COURT OF APPEAL FOR ONTARIO

CITATION: Nortel Networks Corporation (Re), 2015 ONCA 681
DATE: 20151013
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Simmons, Gillese and Rouleau JJ.A.

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 Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Richard B. Swan, S. Richard Orzy and Gavin H. Finlayson, for the appellant *Ad Hoc* Group of Bondholders

Andrew Kent and Brett Harrison, for the respondent The Bank of New York Mellon

Edmond Lamek, for the respondent Law Debenture Trust Company of New York

Benjamin Zarnett and Graham D. Smith, for the Monitor and the respondent Canadian Debtors

Kenneth D. Kraft and John J. Salmas, for the respondent Wilmington Trust, National Association

Kenneth T. Rosenberg and Ari N. Kaplan, for the respondent Canadian Creditors' Committee

Tracy Wynne, for the Joint Administrators (EMEA)

Scott A. Bomhof and Adam M. Slavens, for Nortel Networks Inc./U.S. Debtors

Heard: April 29, 2015

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice, dated August 19, 2014, with reasons reported at 2014 ONSC 4777, 121 O.R. (3d) 228.

Rouleau J.A.:

A. OVERVIEW

[1] This appeal represents another chapter in the Nortel proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), which has been on-going since January 2009. A parallel proceeding under Chapter 11 of the United States *Bankruptcy Code* has also been on-going in Delaware since that time.

[2] The *Ad Hoc* Group of Bondholders (the "appellant") brings this appeal with leave. The group represents substantial holders of "crossover bonds", which are unsecured bonds either issued or guaranteed by certain of the Canadian Nortel entities. The relevant indentures provide for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations, such a make-whole provisions and trustee fees.

[3] In contrast, the claims of other claimants, such as Nortel pensioners and former employees, do not have a provision for interest on amounts owing to them.

[4] Holders of the crossover bonds have filed claims for principal and pre-filing interest in the amount of US$4.092 billion against each of the Canadian and U.S. Nortel estates. They also claim they are entitled to post-filing interest and related claims under the terms of the crossover bonds. As of December 31, 2013, the amount of this claim was approximately US$1.6 billion. The total of these two

amounts represents a significant portion of the proceeds generated from the worldwide sale of Nortel's business lines and other Nortel assets, totalling approximately $7.3 billion. This latter amount is apparently not growing at any appreciable rate because of the conservative nature of the investments made with it pending the outcome of the insolvency proceedings.

[5] In the context of a joint allocation trial, the *CCAA* judge directed that two issues be argued:

> 1. whether the holders of the crossover bond claims are legally entitled … to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and
>
> 2. if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

[6] The *CCAA* judge answered the first question in the negative and so he did not need to answer the second question. In reaching that conclusion, he accepted that the common law "interest stops rule", which has been held to be a fundamental tenet of insolvency law, applies in the *CCAA* context. He disagreed with the appellant's submission that the Supreme Court of Canada's decision in *Canada 3000 (Re)*; *Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, [2006] 1 S.C.R. 865, and this court's subsequent decision in *Stelco (Re)*, 2007 ONCA 483, 35 C.B.R. (5th) 174, are binding authority that the interest stops rule does not apply in the *CCAA* context.

[7] On appeal, the appellant raises two related issues – whether the *CCAA* judge erred in concluding that an interest stops rule applies in *CCAA* proceedings and, if not, whether he erred in concluding that the holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest.

[8] I would dismiss the appeal. As I will explain, there are sound legal and policy reasons for applying the interest stops rule in the *CCAA* context, and as I read *Stelco* and *Canada 3000,* they do not preclude such a result. Nor do I see a basis for varying the order that he made.

B. BACKGROUND

[9] In the *CCAA* court's initial order of January 14, 2009, the Canadian Debtors[1] were directed, subject to certain exceptions, to make no payments of principal or interest on account of amounts owing by the Canadian Debtors to any of their creditors as of the filing date, unless approved by the Monitor. Further, all proceedings and enforcement processes, and all rights and remedies of any person against the Canadian Debtors were stayed absent consent of the Canadian Debtors and the Monitor, or leave of the court.

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[1] There are five Canadian Debtors: Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation.

[10] In accordance with a claims procedure order dated July 30, 2009, claims against the Canadian Debtors were required to be filed by a claims bar date. Under a subsequent claims resolution order dated September 16, 2010, a disputed claim could be brought before the *CCAA* court for final determination.

[11] As previously noted, holders of the crossover bonds filed proofs of claim that included not only the principal amount of the debt and interest accrued to the date of insolvency but also contractual claims for interest and other amounts post-filing.

[12] In May 2014, a joint allocation trial, conducted by way of video-link by the *CCAA* judge in Ontario and Judge Gross in Delaware, commenced on the issue of the allocation of the sale proceeds among the debtor estates, including the Canadian and U.S. estates. In his 2015 decision, the *CCAA* judge, citing the "fundamental tenet of insolvency law that all debts shall be paid *pari passu*" and that "all unsecured creditors receive equal treatment" held that the $7.3 billion in funds generated from the Nortel liquidation should be allocated on a *pro rata* basis as among the estates: 2015 ONSC 2987, 23 C.B.R. (6th) 249, at para. 209. He ordered, at para. 258, that the funds be allocated among the debtor estates in accordance with a number of principles, including the principle that each debtor estate "is to be allocated that percentage of the [liquidation proceeds] that the total allowed claims against that Estate bear to the total allowed claims against

all Debtor Estates." A number of parties have sought leave to appeal that decision.

[13] It was on June 24, 2014, while the joint allocation trial was proceeding, that the *CCAA* judge directed that the two issues set out above be decided.

C. DECISION BELOW

[14] The *CCAA* judge began his analysis with a review of cases applying the interest stops rule in the bankruptcy and winding-up context. He noted the relationship between the interest stops rule and the *pari passu* principle, which he described as "a fundamental tenet of insolvency law" that requires equal treatment of unsecured creditors. He found there was "no reason to not apply the [common law] interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application." The issue was "whether the rule should apply to this CCAA proceeding."

[15] He went on to conclude that "[t]here is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest." In reaching this conclusion, he distinguished *Stelco* and *Canada 3000* and found that the application of the interest stops rule was supported by the more recent decisions in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3

S.C.R. 379, and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

[16] The *CCAA* judge thus ordered that "holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion)."

D. ISSUES ON APPEAL

[17] The appellant raises two related issues:

1. Did the *CCAA* judge err in concluding that an interest stops rule applies in *CCAA* proceedings?
2. If the *CCAA* judge did not err in concluding that an interest stops rule applies in *CCAA* proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

E. ANALYSIS

(1) Did the *CCAA* judge err in concluding that an interest stops rule applies in *CCAA* proceedings?

[18] The appellant, supported by the Bank of New York Mellon and the Law Debenture Trust Company of New York as indenture trustees, submits that the *CCAA* judge erred in concluding that the interest stops rule applies.

[19] First, the appellant submits he applied inapplicable case law and misinterpreted case law in concluding that the rule did and should apply. Among other things, the appellant criticizes the *CCAA* judge's application of the Supreme Court of Canada's decisions in *Century Services* and *Indalex*, which deal with the inter-play between the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

[20] The appellant also submits that the application of the interest s ops rule in the *CCAA* context is inconsistent with the *CCAA* and would have negative practical consequences.

[21] Finally, the appellant submits that *Canada 3000* and *Stelco* are binding authority that preclude the application of the interest stops rule in the *CCAA* context and that the *CCAA* judge violated the principle of *stare decisis* in refusing to follow them.

[22] I will deal with these submissions in turn, beginning with a discussion of the interest stops rule and the related *pari passu* principle.

(a) Should the interest stops rule apply in *CCAA* proceedings?

(i) Origin and scope of the interest stops rule

[23] It is well settled that the *pari passu* principle applies in insolvency proceedings. This principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those

assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada: *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486, at para. 20 (S.C.), *per* Blair J.[2] In fact, the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokal "Priority as Pathology: The *Pari Passu* Myth" (2001) 60:3 Cambridge L.J. 581, at p. 581. According to an article in the Cambridge Law Journal, "[c]ommentators claim to have found [the *pari passu*] principle entrenched in jurisdictions far removed ... in geography and time": Mokal, at pp. 581-582.

[24] The *pari passu* principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets.

[25] As explained in *In re Humber Ironworks and Shipbuilding Co.* (1869), L.R. 4 Ch. App. 643, nearly 150 years ago, a necessary corollary of the *pari passu* principle is the interest stops rule. Absent the interest stops rule, the fairness and orderly distribution sought by the *pari passu* principle could not be achieved. Selwyn L.J. explained the rationale for the interest stops rule, at pp. 645-646:

> In the present case we have to consider what are the positions of the creditors of the company, when, as here, there are some creditors who have a right to receive interest, and others having debts not bearing interest.

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[2] As explained in Roderick J. Wood's text on bankruptcy and insolvency law, "insolvency law is the wider concept, encompassing bankruptcy law but also including non-bankruptcy insolvency systems.": Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law Inc., 2009), at p. 1.

....

> It is very difficult to conceive a case in which the assets of a company could be ... immediately realized and divided; but suppose they had a simple account at a bank, which could be paid the next day, that would be the course of proceeding. Justice, I think, requires that that course of proceeding should be followed, and that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that, in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up. I, therefore, think that nothing should be allowed for interest after that date.

[26] Giffard L.J. similarly stated, at p. 647-648:

> That rule ... works with equality and fairness between the parties; and if we are to consider convenience, it is quite clear that, where an estate is insolvent, convenience is in favour of stopping all the computations at the date of the winding-up.
>
> ...
>
> I may add another reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

[27] Thus, the primary purpose behind the common law interest stops rule is fairness to creditors. Another purpose is to achieve the orderly administration of an insolvent debtor's estate.

[28] The common law interest stops rule has been consistently applied in proceedings under bankruptcy and winding-up legislation. In fact, as explained by Blair J. in *Confederation Life Insurance Co.* at paras. 22-23, the rule has been applied even when the legislation might be read to the contrary:

> This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the *Winding-Up Act* and section 121 of the *BIA*, which might be read to the contrary, in my view.
>
> ...
>
> Yet, the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

[29] I will now turn to the question of whether the interest stops rule should be applied in the *CCAA* context.

(ii) Should the interest stops rule apply in *CCAA* proceedings?

[30] The respondents[3] maintain that one would expect the interest stops rule to apply in *CCAA* proceedings given that *CCAA* proceedings are insolvency proceedings to which the common law *pari passu* principle applies. Consistent with the *pari passu* principle and the related interest stops rule, creditors in *CCAA*

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[3] The respondents are the Monitor, the Canadian Debtors, the Canadian Creditors' Committee and the Wilmington Trust, National Association. While technically The Bank of New York Mellon and the Law Debenture Trust Company of New York are also respondents, they support the appellant's position and so my use of the term "respondents" excludes them.

proceedings must surely expect to be treated fairly and not see creditors with interest entitlements have their claims grow, post-insolvency, disproportionately to those with no, or lesser, interest entitlements. In the respondents' submission, the same reasoning used by courts to conclude that the interest stops rule applies in winding-up and bankruptcy proceedings leads to the conclusion that the interest stops rule applies in *CCAA* proceedings.

[31] The appellant, on the other hand, submits that *CCAA* proceedings are different from other insolvency proceedings in that they do not immediately or permanently alter the rights of creditors. The filing is intended to give the debtor breathing space so that a plan of compromise or arrangement can be negotiated with creditors and the business can continue. The objective of a *CCAA* proceeding is a consensual, statutory compromise in the form of a *CCAA* plan. Such a *CCAA* plan can provide for any kind of distribution, provided it is approved by the requisite majority of creditors and the court.

[32] In the appellant's submission, until a plan is negotiated or the proceeding is converted to bankruptcy or winding-up, the rights of creditors are not altered; rather, their rights to execute on them are simply stayed. In the appellant's view, therefore, unless and until this sought-after compromise of rights is negotiated, only the exercise of the rights is stayed. The *CCAA* filing does not affect the right to accrue interest; it only stays the collection of that interest.

[33] The appellant further argues that the *CCAA* judge's decision is contrary to the established *CCAA* practice and the reasonable expectations of the parties in this proceeding. In particular, the appellant notes that a *CCAA* plan may, and often does, provide for the recovery of post-filing interest. The appellant also submits that the application of the interest stops rule would allow debtors to obtain a permanent interest holiday simply by filing for *CCAA* protection, even if the filing were later withdrawn, causing a permanent prejudice to the creditors not contemplated by the *CCAA*. And, the appellant submits that an interest stops rule would create a disincentive for creditors to participate in *CCAA* proceedings since they would not be compensated for delays under the *CCAA* even if there were ultimately assets available to do so

[34] I do not accept the appellant's submissions on this point. Admittedly, there are differences between the *CCAA* and other insolvency schemes, including that the *CCAA* does not provide for a fixed scheme of distribution. Further, assuming a plan of compromise or arrangement under the *CCAA* is negotiated it may or may not result in a distribution to creditors. Nevertheless, in my view, the same principles that underpin the conclusion that the interest stops rule is necessary in bankruptcy and winding-up proceedings – namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate - apply with equal force to *CCAA* proceedings. I say so for several reasons.

[35] First, the *CCAA* is part of an integrated insolvency regime, which also includes the *BIA*. The Supreme Court of Canada in *Century Services* considered the *CCAA* regime and opined, at para. 24, that "[w]ith parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation". The court went on to explain, at para. 78, that the *CCAA* and *BIA* are related and "no 'gap' exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy".

[36] Consistent with the notion of harmonization, because the common law interest stops rule applies upon bankruptcy under the *BIA*, it should follow that the common law rule also applies in a *CCAA* proceeding unless, of course, the rule is ousted by the *CCAA*. The *CCAA* does not address entitlement to claim post-filing interest let alone oust the common law rule with clear wording.

[37] Second, if the interest stops rule were not to apply in *CCAA* proceedings, the creditors who do not have a contractual right to post-filing interest would, as the Supreme Court explained in *Century Services* at para. 47, have "skewed incentives against reorganizing under the *CCAA*" and this would "only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert." This concern over skewed incentives was confirmed in *Indalex*

where the Supreme Court held, at para. 51, that "[i]n order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those they would receive under the *BIA*.

[38] Without an interest stops rule under the *CCAA*, the creditors with no claim to post-filing interest would have an incentive to proceed under the *BIA* or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, where the interest stops rule operates to prevent creditors, such as the appellant, who have a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors.

[39] Third, as recognized by the Supreme Court in *Century Services* at para. 77, the "*CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all". This is achieved through grouping all claims within a single proceeding and staying all actions against the debtor, thus putting creditors on an equal footing: *Century Services*, para. 22.

[40] As submitted by the Canadian Creditors' Committee, if post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights to sue the debtor and obtaining a judgment that bears interest, the *status quo* has not been preserved.

[41] Fourth, if the interest stops rule were not to apply in *CCAA* proceedings, the key objective of that statute – to facilitate the restructuring of corporations through flexibility and creativity – may be undermined. This is because of the asymmetrical entitlement to interest that would be created. Creditors with an entitlement to post-filing interest may be less motivated to compromise than those creditors without such an entitlement. Using the case under appeal as an example, if post-filing interest is allowed to accrue, the delay and failure to reach a compromise will see the appellant's proportionate claim against the assets of the debtors rise very significantly at the expense of other creditors. One could well understand that if the urgency for reaching a compromise and the incentive to compromise are significantly lower for one group of unsecured creditors than for the balance of the unsecured creditors, restructuring will be more difficult to achieve and the ability to reach creative solutions will be lessened.

[42] Furthermore, if the amount of an unsecured creditor's legal entitlement is constantly shifting as post-filing interest accrues, the ability to find a compromise that is acceptable to all creditors at any one point in time will pose a greater challenge than if the entitlements are fixed as of the date of filing.

[43] Fifth, the principle of fairness supports the application of the interest stops rule. Insolvency proceedings are intended to be fair processes for liquidating or restructuring insolvent corporations. How, one may ask, is it fair if the appellant, an unsecured creditor, sees its claim against the assets of the debtor balloon

from $4.092 billion to $5.692 billion (as of December 31, 2013) because of contractual provisions when the claims of unsecured creditors, who have no such contractual provisions and who have been prevented for almost seven years by the *CCAA* stay from converting their claims into court judgments that would bear interest, have seen no increase at all? Delays in liquidating the Nortel assets have helped the Monitor achieve the very significant recoveries made ($7.3 billion) and, in fairness, this achievement should be for the benefit of all creditors.

[44] Finally, I wish to respond to the appellant's concerns.

[45] As to past practice and the reasonable expectations of the parties, I do not view the existence of an interest stops rule as being contrary to established *CCAA* practice or as preventing a *CCAA* plan from providing for post-filing interest. Parties may negotiate for a plan that provides for payments of more or less than a creditor's legal entitlement in lieu of the foregone interest. Thus, I do not accept the appellant's submission that there would be a disincentive to participate in *CCAA* proceedings, which is based on the premise that post-filing interest may not be recovered under a *CCAA* plan.

[46] The appellant also raised the concern that a debtor company could obtain a permanent interest holiday, resulting in unfairness. The appellant says that if there are proceeds over and above the amounts needed to satisfy the pre-filing claims of creditors, those proceeds would be for the benefit of the shareholders of the debtor. This follows from the fact that the *CCAA* contains no provision for

the payment of a "surplus" to creditors and the interest stops rule would prevent the unsecured creditors from recovering any post-filing interest. The debtor could therefore resort to the *CCAA* to stop interest from accruing and operate his business interest free.

[47] This hypothetical raises the same concern about the loss of post-filing interest but in a somewhat different way. The concern is that a debtor may seek *CCAA* protection to avoid the obligation to pay interest.

[48] There may well be exceptional situations where, at some point in a *CCAA* proceeding, the common law interest stops rule risks working an unfairness of some sort. I leave for another day what orders, if any, might be made by a *CCAA* judge in cases such as the hypothetical presented by the appellant where a debtor might be considered to benefit unfairly as a result of the common law interest stops rule. I note, however, that in order to achieve the remedial purpose of the *CCAA*, *CCAA* courts have been innovative in their interpretation of their stay power and in the exercise of their authority in the administration of *CCAA* proceedings. This approach has been specifically endorsed by the Supreme Court of Canada in *Century Services* and would no doubt guide the court should the need arise: see, for example, paras. 61 and 70.

[49] In conclusion, there are sound reasons for adopting an interest stops rule in the *CCAA* context. I now turn to the argument that *Canada 3000* and *Stelco* preclude the application of the rule.

(b) Are *Canada 3000* and *Stelco* binding authorities to the effect that the interest stops rule does not apply in *CCAA* proceedings?

[50] The appellant vigorously maintains that the *CCAA* judge was bound by *Canada 3000* and *Stelco*, which both confirm that the interest stops rule does not apply in *CCAA* proceedings.

[51] I would not give effect to this submission. As I will explain, both of these decisions should be read narrowly and do not constitute a precedent with respect to the issue raised in this appeal – whether the common law interest stops rule applies in *CCAA* proceedings.

(i) ***Canada 3000***

Background and lower court decisions

[52] The decision in *Canada 3000* arose out of the collapse of three airlines – Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"), and Inter-Canadian (1991) Inc. ("Inter-Canadian"). Canada 3000 filed for protection under the *CCAA* and, three days later, filed for bankruptcy. Inter-Canadian filed a *BIA* proposal but the proposal ultimately failed and so it too was placed into bankruptcy effective as of the date it filed its notice of intention to make a proposal.

[53] At the time the airlines collapsed, they owed significant amounts in unpaid airport and navigation charges. As a result, various airport authorities and NAV

Canada sought remedies under the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 ("*Airports Act*") and the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("*CANSCA*"). In particular, they sought orders seizing and detaining aircraft leased by the bankrupt airlines. While the lessors of the planes retained legal title to the aircraft, the bankrupt airlines were the registered owner for the purposes of the *Aeronautics Act*, R.S.C. 1985, c. A-2.

[54] The airport authorities and NAV Canada brought proceedings in Ontario and Quebec.

[55] In Ontario, Ground J. dismissed motions for orders permitting the airport authorities and NAV Canada to seize and detain the aircraft leased by Canada 3000: *Canada 3000 (Re)* (2002), 33 C.B.R. (4th) 184 (S.C.). On the question of interest, he concluded, at para. 73, that the airport authorities and NAV Canada were entitled to charge interest on the unpaid charges up to the date of payment or the posting of security for payment.

[56] On appeal from Ground J.'s decision, this court held that the interest question need not be determined since the airport authorities and NAV Canada did not have the right to detain the aircraft: *Canada 3000 (Re)* (2004), 69 O.R. (3d) 1, at para. 197.

Supreme Court's decision

[57] On appeal to the Supreme Court of Canada, the court determined that the airport authorities and NAV Canada had the right to detain the aircraft leased and operated by the bankrupt airlines. The issue of post-filing interest was, therefore, an issue the court had to decide.

[58] In deciding that issue, Binnie J. made the following comment at para. 96:

> While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*]. [Emphasis added.]

[59] The appellant submits that the underlined words are binding *ratio* and must be followed in this case.

[60] While I agree that Binnie J.'s comment about the *CCAA* is not o*biter*, I am not convinced that it should be read as broadly as the appellant contends. In *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, Binnie J. warned, at para. 57, against reading "each phrase in a judgment ... as if enacted in a statute". Rather, the question to be asked is "what did the case decide?".

[61] To answer what *Canada 3000* decided about post-filing interest under the *CCAA*, it is important to consider the context in which Binnie J. made his comment, including the facts of the case, the issues before the court, the structure of his reasons, the wording he used, and what he said as well as what he did not say.

[62] At para. 40., Binnie J. defined the "two major questions raised by the appeals" as follows: (1) "are the *legal titleholders* liable for the debt incurred by the registered owners and operators of the failed airlines to the service providers?" and (2) "even if they are not so liable, are *the aircraft* to which they hold title subject on the facts of this case to judicially issued seizure and detention orders to answer for the unpaid user charges incurred by Canada 3000 and Inter-Canadian?" (emphasis in original). The answer to those two questions turned on the interpretation of the *Airports Act* and *CANSCA*. As Binnie J. noted at para. 36, the case was "from first to last an exercise in statutory interpretation".

[63] After engaging in a lengthy exercise of statutory interpretation, he concluded that: (1) under s. 55 of *CANSCA*, the legal titleholders were not jointly and severally liable for the charges due to NAV Canada; and (2) under s. 56 of *CANSCA* and s. 9 of the *Airports Act*, the airport authorities and NAV Canada were entitled to apply for an order detaining the aircraft operated by the failed airlines.

[64] Binnie J. then addressed eight additional arguments made by the parties and just before his last paragraph on disposition, he included a section simply entitled "Interest", starting at para. 93.

[65] He began his analysis of the interest issue by outlining the statutory authority for charging interest: s. 9(1) of the *Airports Act* expressly provided for

the payment of interest, and while *CANSCA* did not explicitly provide for interest, a regulation under *CANSCA* imposed interest: para. 93.

[66] "The question then", said Binnie J. at para. 95, was "how long the interest can run". He addressed that question as follows, at paras. 95-96:

> The airport authorities and NAV Canada have possession of the aircraft until the charge or amount in respect of which the seizure was made is paid. It seems to me that this debt must be understood in real terms and must include the time value of money.
>
> Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. <u>While a CCAA filing does not stop the accrual of interest</u>, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*]. [Emphasis added.]

[67] Significantly, Binnie J. made no mention in his reasons of the common law interest stops rule or the related *pari passu* principle. Nor did he cite any case law dealing with those issues. In fact, even though it is well established that the interest stops rules applies under the *BIA*, he did not rely on the common law rule in support of his finding that interest stopped on bankruptcy. Instead, he relied on

ss. 121 and 122 of the *BIA* in concluding that the interest payable under the *Airports Act* and the regulation under *CANSCA* did not accrue post-bankruptcy.

[68] Binnie J.'s analysis of the issue is rooted in the factual and statutory context of the case. In discussing the accrual of interest under the *CCAA*, he specified that the interest was on "unpaid charges", namely charges under *CANSCA* and the *Airports Act*. Binnie J. was not answering an abstract legal question but rather deciding how long interest ran in the particular factual and statutory context.

[69] In effect, I read Binnie J. as saying that a *CCAA* filing does not stop the accrual of interest under *CANSCA* or the *Airports Act* but the statutory provisions of the *BIA* ss. 121 and 122 do. He was not deciding whether, in the absence of the right to interest under *CANSCA* and the *Airports Act*, interest would have accrued or been stopped by the common law interest stops rule.

[70] Let me add that I agree with the *CCAA* judge's comment that Binnie J.'s statement in *Canada 3000* should "now be construed in light of *Century Services* and *Indalex*". In fact, one can well imagine that the court's interpretation of *CANSCA* and the *Airports Act* as allowing the accrual of interest in a *CCAA* proceeding but not in a *BIA* proceeding might have been different had it reached the Supreme Court after these two more recent cases. That question, however, is for another day. For now, I turn to this court's decision in *Stelco*.

(ii) *Stelco*

Background and motion judge's decision

[71] The post-filing interest issue in *Stelco* arose in "the final chapter of the financial restructuring of Stelco" under the *CCAA*: *Stelco (Re)* (2006), 24 C.B.R. (5th) 59, at para. 1 (S.C.). The final chapter involved competing claims to a portion of the amount payable to the holders of subordinated notes (the "Junior Noteholders") pursuant to Stelco's plan of arrangement (the "Plan"). The claim to these funds ("Turnover Proceeds") was made by the "Senior Debentureholders".

[72] The dispute over the Turnover Proceeds arose after Stelco's Plan had been sanctioned and Stelco had emerged from restructuring with its debt reorganized. The Senior Debentureholders claimed the Turnover Proceeds on the basis of subordination provisions contained in the Note Indenture under which Stelco had issued convertible unsecured subordinated debentures to the Junior Noteholders.

[73] Under the terms of the Note Indenture, the Junior Noteholders expressly agreed that, in the event that the debtor became insolvent, they would subordinate their right of repayment until after repayment in full of "Senior Debt".

[74] The plan of arrangement that had been approved was *a* "no interest" plan, meaning that distribution from Stelco to the creditors did not include or account for post-filing interest. The Plan, however, provided that the rights as between the Senior Debentureholders and the Junior Noteholders were preserved. The

Senior Debentureholders, who had not received payment of post-filing interest from Stelco under the Plan, demanded payment of it from the Junior Noteholders pursuant to the terms of the Note Indenture. The Junior Noteholders argued, among other things, that the subordination provisions did not survive the Plan's implementation and that the Senior Debentureholders were not entitled to claim post-filing interest from them.

[75] The motion judge, and on appeal, this court ruled in favour of the Senior Debentureholders. The courts found that the Plan was expressly drafted to preserve the subordination provisions and that the *CCAA* does not purport to affect rights as between creditors to the extent that they do not directly involve the debtor.

How to read *Stelco*?

[76] The appellant and the respondents offer different readings of *Stelco*.

[77] The appellant argues that this court's decision is binding authority for the proposition that the interest stops rule does not apply in the *CCAA* context. The passages relied on by the appellant include para. 67:

> [T]here is no persuasive authority that supports an Interest Stops Rule in a *CCAA* proceeding. Indeed, the suggested rule is inconsistent with the comment of Justice Binnie in [*Canada 3000*] at para. 96, where he said:
>
> > While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable

> against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

[78] The respondents, for their part, read the case more narrowly as a resolution of an inter-creditor dispute. They submit that the *ratio* of the case is that there was no rule that prohibited giving effect to the agreed upon inter-creditor postponement. To the extent that this court discussed the interest stops rule in the abstract, its comments are o*biter*.

[79] I agree with the respondents. In my view, the court in *Stelco* did not need to decide whether the interest stops rule applies in *CCAA* proceedings for it to decide the inter-creditor dispute before the court and so its statements about the rule's application are not binding.

[80] This court expressly noted, at para. 44, that it was dealing with an inter-creditor dispute. The Junior Noteholders had accepted the subordination terms in the Note Indenture. They had agreed not to be paid anything, in the event of insolvency, until those who held Senior Debt were paid principal and interest in full. The court affirmed, at para. 44, that the *CCAA* does not change the relationship among creditors where it does not directly involve the debtor.

[81] As noted, this was a "no interest" plan, meaning that the Senior Debentureholders received no post-filing interest from Stelco. Rather, they sought and eventually received payment of post-filing interest from the Junior Noteholders' share of the proceeds. The court found that the Stelco Plan

contemplated the continued accrual of interest to Senior Debentureholders for the purpose of their rights as against the Junior Noteholders after the *CCAA* filing date: paras. 59 and 70. It noted that *CCAA* plans can and sometimes do provide for payments in excess of claims filed in *CCAA* proceedings. There was no rule precluding the payment of post-filing interest to the Senior Debentureholders in accordance with the Stelco Plan: para. 70.

[82] The court's conclusion that the Junior Noteholders could not rely on the interest stops rule is consistent with the traditional interest stops rule. The interest stops rule relates to claims by creditors against the debtor. It does not deal with arrangements as between creditors. In other words, whether or not the interest stops rule applies in *CCAA* proceedings did not need to be decided because the agreement between creditors fell outside the scope of that rule.

[83] The appellant makes two further submissions based on its interpretation of s. 6.2(1) of the Note Indenture. That paragraph reads as follows:

> 6.2 Distribution on Insolvency or Winding-up.
>
> ...
>
> (1) the holders of all Senior Debt will first be entitled to receive payment in full of the principal thereof, premium (or any other amount payable under such Senior Debt), if any, and interest due thereon, before the Debentureholders will be entitled to receive any payment or distribution of any kind or character, whether in cash, property or securities, which may be payable or

> deliverable in any such event in respect of any of the Debentures; [Emphasis added.]

[84] The first argument is that the Senior Debentureholders were only entitled to receive principal, premium and interest "which may be payable or deliverable in any such event", the event being insolvency or bankruptcy proceedings. Therefore, the court must have concluded, at least implicitly, that the Senior Debentureholders would have been entitled to maintain their claim for post-filing interest against Stelco.

[85] The second argument is that, by the terms of s. 6.2(1), the Senior Debentureholders were only entitled to interest "due thereon" and so they could not claim post-filing interest from the Junior Noteholders unless they could claim post-filing interest from Stelco.

[86] I would not give effect to either submission.

[87] In *Stelco*, the court did not address either argument and we do not have a copy of the entire agreement nor do we have the other agreements that form part of the factual matrix. Without that context, this court is not in the position to interpret s. 6.2(1).

[88] In my view, the key question for this court is not how to properly interpret s. 6.2(1) but, rather, how we should read the reasons in *Stelco*. What did the *Stelco* court decide, and specifically, should we read the panel as implicitly deciding that the Senior Debentureholders could not recover post-filing interest

from the Junior Noteholders unless they could claim post-filing interest against Stelco?

[89] In discussing post-filing interest, the court's only mention of the Senior Debentureholders' claim as against Stelco is found at paras. 57-59, where the panel expressly rejected the argument that "any claim the Senior [Debentureholders] have for interest must be based on a "claim" [as defined in the Plan] they have against Stelco for such interest" and that "[i]f the Senior Debt does not include post-filing interest, there can be no claim against the [Junior] Noteholders for such amounts": see paras. 58-59.

[90] Admittedly, the panel made this comment in discussing the effect of the Stelco Plan as opposed to the effect of the interest stops rule. However, as I read the section on post-filing interest as a whole, the court is saying that the Junior Noteholders agreed to be bound by the deal they made. They had agreed to the subordination provisions that guaranteed full payment to the Senior Debentureholders in the event of insolvency, and the Plan affirmed that the Senior Noteholders could claim the full amount that would have been owing had there been no *CCAA* filing. In this court's words at para. 70, there is no interest stops rule "that precludes such a result." In my view, therefore, this court did not make an implicit finding that the Senior Debentureholders had to be able to claim post-filing interest from Stelco in order to claim post-filing interest from the Junior Noteholders.

[91] In conclusion, I consider the comment that there is no persuasive authority that supports an interest stops rule in *CCAA* proceedings to be *obiter*. *Stelco* dealt with the effect of an agreement as between creditors as to how, between them, they would share distributions. Whether or not interest stops upon a *CCAA* filing was of no import in answering that question.

(2) If the *CCAA* judge did not err in concluding that an interest stops rule applies in *CCAA* proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

[92] The appellant objects to the wording of the *CCAA* judge's order. It provides that "holders of Crossover Bond Claims are not legally entitled to claim *or receive* any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). While the appellant asked the *CCAA* judge to amend his order to delete "or receive", he refused. The appellant submits that, to the extent this precludes the bondholders from receiving post-filing interest under a *CCAA* plan, the *CCAA* judge erred. The appellant notes that all the parties in this proceeding agree that a *CCAA* plan may provide for post-filing interest.

[93] As I explained above, the interest stops rule does not preclude the payment of post-filing interest under a plan of compromise or arrangement.

[94] As I read the *CCAA* judge's reasons and order, he did not decide otherwise. His decision confirms that the common law interest stops rule applies

in *CCAA* proceedings. If a plan of compromise or arrangement is concluded, it should not, for example, be read as limiting any right to recover post-filing interest creditors may have as amongst themselves, as existed in *Stelco*, or from non-parties. Nor does it dictate what any creditor may seek in bargaining for a fair plan of compromise or arrangement. In that regard, I do not interpret the *CCAA* judge's use of the words "or receive" as preventing the appellant from seeking and obtaining such a result in a negotiated plan. In particular, I note the *CCAA* judge's comment at para. 35 of his reasons that "the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done."

[95] The appellant also seeks clarification as to the effect of the words "*any amounts* under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). The appellant notes that, without clarification, the wording of the order could potentially preclude the recovery of other contractual entitlements under the relevant indentures, such as costs and make-whole provisions, even though no arguments were advanced before the *CCAA* judge with respect to any amounts other than post-filing interest.

[96] The issue the *CCAA* judge was directed to answer was "whether the holders of the crossover bond claims ... [were] legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the

outstanding principal debt and pre-petition interest". As indicated in the appellant's factum, the only arguments advanced before the *CCAA* judge related to post-filing interest and not any other amounts under the indentures. The appellant does not appear to have made submissions to the *CCAA* judge with respect to the costs and make-whole fees it now raises in its factum. This court is in no position to deal with the new argument raised by the appellant. Further, beyond making the broad submission noted above, the appellant did not expand on that submission and direct the court to the specific claims or indenture provisions it relies on in support of its argument or explain why the claims should not be caught by the order.

[97] As I have already indicated, the *CCAA* judge's order confirms that the interest stops rule, and the limits imposed by the rule, apply in *CCAA* proceedings. To the extent that the appellant maintains that there are other contractual entitlements under the relevant indentures not covered by the interest stops rule, it is up to the *CCAA* court to decide if those can now be raised and ruled upon.

F. FINAL COMMENTS

[98] I acknowledge that the Nortel *CCAA* proceedings are exceptional, particularly with respect to the length of the delay. The amount the appellant claims for post-filing interest and related claims under the indentures, and the resulting impact on other unsecured creditors is so great because of the length of

that process. The principle, however, is the same whether the *CCAA* process is short or long. After the imposition of a stay in *CCAA* proceedings, allowing one group of unsecured creditors to accumulate post-filing interest, even for a relatively short period of time, would constitute unfair treatment vis-à-vis other unsecured creditors whose right to convert their claim into an interest-bearing judgment is stayed.

[99] This decision does not purport to change or limit the powers of *CCAA* judges. Although the decision clearly settles at the outset of a *CCAA* proceeding whether there is a legal entitlement to post-filing interest, it does not dictate how the proceeding will progress thereafter until a plan of compromise or arrangement is approved, or the *CCAA* proceeding is otherwise brought to an end.

[100] The determination of legal entitlement is important as it clearly establishes the starting point in a *CCAA* proceeding. It tells creditors, debtors and the court what legal claim a particular creditor has. Its significance is not only for purposes of setting the voting rights of creditors on any proposed plan of compromise or arrangement, it also ensures that, in assessing any such proposed plan, the parties will know what they are or are not compromising and the court will be equipped to consider the fairness of such a plan.

G. DISPOSITION

[101] For these reasons, I would dismiss the appeal. Pursuant to the agreement of the parties, I would award the respondent Monitor, as successful party, costs as against the appellant fixed in the amount of $40,000, inclusive of disbursements and applicable taxes. I would make no other order as to costs.

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