2013 ABCA 293
Alberta Court of Appeal

Piikani Nation v. Piikani Energy Corp.

2013 CarswellAlta 1567, 2013 ABCA 293, [2013] 12 W.W.R. 436, [2013] A.W.L.D. 4727, 230 A.C.W.S. (3d) 728, 367 D.L.R. (4th) 173, 556 A.R. 200, 584 W.A.C. 200, 5 C.B.R. (6th) 185, 86 Alta. L.R. (5th) 203

Grant Thornton Alger Inc. (Estates formerly accepted under the responsibility of Alger & Associates Inc.), in its Capacity as Trustee of Piikani Energy Corporation, Respondent (Applicant) and 607385 Alberta Ltd. and Dale McMullen, Appellants (Respondents) and Stephanie Ho Lem, Not a Party to the Appeal (Respondent)

Piikani Nation, Not a Party to the Appeal (Applicant) and Piikani Energy Corporation, Not a Party to the Appeal (Respondent)

Piikani Nation and Chief Reg Crow Shoe, Not a Party to the Appeal (Plaintiff) and Piikani Investment Corporation, Not a Party to the Appeal (Defendant)

Frans Slatter, Patricia Rowbotham, Barbara Lea Veldhuis JJ.A.

Heard: March 6, 2013
Judgment: August 29, 2013
Docket: Calgary Appeal 1201-0072-AC, 1201-0073-AC

Proceedings: reversing *Piikani Nation v. Piikani Energy Corp.* (2012), (sub nom. *Piikani Energy Corp. (Bankrupt), Re*) 537 A.R. 211, 2012 CarswellAlta 459, 2012 ABQB 187, 88 C.B.R. (5th) 1, 58 Alta. L.R. (5th) 219 (Alta. Q.B.)

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R.J. Gilborn, Q.C., L. Chan, for Respondents

Subject: Insolvency; Civil Practice and Procedure; Contracts; Corporate and Commercial; Torts
Related Abridgment Classifications
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.2 Fraudulent preferences
XI.2.d Time within which avoidable
XI.2.d.ii Related persons
Headnote
Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — Time within which avoidable — Related persons
P Nation agreed to allow lands to be used for development of dam, including power plant — P Nation received $36.3 M, which was settled into P Trust — HL conducted consulting business through 607 Ltd. — HL and M become directors of PE Corp. — PE Corp. entered into consulting agreement stipulating that 607 Ltd. receive annual fee of $150,000 — Legal disputes led to P Nation appointing investigator, A Inc., for P investment — A Inc. terminated consulting agreement

and demanded HL repay unearned portion of $73,150 — PE Corp. paid M severance of $240,000 — A Inc. assigned PE Corp. into bankruptcy, and was named trustee — A Inc. brought application to have payments voided as fraudulent preferences — Ruling in favour of A Inc., chambers judge found that M and HL were not at arm's length to PE Corp. — M and 607 Ltd. appealed — Appeal allowed; application of trustee dismissed — Finding that HL and M did not deal with PE at arm's length was based on errors of law — Error was in concluding that concept of "insiders" was relevant, that jurisprudence under Income Tax Act was irrelevant, and that director could never be at arm's length to corporation regardless of nature of transaction — Chambers judge erroneously found that HL and M constituted 50 per cent of PE Corp.'s board of directors, when there were in fact five directors rather than four — HL was acting at arm's length at time of payment to 607 Ltd., there being no evidence that HL had any involvement or control in early payment — There was no evidence that M directed severance payment or had any role in his own termination — As HL and M were dealing at arms' length with PE Corp., it was not necessary to consider whether PE Corp. was in fact insolvent at time of payments, whether payments were "preference", or other arguments.

Table of Authorities

Cases considered:

Del Grande v. R. (1992), (sub nom. *Del Grande v. Canada*) [1993] 1 C.T.C. 2096, 1992 CarswellNat 1329, 93 D.T.C. 133 (T.C.C.) — considered

Duro Lam Ltd. v. Last (1970), (sub nom. *Panfab Corp., Re*) 15 C.B.R. (N.S.) 20, 17 D.L.R. (3d) 382, [1971] 2 O.R. 202, 1970 CarswellOnt 92 (Ont. S.C.) — considered

Galaxy Sports Inc., Re (2003), 2003 BCSC 493, 2003 CarswellBC 734, 42 C.B.R. (4th) 211 (B.C. S.C.) — referred to

Galaxy Sports Inc., Re (2004), 2004 BCCA 284, 2004 CarswellBC 1112, 20 R.P.R. (4th) 1, 240 D.L.R. (4th) 301, 1 C.B.R. (5th) 20, 29 B.C.L.R. (4th) 362, 200 B.C.A.C. 184 (B.C. C.A.) — considered

Gestion Yvan Drouin Inc. c. R. (2000), [2001] 2 C.T.C. 2315, 2000 CarswellNat 3035, 2000 CarswellNat 3296, (sub nom. *Gestion Yvan Drouin Inc. v. R.*) 2001 D.T.C. 72 (Fr.), 12 B.L.R. (3d) 21 (T.C.C. [General Procedure]) — considered

Gingras, Robitaille, Marcoux Ltée v. Beaudry (1980), (sub nom. *Tremblay, Re*) 36 C.B.R. (N.S.) 111, 1980 CarswellQue 59, [1980] C.S. 468 (C.S. Que.) — considered

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

McLarty v. R. (2008), [2008] 4 C.T.C. 221, (sub nom. *McLarty v. Minister of National Revenue*) 374 N.R. 311, (sub nom. *Canada v. McLarty*) [2008] 2 S.C.R. 79, 46 B.L.R. (4th) 1, (sub nom. *McLarty v. Canada*) 293 D.L.R. (4th) 659, 2008 CarswellNat 1380, 2008 CarswellNat 1381, 2008 SCC 26, (sub nom. *R. v. McLarty*) 2008 D.T.C. 6366 (Fr.), (sub nom. *R. v. McLarty*) 2008 D.T.C. 6354 (Eng.) (S.C.C.) — considered

Minister of National Revenue v. Sheldon's Engineering Ltd. (1955), [1955] S.C.R. 637, [1955] C.T.C. 174, 55 D.T.C. 1110, [1955] 3 D.L.R. 801, 1955 CarswellNat 240 (S.C.C.) — considered

R. v. Ulybel Enterprises Ltd. (2001), 2001 SCC 56, 2001 CarswellNfld 239, 2001 CarswellNfld 240, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 45 C.R. (5th) 1, [2001] 2 S.C.R. 867 (S.C.C.) — considered

Skalbania (Trustee of) v. Wedgewood Village Estates Ltd. (1989), 74 C.B.R. (N.S.) 97, [1989] 5 W.W.R. 254, 60 D.L.R. (4th) 43, 44 C.R.R. 341, 37 B.C.L.R. (2d) 88, 1989 CarswellBC 344 (B.C. C.A.) — considered

Skalbania (Trustee of) v. Wedgewood Village Estates Ltd. (1989), 76 C.B.R. (N.S.) xxix (note), 62 D.L.R. (4th) viii (note), 40 B.C.L.R. (2d) xxxiii (note) (S.C.C.) — referred to

Swiss Bank Corp. v. Minister of National Revenue (1972), 1972 CarswellNat 176, [1972] C.T.C. 614, 72 D.T.C. 6470, 31 D.L.R. (3d) 1, [1974] S.C.R. 1144 (S.C.C.) — considered

Zameck v. R. (2000), 2000 CarswellNat 3042, [2001] 1 C.T.C. 2586, 2000 CarswellNat 4617 (T.C.C. [Informal Procedure]) — considered

Statutes considered:

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

Generally — referred to

s. 4 — considered

s. 4(2)(b) — considered

s. 4(4) — considered

s. 4(5) — considered

s. 95 — considered

s. 95(1) — considered

s. 95(2) — considered

s. 96 — considered

s. 109(6) — referred to

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

s. 102 — considered

s. 102(6)(b) — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

s. 69 — considered

s. 251(2) "related persons" — considered

Securities Act, R.S.A. 2000, c. S-4

Generally — referred to

s. 1(aa) "insider" — referred to

Words and phrases considered:

arm's length

The term "arm's length" is not defined in the *BIA* [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3]. As discussed, the chambers judge looked at the *Securities Act* [R.S.A. 2000, c. S-4] for guidance on how to interpret this term. We disagree with the chambers judge's approach in this regard. The concept of an "insider" is qualitatively different from the concept of an "arm's length" person.

In our view, the jurisprudence under the *ITA* [*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)] provides appropriate principles for determining whether two parties dealt at arm's length. As a starting point, we note that the definitions of "related persons" and "arm's length" are either similar or identical in ss 4, *BIA* and s 251(2), *ITA*.

Historically, the terms "control" and "arm's length" were introduced to the *Bankruptcy Act* in SC 1966-67, c 32, although neither was then incorporated in the preferences provision. Instead they appeared in a section that addressed "Reviewable Transactions"; that provision is now subsumed in section 96. The Reviewable Transactions provision deemed a transaction reviewable when it occurred otherwise than at arm's length, and it specified that whether parties dealt with each other at arm's length was a matter of fact.

When the terms "control" and "arm's length" were incorporated into the *BIA*, they already existed in the *ITA*: *Duro Lam Ltd. v. Last* (1970), [1971] 2 O.R. 202, 17 D.L.R. (3d) 382 (Ont. S.C.). In that case, the court had to decide whether "control" had the same meaning as in the *ITA* context. Justice Houlden held that when Parliament chose to incorporate the term in the *BIA*, when its meaning had been well-established by case law, it "must have intended to adopt that definition when it used almost identical wording in the *Bankruptcy Act*": at 385. In our view, a similar logic applies to the term "arm's length".

APPEAL from judgment reported at *Piikani Nation v. Piikani Energy Corp.* (2012), (sub nom. *Piikani Energy Corp. (Bankrupt), Re*) 537 A.R. 211, 2012 CarswellAlta 459, 2012 ABQB 187, 88 C.B.R. (5th) 1, 58 Alta. L.R. (5th) 219 (Alta. Q.B.) determining that two directors were not at arm's length to corporation for purposes of payments.

***Per curiam*:**

Introduction

1 This is an appeal by 607385 Alberta Ltd. ("607") and Dale McMullen from a chambers judge's ruling in favour of Alger & Associates Inc. (now Grant Thorton Alger Inc.) ("Alger"), Trustee in Bankruptcy of Piikani Energy Corporation. Alger alleged that certain payments by Piikani Energy to 607 and McMullen were fraudulent preferences and brought an application to set them aside and recover these funds.

Background Facts

2 Pursuant to a 2002 Settlement Agreement, the Piikani Nation agreed to allow a portion of its lands to be used for the development of the Oldman River Dam, which included a hydro-electric power plant. In exchange, the Piikani Nation received $36.3M, which was settled into the Piikani Trust. The Settlement Agreement contemplated, among other things, that the trustee of the Piikani Trust could disburse funds for investment if the Nation and the Piikani Investment Corporation recommended it and that these funds would flow to Piikani Business Entities, which included Piikani Energy.

3 The appellant 607 is a corporation through which Stephanie Ho Lem conducts her consulting business. Both Ho Lem and McMullen were directors of Piikani Investment Corporation between 2003 and 2004, until November 2008. McMullen became one of Piikani Energy's directors in 2005 and its president and CEO on February 1, 2009. Ho Lem became one of Piikani Energy's directors in 2007. She reported to McMullen and did many of the tasks that Piikani Energy's former CEO had conducted. Ho Lem's title was Vice-President and Corporate Secretary.

4 On January 1, 2009, 607 and Piikani Energy entered into a 36-month consulting agreement, which stipulated that 607 would receive an annual consulting fee of $150,000, payable on the first day of each year or as agreed to by the parties.

5 On February 1, 2009, McMullen and Piikani Energy entered into an employment agreement, which set out McMullen's annual salary, as well as severance provisions.

6 In October 2009, ongoing legal battles between the Nation, Piikani Investment, and Piikani Energy led the Nation to apply for the appointment of an investigator for Piikani Investment. Alger was appointed as Piikani Investment's investigator.

7 On December 18, 2009, 13 days before it was due, Piikani Energy paid to 607 as its annual retainer for 2010 the sum of $150,000. Ho Lem (through 607) continued to work for Piikani Energy until July 6, 2010, when Alger terminated the consulting agreement between 607 and Piikani Energy and demanded that Ho Lem repay the unearned portion of $73,150.

8 On December 18, 2009, Piikani Energy also paid McMullen a severance payment of $240,000 pursuant to the employment agreement between McMullen and Piikani Energy.

9 On December 21, 2009, on the Nation's application, the chambers judge named Alger as Piikani Energy's Interim Conservator.

10 On November 20, 2013, Alger assigned Piikani Energy into bankruptcy. It was named trustee in bankruptcy a few days later, and brought the application to have payments to 607 and McMullen voided as fraudulent preferences.

Issues

11 This appeal raises the following issues:

> (a) Did the chambers judge err in holding that McMullen and Ho Lem were not at arm's length to Piikani Energy when those payments were made?
>
> (b) Did the chambers judge err in holding that Piikani Energy was insolvent when it made the impugned payments?

Legislation

12 The following portions of section 4, *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 are relevant to this appeal:

> (2) For the purposes of this Act, persons are related to each other and are "related persons" if they are
>
> (a) [...]
>
> (b) an entity and
>
> (i) a person who controls the entity, if it is controlled by one person,
>
> (ii) a person who is a member of a related group that controls the entity, or
>
> (iii) any person connected in the manner set out in paragraph
>
> (a) to a person described in subparagraph (i) or (ii); or
>
> [...]
>
> (4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.
>
> (5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.

13 Subsections 95(1) and (2) read:

> 95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

> (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.
>
> (2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

14 The current wording of s 95, *BIA* came into force on September 18, 2009. The 2009 amendments created a distinction between arm's length and non-arm's length creditors, which is significant to this appeal for two reasons.

15 First, whether a transaction is at arm's length determines how much of the period before bankruptcy is under scrutiny. An arm's length transaction is reviewable if it occurred within three months before the initial bankruptcy event, while a non-arm's length transaction is reviewable within a year before that event. The timing of the 607 and McMullen payments in this appeal was more than three months, but less than 12 months before the bankruptcy. Therefore, if the payments were at arm's length, they are not subject to review.

16 Second, the amendments eliminate the question of intent for preferences between non-arm's length parties. Before 2009, the fact that an insolvent person's transaction led to a preference in fact gave rise to a presumption that the insolvent person intended that result. But the presumption of intent was rebuttable under section 95(2). In the case of arm's length parties, it still is. However, since the 2009 amendments, intent is no longer a legally-required component of a preference between non-arm's length parties. If a preference arises in fact between non-arm's length parties, it is simply void as against the trustee.

Standard of Review

17 It is a question of fact whether persons not related to one another were dealing with each other at arm's length at a particular time: s 4(4), *BIA*. Questions of fact are reviewable only where there is a palpable and overriding error. The application of a legal standard to a set of facts raises a question of mixed fact and law and is also reviewable on the palpable and overriding error standard: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at para 26. This court will afford deference to the chambers judge's conclusion reached in light of all the relevant facts and through application of the correct legal standard. However, conclusions resting on an incorrect statement of the legal standard can amount to an error of law: *Housen* at para 31. The articulation of the legal standard is reviewed for correctness.

Arm's length determination

(i) The chambers judge's analysis

18 In considering whether Ho Lem and McMullen were dealing at arm's length with Piikani Energy, the chambers judge declined to look for guidance in decisions discussing the meaning of "arm's length transactions" in the context of the *Income Tax Act*, RSC 1985, c 1 (5th Supp). The chambers judge reasoned that the *ITA* provisions dealing with arm's length transactions differ in purpose from the preferences provision in the *BIA*.

19 Having rejected the *ITA* cases, the chambers judge relied on three concepts to conclude that directors generally are not at arm's length with the corporation they serve. First he noted that the definition of "arm's length" for *BIA* purposes is more closely connected with the concept of "insiders" under the *Securities Act*, RSA 2000, c S-4. Second, he noted that a corporate director's fiduciary duties make it difficult to see how a director could be at arm's length. And third, he found it difficult to countenance how "decision-makers could be at arm's length to the corporation when they make

payment decisions, especially to themselves": at para 129. Although the chambers judge recognized that the *BIA* requires an individualized analysis, he ultimately determined that Ho Lem and McMullen were not at arm's length with Piikani Energy, given that they were among its key employees and directors at the relevant time.

(ii) Meaning of "arm's length"

20 The term "arm's length" is not defined in the *BIA*. As discussed, the chambers judge looked at the *Securities Act* for guidance on how to interpret this term. We disagree with the chambers judge's approach in this regard. The concept of an "insider" is qualitatively different from the concept of an "arm's length" person.

21 In our view, the jurisprudence under the *ITA* provides appropriate principles for determining whether two parties dealt at arm's length. As a starting point, we note that the definitions of "related persons" and "arm's length" are either similar or identical in ss 4, *BIA* and s 251(2), *ITA*.

22 Historically, the terms "control" and "arm's length" were introduced to the *Bankruptcy Act* in SC 1966-67, c 32, although neither was then incorporated in the preferences provision. Instead they appeared in a section that addressed "Reviewable Transactions"; that provision is now subsumed in section 96. The Reviewable Transactions provision deemed a transaction reviewable when it occurred otherwise than at arm's length, and it specified that whether parties dealt with each other at arm's length was a matter of fact.

23 When the terms "control" and "arm's length" were incorporated into the *BIA*, they already existed in the *ITA*: *Duro Lam Ltd. v. Last* (1970), [1971] 2 O.R. 202, 17 D.L.R. (3d) 382 (Ont. S.C.). In that case, the court had to decide whether "control" had the same meaning as in the *ITA* context. Justice Houlden held that when Parliament chose to incorporate the term in the *BIA*, when its meaning had been well-established by case law, it "must have intended to adopt that definition when it used almost identical wording in the *Bankruptcy Act*": at 385. In our view, a similar logic applies to the term "arm's length".

24 Moreover, one of the key cases in defining "arm's length" in the *BIA* context drew on the *ITA* for interpretive guidance: *Gingras, Robitaille, Marcoux Ltée v. Beaudry (sub nom. Tremblay, Re* (1980), 36 C.B.R. (N.S.) 111 (C.S. Que.). Although *Tremblay* is sometimes discussed as though it defined the term "arm's length" uniquely in the *BIA* context, Moisan J in fact formulated his definition by referring to s 69, *ITA*.

25 Further, the British Columbia Court of Appeal also looked to *ITA* cases to interpret the meaning of "arm's length": *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.* (1989), 60 D.L.R. (4th) 43 (B.C. C.A.), leave denied (1989), 62 D.L.R. (4th) viii (note) (S.C.C.). In that case, Esson JA, writing for the majority, held that Locke J's opinion in *Minister of National Revenue v. Sheldon's Engineering Ltd.*, [1955] S.C.R. 637 (S.C.C.), "remain[ed] the most authoritative judicial exposition of the term": *Skalbania (Trustee of)* 48.

26 In addition, defining "arm's length" consistently regardless of whether it appears in the *BIA* or *ITA* accords with the view that courts may consider the legislature's "statute book" in giving meaning to a term. This approach relies on the logical assumption that Parliament knows what other statutes say when it passes an enactment, and perhaps even more so when it amends a statute (i.e. the *BIA*) to incorporate a term that has been defined in the courts in another context (i.e. the *ITA*). This approach also minimizes the potential for unnecessary conflicts in interpretation.

27 The Supreme Court recognized the utility of this principle in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 (S.C.C.), at para 30, citing Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008):

> The meaning of words in legislation depends not only on their immediate context but also on a larger context which includes the Act as a whole and the statute book as a whole. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. ... Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred.

28 In *McLarty v. R.*, 2008 SCC 26 (S.C.C.), Rothstein J discussed the term "not dealing at arm's length" in s 69, *ITA*. Justice Rothstein explained that the general concern in non-arm's length transactions is that "there is no assurance that the transaction 'will reflect ordinary commercial dealing between parties acting in their separate interests'": at para 43, citing *Swiss Bank Corp. v. Minister of National Revenue* (1972), [1974] S.C.R. 1144 (S.C.C.), at 1152. Thus, the *ITA* provisions dealing with non-arm's length parties are "intended to preclude artificial transactions from conferring tax benefits on one or more of the parties": at para 43.

29 While Rothstein J held that a court must consider all the relevant circumstances to determine if the parties in a transaction are at arm's length, he also noted that the Canada Revenue Agency Income Tax Interpretation Bulletin IT-419R2 "Meaning of Arm's Length" (June 8, 2004) contains the following "useful criteria that have been developed and accepted by the courts": (i) was there a common mind which directs the bargaining for both parties to a transaction; (ii) were the parties to a transaction acting in concert without separate interests; and (iii) was there *de facto* control: *Swiss Bank Corp.* at para 62.

30 We are of the view that the above mentioned factors provide helpful guidance and apply in the *BIA* context to determine whether, as a question of fact, two parties dealt with each other at arm's length. While some of the definitions offered in past case law, including *Tremblay* and *Skalbania (Trustee of)*, might contain helpful illustrations of these concepts, courts should approach their task of characterizing a relationship between a creditor and a bankrupt in light of these principles.

(iii) Are directors presumed to be non-arm's length with the corporation they serve?

31 The chambers judge placed significant emphasis on Ho Lem's and McMullen's roles as directors of Piikani Energy and on the effect that this role had on whether they were at arm's length with Piikani Energy.

32 In *Gestion Yvan Drouin Inc. c. R.* (2000), 12 B.L.R. (3d) 21 (T.C.C. [General Procedure]) and its companion case, *Zameck v. R.*, [2001] 1 C.T.C. 2586 (T.C.C. [Informal Procedure]), Archambault TCJ considered a corporation's payment of dividends to its shareholding (but non-controlling) directors. Citing the three criteria for assessing whether a transaction occurred at arm's length that the Supreme Court endorsed in *McLarty*, Archambault J held that "in the absence of special circumstances, the fact that a taxpayer was at once a shareholder, a director and an officer of a corporation [does not] necessarily mean [...] that there was a *de facto* non-arm's length relationship between the taxpayer and the corporation": at para 83.

33 The Court in *Del Grande v. R.* (1992), 93 D.T.C. 133 (T.C.C.) reached a similar conclusion. There, Bowman J held that a shareholder, director and officer of a corporation holding 25% of the common shares of the corporation, with an option to acquire a further 25%, nevertheless dealt at arm's length with that corporation: at para 141. He stated:

> Ultimately the question resolves itself into one of fact, whether the relationship between Mr. Del Grande and the two corporations was such that it could be said that he was the directing mind of the corporations or whether he and the McCleery family acted so closely in concert that he exercised a degree of control over the corporations vastly disproportionate to his minority position so as to be able to induce the corporations to confer benefits upon him that they would not otherwise have done.

34 In *Galaxy Sports Inc., Re*, 2004 BCCA 284 (B.C. C.A.), the Court considered the phrase "arm's length" in s 109(6), *BIA*, noting that the term "has generally been defined to mean that there are no bonds of dependence, control or influence, between the corporation and the person in question:" at para. 56. In *Galaxy Sports Inc., Re*, the court overturned a decision that three board members, who did not individually or collectively have a controlling interest, could not vote at a creditors' meeting. That initial decision was based on a view that the directors in question, unlike some directors, were "active managers of the company": 2003 BCSC 493 (B.C. S.C.) at para 11. The Court of Appeal recognized that directors may have some influence over a company by virtue of their position, but ultimately concluded that being a director of a company does not necessarily mean that there is a non-arm's length relationship with the company:

> 56 [The chambers judge] drew a distinction ... between "passive" and "active" directors, finding that Messrs. Watson and Dewar were active managers and that "Each could influence the direction of Galaxy." With respect, I doubt that the *BIA* intended that a distinction be drawn between individual directors on that basis. All directors are required to devote their best efforts to the company's affairs, and every director can by the very nature of his or her office 'influence' those affairs.[...] This does not mean, without more, that each was able to control the company or that the company was dependent on him.

35 While a director might frequently not be at arm's length with the corporation, the *Business Corporations Act*, RSA 2000, c. B-9 recognizes that this is not invariably the case. Section 102 of the *Business Corporations Act* generally requires a director to disclose any conflicts of interest, and to refrain in voting on any related director's resolutions. But the *Act* recognizes a number of exceptions:

> 102(6) A director referred to in subsection (1) shall not vote on any resolution to approve the contract or transaction unless the contract or transaction is [...]
>
> > (b) a contract or transaction relating primarily to the director's remuneration as a director, officer, employee or agent of the corporation or an affiliate, [...]

Section 102(6)(b) recognizes that when directors are negotiating their own compensation (or severance arrangements) their interests are recognizably adverse to those of the corporation. So long as the corporation is represented by independent individuals, the director would be dealing at arm's length in such negotiations.

36 Thus, the fact that a creditor is a director of a company is not in itself a conclusive indicator that he is not acting at arm's length. If Parliament had intended to establish such a presumption, it could easily have done so by including directors within the definition of "related parties".

(iv) Were Ho Lem and McMullen at arm's length with Piikani Energy?

37 As discussed, the finding that Ho Lem and McMullen did not deal with Piikani Energy at arm's length was based on errors of law. The error was in concluding that the concept of "insiders" was relevant, that the jurisprudence under the *ITA* was irrelevant, and that a director could never be at arm's length to the corporation, regardless of the nature of the transaction.

38 The burden of proving preferential treatment was on the Trustee. The chambers judge had limited evidence before him of how the decisions to pay Ho Lem and McMullen arose. He noted that there was no evidence of board meetings, resolutions or corporate actions, nor was there any evidence from any other directors, officers or employees, besides the evidence of the recipients of the payments. However, his ultimate conclusion regarding Ho Lem's and McMullen non-arm's length status is based on his observations that both Ho Lem and McMullen were key employees and together constituted 50% of Piikani Energy's Board of Directors. This latter finding is clearly in error, as Piikani Energy had five directors, not four as the chambers judge found.

39 In our view, the chambers judge erred in concluding that McMullen and Ho Lem were non-arm's length with Piikani Energy. It is difficult to understand how he reached this conclusion in the absence of evidence about Ho Lem's and McMullen's specific roles in making the impugned payments, particularly where Ho Lem and McMullen were only two of five directors and where another director signed McMullen's termination letter. The fact that Ho Lem and McMullen were directors and key employees of Piikani Energy does not on its own lead to the conclusion that they were not acting at arm's length in relation to Piikani Energy with respect to the disputed payments. The chambers judge himself noted that the only evidence about the circumstances of the payments came from Ho Lem and McMullen; there is no suggestion that this evidence was contradicted. Nonetheless, the chambers judge disregarded this evidence and concluded that Ho Lem and McMullen were non-arm's length by reference to their directorship and the timing of the payments. This, in our view, is a reviewable error.

40 The evidence before the chambers judge about the circumstances surrounding the impugned payments consisted of affidavit evidence from McMullen and Ho Lem. The evidence was that the payment to 607 was made approximately two weeks before the payment was due on January 1, 2010, as it was more convenient to transact business before Christmas. Further, the consulting agreement between Piikani Energy and 607 stipulated that the annual fee under that agreement could be paid on January 1, 2010, or on another day agreed to by the parties. This explanation is not entirely implausible, given the impending Christmas season and the fact that businesses often close over the holidays. Further, there is no evidence that Ho Lem had any involvement in or control over the early payment of the annual retainer. Accordingly, we find that Ho Lem was acting at arm's length at the time of the payment to 607.

41 With respect to the payment to McMullen, the evidence was that McMullen's letter of termination was signed by another director. McMullen's severance payment was contemplated in his employment agreement (dated February 1, 2009), which was negotiated well before the date on which his severance was contemplated and the severance payment was made (on December 19, 2009). The evidence was that the letter of termination was authored by someone other than McMullen himself and the severance payment was the consequence of the termination of employment. While McMullen may have played a key role in Piikani Energy, there is no evidence that he directed the payment or that he had any role in his own termination, which would trigger the severance payment. We therefore find that McMullen was at arm's length with Piikani Energy at the time of the severance payment.

Other Issues

42 Given the conclusion that the appellants were dealing at arm's length with Piikani Energy, it is not necessary to consider the many other arguments made. Specifically, it is not necessary to consider whether Piikani Energy was in fact insolvent at the time of the payments. It is also not necessary to consider whether the payments were a "preference". The *BIA* does not make any payment within 12 months of the bankruptcy void, only those that result in a preference. While intention to grant a preference is no longer a requirement, the *BIA* still contemplates that there are payments that can legitimately be made, and others that are improperly preferential.

Conclusion

43 The appeal is allowed, the judgments against the appellants are set aside, and the application of the Trustee is dismissed.

Appeal allowed.

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