer referred to in the demand letter. He submits that the allegations contained in the complaint and demand letter lend credence to his claim that Worldspan breached the Vessel Construction Agreement by engaging in dishonest business practices, and over-billed him. Further, Mr. Sargeant says that the petitioner's failure to disclose this dispute between the principals of Worldspan, in addition to demonstrating a lack of good faith, reveals an internal division that diminishes the prospects of Worldspan continuing in business.

11 As yet, there has been no judicial determination of the allegations made by Mr. Barnett in his complaint against Mr. Blane.

Discussion and Analysis

12 On an application for an extension of a stay pursuant to s. 11.02(2) of the *CCAA*, the petitioners must establish that they have met the test set out in s. 11.02(3):

> (a) whether circumstances exist that make the order appropriate; and
>
> (b) whether the applicant has acted, and is acting, in good faith and with due diligence.

13 In considering whether "circumstances exist that make the order appropriate", the court must be satisfied that an extension of the Initial Order and stay will further the purposes of the *CCAA*.

14 In *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.) at para. 70, Deschamps J., for the Court, stated:

> ... Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

15 A frequently cited statement of the purpose of the *CCAA* is found in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84, [1990] B.C.J. No. 2384 (B.C. C.A.), at p. 3 where the Court of Appeal held:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

16 In *Pacific National Lease Holding Corp., Re*, [1992] B.C.J. No. 3070 (B.C. S.C.) Brenner J. (as he then was) summarized the applicable principles at para. 26:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
>
> (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

17 In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (B.C. C.A.), the Court of Appeal set aside the extension of a stay granted to the debtor property development company. There, the Court held that the *CCAA* was not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise on which the creditors could vote. At para. 26, Tysoe J.A., for the Court said this:

> In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

18 At para. 32, Tysoe J.A. queried whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan or arrangement intended to be made by the debtor company simply proposed that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

19 In *Cliffs Over Maple Bay Investments Ltd.* at para. 38, the court held:

> ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

20 As counsel for the petitioners submitted, *Cliffs Over Maple Bay Investments Ltd.* was decided before the current s. 36 of the *CCAA* came into force. That section permits the court to authorize the sale of a debtor's assets outside the ordinary course of business without a vote by the creditors.

21 Nonetheless, *Cliffs Over Maple Bay Investments Ltd.* is authority for the proposition that a stay, or an extension of a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors.

22 Other factors to be considered on an application for an extension of a stay include the debtor's progress during the previous stay period toward a restructuring; whether creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension: *Federal Gypsum Co., Re*, 2007 NSSC 347, 40 C.B.R. (5th) 80 (N.S. S.C.) at paras. 24-29.

23 The good faith requirement includes observance of reasonable commercial standards of fair dealings in the *CCAA* proceedings, the absence of intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process: *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.) at paras. 14-17.

Whether circumstances exist that make an extension appropriate

24 The petitioners seek the extension to April 13, 2012 in order to allow a reasonable period of time to continue their efforts to restructure and to develop a plan of arrangement.

25 There are particular circumstances which have protracted these proceedings. Those circumstances include the following:

> (a) Initially, Mr. Sargeant expressed an interest in funding the completion of the Vessel as a Crescent brand yacht at Worldspan shipyards. On July 22, 2011, on the application of Mr. Sargeant, the Court appointed an independent Vessel Construction Officer to prepare an analysis of the cost of completing the Vessel to Mr. Sargeant's specifications. The Vessel Construction Officer delivered his completion cost analysis on October 31, 2011.
>
> (b) The Vessel was arrested in proceedings in the Federal Court of Canada brought by Offshore Interiors Inc., a creditor and a maritime lien claimant. As a result, The Federal Court, while recognizing the jurisdiction of this Court in the *CCAA* proceedings, has exercised its jurisdiction over the vessel. There are proceedings underway in the Federal Court for the determination of *in rem* claims against the Vessel. Because this Court has jurisdiction in the CCAA proceedings, and the Federal Court exercises its maritime law jurisdiction over the Vessel, there have been applications in both Courts with respect to the marketing of the Vessel.

Tab 4

2015 ONSC 7574
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 19174, 2015 ONSC 7574, 261 A.C.W.S. (3d) 518, 31 C.B.R. (6th) 311

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp. and Target Canada Property LLC.

Morawetz R.S.J.

Judgment: December 11, 2015
Docket: CV-15-10832-00CL

Counsel: J. Swatz, Dina Milivojevic, for Target Corporation
Jeremy Dacks, for Target Canada Entitites
Susan Philpott, for Employees
Richard Swan, S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.
Jay Carfagnini, Alan Mark, for Monitor, Alvarez & Marsal
Jeff Carhart, for Ginsey Industries
Lauren Epstein, for Trustee of the Employee Trust
Lou Brzezinski, Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals
Linda Galessiere, for Various Landlords

Subject: Insolvency
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 --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Approval of reports — Monitor in proceedings under Companies' Creditors Arrangement Act (CCAA) brought application for approval of reports and activities set out in reports — Application was opposed by two of applicants' landlords — Application granted in part — Monitor played integral role in balancing and protecting various interests in CCAA environment — Court specifically mandated monitor to undertake various activities — In its reports, monitor had provided helpful commentary to court and to stakeholders about progress of CCAA proceedings — In circumstances where monitor was requesting approval of its reports and activities in general sense, caution was to be exercised to avoid broad application of res judicata and related

doctrines — Benefit of any approval of monitor's reports and its activities should be limited to monitor itself — Limiting effect of approval addressed concerns of objecting parties and it did not impact prior court orders.

Table of Authorities

Cases considered by *Morawetz R.S.J.*:

Bank of America Canada v. Willann Investments Ltd. (1993), 23 C.B.R. (3d) 98, 1993 CarswellOnt 249 (Ont. Gen. Div.) — referred to

Forrest v. Vriend (2015), 2015 BCSC 1878, 2015 CarswellBC 2979 (B.C. S.C.) — considered

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2006), 2006 CarswellOnt 2835, 19 C.B.R. (5th) 165 (Ont. S.C.J. [Commercial List]) — referred to

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2007), 2007 CarswellOnt 1182, 2007 ONCA 145, 31 C.B.R. (5th) 167 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — considered

s. 23(1) — considered

s. 23(2) — considered

APPLICATION by monitor for approval of reports and activities set out in reports.

***Morawetz R.S.J.*:**

1 Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

2 Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

3 Such is not the case in this matter.

4 The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

5 The essence of the opposition is that the request of the Monitor to obtain approval of its activities — particularly in these liquidation proceedings — is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

6 Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

7 Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

8 The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

9 The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable — if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

10 Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

11 In addition, paragraph 51 of the Amended and Restated Order provides that:

> ... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

12 The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

> (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
>
> (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
>
> (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
>
> (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
>
> (e) provides protection for the monitor, not otherwise provided by the CCAA; and
>
> (f) protects creditors from the delay in distribution that would be caused by:
>
> a. re-litigation of steps taken to date; and
>
> b. potential indemnity claims by the monitor.

13 Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

14 Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel. The issue was recently considered in *Forrest v. Vriend*, 2015 CarswellBC 2979 (B.C. S.C.), where Ehrcke J. stated:

25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

> 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> . . . . .

30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:

> 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
>
> . . . . .
>
> 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> . . . . .
>
> 37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

15 In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

16 Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

17 Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

18 For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor

in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

19 On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]); *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2007 ONCA 145 (Ont. C.A.) and *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ont. Gen. Div.)).

20 The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

21 In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

22 I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

23 By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

24 By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

25 Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

26 The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Application granted in part.

2015 ONSC 7574, 2015 CarswellOnt 19174, 261 A.C.W.S. (3d) 518, 31 C.B.R. (6th) 311

End of Document

Tab 5

2019 MBCA 115
Manitoba Court of Appeal

Lantin et al v. Seven Oaks General Hospital

2019 CarswellMan 875, 2019 MBCA 115, [2020] 2 W.W.R. 383,
311 A.C.W.S. (3d) 390, 442 D.L.R. (4th) 684, 50 C.P.C. (8th) 233

JOCELYN LANTIN, as Litigation Guardian for ALEXANDER LANTIN (Plaintiff / Respondent) and SEVEN OAKS GENERAL HOSPITAL (Defendant / Appellant) and REX SOKOLIES (Defendant)

Diana M. Cameron, William J. Burnett, Christopher J. Mainella JJ.A.

Heard: September 6, 2019
Judgment: November 6, 2019
Docket: AI19-30-09233

Proceedings: reversing *Lantin et al. v. Seven Oaks General Hospital* (2018), 2018 MBQB 160, 2018 CarswellMan 517, McCawley J. (Man. Q.B.)

Counsel: M.T. Green, for Appellant
R.M. Beamish, for Respondent

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.16 Amending or varying
XXII.16.c After judgment entered
XXII.16.c.i Error or inadvertence
Headnote
Civil practice and procedure --- Judgments and orders — Amending or varying — After judgment entered — Error or inadvertence
Slip rule — Patient was high school student with no prior health issues who attended defendant hospital on three occasions over three months for progressively worsening illness — Chest x-ray on third visit showed possibility of tuberculosis that required follow-up, but report was filed in error and results were never communicated — Patient had tuberculosis that spread to his brain, resulting in brain lesions, stroke, seizure, and permanent disability — Patient walked with cane and could no longer play guitar or sports, and his academic performance declined significantly — Plaintiff was awarded $175,000 in non-pecuniary damages, $1,300,000 for loss of earning capacity, and $64,145.51 for subrogated claim of Manitoba Health, for total of $1,539,145.51, against hospital — Plaintiff's counsel requested that allowance be made for loss of opportunity to invest non-pecuniary damages but trial judge neither addressed request nor did judgment drafted by counsel for plaintiff — Judgment was deemed to be entered on date it was signed, May 18, 2017 — On appeal, damages for loss of earning capacity were reduced by $775,000 based on trial judge's failure to allow for contingencies in her analysis but non-pecuniary damages award was upheld — Certificate of decision was signed by appellate court's deputy registrar on June 19, 2018 stating plaintiff recovered judgment in sum of $764,145.51 — During time between when appellate court pronounced its decision and certificate of decision was signed, counsel for plaintiff

raised, for first time, claim that s. 80(3) of Court of Queen's Bench Act (Act) mandated that three percent be added to award for non-pecuniary damages to compensate for loss of opportunity to invest those damages — Parties wrote to judge and trial judge advised that "through an oversight, an award of loss of opportunity to invest general damages had not specifically been included, as was required under the [QB] Act, although that had been the court's clear intention" — Trial judge said that rectified slip and her original intention was "not tantamount to interfering with the decision of the Court of Appeal, nor does it constitute a new ruling" — Amendment added $43,682.88 to award — Hospital appealed — Appeal allowed — While accidental slips and oversights may be corrected under slip rule, it cannot be used to correct substantive errors in fact or law — For latter, proper remedy is an appeal — Issue in this case was whether trial judge erred in concluding that prior determination on hospital's appeal made no difference to her ability to apply slip rule — When an appellate court reverses judgment below, former decision was avoided ab initio and replaced by appellate decision which becomes res judicata between parties — Trial judge erred in law in accepting plaintiff's submission that there were two judgments in effect; only judgment in effect between parties was one given on appeal granting plaintiff damages of $764,145.51 — Slip rule was not available to trial judge — Appellate court was entitled to assume that trial judge had complied with s. 80(3) of Act and that allowance for loss of opportunity to invest was included in that award — If plaintiff was unhappy with amount awarded by trial judge for non-pecuniary damages, appropriate remedy was to appeal that portion of decisiona The Court of Queen's Bench Act, S.M. 1988-89, c. 4, s 80(3).

Table of Authorities

Cases considered by *Christopher J. Mainella J.A.*:

Abromovich v. Snow Lake (Town) (1996), 1996 CarswellMan 558, 113 Man. R. (2d) 164 (Man. C.A.) — referred to

Chandler v. Assn. of Architects (Alberta) (1989), [1989] 6 W.W.R. 521, 36 C.L.R. 1, [1989] 2 S.C.R. 848, 70 Alta. L.R. (2d) 193, 40 Admin. L.R. 128, 62 D.L.R. (4th) 577, 99 N.R. 277, 101 A.R. 321, 1989 CarswellAlta 160, 1989 CarswellAlta 620 (S.C.C.) — referred to

Danyluk v. Ainsworth Technologies Inc. (2001), 2001 SCC 44, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 7 C.P.C. (5th) 199, 272 N.R. 1, 149 O.A.C. 1, 2001 C.L.L.C. 210-033, 34 Admin. L.R. (3d) 163, [2001] 2 S.C.R. 460, 2001 CSC 44 (S.C.C.) — considered

Doucet-Boudreau v. Nova Scotia (Department of Education) (2003), 2003 SCC 62, 2003 CarswellNS 375, 2003 CarswellNS 376, (sub nom. *Doucet-Boudreau v. Nova Scotia (Minister of Education))* 232 D.L.R. (4th) 577, 312 N.R. 1, 218 N.S.R. (2d) 311, 687 A.P.R. 311, (sub nom. *Doucet-Boudreau v. Nova Scotia (Minister of Education))* [2003] 3 S.C.R. 3, 112 C.R.R. (2d) 202, 45 C.P.C. (5th) 1 (S.C.C.) — referred to

Harrison v. Harrison (2007), 2007 BCCA 120, 2007 CarswellBC 374, 64 B.C.L.R. (4th) 318, 237 B.C.A.C. 187, 392 W.A.C. 187 (B.C. C.A.) — referred to

Kobs v. Merchants Hotel (1990), 70 Man. R. (2d) 178, 1990 CarswellMan 111 (Man. C.A.) — referred to

Krangle (Guardian ad litem of) v. Brisco (2002), 2002 SCC 9, 2002 CarswellBC 64, 2002 CarswellBC 65, [2002] 3 W.W.R. 45, 208 D.L.R. (4th) 193, 281 N.R. 88, 98 B.C.L.R. (3d) 1, 9 C.C.L.T. (3d) 195, 161 B.C.A.C. 283, 263 W.A.C. 283, [2002] 1 S.C.R. 205, [2002] B.C.T.C. 15, 2002 CSC 9 (S.C.C.) — referred to

Lantin (Litigation guardian of) v. Sokolies (2017), 2017 MBQB 40, 2017 CarswellMan 124 (Man. Q.B.) — referred to

Lantin et al v. Seven Oaks General Hospital (2018), 2018 MBCA 57, 2018 CarswellMan 206, [2018] 8 W.W.R. 296 (Man. C.A.) — referred to

Laufer v. Bucklaschuk (1999), 1999 CarswellMan 565, 181 D.L.R. (4th) 83, [2000] 2 W.W.R. 462, 145 Man. R. (2d) 1, 218 W.A.C. 1 (Man. C.A.) — referred to

Melnychuk v. Moore (1989), 13 M.V.R. (2d) 305, 57 Man. R. (2d) 174, [1989] 6 W.W.R. 367, 1989 CarswellMan 185 (Man. C.A.) — considered

Montreal (City) v. McGee (1900), 30 S.C.R. 582, 1900 CarswellQue 15 (S.C.C.) — referred to

Paper Machinery Ltd. v. J.O. Ross Engineering Corp. (1934), [1934] S.C.R. 186, [1934] 2 D.L.R. 239, 1934 CarswellNat 30 (S.C.C.) — considered

Penner v. Niagara Regional Police Services Board (2013), 2013 SCC 19, 2013 CarswellOnt 3743, 2013 CarswellOnt 3744, 32 C.P.C. (7th) 223, 49 Admin. L.R. (5th) 1, 356 D.L.R. (4th) 595, 442 N.R. 140, 304 O.A.C. 106, [2013] 2 S.C.R. 125, (sub nom. *Penner v. Niagara (Police Services Board))* 118 O.R. (3d) 800 (note) (S.C.C.) — considered

Prévost v. Bedard (1915), 51 S.C.R. 629, 24 D.L.R. 862, 1915 CarswellQue 11 (S.C.C.) — referred to

St. Nazaire Co., Re (1879), 12 Ch. D. 88 (Eng. C.A.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, [2003] 3 S.C.R. 77, 9 Admin. L.R. (4th) 161, 31 C.C.E.L. (3d) 216 (S.C.C.) — referred to

Towers Ltd. v. Quinton's Cleaners Ltd. (2009), 2009 MBCA 81, 2009 CarswellMan 375, [2010] 1 W.W.R. 246, 245 Man. R. (2d) 70, 466 W.A.C. 70 (Man. C.A.) — referred to

Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd. (2013), [2013] 4 All E.R. 715, [2013] R.P.C. 29, [2013] 3 W.L.R. 299, [2013] UKSC 46, [2014] 1 A.C. 160 (U.K. S.C.) — referred to

Wong v. Grant Mitchell Law Corp. (2016), 2016 MBCA 65, 2016 CarswellMan 225, 330 Man. R. (2d) 143, 675 W.A.C. 143, 98 C.P.C. (7th) 239 (Man. C.A.) — referred to

Wong v. Grant Mitchell Law Corp. (2017), 2017 CarswellMan 53, 2017 CarswellMan 54 (S.C.C.) — referred to

Statutes considered:

Court of Appeal Act, R.S.M. 1987, c. C240

ss. 25-29 — referred to

s. 26(1) — considered

Court of Queen's Bench Act, S.M. 1988-89, c. 4

s. 80(3) — considered

s. 80(4) — considered

s. 89 — referred to

s. 94 — considered

Rules considered:

Court of Appeal Rules, Man. Reg. 555/88 R

R. 40(1) — considered

R. 46.2 [en. Man. Reg. 94/2003] — referred to

Queen's Bench Rules, Man. Reg. 553/88

R. 1.03 "judgment" — considered

R. 1.04.1(b) [en. Man. Reg. 127/94] — referred to

R. 59.06(1) — considered

R. 70.34(1) — referred to

APPEAL by hospital from judgment reported at *Lantin et al. v. Seven Oaks General Hospital* (2018), 2018 MBQB 160, 2018 CarswellMan 517 (Man. Q.B.), from amendment of appeal judgment.

***Christopher J. Mainella J.A.*:**

1 This appeal is about the limits of the "slip rule", the extraordinary power to amend an order or judgment after it has been formally entered.

2 The appeal arises from the aftermath of a prior decision of this Court (see *Lantin et al v. Seven Oaks General Hospital*, 2018 MBCA 57 (Man. C.A.) (hereinafter *Lantin CA*)) where the defendant hospital's appeal was allowed and an award of damages was varied.

3 After this Court's judgment was entered, the judge made an order amending the judgment she had granted, which was the subject of the prior appeal, because of an accidental slip or omission not to make an allowance for loss of opportunity to invest the non-pecuniary damages.

4 The wording of the relevant rules of the Manitoba, Court of Queen's Bench Rules, Man Reg 553/88 (the *QBR*), is as follows:

> **DEFINITIONS**
>
> **1.03** In these rules, unless the context requires otherwise,
>
> > **"judgment"** means a decision that finally disposes of all or part of an application or action on its merits or by consent of the parties, and includes a judgment in consequence of the default of a party;
>
> ***Amending***
>
> **59.06(1)** An order that,
>
> > (a) contains an error arising from an accidental slip or omission; or
> >
> > (b) requires amendment in any particular on which the court did not adjudicate;
>
> may be amended on a motion in the proceeding.

5 The effect of the amendment was to increase the non-pecuniary damages by almost 25 per cent.

6 In this appeal, the hospital argues there is a need for finality in litigation. It says "there is simply no legal basis which justifies the learned judge's decision to intervene in this matter at this late date." The plaintiff replies by saying that the amendment was appropriate under the slip rule to correct an error of law and to conform to the judge's original intention.

7 For the following reasons, I would allow the hospital's appeal.

Background

The Trial and the Original Appeal

8 Damages of $1,539,145.51 were awarded after a trial (see *Lantin (Litigation guardian of) v. Sokolies*, 2017 MBQB 40 (Man. Q.B.)). The breakdown was $175,000 in non-pecuniary damages for pain and suffering; $1,300,000 in damages for loss of earning capacity; and the subrogated claim of Manitoba Health of $64,145.51.

9 In his closing submission, counsel for the plaintiff requested that allowance be made for the loss of opportunity to invest the non-pecuniary damages. The judge did not make specific comment on the loss of opportunity to invest the non-pecuniary damages in her reasons, nor was an amount for such loss separately fixed in the judgment that counsel for the plaintiff drafted. By virtue of r 1.04.1(b) of the *QBR*, the judgment was deemed to be entered on the date it was signed by the judge, May 18, 2017.

10 Sections 80(3)-(4) of The Court of Queen's Bench Act, CCSM c C280 (the *QB Act*) address non-pecuniary damages:

> **Non-pecuniary damages**
>
> **80(3)** The court shall not make an award of interest on non-pecuniary damages but in determining the amount of the non-pecuniary damages, a judge shall make allowance for the loss of opportunity for the successful party to invest the amount of the damages.
>
> **Relevant circumstances**
>
> **80(4)** For purposes of subsection (3), a judge shall have regard to such considerations as the judge considers relevant, including the prejudgment rate from the date of the notice under clause (1)(b) to the date of the order awarding the damages.

11 In the original appeal, this Court reduced the damages for loss of earning capacity by $775,000 because the judge "failed to make any allowance for contingencies in her analysis of the plaintiff's loss of earning capacity, with the result that the award for that loss was inordinately high" (*Lantin CA* at para 2). In terms of the non-pecuniary damages, we did not accede to the hospital's request for a reduction to $80,000. We concluded that, in light of "counsel's submissions and the awards made in other cases" (at para 79), the amount of non-pecuniary damages should not be changed.

12 A certificate of decision was signed by the Court of Appeal's deputy registrar on June 19, 2018. It read, in part, "The Appeal be allowed and that the plaintiffs recover judgment against the defendant Seven Oaks General Hospital for the sum of $764,145.51." Once the certificate of decision was signed, the judgment of this Court was entered and finally disposed of the negligence action against the hospital on its merits.

The Slip as to Calculation of Non-Pecuniary Damages

13 In the approximately one month between when this Court pronounced its decision and the certificate of decision was signed, counsel for the plaintiff raised with counsel for the hospital, for the first time, the claim that section 80(3) of the QB Act mandated that the award for non-pecuniary damages be adjusted upward by three per cent per annum to compensate for the loss of opportunity to invest those damages.

14 On June 13, 2018, counsel for the plaintiff advised counsel for the hospital that he would write to the judge about the situation, bring a motion to amend the judgment and file "a Notice of Appeal in order to protect [his] position." In the week before the certificate of decision was signed, both counsel wrote to the judge about the controversy. The letters contained legal submissions on a contentious point in the absence of any motion or other process. The proper procedure should have been for an appointment to have been arranged with the judge in order to deal with the matter formally.

15 The judge wrote back to counsel on June 29, 2018. She advised that, "through an oversight, an award of loss of opportunity to invest general damages had not specifically been included, as was required under the [QB] Act, although that had been the court's clear intention" (at para 7). She acknowledged the hospital's position that she had no jurisdiction given the decision of the Court of Appeal and that she was *functus officio*. She said she was prepared to have counsel attend before her to make submissions. In her letter, she referred counsel to the decision of *Melnychuk v. Moore*, 1989 CarswellMan 185 (Man. C.A.).

16 In *Melnychuk*, Twaddle JA suggested, in applying the similarly worded legislation that preceded section 80(3) of the QB Act, that, for reasons of transparency, a trial judge should separately fix the amount for the loss of opportunity to invest non-pecuniary damages and that the rate of three per cent was reasonable to compensate for the loss of opportunity to invest although he noted that presumptive rate was not "prescribed", may "not be entirely accurate" and, therefore, was "rebuttable" (at para 50).

17 It is unnecessary to decide the correctness of the judge's conclusion that the plaintiff was "entitled at law" (i.e., section 80(3) of the QB Act) (at para 17) to a three per cent rate for loss of opportunity to invest the non-pecuniary damages. The decision in *Melnychuk* has been interpreted in other cases (see *Kobs v. Merchants Hotel*, 1990 CarswellMan 111 (Man. C.A.) at para 20; and *Laufer v. Bucklaschuk* (1999), 181 D.L.R. (4th) 83 (Man. C.A.) at para 122). Section 80(3) of the QB Act must be read in conjunction with section 80(4) and applied reasonably in light of all the relevant circumstances.

18 The plaintiff did not move for a rehearing of the appeal based on r 46.2 of the Manitoba, Court of Appeal Rules, Man Reg 555/88R (the *CAR*), before this Court's judgment was entered. The plaintiff did not attempt to exercise any other appellate rights despite counsel's stated intention to do so.

The Judge's Decision

19 In granting the order, the judge stated, "The question here is whether the fact that an appeal and a determination by the Court of Appeal makes any difference to the application of the 'slip rule' in the circumstances of this case. In my view, it does not" (at para 16). She said rectifying the slip so that the judgment conformed to section 80(3) of the QB Act and her original intention was "not tantamount to interfering with the decision of the Court of Appeal, nor does it constitute a new ruling" (at para 18).

20 The amendment to the judgment added $43,682.88 to the award for non-pecuniary damages based on the application of the three per cent rate for the approximately eight-year period between when the action was commenced and the judgment was signed.

Discussion

The Standard of Review

21 A decision to amend an order under r 59.06(1) of the *QBR* is discretionary. The standard of review was discussed in *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 (S.C.C.) (at para 27):

> A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.

(See also *Towers Ltd. v. Quinton's Cleaners Ltd.*, 2009 MBCA 81 (Man. C.A.) at paras 24-28.)

The Slip Rule

22 Formal entry of an order or judgment is a watershed moment in litigation. Once an order or judgment is drawn up and formally entered, the court or judge who pronounced it has no jurisdiction to amend it absent a recognised power to do so (see The Hon Mr Justice KR Handley, *Spencer Bower and Handley: Res Judicata*, 4th ed by Andrew Grubb (London, UK: LexisNexis, 2009) at para 5.03). As a general rule, formal entry of an order or judgment triggers the common law doctrine of *functus officio* (see Donald J Lange, *The Doctrine of Res Judicata in Canada*, 4th ed (Markham: LexisNexis, 2015) at 489-90; Linda S Abrams & Kevin P McGuinness, *Canadian Civil Procedure Law*, 2nd ed (Markham: LexisNexis, 2010) at paras 16.374-16.375; and *Harrison v. Harrison*, 2007 BCCA 120 (B.C. C.A.) at para 29).

23 This rule of finality is derived from the intention of the Legislature for appellate jurisdiction to be with the Court of Appeal exclusively which, in Manitoba, is reflected by the operation of section 89 of the QB Act and sections 25-29 of The Court of Appeal Act, CCSM c C240 (the *CA Act*) (see *St. Nazaire Co., Re* (1879), 12 Ch. D. 88 (Eng. C.A.), at 96-97); *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934] S.C.R. 186 (S.C.C.) at 188; *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.) at 860; and, *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62 (S.C.C.) at paras 77-79).

24 While accidental slips and oversights may be corrected under the slip rule, deliberate decisions and afterthoughts cannot be corrected under that rule. The slip rule is not an alternative procedure to correct substantive errors in fact or law; the proper remedy is an appeal (see *Abromovich v. Snow Lake (Town)*, 1996 CarswellMan 558 (Man. C.A.) at para 4; and *Wong v. Grant Mitchell Law Corp.*, 2016 MBCA 65 (Man. C.A.) at paras 4-5, leave to appeal to SCC refused, 37227 (9 February 2017) [2017 CarswellMan 53(S.C.C.)]).

25 The ambit of the slip rule is defined by a court's inherent jurisdiction, the rules of court and legislation. Courts have inherent jurisdiction to amend a formally entered order or judgment "[w]here there has been a slip in drawing it up, or ... [w]here there has been error in expressing the manifest intention of the court" (Paper Machinery Ltd. at p 188; see also *Prévost v. Bedard* (1915), 51 S.C.R. 629 (S.C.C.) at 635). Rule 59.06(1) (and r 70.34(1) for family proceedings) of the *QBR* broaden the ambit of the slip rule further than the Court's inherent jurisdiction. Legislation may allow for amendment in a particular context (which is not the situation here).

26 Professor Tarrant explains the procedure in relation to the slip rule in the following fashion: "When it is desired to have a judgment or order amended under the slip rule the application must be made to the same court that made the order unless that court has ceased to exist" (John Tarrant, *Amending Final Judgments and* Orders (Sydney, Austl: The Federation Press, 2010) at 150; see also Handley at para 5.03).

27 In my view, the issue here is not whether the judge erred in determining that failing to make allowance for loss of opportunity to invest non-pecuniary damages was an oversight that fell within the ambit of the slip rule. This is not the appropriate case to chart the fine line between an oversight and an afterthought. Rather, the true question on this appeal is the correctness of the judge's conclusion that this Court's prior determination on the hospital's appeal made no difference to her ability to apply the slip rule.

The Legal Effect of the Hospital's Successful Appeal

28 The order appealed from says the judge amended "the judgment signed on May 18, 2017". Regrettably, the judge accepted the plaintiff's submission that there were two judgments in effect: the one she signed on May 18, 2017 and the one given by this Court as certified on June 19, 2018. In my respectful view, that was an error in law.

29 Section 26(1) of the CA Act and r 40(1) of the *CAR* read as follows:

> **Court may pronounce proper judgment**
>
> **26(1)** The court, upon an appeal, may give any judgment which ought to have been pronounced, and may make such further or other order as is deemed just.
>
> **Certificate of decision**
>
> **40(1)** The decision of the court shall be certified by the registrar in Form 2 of Schedule A to the proper officer of the court appealed from who shall make all proper and necessary entries of the decision, and all subsequent proceedings may be taken as if the judgment had been given or pronounced in the court appealed from.

30 Handley JA describes the legal effect of a successful appeal this way: "When an appellate court reverses the judgment below, the former decision, until then conclusive, is avoided *ab initio* and replaced by the appellate decision, which becomes the *res judicata* between the parties" (Handley at para 2.33).

31 The idea of two judgments existing at the same time for the same parties on the same cause of action is both illogical and contrary to the law. The correct statement of principle is set out as follows in WB Williston & RJ Rolls, *The Law of Civil Procedure* (Toronto: Butterworths, 1970), vol 2 at 1022: "More than one final judgment may be given in an action or proceeding if several causes of action or issues are decided at different times, but if there is only one cause of action only one judgment can be given."

32 In allowing the hospital's appeal, this Court exercised its appellate jurisdiction and gave the judgment "which ought to have been pronounced" on the negligence action (section 26(1) of the CA Act). Any subsequent proceedings to be taken would be on that judgment as if it had been given by the Court of Queen's Bench (see r 40(1) of the *CAR*). By operation of law, the only judgment that was in effect between the parties for the hospital's negligence when the *QBR* r 59.06(1) motion was filed on August 21, 2018 was the one given by this Court in favour of the plaintiff for the sum of $764,145.51.

Common Law Doctrines Against Relitigation of Issues

33 Several common law doctrines against relitigation of issues decided in a previous judicial proceeding were raised in the course of this appeal (see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (S.C.C.) at para 15; and *Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd.*, [2013] UKSC 46 (U.K. S.C.) at para 17). However, given the judge's error in relying on the slip rule to amend a judgment, which had ceased to be in effect by operation of law, it is unnecessary to discuss whether any of those common law doctrines would be applicable.

Conclusion

34 In my respectful view, the slip rule was not available to the judge here as the judgment in effect had been given by a different and higher level of court having exercised its appellate jurisdiction under section 26(1) of the CA Act to substitute its own judgment.

35 The unusual path of this litigation illustrates the importance of the comments made in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (S.C.C.), that a litigant has an entitlement to only "one bite at the cherry" (at para 18); thereafter, other interests, such as finality, come into play. It is well settled that damages resulting from a discrete cause of action should be assessed and recovered once for all at the trial (subject to modification on appeal) (see *Montreal (City) v. McGee* (1900), 30 S.C.R. 582 (S.C.C.) at 589; and *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 (S.C.C.) at para 21). This is in keeping with the legislative direction applicable to all civil litigation that, "As far as possible, a multiplicity of proceedings shall be avoided" (section 94 of the QB Act).

36 Adjusting damages for inflation and lost opportunity is a routine part of civil litigation. Counsel are expected to raise all relevant arguments at the first assessment. Here, the plaintiff was represented by experienced counsel, had a fair trial and appeal, and ultimately received a large award of damages for the unfortunate losses caused by the hospital's negligence.

37 There is no ambiguity about the meaning or application of section 80(3) of the QB Act. That section directs that the Court shall not make an award of interest on non-pecuniary damages. It further provides that, in determining the amount of non-pecuniary damages, a judge must make allowance for the loss of opportunity to invest the amount of the damages.

38 In the present case, the judge determined the amount of non-pecuniary damages. When the award of $175,000 for non-pecuniary damages was appealed, absent a cross appeal, this Court was entitled to assume that the judge had complied with section 80(3) and that an allowance for the loss of opportunity to invest was included in that award. As noted previously, this Court concluded that, in light of counsel's submissions and the awards made in other cases, the amount of non-pecuniary damages should not be changed.

39 If the plaintiff was unhappy with the amount awarded by the judge for non-pecuniary damages, he should have appealed (or cross appealed) that portion of the decision. He failed to do so.

40 When the controversy regarding the loss of opportunity to invest the non-pecuniary damages arose before the certificate of decision was signed, consideration was given to exercising rights of appeal but later abandoned. At some point, to ensure a proper balance is maintained in the justice system, matters must come to an end to respect the public interest in finality of litigation, fairness to the hospital, judicial economy and to ensure that the most proportional process is followed.

Disposition

41 In the result, I would allow the appeal and set aside the order appealed from, with costs to the hospital in this Court and the Court below.

***Diana M. Cameron J.A.*:**

I agree

***William J. Burnett J.A.*:**

I agree

Appeal allowed.