Nos. CA016105, CA016103, CA016126

Vancouver Registry

Court of Appeal for British Columbia

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT

AND:

IN THE MATTER OF WESTAR MINING LTD.

AND:

UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION
and UNITED MINE WORKERS OF AMERICA, LOCAL 7292

APPELLANTS

AND:

OFFICE AND TECHNICAL EMPLOYEES UNION LOCAL 378

APPELLANT

AND:

LARRY BELL, ROBERT CHASE and PETER DOLEZAL

APPELLANTS

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Toy
The Honourable Madam Justice Prowse

F. G. Potts, Counsel for the Respondent Greenhills Workers' Association

M. T. Blaxland Counsel for the Respondent 300 Union Employees

K. Johnston Counsel for the Respondent Director of Employment Standards

Ms. Gwen K. Randall Counsel for the Appellants United Mine Workers of America International Union and United Mine Workers of America Local 2792

A. J. MacDonell Counsel for the Appellant Office and Technical Employees Union Local 378

P. Butler, Q.C. and R. P. Sloman Counsel for the Three Directors Larry Bell, Robert Chase and Peter Dolezal

Place and Date of Hearing: Vancouver, British Columbia
December 10, 1992

Place and Date of Judgment: Vancouver, British Columbia

January 28, 1993

Written Reasons by:

The Honourable Madam Justice Prowse

Concurred in by:

The Honourable Mr. Justice Toy

Dissenting Reasons by:

The Honourable Chief Justice McEachern (p. 13, para. 29)

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UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION et al.

AND:

OFFICE AND TECHNICAL EMPLOYEES UNION LOCAL 378

AND:

LARRY BELL, ROBERT CHASE and PETER DOLEZAL

Reasons for Judgment of The Honourable Madam Justice Prowse:

l. NATURE OF APPLICATIONS

1 There are three applications before us to discharge the order of Southin, J.A., pronounced December 4, l992, refusing leave to appeal from an interlocutory order of Macdonald, J., pronounced August 26, l992, relating to proceedings under the ***Companies' Creditors Arrangement Act***, R.S., c. C-25 (the "CCAA"). The applicants seek leave to appeal and a stay of proceedings pending appeal.

ll. ISSUES

2 There are three issues arising from these applications:

l) Does a panel of this Court have jurisdiction to vary or discharge an order of a single justice on an application for leave to appeal under s. 13 of the CCAA?

2) Was Southin J.A. correct in concluding that s. 14(2) of the CCAA requires that an application for leave to appeal be heard and a notice of appeal filed and delivered within 21 days of the order or decision being appealed unless the court appealed from extends that period?

3) Should application for leave to appeal be allowed and a stay of proceedings entered on the merits?

3 Because I have concluded that a panel of this Court does not have jurisdiction to hear these applications, it is unnecessary for me to deal with the second and third issues. However, in order to provide some guidance for those practising in this area, I will also deal with the second issue.

lll. ANALYSIS

1) Jurisdiction

4 The respondents submit that a panel of this Court has no jurisdiction to review the decision of a single justice refusing leave to appeal with respect to matters under the CCAA. The respondents say that the right of the applicants to apply for leave to appeal from a decision of the Supreme Court is governed by

ss. 13 and 14 of the CCAA, which is a federal statute. They say that provincial legislation, in the form of the ***Court of Appeal Act***, S.B.C. l982, c.7, cannot enlarge upon the right to apply for leave to appeal set out in the CCAA.

5 Sections 13 and 14 of the CCAA provide:

13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom 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.

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.

(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, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in the Yukon Territory, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his appeal, and within that time he has made a deposit or given sufficient security according to the practice of the court appealed to that he will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

(Emphasis added.)

6 The relevant provisions of the ***Court of Appeal Act*** provide:

6. (1) An appeal lies to the court

(a) from an order of the Supreme court or an order of a judge of that court ....

...

6.1 (2) Notwithstanding section 6 (1), an appeal does not lie to the court from an interlocutory order without leave of a justice.

...

9. (7) The court may discharge or vary an order made by a single justice.

7 The respondents submit that s. 13 of the CCAA clearly states that an application for leave to appeal may be commenced in any one of three ways, and that once that choice is made a party does not have any further right to pursue an application for leave to appeal. Although the respondents acknowledge that s. 14(2) of the CCAA provides that provincial rules of practice shall govern appeals "as far as possible", the respondents say that creating an additional forum for pursuing leave to appeal goes beyond a mere matter of practice and is contrary to the express wording of s. 13. The respondents also submit that applying s. 9(7) of the ***Court of Appeal Act*** would have the effect of substituting the word and for the word or in s. 13. The respondents say that provincial legislation cannot extend the right of appeal under the CCAA in this fashion.

8 The respondents submit that s. 18 of the CCAA bolsters their submission since it grants power to the Governor General in Council to "make, alter or revoke" general rules for carrying into effect the objects of the Act, but also states that such rules shall not extend the jurisdiction of the court. No rules have been passed pursuant to this provision.
The respondents' point, however, is that if rules made under the CCAA cannot extend the jurisdiction of the court, then, *a fortiori*, provisions enacted pursuant to a provincial power cannot do so. This submission assumes that providing an additional forum for pursuing leave to appeal extends the jurisdiction of the court. I also note that, in British Columbia, the "court" referred to in s. 18 is the Supreme Court of British Columbia.

9 The applicants submit that s. 9(7) of the ***Court of Appeal Act*** governs, and that these applications should be dealt with in the same manner as other applications to vary or discharge the order of a justice. They say that the opening words of s. 14(2) of the CCAA are applicable to this situation and that the manner in which an application for leave to appeal may be pursued is a matter of practice.

10 Support for the respondents' position is found in two cases to which we have been referred: ***Sa Majeste le Roi et le Procureur General du Canada v. Miss Style Inc.***

(l936), 18 C.B.R. 20 (Que. C.A.) and ***Regina v. Gelz*** (l990), 55 C.C.C. (3d) 425 (B.C.C.A.).

11 In ***Miss Style***, the petitioners applied to the Quebec Court of Appeal from a decision of a single justice of that Court who had dismissed the petitioners' application for leave to appeal pursuant to s. 12 (now s. 13) of the CCAA. The full Court dismissed the application for leave to appeal for the following reasons:

> Whereas leave to appeal may be requested, at the petitioners' choice, either before the trial judge, or before one of the judges of the court of the King's Bench, or before this Court itself; [under the CCAA]
>
> Whereas the petitioners, using this option, applied to the Honourable Justice St-Jacques, one of the judges of this Court, and the latter, after hearing the parties, dismissed the said application by a judgment dated 29 June last;
>
> Whereas the petitioners' right is now extinguished and there are no grounds for any further judgment subsequent to that rendered by the Honourable Justice St-Jacques;
>
> On these grounds, the Court rejects the said application or petition...;
>
> (Emphasis added.)

12 We are not aware if Quebec had a section similar to s. 9(7) of the ***Court of Appeal Act*** at that time. In that respect, the case may be distinguishable. However, there is no doubt that the Quebec Court of Appeal decided that s. 12 (now s. 13) of the CCAA was determinative of the petitioners' right to apply for leave to appeal.

13 The ***Gelz*** decision dealt with an application to review the dismissal by a justice of an application for leave to appeal a summary conviction under the ***Criminal Code***. The accused applicant had been convicted of having the care or control of an automobile while his ability to drive was impaired, and his appeal to the County Court was dismissed. The applicant then applied for leave to appeal to this Court on a question of law alone. The application came before a single justice of this Court and was dismissed. The applicant then applied for a review of the justice's decision pursuant to s. 675(4) of the ***Ciminal Code,*** which provides as follows:

> 675. (4) Where a judge of the court of appeal refuses leave to appeal under this section otherwise than under paragraph (1)(b), the appellant may, by filing notice in writing with the court of appeal within seven days after refusal, have the application for leave to appeal determined by the court of appeal.

14 This Court held that s. 675 (4) did not apply to summary conviction offences. In coming to that conclusion, this Court distinguished two earlier decisions in which a panel of the Court had reviewed the decision of a justice with respect to summary conviction matters under provincial statutes. Mr. Justice Seaton, speaking for the Court, dealt with that issue at page 427 of ***Geltz***:

> Both ***Thompson*** and ***Kennedy***dealt with provincial offences where it might be argued that jurisdiction to review could be based on the ***Court of Appeal Act***, S.B.C. l982, c. 7, s.9(7). Provincial legislation cannot bestow jurisdiction in a ***Criminal Code*** matter. We must look to the ***Code....***

15 The respondents say that the ***Miss Style*** and the ***Gelz*** decisions make it clear that when the court is dealing with federal legislation, and where there are specific provisions in that legislation dealing with the right to apply for leave to appeal, the court is bound by those provisions and cannot extend them by recourse to a provincial enactment.

16 In reply, the applicants rely on ***Philip's Manufacturing Ltd. v. Hongkong Bank of Canada*** (l7 January 1992), Vancouver Registry CA014859, (B.C.C.A.), in which a panel of this Court reviewed the decision of a single justice pursuant to s. 9(7) of the ***Court of Appeal Act*** in a proceeding commenced under the CCAA. However, that decision is of no assistance since the issue of jurisdiction was not raised.

17 The applicants also rely on ***Canadian Utilities Ltd. and Western Chemicals Ltd. v. Deputy Minister of National Revenue for Customs and Excise*** (l963), 41 D.L.R. (2d) 429 (S.C.C.). In that case, an application for leave to appeal was made to the Exchequer Court from a declaration of the Tariff Board. The Exchequer Court decided that the questions on which leave to appeal was sought were not questions of law, as the statute required, and that this was not the kind of case in which leave should be given in any event. On further

appeal to the Supreme Court of Canada, the Supreme Court granted the motion to quash the appeal on the basis that it had no jurisdiction to hear it. In so doing, Mr. Justice Cartwright, speaking for the Court, made the following comments upon which the applicants here rely:

> It appears to me to have been consistently held in our Courts and in the Courts of England that where a statute grants a right of appeal conditionally upon leave to appeal being granted by a specified tribunal there is no appeal from the decision of that tribunal to refuse leave, provided that the tribunal has not mistakenly declined jurisdiction but has reached a decision on the merits of the application. (p. 435)

18 I fail to see how the ***Canadian Utilities*** case is of any assistance to the applicants. It cannot be said that Southin J.A. "mistakenly declined jurisdiction". Rather, she assumed jurisdiction and refused leave to appeal on the basis that the applicants had not complied with s. 14(2) of the CCAA.

19 On the basis of the wording of ss. 13 and 14 of the CCAA, taken together with the cases of ***Miss Style*** and ***Gelz***, I conclude that we are without jurisdiction to hear these applications. I concur with the analysis of the jurisdictional issue proffered by the respondents. I would dismiss these applications on this ground.

20 By way of postscript, I note that the respondents provided us with two further decisions relating to this issue subsequent to submissions: ***Insurance Corporation of British Columbia v. Julia Brewer*** (26 November 1991), Vancouver Registry CA014485, (B.C.C.A.), and ***Geogas SA v. Trammo Gas Ltd.***, [1991] 3 All E.R. 554 (H.L.). I do not find it necessary to comment on those cases since neither of them deals with the issue of whether a provincial statute can enlarge upon specified rights of appeal contained in a federal statute.

2) Section 14(2) - Time Limits

21 The respondents submit that Southin, J.A. was correct in concluding that s. 14(2) of the CCAA requires that an application for leave to appeal be heard, and a notice of appeal filed and delivered, within 21 days of the order or decision appealed from, unless that period is extended by the court which made the order. The applicants reply that all s. 14(2) requires is that the applicants take steps to perfect their appeal within 21 days, and that the applicants here have taken such steps by filing and serving their notice of application for leave to appeal within 21 days.

22 I am satisfied that Southin J.A. was correct in concluding that the language of s. 14(2), when read as a whole, requires that the application for leave to appeal be heard within 21 days.

23 For convenience, I will repeat the wording of s. 14(2):

> 14.(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, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, ... allows, the appellant has taken proceedings therein to perfect his appeal, and within that time he has made a deposit or given sufficient security according to the practice of the court appealed to that he will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.
>
> (Emphasis added)

24 The applicants' interpretation of s. 14(2) fails to give any meaning or effect to the words which I have emphasized. Although practices in this Court regarding the deposit of security have changed since the CCAA was enacted, it is still open to a judge to impose terms as a condition of granting leave to appeal, and, in that respect, the closing words of s. 14(2) can be given effect.

25 In my view, the words of s. 14 (2) which I have emphasized contemplate that, within 21 days of the order or decision appealed from (unless the time is extended), the application for leave to appeal will be heard, and terms, if any, imposed.

26 Although Southin, J.A. concluded that s. 14(2) also required that a notice of appeal be filed and delivered within 21 days, I conclude that this is unnecessary, since s. 14(4) of the ***Court of Appeal Act*** provides that: "Where leave to appeal is granted, the

appeal shall, for all purposes, be deemed to have been brought." A notice of appeal is not required in these circumstances.

27 As a practical matter, I am also persuaded that the nature of proceedings under the CCAA militates in favour of a limited period in which to pursue leave to appeal. These proceedings require the judge conducting the proceedings to maintain a fine balance between the interests of all the parties. Timing is all important. If interlocutory appeals were not governed by strict rules as to time, that balance might be lost and the purpose of the proceedings frustrated. This view is reflected in the following comments made by Macfarlane, J.A., sitting in Chambers, in ***Re Pacific National Lease Holding Corporation et al***. (4 Nov. 1992), Vancouver Reg. CA016047, (B.C.C.A. in Chambers), at page 13:

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A.

Although in other types of cases it might be viewed as a hardship to require parties to complete their application for leave to appeal within a 21 day period, I am not able to conclude that this is an unreasonable requirement in cases under the CCAA, or that to interpret s. 14(2) in this manner leads to an absurd result. This is particularly so since the court appealed from can extend the 21 day period if satisfied that it is appropriate to do so.

lV. CONCLUSION

28 In the result, I would dismiss the applications, with costs to the respondents.

"The Honourable Madam Justice Prowse"

I AGREE:

"The Honourable Mr. Justice Toy"

Reasons for Judgment of Chief Justice McEachern

29 I regret that I find myself in respectful disagreement with the judgment of my colleagues on this application to set aside the order of Southin J.A., in Chambers, which refused leave to appeal a Chambers Order made by Macdonald J. during proceedings brought under the***Companies' Creditors Arrangement Act***, R.S. c. C-25. I shall call that Act "the CCAA" or "the Act".

30 On June 10, 1992, Macdonald J. made an order on the application of the Company:

> ...that the Petitioner be permitted to maintain in trust a sum not exceeding $4,000,000, without further order of this Court, to be applied to satisfy the liabilities of the directors and officers of the Petitioner in respect of the payment of wages under the***Employment Standards Act***, S/B.C. 1980,C. 10 and remittances in connection therewith pursuant to the***Income Tax Act***, S.C. 1970 - 71 - 72, C. 63 as amended, the***Canada Pension Plan Act***, R.S.C. c. C-8, as amended, and the***Unemployment Insurance Act***, R.S.C. 1985, C. U-1, as amended, provided [that the fund would not be used to satisfy claims which were payable prior to May 14, 1992].

31 In consequence of this Order, which has not been entered, the applicant Directors did not resign and continued to direct the operations of the Company in difficult circumstances. On August 26, 1992, a further Order was made authorizing the Company to transfer the trust fund to the Director of Employment Standards, which was done.

32 Also on August 26, 1992, Macdonald J., as part of other proceedings before him, without notice to the Directors and in their absence, varied the previous Order by directing that:

> ...the Director of Employment Standards to apply the proceeds of [the trust fund] ...to satisfy as a first charge thereon, the entitlement of employees of the Petitioner who have worked since May 14, 1992, to vacation pay which has accrued since May 14, 1992...

33 This variation directly benefits the employees of the Greenhills mine at the

possible expense of the Companies other employees, particularly those of its Balmer mine and other non-union employees.

34 The Directors are concerned that this variation may substantially increase their unprotected liability, and that it ought not to have been made in their absence. They rely upon the judgment of this Court in ***F.B.D.B. v. Mission Creek Farm Inc.*** (1988), 25 B.C.L.R. (2d) 188 as authority for the proposition that a judge's authority to vary an unentered order must be exercised judicially.

35 The Directors and the United Mine Workers Union, which represents workers with unpaid claims but who had been locked out since May 1, 1992, filed Notices of Applications for Leave to Appeal to this Court on September 16, 1992, within the 21 day period limited for that purposes by the CCAA.

36 The relevant provisions of the CCAA are as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom 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.
>
> 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.
>
> (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, but no appeal shall be entertained unless within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in the Yukon Territory, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his appeal, and within that time he has made a deposit or given sufficient security according to the practice of the court appealed to that he will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal. R.S., c. C-25 , s. 14.
>
> (my underlining)

37 The applications for leave came on for hearing before Southin J.A., in Court of Appeal Chambers on December 4, 1992. I think it fair to say that she dismissed the applications on the narrow ground that Leave to Appeal had not been perfected within the 21 day period specified by s. 14 (2) quoted above.

38 S. 14 (2) uses archaic language such as "rendering" and "perfect". It seems to pre-date the establishment of this Court as the highest court of final resort for the Yukon Territory, and it tracks language relating to security for costs on appeals which was dropped from appellant practice in this Court many years ago. The section requires that no appeal shall be entertained unless, within the time limited, that is twenty-one days, the appellant has taken proceedings to "perfect" the appeal.

39 I am not persuaded that "perfect" means that leave to appeal must actually be obtained within such period because if that were so then I would expect the section to say exactly that. Instead, it requires the appellant to take "proceedings" to perfect the appeal.

40 We are required by the ***Interpretation Act***, R.S. c. I-24 s. 12 to give every enactment such fair, large liberal construction and interpretation as best ensures the attainments of it objects. It is therefore my view that s. 14 (2) only requires the appellant to take proceedings towards obtaining leave to appeal within twenty-one days.

41 In this case the applicants not only filed their applications within twenty-one days, but they also served their applications upon the Respondents. I am not persuaded that any particular number of proceedings is required, short of obtaining leave, (such as by filing a Leave Book, or setting the application for hearing, or actually embarking upon or completing the hearing), and it cannot be said that an appeal would be any more perfected at any such stage short of leave being obtained than is the case upon proceedings being taken towards perfection by filing and serving an application for Leave to Appeal. I am constrained to conclude, therefore, that the filing and serving of an Notice of Motion for leave, pursuant to our usual practice in other cases where leave is required, is sufficient.

42 The Respondents, however, raises a much more difficult point which has persuaded my colleagues that this Court has no jurisdiction to "review" the decision of Southin J.A.

43 In my respectful judgment my colleagues do not give sufficient weight to the

opening words of s. 14 (2) of the CCAA, to the variable means of obtaining leave under s. 14, or to the provisions of the***Court of Appeal Act***, S.B.C. 1982 c. 7.

44 The***Court of Appeal Act***, s. 6 (1) (a) gives jurisdiction for an appeal from an order of a judge of the Supreme Court. S. 6 (2) provides that where another enactment, such as the CCAA, provides a limited right of appeal, such as, I suppose, with leave only (for no leave would otherwise be required), then that enactment prevails.

45 S. 13 of the CCAA provides for an appeal with leave, and further provides that leave may be obtained from the judge who made the order, from this court, or from a judge of this court. I do not find any support in the language of s. 13 for my colleagues' conclusion that these are exclusive alternatives, so that the refusal of leave at any level precludes an application at another level. Maxwell on***Interpretation of Statutes***, 12th ed., 1969, pp. 232-3 suggests that in some cases "and" and "or" may be substituted for each other. While it is true that the CCAA must prevail, I see no conflict between it and the***Court of Appeal Act***, or with the practice which is followed in this province to obtain leave from the Court.

46 S. 14 (2) begins with these important words:

> All appeals under s. 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to...
>
> (my emphasis)

47 The practice of this Court is for leave applications to be brought before a single judge in Chambers. That is what occurred in***Phillips Manufacturing Ltd. v. Hongkong Bank of Canada et al.***, CA014859, dated January 17, 1992, (B.C.C.A.). I suppose the applicants here could have insisted on bringing their application before a panel of the Court, but they would have been discouraged from doing so because of the inconvenience that would cause should the applicants find it necessary to elbow their way into the space already committed to others. In addition, it is advantageous to have applications brought first before a judge in Chambers because that process provides leave in clear cases, and screens out all but the most disputatious applications.

48 In view of my colleagues' decision in this appeal, most counsel will probably feel constrained to bring applications in similar circumstances directly to the Court. In my view, this will cause unnecessary inconvenience to others.

49 Returning to this case, I conclude that the clear intention of s. 14 (2) of the CCAA was that appeals, which would include applications for leave to appeal, would, so far as possible, be governed according to the practice of the court "...in other cases". That practice makes it "possible" to apply to a single judge, and thereafter, if required, to proceed by way of an application under ss. 9 (7) and 9 (1) (a) of the***Court of Appeal Act***. The former section provides that the Court may discharge or vary an order made by a single judge. The latter permits the Court to exercise the jurisdiction it has under the CCAA to give or make any order that could have been made or given by the court appealed from. In this way, in my judgment, the grant of leave jurisdiction to a judge or to the Court may be exercised according to the practice in other cases in this Court.

50 It was argued that the foregoing should be defeated by the distinction between practice on appeals, and by the absence of an express grant of jurisdiction for a review. I am unable to accept that submission. The law and practice in this Province are in complete harmony with the CCAA. Both the Court and a judge of the Court have jurisdiction to give leave, and no violence is done to the language of s. 14 by following the practice that obtains in other cases where leave is required to appeal to this Court. In other words, the CCAA gives both a judge in Chambers and the Court jurisdiction to grant leave, and the process I have just described is the "practice" followed by parties wishing to apply to the Court for leave in other cases in this province.

51 While the practice whereby parties obtain leave to appeal from the Court in the province is as I have just stated, and while such practice is often described as a "review", the Court exercises its own judgment on the merits of the application when a question of law arises as distinguished from the exercise of a discretion: Practice dictates how parties get before the Court in this province but the jurisdiction of the Court to give leave is found in the Act. In my judgment, with respect, an application to the Court for leave is not a new or further layer of jurisdiction not prescribed by the CCAA, as was contended by Mr. Potts in his most able and comprehensive submission.

52 It was also argued, because of the decision of the Court of Appeal of Quebec in,***Sa Majeste le roi et le Procureur General du Canada v. Miss Style Inc.*** (1936), 18 C.B.R. 20, that we should not adopt a practice different from other provinces. With respect, the language of s.14 anticipates that there will be differences between the practice throughout

Canada, firstly because it expressly makes an exception for the Yukon Territory, and secondly because it makes appeals subject to the variable practices in the highest Courts of final resort in the provinces, or in the Supreme Court of Canada for the Yukon Territory. Also, it does not appear that the practice in Quebec or the language of the comparable Court of Appeal Act for Quebec were the same as ours.

53 My colleagues rely heavily upon the judgment of this Court in***R. v. Gelz***, CA011667, dated March 23, 1990, cited in: 55 C.C.C. (3d) 425. It was held in that case that this Court has no jurisdiction to give leave to appeal against a summary conviction appeal when leave has been refused by a single judge.

54 With respect, I do not find that case helpful or in point because it is based entirely upon a strict construction of the***Criminal Code***which does not include any provision similar to the opening words of s. 14 (2) of the CCAA upon which the applicants rely. Similarly, I do not find***Insurance Company of British Columbia v. Julia Brewer*** (Unreported), Vancouver Registry CA014485, dated November 26, 1991, and the cases upon which it is based, helpful because the Court had no original jurisdiction in that case.

55 The respondents opposing leave, also argued for a restricted construction of s. 14 (2) on the ground that that section contemplates an order being made for a deposit or security for costs being included in the order for leave within twenty-one days. With respect, that obligation is expressly subject to the practice of the Court and there is no practice requiring such deposit or security.

56 Turning to the merits, I am satisfied there are important questions to be argued relating to the granting of priority to one group of employees to the possible disadvantage of others interests including the intended beneficiaries of the trust.

57 Having decided that, I turn to consider the judgment of Macfarlane J.A. in***Re Pacific National Lease Holding Corp. et al.***, CA016047, dated October, 28, 1992 where that learned judge commented generally upon the circumstances where leave to appeal should be granted in CCAA matters. Relying upon a number of authorities, he points out that the Supreme Court exercises a general supervisory function in such matters and that leave should be granted sparingly because the principal purpose of the Act is to keep the Company alive while attempting to reorganize itself. In such circumstances, Chambers judges must be free to adapt their orders to dynamic circumstances. Macfarlane J.A. concluded:

> Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.
>
> Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

58 I respectfully agree with what Macfarlane J.A. has said, but in this case the situation of the Company has stabilized as its principal assets have been sold. The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities, and the proper distribution of the trust fund which was established with the approval of the Court primarily for the protection of the Directors.

59 In these circumstances, I do not believe the problems mentioned by Macfarlane J.A. arise in this case.

60 For all these reasons, I would give leave to appeal.

"The Honourable Chief Justice McEachern"