NOVA SCOTIA COURT OF APPEAL

Citation: *Atlantic Sea Cucumber Ltd. v. Weihai Taiwei Haiyang Aquatic Food Co. Ltd.*, 2024 NSCA 35

Date: 20240327
Docket: CA 525584
Registry: Halifax

Between:

Atlantic Sea Cucumber Ltd.

Appellant

v.

Weihai Taiwei Haiyang Aquatic Food Co. Ltd. and msi Spergel Inc.

Respondents

Judge:	The Honourable Justice Joel Fichaud
Appeal Heard:	March 12, 2024, in Halifax, Nova Scotia
Subject:	*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") – abridgement of time periods
Summary:	On May 1, 2023, Atlantic Sea Cucumber Ltd. ("Atlantic Sea") filed a Notice of Intention to Make a Proposal under the *BIA*. The *BIA* says if a proposal is not filed within either 30 days of the Notice of Intention or an extended period authorized by the court, the intended proponent is deemed to be bankrupt. On May 31, 2023, the Registrar in Bankruptcy and Insolvency extended Atlantic Sea's period to July 15, 2023. The *CCAA* permits the conversion of an intended proposal under the *BIA* to an arrangement under the *CCAA*. On July 6, 2023, Atlantic Sea filed an application to the Supreme Court of Nova Scotia for approval of a conversion. The Notice set the hearing date as July 13, 2023. The application documents

were not filed and served on the respondent Weihai Taiwei Haiyang Aquatic Food Co. Ltd. ("WTH") within the time period for *inter partes* applications prescribed by the Nova Scotia's *Civil Procedure Rules*. Atlantic Sea's Notice of Application applied for an abridgement of the time period. The judge found WTH was prejudiced by the insufficient notice and declined to abridge the time period. The judge then dismissed Atlantic Sea's application for conversion because, with the insufficient notice, the matter was not properly before the court.

Atlantic Sea appealed to the Court of Appeal. However, Atlantic Sea did not file an application for leave to appeal.

Issues: Is leave to appeal required? Did the judge commit an appealable error by declining to abridge the time period?

Result: Section 13 of the *CCAA* requires leave to appeal. The requirement applies to this proceeding. Atlantic Sea had not applied for leave. Consequently, the Court denied leave to appeal.

The Court also addressed the parties' submissions on the merits:

1. Atlantic Sea submitted that the time limit in the *Civil Procedure Rules* conflicted with the *CCAA* and was inoperative for paramountcy. The Court of Appeal held that both the *CCAA* and the *Civil Procedure Rules* give the judge a discretion to waive or abridge the time limit, and the same criteria would govern the exercise of the discretion. There is no legal or operational conflict between the *CCAA* and the *Rules* and the *Rules* are not inoperative for paramountcy.
2. The applications judge found that, in the circumstances, the hearing on July 13, 2023, after the late filing and service, would prejudice WTH's ability to respond to Atlantic Sea's application. The Court of Appeal held the judge made no palpable and overriding error of fact or error of law, and his ruling did not cause a patent injustice.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 19 pages.

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v.

Weihai Taiwei Haiyang Aquatic Food Co. Ltd. and msi Spergel Inc.

Respondents

Judges: Farrar, Fichaud and Derrick, JJ.A.

Appeal Heard: March 12, 2024

Held: Leave to appeal denied with costs, per reasons for judgment of Fichaud, J.A., Farrar and Derrick, JJ.A. concurring

Counsel: Darren O'Keefe for the Appellant
Gavin D.F. MacDonald, Meaghan Kells and Hannah Helm a/c for the Respondent Weihai Taiwei Haiyang Aquatic Food Co. Ltd.
Joshua J. Santimaw for the Respondent Proposal Trustee msi Spergel Inc.

Reasons for Judgment:

[1] On May 1, 2023, Atlantic Sea Cucumber Ltd. ("Atlantic Sea") filed a Notice of Intention to make a proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). The *BIA* says if the proposal is not filed within either 30 days thereafter or an extended period authorized by the court, the intended proponent is deemed to be bankrupt. On May 31, 2023, the Supreme Court's Registrar in Bankruptcy and Insolvency extended Atlantic Sea's period to July 15, 2023.

[2] The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") permits the conversion of an intended proposal under the *BIA* to an arrangement under the *CCCA*. On July 6, 2023, Atlantic Sea filed an application to the Supreme Court of Nova Scotia for a conversion. The Notice of Application set the hearing for July 13, 2023. The application documents were not filed and served within the time limit for an *inter partes* application under Nova Scotia's *Civil Procedure Rules*. Atlantic Sea's Notice of Application applied for an abridgement of the time periods.

[3] The judge found the respondent creditor was prejudiced by the insufficient notice and declined to abridge the time. The judge then dismissed Atlantic Sea's application for conversion because, with the insufficient notice, the matter was not properly before the court.

[4] Atlantic Sea appealed. It has not applied for leave to appeal and says leave is unnecessary. The issues are whether leave is required and whether the judge made an appealable error by declining to abridge the time limits.

Background

[5] Atlantic Sea was incorporated under the *Companies Act*, R.S.N.S. 1989, c. 81, as amended. Atlantic Sea's business has been the purchase of wild sea cucumbers harvested from Nova Scotia's coastal waters, and the processing and sale of the dried product to domestic and international customers. Its production facility is in Hackett's Cove, Nova Scotia.

[6] The Respondent Weihai Taiwei Haiyang Aquatic Food Co. Ltd. ("WTH") is a judgment creditor of Atlantic Sea. According to the List of Creditors in Atlantic Sea's Notice of Intention to Make a Proposal, WTH's claim was $1,625,663.10,

within the total creditors' claims of $6,335,506.10. The only creditor with a higher debt ($2,748,183) was Atlantic Sea's parent company, Atlantic Golden Age Holding Inc. ("Atlantic Golden").

[7] Atlantic Sea and WTH have a fractious history. On February 2, 2023, after a five-day trial, Justice Coughlan of the Supreme Court of Nova Scotia issued a written decision (2023 NSSC 27). The decision discussed the parties' dealings, rejected the evidence of Atlantic Sea's principal Songwen Gao (Decision, para. 16) and awarded WTH damages of $986,256.75 (US$). Justice Coughlan's Order of April 13, 2023 added costs of $83,589.31 (Can$) to the judgment debt. At the hearing in this Court, WTH's counsel said WTH prefers Atlantic Sea's bankruptcy to a proposal or creditors' arrangement because the bankruptcy would sideline Mr. Gao's influence.

[8] By May of 2023 Atlantic Sea was insolvent.

[9] Part III of the *BIA* provides for proposals. Section 50.4(1), in Part III, says before filing a proposal an insolvent person may file a notice stating its intention to make a proposal. The Notice of Intention identifies a licensed trustee who has consented to act and lists the creditors with claims of $250 or more.

[10] Upon the filing of a Notice of Intention, ss. 69 through 69.6 of the *BIA* stay creditors' collection proceedings, subject to prescribed conditions.

[11] On May 1, 2023, Atlantic Sea filed a Notice of Intention to make a proposal under s. 50.4(1). The Respondent msi Spergel Inc. is the intended proposal's trustee.

[12] Section 50.4(8)(a) of the *BIA* says if the proposal is not filed within thirty days of the filing of the notice of intention, or within any extension granted under s. 50.4(9), the insolvent person is deemed to have made an assignment in bankruptcy.

[13] Section 50.4(9) gives the court discretion to extend the thirty day period based on listed criteria. The extensions may be in repeated segments of 45 days, to an aggregate not exceeding five months after the expiry of the initial thirty days.

[14] On May 26, 2023, Atlantic Sea applied to the Supreme Court of Nova Scotia in Bankruptcy and Insolvency for an extension under s. 50.4(9). On May 31, 2023 the Court's Registrar in Bankruptcy issued an Order that "pursuant to

Section 50.4(9) of the BIA, the time for the Company to file a proposal with the Official Receiver be and is hereby extended to July 15, 2023".

[15] Section 11.6 of the *CCAA* permits the conversion of an intended proposal under the *BIA* to an arrangement under the *CCAA*:

> ***Bankruptcy and Insolvency Act* matters**
>
> **11.6** Notwithstanding the *Bankruptcy and Insolvency Act*,
>
> > **(a)** proceedings commenced under Part III [Proposals] of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and
> >
> > **(b)** an application under this Act by a bankrupt may only be made with the consent of the inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from
> >
> > > **(i)** the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or
> > >
> > > **(ii)** the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

[16] On July 4, 2023, Atlantic Sea emailed WTH that Atlantic Sea "intends on filing an application for *CCAA* conversion so they can carry on a sales process".

[17] On July 6, 2023, further to s. 11.6(a) of the *CCAA*, Atlantic Sea filed an *inter partes* Notice of Application in the Supreme Court of Nova Scotia in Bankruptcy and Insolvency. The Notice sought to convert its *BIA* proceeding to a proceeding under the *CCAA*. The Notice included:

> **NOTICE OF APPLICATION IN CHAMBERS**
>
> **To:** The parties listed in Schedule "A" via electronic email;
>
> **And to: msi Spergel Inc.**, Proposed Monitor
>
> Attn: Joshua Santimaw (jsantimaw@boyneclarke.ca)
>
> **The applicant requests an order against you**
>
> The applicant, Atlantic Sea Cucumber Ltd. (the "**Company**") is applying to a judge in General Chambers in Halifax on July 13th, 2023 for an Order:
>
> a) abridging notice periods and service requirements pursuant to section 11 of the *Companies' Creditors Arrangement Act* ("***CCAA***");

> b) directing that service on the service list set out in Schedule “A” hereto is sufficient for the purposes of this Application further to section 11 of the CCAA;
>
> c) declaring that the Company is a company to which the CCAA applies;
>
> d) authorizing the continuation under the CCAA of the Company’s proposal proceedings commenced under the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the “**BIA**”), on May 1,2023, pursuant to the Notice of Intention to Make a Proposal filed by the Company;
>
> e) appointing msi Spergel Inc. (the “**Proposed Monitor**”) as an officer of this Honourable Court to monitor the business and financial affairs of the Company;
>
> f) staying, for a period not to exceed 10 days or until otherwise ordered by the court, all proceedings and enforcement processes taken or that might be taken in respect of the Company, the Proposed Monitor, or their respective employees and representatives;
>
> g) prohibiting, for a period not to exceed 10 days, or until otherwise ordered by the court, the commencement of any action, suit or proceeding against the Company;
>
> h) granting an administration charge of up to the maximum amount of $300,000 over the property of the Company; and
>
> i) such further and other relief as may be requested and this Honourable Court deems just.
>
> …
>
> **Evidence supporting application**
>
> The applicant offers the following affidavits in support of the application: (i) the affidavit of Songwen Gao, to be filed, and (ii) the Second Report of the Proposed Trustee, msi Spergel Inc.
>
> A copy of each affidavit is to be delivered to you with this notice, and further affidavits may be delivered before the deadlines provided in Civil Procedure Rule 5 - Application.
>
> [bolding in Notice of Application]

Schedule “A”, *i.e.* the parties to whom the Notice was addressed, included WTH’s counsel. The “Grounds for Order” in Schedule “B” of the Notice included:

> …
>
> 6. The Company is insolvent and now seeks to continue the NOI [Notice of Intention] proceedings under the *Companies’ Creditors Arrangement Act*, RSC 1985, c. C-36 (the “**CCAA**”) pursuant to section 11.6 therein. The Company requires the continued stay of proceedings and the other relief set out in the initial

> Order to maximize the value of its business while it turns a going-concern sales process for the benefit of all stakeholders. Under the circumstances, a bankruptcy and liquidation would not be commercially reasonable and would result in a worse outcome for the stakeholders of the Company.
>
> …
>
> 11. The Company also seeks to abridge the time requirements for bringing this Application, pursuant to section 11 of the *CCAA*, the Civil Procedure Rules and the inherent jurisdiction of this Court.
>
> …
>
> 13. The Company shall rely upon the following legislation, rules or points of law in respect of the Application:
>
> a) *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, as amended;
>
> b) Civil Procedure Rules 22.01 and 23; and
>
> c) Such further and other grounds as counsel may advise and this Honourable Court may permit.

[18] On July 6, 2023, Atlantic Sea emailed the Notice of Application to the addressed creditors, including WTH.

[19] The application was supported by affidavits of Songren Gao, Atlantic Sea's principal, dated July 7 and 11, 2023, Atlantic Sea's written submissions dated July 11, 2023 and the proposed monitor's Second Report dated July 11, 2023. The supporting documents were filed and served by email on July 11, 2023, two days before the hearing.

[20] On July 13, 2023, Justice Peter Rosinski of the Supreme Court of Nova Scotia, sitting in bankruptcy and insolvency, heard Atlantic Sea's application. WTH appeared by counsel to oppose the application.

[21] The judge dismissed Atlantic Sea's application. On July 14, 2023, he emailed a letter to counsel for Atlantic Sea, WTH and msi Spergel Inc., stating:

> … I heard the emergency motion between 2 and 5 PM on July 13, 2023. …
>
> I have been unable to create a decision supported by reasons in this frenetic time interval.
>
> In order to ensure you have a result, I can advise you that I conclude the application should be denied and that the matter not be converted to process under the CCAA. I will follow-up with written reasons as soon as I am able.
>
> …

[22] Justice Rosinski issued a formal Decision dated July 19, 2023 (2023 NSSC 232). He declined to abridge the time requirements for filing and service and, given the insufficient notice, dismissed Atlantic Sea's application as not properly before the Court. He reasoned as follows:

> [7] I provisionally heard the Application's merits on July 13, 2023.
>
> [8] I say "provisionally", because I first have to decide herein whether to abridge the filing and service dates of the Application documents, before I consider the merits of the Application.
>
> [9] I do not find that there has been a satisfactory explanation by the Applicant for why this Application was not commenced earlier than July 6, 2023 – and specifically not 10 days before July 13, 2023.
>
> [10] Had it been filed and served as required by s. 11 of the *Companies' Creditors Arrangements Act* ["CCAA"] (10 days before the hearing) on the Respondent (by my estimation June 27, 2023), it could have been docketed for 2 p.m. on July 13, 2023, without complaint by the Respondent WTH.
>
> [11] WTH has argued that I should not abridge the time for filing and service.
>
> [12] I agree with WTH.
>
> [13] ASC was in control of the preparation of its Application. It knew on May 31, 2023, that the Stay of proceedings would end on July 15, 2023. It made a choice as to when it filed/served its Application.
>
> [14] ASC knowingly took a risk that the Court would not grant an abridgement of the time for filing and service of its Application.
>
> [15] I am satisfied that the Respondent WTH was prejudiced in its ability to effectively respond to this Application on July 13, 2023, *inter alia*, as a result of the following:
>
> 1. counsel for WTH only became aware on July 4, 2023, that ASC was contemplating the Application.
>
> …
>
> 2. although it had the Monitor's May 24, 2023, First Report, **WTH prepared its written submissions to this Court, without the benefit of the Monitor's July 11, 2023, Second Report** (although it had it before it presented its oral arguments herein).
>
> 3. WTH, as did the Court, received **two late-filed affidavits of Mr. Gao**, which superficially were not in proper form, and which are the only evidence presented by the Applicant.
>
>   The first affidavit is dated sworn July 7, 2023, and the latter affidavit as submitted was also "sworn virtually by videoconference in Shanghai China before [counsel Darren

O'Keefe] at St. John's, Newfoundland and Labrador this [blank] day of 2023". As I understand it the second affidavit was sworn between July 8 and 10, 2023.

4. WTH was entitled to cross-examine Mr. Gao – but did not request to do so. I am satisfied that this was because I infer that its counsel was genuinely satisfied that this was not possible, before the hearing ended on July 13, 2023: his being in China, resulting in significant time differences with Nova Scotia; he required translation services when testifying at the trial before Justice Coughlan; how one would quickly enough have arranged a "court room" equivalent in China suitable for audiovisual connection and simultaneous interpretation, or an interpreter here in Halifax?

[16] In argument, WTH questions the *bona fides* of <u>Mr. Gao</u>, who <u>is the beneficial owner of both ASC and Golden</u>, generally, and specifically regarding the validity of the Collateral Mortgage and Loan, and the timing of the registrations thereof.

[17] Had WTH counsel insisted on cross-examining Mr. Gao, I am satisfied that it is unlikely the hearing could have concluded before the present stay of proceedings expired on Saturday, July 15, 2023, and likely it would have been weeks before a heating date could be found for which the Court and all the necessary parties were available.

[18] WTH would also have had an opportunity to explore with Mr. Gao whether Golden and ASC fall within the definition of "related to or dealing at arm's length with a debtor company" pursuant to s. 2(2) and 3 of the *CCAA*.

[19] Conversely, I consider then prejudice to ASC of not granting it an abridgement of time.

[20] If ASC cannot convert the proceeding to one under the *CCAA*, it will remain under the *BIA*. The stay of proceedings was set to imminently expire.

[21] In my view, the parties could still request an extension of time of the stay of proceedings under the *BIA* on July 17, 2023.

[22] Ultimately, I see very little prejudice to the Applicant, as a result of my decision to not abridge the relevant time periods for filing and service of documents in support of the Application in Chambers to convert the proceeding from the *BIA* to the *CCAA*.

[23] I am not persuaded that my declining to abridge the time periods, even if my decision will trigger the assignment into bankruptcy under the *BIA* or merely continuation under the *BIA*, will jeopardize the interests of the stakeholders collectively.

[24] I exercise my discretion <u>not to abridge</u> the time for filing and service upon WTH.

> [25] Therefore, the Application was not properly before the Court on July 13, 2023, and I am unable in the circumstances to grant the relief sought in the Application.
>
> [26] On that basis, I dismiss the Application.
>
> [Justice Rosinski's underlining and bolding. Footnotes omitted]

[23] Later, Justice Rosinski's decision was formalized by an order stating:

> **IT IS HEREBY ORDERED THAT**:
>
> 1. The application of Atlantic Sea to abridge the notice periods and service requirements pursuant to section 11 of the CCAA is denied.
> 2. Therefore, the application to convert the matter to a proceeding under the CCAA is not properly before the Court, and as such the relief sought is not granted.
>
> …

[24] The Registrar's order of May 31, 2023 had granted an extension "to July 15, 2023". July 15 was a Saturday. Atlantic Sea and msi Spergel Inc. took the position that the extension continued to Monday, July 17. The position was based on the definition of time in Rule 94.02 of the Nova Scotia Supreme Court's *Civil Procedure Rules* rather than the different approach in the *Interpretation Act*, R.S.C. 1985, c. I-21.

[25] On July 17, 2023 Atlantic Sea applied to the Supreme Court, under s. 50.4(9) of the *BIA*, for a further extension of the time to file a proposal. On July 17, 2023, the Registrar in Bankruptcy heard the application. At the conclusion of that hearing, the Registrar gave a "bottom line" decision, dismissing the application, with reasons to follow. On July 19, 2023, the Registrar sent the parties a letter stating that the application was denied. The Registrar's formal decision issued on July 21, 2023 (2023 NSSC 238). The decision explained why the Registrar declined to extend:

> [15] … I conclude that the application fails not for lack of viability, but under 50.4(9)(a)'s requirement for good faith and due diligence or, if I am wrong, because I would not exercise my discretion in favour of the Debtor.
>
> …
>
> [22] The current case is something of an unusual situation in that although there were notable developments between May 31 and July 6, they were primarily if not exclusively geared towards converting the insolvency to CCAA proceedings. As I read the BIA, the "good faith and due diligence" requirement relates to the development of a viable proposal, not to other insolvency options.

…

> [23] … I question whether in the last 75 days, more could have been done to determine who are the creditors and what is their status. On balance, I am not convinced that what has been done, in these circumstances, are adequate to satisfy me to a civil standard of due diligence.
>
> [24] Which brings me to good faith. There are two places where this is relevant: directly, in the 50.4(9)(a) test, and more holistically under section 4.2(1) of the BIA.
>
> …
>
> [26] At all Court stages of this and the CCAA proceeding, there have been different flavours of attempts to "strong arm" the Court by compressing timelines where the upshot has been "you have to sign this or disaster will result".
>
> [27] I was not presented with any reason for this. It is not consistent with good faith and fair dealing. It is, conversely, consistent with attempting to compel the Court to the Debtor's agenda and objectives.
>
> [28] Inconsistent with good faith as well is the current state of affairs. Distilled, it is this: "we were unsuccessful in the CCAA application. We don't have any additional materials to put in front of you; we don't even know what the creditor matrix is going to look like, given a potential substantial additional creditor and the security dispute. So give us ten days to pull all that together because we didn't think we would fail on the CCAA application."
>
> …
>
> [32] Finally, I turn to my discretion. 50.4(9) is permissive, not mandatory. It states that I "may" grant an extension (assuming it to be made in time) if the three part test is met. I have assumed the application was timely, and concluded the test was not met. If I am right on the first point and wrong on the second, however, I would not exercise my discretion in favour of the Debtor.

[26] Atlantic Sea has appealed the Registrar's decision to the Supreme Court of Nova Scotia. The hearing is scheduled for early April 2024.

[27] On July 19, 2023, Atlantic Sea filed a Notice of Appeal (General) to the Court of Appeal from Justice Rosinski's Decision of July 19, 2023.

[28] Atlantic Sea and the proposed monitor take the position that, as the intended proposal proceeding under the *BIA* is "continued" by s. 11.6 of the *CCAA*, the *CCAA* application is really an interlocutory motion under the *BIA*. Consequently, s. 195 of the *BIA* would stay a bankruptcy pending the outcome of the appeal. WTH's counsel does not share that opinion. I express no view on that issue.

[29] Neither Atlantic Sea nor WTH has taken steps to treat Atlantic Sea as a deemed bankrupt after July 15 (or July 17 if the terminal date moved to a Monday), 2023, when the Registrar's extension expired.

[30] In the eight months since Justice Rosinski's Decision, Atlantic Sea has not re-filed its application under s. 11.6 of the *CCAA*, this time with ten days advance notice, to remedy the procedural defect that generated Justice Rosinski's ruling.

Issues

[31] Atlantic Sea's factum states three issues, which I quote but re-order:

> (1) Does ASC require leave to bring the within appeal and, if so, should leave be granted?
>
> (2) Did the Learned Judge err in applying the notice and service requirements under the Nova Scotia *Civil Procedure Rules* as opposed to those indicated by section 11 of the CCAA?
>
> (3) In the event the Nova Scotia *Civil Procedure Rules* did apply, did the Learned Justice err in refusing to abridge the time for filing and service of the Application and thereby refusing to decide the Application on its merits?

Standard of Review

[32] Findings of fact and mixed fact and law with no extractable legal error are reviewed for palpable and overriding error, meaning a clear error that affected the outcome: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras. 8, 10, 19-25, 31-36; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at paras. 65 and 69.

[33] Statutory interpretation is an issue of law that is reviewed for correctness.

[34] A discretionary ruling is reviewed for error in legal principle or whether it results in a patent injustice. It is presumed a judicial discretion will not be exercised to cause a patent injustice. Consequently, the "patent injustice" standard is a subset of error in legal principle. *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras. 22, 26-29. *R. v. Nova Scotia (Ombudsman)*, 2017 NSCA 31, para. 24. *Magee v. Lauzon*, 2024 NSCA 23, para. 21.

First Issue: Leave to Appeal

[35] The *CCAA* says:

> **Leave to appeal**

> **13** Except in Yukon, any person dissatisfied with an order or a decision **made under this Act** may appeal from the order or decision **on obtaining leave** of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs. [bolding added]

[36] Atlantic Sea has not applied for leave. It submits Justice Rosinski's ruling was not "made under" the *CCAA* and leave is not required. Its factum explains:

> 45. While ASC was seeking an order under the CCAA, the requested relief is irrelevant to whether the Decision was actually "made under" the CCAA legislation. ASC respectfully submits that the facts and applicable legal concepts discussed above make it readily apparent that the Decision under appeal was not made pursuant to the CCAA, or even the BIA. The Decision was made, as the Learned Justice expressly stated, "entirely within the procedural ambit of our Civil Procedure Rules". [underlining in factum]

[37] I respectfully disagree.

[38] The phrase "made under" in s. 13 of the *CCAA* attracts an "expansive interpretation" after a "broad functional inquiry" rather than a "parsing exercise". Briefly, "if a claim is being prosecuted by virtue of or as a result of the *CCAA*, section 13 applies". See: *Sandhu v. MEG Place LP Investment Corporation*, 2012 ABCA 91, para. 17; *Re Essar Steel Algoma Inc.*, 2016 ONCA 138, para. 22; *Urbancorp Inc. v. 994697 Ontario Inc.*, 2023 ONCA 126, paras. 10, 19-20.

[39] Atlantic Sea's Notice of Application to the Supreme Court, Schedule "B" (Grounds for Relief) says:

> 6. The Company is insolvent and now seeks to continue the NOI [Notice of Intention] proceedings **under the *Companies' Creditors Arrangement Act*,** RSC 1985, c. C-36 (the "*CCAA*" pursuant to section 11.6 therein. … [bolding added]

[40] Atlantic Sea's Memorandum of Fact and Law, dated July 11, 2023, in support of its application to Justice Rosinski, included:

> 2. …At the Application, ASCL is seeking an Order, among other things:
>
> …
>
> d. authorizing the continuation **under the CCAA** of the Company's proposal proceedings commenced under the BIA, pursuant to the NOI;
>
> [bolding added]

[41] The *CCAA* says:

> **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. [bolding added]

[42] The practice of the Nova Scotia Supreme Court is governed by the Court's *Civil Procedure Rules*. Rules 5.06 and 31 say notice of the documents for an application must be given at least 10 days before the hearing. Rule 23.11 says the documents for a motion in chambers also must be filed no later than 10 days before the hearing. Rule 94.02 says the time periods exclude the days the interval begins and ends, Saturdays and Sundays.

[43] Section 10(1) of the *CCAA* incorporates the "practice" of the Supreme Court of Nova Scotia. The practice includes the time prescriptions in the Court's *Rules*. Those time prescriptions are "under" the *CCAA* by incorporation. Justice Rosinski applied those prescriptions. Under s. 11 of the *CCAA*, he had discretion to abridge or waive the time, but he declined to do so.

[44] Atlantic Sea applied "under" the *CCAA* and Justice Rosinski's ruling was "under" the *CCAA*. Section 13 requires leave to appeal.

[45] The *CCAA* says:

> **Court of appeal**
>
> **14** **(1)** An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.
>
> **Practice**
>
> **(2)** All appeals under section 13 shall be regulated as far as possible according to **the practice in other cases of the court appealed to** …
>
> [bolding added]

[46] The practice in this Court is governed by *Civil Procedure Rule* 90. Rule 90.05 prescribes a Notice of Appeal (General) for appeals as of right and a Notice of Application for Leave to Appeal and Appeal for appeals requiring leave.

[47] Atlantic Sea filed a Notice of Appeal (General), used for an appeal as of right. It has not applied for leave by filing a Notice of Application for Leave to Appeal. At the hearing in this Court, Atlantic Sea's counsel acknowledged Atlantic Sea has not applied for leave to appeal.

[48] Atlantic Sea's factum says:

> 46. ASC says that leave is not required. Alternatively, ASC respectively [*sic*] asks that leave be granted such that the Appeal can be decided on its merits.

[49] An alternative sentence in a factum is not an application for leave to appeal under the practice of this Court.

[50] Absent an application, I would deny leave to appeal.

[51] Nonetheless, out of respect for the parties' efforts to address the merits, I will assume Atlantic Sea has applied for and obtained leave to appeal. The remainder of these reasons proceeds from that premise.

Second Issue: Effect of ss. 11 and 11.02(1) of the CCAA

[52] Atlantic Sea relies on ss. 11 and 11.02(1) of the *CCAA*:

> 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.
>
> …
>
> 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,** …
>
> [bolding and underlining reproduced from the quotations in Atlantic Sea's factum, para. 21]

[53] Atlantic Sea focuses on the emphasized words. Its factum submits:

> 20. … Section 11 allows an application for an initial order to be made **without notice**. It also states that the initial order will be for a period **of not more than 10 days**. In effect, this establishes a reverse notice period that supersedes the normal procedural regime to balance the needs of debtor and creditor, protecting the debtor from undue creditor interference while preserving the creditor's right to be heard within a reasonable timeframe.
>
> …
>
> 25. The doctrine of paramountcy applies where a provincial enactment and a federal enactment are each valid enactments within the constitutional powers of the respective legislating government, but where concurrent operation of the two laws results in conflict in operation between the two and/or frustration of the federal statute's purpose.

…

> 29. ASC submits that the CCAA was directly applicable to every facet of the Application and, as a matter of federal paramountcy, the Learned Justice was therefore not entitled to disregard its specific provisions respecting the notice and service required on an initial order application (or lack thereof). ASC applied under s. 11 of the CCAA and was entitled to have the Application determined on that basis.
>
> [bolding and underlining in factum]

[54] At the hearing in this Court, Atlantic Sea's counsel reiterated the proposition that, under s. 11.6, Atlantic Sea enjoyed the right to proceed without notice and obtain an initial conversion order, and any participation by creditors is relegated to the come-back hearing under s. 11.02(1). Counsel submitted that, by declining to abridge what he termed the "arbitrary" ten days notice requirement in the *Civil Procedure Rules*, the judge effected an operational conflict between the federal *CCAA* and the provincial *Rules*. Paramountcy would resolve the conflict and the ten days' notice requirement would be inoperative.

[55] The submission is unpersuasive.

[56] Section 11 says the court "may" act on short notice or without notice "as it may see fit".

[57] Atlantic Sea did not have the *right* to apply *ex parte* or on short notice. It had the right to ask Justice Rosinski to exercise his discretion whether to waive or abridge the period of notice.

[58] Similarly, Justice Rosinski was not *obligated* to allow Atlantic Sea to apply without notice or on short notice. Rather, he was required to exercise his discretion on the point without palpable and overriding error of fact or error in legal principle and without causing a patent injustice, according to the appellate standard of review for discretionary rulings.

[59] As I have discussed under the First Issue, s. 10(1) of the *CCAA* incorporates "the practice of the court in which the application was made", meaning the *Civil Procedure Rules* of the Supreme Court of Nova Scotia. Rules 5.06, 23.11 and 31 require notice ten days before the hearing of an application or motion.
Rule 2.03(1)(c) gives the judge discretion to excuse compliance with the time limit:

> **2.03 General judicial discretions**

> **(1)** A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:
>
> …
>
> (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

[60] Atlantic Sea's Notice of Application, Schedule "B", para. 11, requested an order "to abridge the time requirements for bringing this Application, pursuant to section 11 of the *CCAA*, the Civil Procedure Rules and the inherent jurisdiction of this Court". Atlantic Sea did not apply *ex parte*. It applied *inter partes* and requested that Justice Rosinski exercise his discretion to abridge under both s. 11 of the *CCAA* and *Civil Procedure Rule* 2.03(1)(c). The judge responded to the request.

[61] Both the *CCAA* and the *Civil Procedure Rules* gave the discretion to abridge or dispense with notice to WTH. Under either, the same evidence and criteria would apply. Atlantic Sea says, under Rule 2.03(1)(c), the judge would disregard the purposes of the *CCAA*. I disagree. An assessment under Rule 2.03(1)(c) would consider the equities between the parties given the dynamics of the underlying litigation, whether that is a *CCAA* application, a tort claim or anything else.

[62] There is no legal or operational conflict between the *CCAA* and Nova Scotia's *Civil Procedure Rules*. Absent a conflict, the paramountcy doctrine is not engaged. The ten-day time limit in the *Civil Procedure Rules* is not inoperative.

[63] In the exercise of his discretion, Justice Rosinski declined to abridge the time. If leave to appeal were granted, as I am assuming *arguendo*, the issue would be whether his ruling offended the appellate standard of review for a discretionary ruling. I will turn to that issue.

Third Issue: Discretion Whether to Abridge

[64] Atlantic Sea's factum explains why, in its view, Justice Rosinski's denial of the abridgement misapplied his discretion:

> 38. As to the length of delay, WTH and the other parties received the Application on 06 July 2023, one week prior to the hearing date. WTH was able to file its response and was heard in oral argument. Both the delay and consequent prejudice to WTH were therefore negligible, particularly when considered "having regard to the nature and significance of the primary relief being sought by

> the moving party", given that ASC was seeking an initial order under the CCAA which would only remain in effect for a period of 10 days, following which WTH or any other opposing creditor would have had a full opportunity to be heard.
>
> 39. The protections offered by the CCAA ought to have negated WTH's tenuous argument that the balance of prejudice would favour it over ASC in the context of the Application. By contrast, the Learned Justice was plainly incorrect in his statement at para. 22, "Ultimately, I see very little prejudice to the Applicant, as a result of my decision to not abridge the relevant time periods for filing and service of documents in support of the Application …". The weighing of potential prejudices between the parties clearly favoured ASC, and these 'potential' negative consequences identifiable at the hearing were unfortunately borne out.
>
> 40. ASC submits that, even if the Nova Scotia *Civil Procedure Rules* were applicable, the analysis ought to have been heavily informed by a close consideration of the CCAA, including its underlying policy aims as discussed in relation to Issue 1, and should have incorporated a far more nuanced view of the relative advantages and disadvantages to each party with reference to the protections embedded in s. 11 of that legislation.
>
> 41 ASC repeats the foregoing and respectfully submits that the Learned Justice erred in concluding that the circumstances did not merit an abridgement of timelines and that the Decision should also be overturned on that basis.

[65] The material circumstances include the following:

- As Justice Rosinski calculated (para. 10), compliance with the *Civil Procedure Rules* would involve notice by June 27, 2023.
- Atlantic Sea filed its notice of intention to make a proposal on May 1, 2023. However, it did not use the ensuing period to prepare a proposal. Instead, it changed its intended course to an arrangement under the *CCAA*. Atlantic Sea had over eight weeks, before June 27, to give proper notice of its revised strategy.
- An abridgement normally requires some reasonable explanation for the requested delay. Atlantic Sea's principal, Mr. Gao, filed two affidavits. His affidavits do not explain the delay. Justice Rosinski (para. 9) found that Atlantic Sea had not given a satisfactory explanation for the delay.
- Atlantic Sea's assumptions were: (1) under s. 11.6 of the *CCAA*, it had the right to proceed with short notice or no notice, (2) creditors were entitled to notice only of the come-back hearing after the initial *CCAA* order, and (3) any time for advance notice in the *Civil Procedure Rules* is

"arbitrary", as counsel termed it, and inoperative for paramountcy. As I have discussed, the assumptions were mistaken in law.

- As Justice Rosinski found (para. 14), Atlantic Sea "knowingly took a risk" that the judge would exercise his judicial discretion to deny the abridgement.

[66] Relative prejudice weighs heavily in the exercise of discretion whether to abridge a time limit. The judge considered the relative prejudice in the context of the existing *BIA* proceeding and prospective *CCAA* proceeding.

[67] First, WTH's perspective:

- WTH's discordant business relationship with Atlantic Sea, its parent Atlantic Golden and their joint principal Mr. Gao had culminated, after a trial, in a substantial judgment to WTH against Atlantic Sea on February 2, 2023 and an Order on April 13, 2023.
- WTH was Atlantic Sea's largest arm's length creditor. Among all creditors, it was second only to Atlantic Golden. The backdrop to these creditors' proceedings under the *BIA* and *CCAA* was a heated commercial dispute between WTH, on the one hand, and Atlantic Sea, its parent Atlantic Golden and their joint principal Mr. Gao, on the other.
- After the Supreme Court's Decision favouring WTH, Atlantic Sea gave Atlantic Golden a general security agreement on March 5, 2023 and a collateral mortgage on April 13, 2023. WTH entered the general security and mortgage documents into evidence before Justice Rosinski. WTH wished to challenge the validity of Atlantic Golden's late non-arm's length security. The challenge would focus on the *bona fides* of Mr. Gao, the operating mind of both companies.
- Atlantic Sea's Notice of Intent to Make a Proposal of May 1, 2023 came one month after the Supreme Court's Order. The Notice of Intention and the Registrar's extension of May 31, 2023 stayed WTH's collection until July 15, 2023.
- Until July 4, 2023, WTH understood it would face a proposal. Then, on July 4, WTH learned by email that, instead, there would be an application to convert under the *CCAA*. On July 6, it learned that the hearing would be on July 13. It received Mr. Gao's affidavits and Atlantic Sea's written submission on July 11.

- The Decision of the Supreme Court of Nova Scotia in February 2023 had rejected Mr. Gao's evidence. For the *CCAA* application in July, WTH wished to cross-examine Mr. Gao, who was in China, to challenge Atlantic Golden's secured claim. Justice Rosinski [para. 15(4)] found that Atlantic Sea's short notice effectively precluded an arrangement for the cross-examination of Mr. Gao on the hearing date selected by Atlantic Sea.
- Based on these circumstances, Justice Rozinski found (para. 15) that, as a result of the short notice, "WTH was prejudiced in its ability to effectively respond to this Application on July 13, 2023".

[68] Then the perspective of Atlantic Sea's stakeholders and creditors:

- Before July 13, 2023, Atlantic Sea could have applied for further extensions of 45 days, up to a cumulative maximum of five months from May 31, 2023, *i.e.* to late October 2023. Atlantic Sea did not do so, and Justice Rosinski said (footnote 3) "no reasons have been put forward why it did not". Apparently, Atlantic Sea preferred to arrive at the hearing on July 13 with the looming threat of a deemed bankruptcy as leverage.
- Justice Rosinski (para. 21) noted that Atlantic Sea could still apply for another extension under s. 50.4(9) of the *BIA*. On July 17, 2023, Atlantic Sea did so. On the merits of s. 50.4(9), the Registrar found Atlantic Sea had failed to show good faith and due diligence and the Registrar, in his discretion, declined the extension.
- Justice Rosinski's ruling was procedural, based on the failure to give 10 days notice. Atlantic Sea takes the position that its appeal of Justice Rosinski's ruling stays the bankruptcy under s. 195 of the *BIA*. Yet, in the eight months since Justice Rosinski's ruling, Atlantic Sea has not renewed its application under the *CCAA* by giving the ten days' notice to remedy the procedural defect.
- An initial *CCAA* order is meant to give "breathing room" for the company to negotiate with its creditors while forestalling further erosion of the value from collection activities: *Canada v. Canada North Group Inc.*, 2021 SCC 30, para. 19 . Here, the Notice of Intention on May 1, 2023 and Registrar's extension from May 31 to July 15, 2023, provided 75 days of breathing room during which the intended proposal had nominated a trustee to manage the assets. The delay in giving notice of the

hearing on July 13, 2023 stemmed from Atlantic Sea's disorganization and strategic maneuvering.

- Justice Rosinski found (para. 23) that a bankruptcy would not jeopardize the interests of the stakeholders collectively. Given the circumstances, the finding is reasonable.

[69] The ruling displays no palpable and overriding error of fact, no error of law and does not occasion a patent injustice. There is no basis for this Court to overturn the judge's exercise of discretion to deny the abridgement.

Conclusion

[70] I would deny leave to appeal and order Atlantic Sea to pay WTH appeal costs of $5,000, all inclusive.

Fichaud J.A.

Concurred: Farrar, J.A.

Derrick J.A.