

CANADA / JUDGMENT

Kelvin Energy Ltd. v. Lee

[1992] 3 SCR 235

COURT

Supreme Court of Canada

DECIDED

29 October 1992

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Kelvin Energy Ltd. v. Lee

Collection

Supreme Court Judgments

Date

1992-10-29

Report

[1992] 3 SCR 235

Case number

22131

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; Iacobucci, Frank

On appeal from

Quebec

Subjects

Appeal

Civil procedure

Notes

SCC Case Information: 22131

Decision Content

Kelvin Energy Ltd. v. Lee, [1992] 3 S.C.R. 235

Loewen, Ondaatje, McCutcheon & Co. Ltd. Appellant

v.

Frederick H. Sparling Respondent

and

Kelvin Energy Ltd. Mis en cause

and

Jimmy S. H. Lee, Michael John Smith,

Asiamerica Capital Ltd. and

Asiamerica Equities Ltd. Mis en cause

and

Nalcap Holdings Inc. Mis en cause

Indexed as: Kelvin Energy Ltd. v. Lee

File No.: 22131.

1992: May 27; 1992: October 29.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

on appeal from the court of appeal for quebec

Appeal -- Interlocutory judgment -- Canada Business Corporations Act -- Application for oppression remedy filed in Superior Court -- Out-of-court settlement -- Examination for discovery authorized by court -- Whether judgment authorizing examination for discovery appealable as of right under s. 249 of Act -- Applicability of rules of Code of Civil Procedure -- Canada Business Corporations Act, R.S.C., 1985, c. C-44, ss. 241 , 242(2) , 248 , 249 -- Code of Civil Procedure, R.S.Q., c. C-25, arts. 29, 511.

Civil procedure -- Examination for discovery -- Mis en cause authorized by court to summon witnesses for examination on discovery -- Article 397 C.C.P. applicable to mis en cause -- Code of Civil Procedure, R.S.Q., c. C-25, arts. 20, 397 -- Canada Business Corporations Act, R.S.C., 1985, c. C-44, ss. 241 , 242(2) , 248 .

After an application for an oppression remedy, based on s. 241 of the Canada Business Corporations Act , had been filed in the Superior Court, the parties began negotiations which led to a settlement. In his capacity as Director appointed under the Act, the respondent, who was impleaded as a mis en cause, indicated to the court that s. 242(2) of the Act requires that the court approve any settlement or discontinuance of proceedings seeking an oppression remedy and expressed concern that the rights of certain shareholders might be neglected in the settlement.

The respondent accordingly asked the court for authorization to summon two witnesses for an examination on discovery and this motion was granted. The appellant appealed from this decision. The Court of Appeal, in a majority judgment, found that the Superior Court judgment was not appealable as of right and allowed the respondent's motion to dismiss the appeal. This appeal is to determine whether the judgment authorizing the examination for discovery is appealable as of right under s. 249 of the Act. That section provides that "[a]n appeal lies to the court of appeal from any order made by a court under this Act".

Held: The appeal should be dismissed.

Per La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.: While s. 248 of the Canada Business Corporations Act specifically mentions the rules of provincial civil procedure, it does not contain any express general reference so as to make orders made under the Code of Civil Procedure orders covered by s. 249 of the Act. Section 248 confirms in explicit terms the essentially suppletive nature of the rules contained in the Code.

The Superior Court judgment authorizing the examination for discovery is not appealable as of right under s. 249 of the Act. A judgment, whether interlocutory or final, will be appealable as of right under this section only if it was made pursuant to a power expressly conferred by that Act. This interpretation is the only one which is consistent with the actual language of s. 249, which allows only for appeals as of right of orders made "under this Act". In this case, even though the respondent was authorized to examine two witnesses in the general context of an application for the approval of a settlement, provided for in s. 242(2) of the Act, this interlocutory judgment does not thereby become an order made under the Act. The relationship between the power which is in fact exercised and the legislative source must be much closer for s. 249 to apply. An examination authorized to collect information on discovery is different for the purposes of an appeal from an order provided for in s. 242(2). Means and ends must not be confused. In the absence of any express provision to the contrary, those means remain covered by the Code of Civil Procedure rules. In the context of the present case, since the Act does not specify the procedure to be followed to obtain the court's approval, arts. 20 and 397 C.C.P. apply on account of their suppletive nature.

An interpretation whereby a judgment such as that rendered by the Superior Court falls within the right of appeal as of right conferred by s. 249 of the Act would be inconsistent with the philosophy underlying the Act. First, in view of the almost unlimited number of interlocutory judgments that may be rendered in the course of a proceeding, such an interpretation would be contrary to the legislature's primary objective of providing a fast and effective remedy to protect shareholders vulnerable to oppression by the majority. Second, when the function of the court under s. 242(2) of the Act is considered together with the correlative necessity of collecting information in advance, it is clear that this interpretation could only lead to an impeding or paralysation of the function vested in the judiciary. On the contrary, an interpretation in keeping with the purpose of the Act requires that the appeal as of right contribute to the ultimate objective of the accompanying action while taking into account inter alia the effective conduct of the proceeding. Limiting the scope of s. 249 to those judgments arising from a power specifically

conferred by the Act, to the exclusion of the variety of interlocutory decisions made under the Code of Civil Procedure, corresponds exactly with such an objective. This approach has the further merit of being consistent with the right of appeal by leave governed by arts. 29 and 511 C.C.P.

Per Lamer C.J.: Section 248 of the Canada Business Corporations Act incorporates the provincial rules of procedure into that Act and it is on account of this reference that the Code of Civil Procedure rules must be applied in Quebec, not because those rules are suppletive in nature.

The only interpretation of s. 249 which is consistent with the objects of the Act is that which limits the appeal as of right provided for in that section to orders made pursuant to powers specifically conferred by that Act, and excludes interlocutory judgments rendered pursuant to rules of procedure contained in the Code of Civil Procedure which are of general application. The incorporation of the rules set forth in the Code into the Act does not make those rules any less general in scope and accordingly does not make orders made under them subject to the appeal as of right provided for in s. 249 of the Act. Limiting the right of appeal to the powers specifically conferred by this Act furthers the underlying purposes of the Act.

Cases Cited

By L'Heureux-Dubé J.

Referred to: Doyle v. Sparling, [1985] R.D.J. 645; Kruco Inc. v. Kruger, [1986] R.D.J. 69; Kruger Inc. v. Kruco Inc., J.E. 88-833; Tsuru v. Montpetit, J.E. 89-217; Sparling v. Royal Trustco Ltd. (1984), 6 D.L.R. (4th) 682, aff'd [1986] 2 S.C.R. 537; Cockfield Brown Inc. (Trustee of) v. Réseau de Télévision TVA Inc. (1988), 70 C.B.R. (N.S.) 59; In re Plotnick Brothers Ltd. (1961), 2 C.B.R. (N.S.) 126; McKechnie v. Équipement de pollution Hurum Ltée, [1991] R.D.J. 6; Bellman v. Western Approaches Ltd. (1981), 17 B.L.R. 117; Ferguson v. Imax Systems Corp. (1982), 38 O.R. (2d) 59 (Div. Ct.), rev'd (1983), 43 O.R. (2d) 128 (C.A.); Martel v. Chassé, [1975] C.A. 210; Droit de la famille -- 203, [1985] C.A. 339; Droit de la famille -- 572, [1989] R.J.Q. 22; Peacock v. Peacock (1969), 11 O.R. (2d) 764; Gleeson v. Gleeson (1976), 11 O.R. (2d) 757; Wygant v. Wygant (1979), 99 D.L.R. (3d) 154; Cecconi v. Cecconi (1977), 15 O.R. (2d) 142; Re Keho Holdings Ltd. and Noble (1987), 38 D.L.R. (4th) 368; Sparling v. Southam Inc. (1988), 41 B.L.R. 22.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C., 1985, c. B-3, s. 193 .

Bankruptcy Rules, C.R.C. 1978, c. 368, s. 4.

Canada Business Corporations Act, R.S.C., 1985, c. C-44, ss. 238 , 241 , 242(2) , (3) , 248 , 249 .

Code of Civil Procedure, R.S.Q., c. C-25, arts. 20, 29, 55, 59, 65, 152, 397, 511.

Divorce Act, R.S.C., 1985, c. 3 (2nd Supp .), s. 21 .

Authors Cited

Ferland, Denis, Benoît Emery et Jocelyne Tremblay. Précis de procédure civile du Québec. Cowansville: Yvon Blais, 1992.

LeBel, Louis. "L'appel des jugements interlocutoires en procédure civile québécoise" (1986), 17 R.G.D. 391.

Martel, Maurice, et Paul Martel. La compagnie au Québec, vol. I, Les aspects juridiques. Montréal: Wilson & Lafleur/Martel Ltée, 1990.

Peterson, Dennis H. Shareholder Remedies in Canada. Toronto: Butterworths, 1989 (loose-leaf).

APPEAL from a judgment of the Quebec Court of Appeal, [1990] R.J.Q. 1825, allowing a motion to dismiss an appeal from a Superior Court judgment. Appeal dismissed.

Jack Greenstein, Q.C., for the appellant.

Pierre Bourque, Q.C., and Eugène Czolij, for the respondent.

Michel Robert, Q.C., for the mis en cause Nalcap Holdings Inc.

//Lamer C.J.//

English version of the judgment delivered by

Lamer C.J. -- I have read the reasons of Justice L'Heureux-Dubé and, while I concur in her conclusion, I cannot adopt quite the same reasoning. I am of the view that in the context of the Canada Business Corporations Act, R.S.C., 1985, c. C-44, the rules in the Code of Civil Procedure, R.S.Q., c. C-25, do not have a suppletive effect, since Parliament incorporated these rules into the Canada Business Corporations Act by s. 248 of that Act.

I do not in any way question the principle that, where the federal legislation is silent, provincial procedural legislation applies in a suppletive manner to matters falling within federal legislative jurisdiction. This principle applies only where the legislation is silent, however, and that is not the situation here. Parliament has expressly provided that in the context of the Canada Business Corporations Act, provincial rules of procedure will apply, and it is on account of this reference that the Code of Civil Procedure rules must be applied in Quebec, not because those rules are suppletive in nature.

It is true that in the circumstances of the instant appeal this distinction is of limited practical interest, since in the absence of the reference in s. 248 of the Act the rules set out in the Code of Civil Procedure would in any case have to be applied in Quebec on a suppletive basis. This Court's decision is liable to apply in other circumstances, however, where denial of the existence of a reference would have more significant consequences.

This having been said, it does not follow that the reasoning of Nichols J.A. of the Quebec Court of Appeal, [1990] R.J.Q. 1825, should be adopted. He considered that in s. 248 of the Canada Business Corporations Act Parliament had incorporated the Code of Civil Procedure rules in its own legislation [translation] ". . . as if they were written therein" (p. 1829). He indicated that in such a

case [translation] ". . . the federal legislation should be read by interpreting its provisions in light of each other, as if the provincial rules were part of it" (p. 1830). Accordingly, in Nichols J.A.'s view, s. 249 of the Canada Business Corporations Act , which provides that "[a]n appeal lies to the court of appeal from any order made by a court under this Act", covers decisions made under the Code of Civil Procedure, which has been incorporated into the Canada Business Corporations Act , as well as decisions rendered specifically under that Act.

Although, like Nichols J.A., I consider that s. 248 of the Canada Business Corporations Act incorporates the rules of the Code of Civil Procedure into that Act, I do not agree with the interpretation proposed by Nichols J.A. of s. 249 of the Canada Business Corporations Act . In my opinion, Nichols J.A. is adopting an unduly literal interpretation of the phrase "this Act" in s. 249 . There is indeed a rule of interpretation to the effect that the various provisions of a statute should be interpreted in light of each other. With respect, however, that rule should not be applied mechanically, and while it is true that the statute forms a unified whole, which is presumed to be coherent, it is also true that the Act should always be given the interpretation which will achieve its purpose.

In this connection, the only interpretation of s. 249 which seems to me to be consistent with the objects of the Canada Business Corporations Act is that which limits the appeal as of right provided for in that section to orders made pursuant to powers specifically conferred by the Canada Business Corporations Act , and excludes interlocutory judgments rendered pursuant to rules of procedure contained in the Code of Civil Procedure which are of general application. The incorporation of the rules set forth in the Code of Civil Procedure into the Canada Business Corporations Act does not make those rules any less general in scope and accordingly does not make orders made under those rules subject to the appeal as of right provided for in s. 249 of the Canada Business Corporations Act .

I concur in the analysis of L'Heureux-Dubé J. regarding the need to limit the right of appeal to the powers specifically conferred by the Canada Business Corporations Act in order to further the underlying purposes of the Act. In particular, I am of the view that Parliament did not intend to give the parties the right to appeal from all the interlocutory decisions which might be rendered during a proceeding, while at the same time seeking to provide a particularly fast and effective remedy for certain classes of persons, including minority shareholders.

For these reasons, I would dismiss the appeal with costs.

//L'Heureux-Dubé J.//

The judgment of La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. was delivered by

L'Heureux-Dubé J. -- This appeal concerns the interpretation of s. 249 of the Canada Business Corporations Act, R.S.C., 1985, c. C-44 ("C.B.C.A. "). In particular, the question is whether under that provision a judgment of the Quebec Superior Court authorizing an examination for discovery is appealable as of right.

Facts

In November 1988, Kelvin Energy Ltd. ("Kelvin") filed an amended application for an oppression remedy under s. 234 C.B.C.A. (now s. 241). During the months preceding the application Kelvin had purchased a large number of voting shares in Nalcap Holdings Inc. ("Nalcap") with a view to controlling it. Kelvin had also made a takeover bid which was opposed by the Nalcap management and its majority shareholders and which was quashed by the court shortly before the application was filed.

The application was heard on November 21, 1988 and was adjourned until January 4, 1989. It was alleged that two members of the board of directors, Jimmy Lee and Michael John Smith, had breached their fiduciary duties to Nalcap and its shareholders by persuading the board of directors to acquire shares of Paramount Funding Ltd. ("Paramount") from the appellant at a price above the market price. Kelvin asked that Lee and Smith be removed from the board of directors and that they repay Nalcap the money spent to purchase the shares of Paramount. On January 4, 1989 the parties informed the court that negotiations were under way to reach a settlement and it was possible that the action would be dropped. An adjournment was granted and a settlement between the parties was confirmed on January 11, 1989. Kelvin had negotiated the sale of all its Nalcap shares and so had no further interest in the proceeding. The court was not presented with any document setting out the terms of the settlement.

In his capacity as Director appointed to carry out the duties and to exercise the powers conferred upon him by the Canada Business Corporations Act , Sparling was a party to the proceedings from the outset because of his continuing interest in the affairs of Nalcap. When the possibility of settlement was first mentioned, his counsel reminded the court that s. 242(2) C.B.C.A. requires that the court approve any settlement or discontinuance of proceedings seeking an oppression remedy. He expressed concern that the rights of the other Nalcap shareholders might be neglected in the settlement concluded between the parties and obtained an order that the application be adjourned sine die and that Sparling be authorized to examine Lee and Smith out of court. The appellant was not present when these submissions were made and it was admitted that the court's authorization did not create any precedent binding on the appellant. Mr. Lee's deposition was taken on June 6, 1989.

Relying on this testimony, Sparling asked the court for authorization to summon two witnesses for an examination on discovery: the appellant's president Robert Atkinson and a Paramount representative, Stephen Sharpe. Gomery J. of the Quebec Superior Court granted the motion on January 4, 1990.

The appellant appealed from this decision and also filed an application for leave to appeal *de bene esse*. By a judgment dated February 9, 1990, Rothman J.A. of the Quebec Court of Appeal dismissed the application for leave to appeal as follows:

[translation] I am far from persuaded that the order made by Gomery J. is an appealable order. If it were appealable, I am convinced that it would be appealable de plano and not with leave to appeal pursuant to art. 29 C.C.P.

This decision was not appealed.

A motion by Sparling to dismiss the appeal brought as of right was allowed by the Court of Appeal, which dismissed the appellant's appeal on July 12, 1990. It is that judgment which is now appealed before us.

Judgments

Superior Court (Montreal, No. 500-05-012429-880, January 4, 1990)

By a judgment dated January 4, 1990, the Superior Court authorized the examination on discovery of Messrs. Atkinson and Sharpe. Referring to the Code of Civil Procedure, R.S.Q., c. C-25 ("C.C.P."), Gomery J. wrote:

Procedure in matters governed by the Act is left to the usual rules in effect in the province in which an application is presented, except to the extent that the court otherwise orders (s. 248). Art. 397(4) of the Code of Civil Procedure permits the examination of any person upon all facts relating to the issues between the parties, if the permission of the court is obtained.

After considering Sparling's responsibilities as Director appointed under the Canada Business Corporations Act and the fact that the settlement had not yet been submitted to the court, Gomery J. concluded that additional information could only clarify the order he would eventually be required to make under s. 242(2) C.B.C.A.

Court of Appeal, [1990] R.J.Q. 1825

Beauregard J.A. was of the view that the judgment on appeal was of the same nature as those referred to in *Doyle v. Sparling*, [1985] R.D.J. 645 (C.A.), *Kruco Inc. v. Kruger*, [1986] R.D.J. 69 (C.A.), and *Kruger Inc. v. Kruco Inc.*, C.A. Montreal, No. 500-09-000151-886, April 29, 1988, J.E. 88-833, and granted the motion to dismiss the respondent's appeal (at p. 1827):

[translation] In my humble opinion, this judgment may be likened to an interlocutory judgment of the Superior Court authorizing one party to examine another or a third party so that the person's testimony may be used in the hearing on the principal issue. This type of judgment is a matter of pure procedure, is not of the type which the Superior Court is called upon to make pursuant to the powers it derives specifically from the Canada Business Corporations Act , and accordingly cannot be the subject of an appeal without leave of a judge of the Court.

Malouf J.A. concurred with Beauregard J.A.'s conclusion, but emphasized that the conclusion was consistent with the purpose of the provisions of the Canada Business Corporations Act (at p. 1828):

By enacting sections 242 to 248 of the Canada Business Corporations Act , Parliament decided to grant relief to a certain class of people particularly minority shareholders. The Court is given extensive powers to correct any action that is "oppressive or fairly [sic] prejudicial to the applicant". Under section 248 the application "may be made in a summary manner by petition, originating notice of motion, or otherwise as the rules of the court provide . . .". I place much emphasis on the words "summary manner".

Although section 249 permits an appeal from any order made by a Court under the Act, Parliament could not have intended that judgments of the nature rendered by the Court below would fall under this section. It is clear to me that Parliament intended to avoid unnecessary delays such as would occur if every interlocutory order was appealable de plano.

In his dissent, Nichols J.A. declined to follow the Court of Appeal's earlier decisions. He noted that, through s. 248 C.B.C.A. , Parliament had incorporated by reference the Code of Civil Procedure rules in the Canada Business Corporations Act (at pp. 1829-30):

[translation] By allowing a court to have recourse to the rules of procedure in effect in its province, Parliament in my opinion is incorporating those rules in its own legislation as if they were written therein.

In that case, the federal legislation should be read by interpreting its provisions in light of each other, as if the provincial rules were part of it.

Accordingly, when the legislation under review contains a provision as general as s. 249, stating that "(a)n appeal lies to the court of appeal from any order made by a court under this Act", an order made under a rule of practice or procedure incorporated in the legislation by reference also becomes an "order made by a court under this Act".

Nichols J.A. therefore concluded, unlike Beauregard and Malouf JJ.A., that the Superior Court judgment was appealable as of right.

Issue

The only issue in this Court is whether the judgment authorizing the examination on discovery of Messrs. Atkinson and Sharpe is an "order" made under the Canada Business Corporations Act within the meaning given to that expression in s. 249 C.B.C.A.

Analysis

Since this case raises the question of the applicability of the rules of the Code of Civil Procedure, I will first examine the general application of these rules in the framework of an action under the Canada Business Corporations Act . This approach will make clear both the choice made by Parliament, and the points at issue here.

Application of the Rules of Civil Procedure

The scope of the Code of Civil Procedure rules is well summarized by Maurice and Paul Martel:

[translation] The fundamental principle is the following: in Quebec it is the Code of Civil Procedure which takes precedence, unless there is an express provision to the contrary in the Canada Business Corporations Act . In the event of a conflict between the federal statute and the Code of Civil Procedure, the former must take precedence.

(La compagnie au Québec, vol. I, Les aspects juridiques (1990), at p. 798.21.)

The provisions of the Code of Civil Procedure therefore apply on a suppletive basis during the proceedings, unless Parliament has expressly provided to the contrary (Doyle v. Sparling, supra, at p. 648, and Tsuru v. Montpetit, Sup. Ct. Montreal, No. 500-05-011706-882, November 29, 1988, J.E. 89-217, at p. 12). Without attempting to list all the rules of civil procedure excluded by the Canada Business Corporations Act , it will suffice to mention by way of example arts. 55 and 59 regarding sufficient interest (as opposed to s. 238 C.B.C.A.) and arts. 65 and 152 dealing with security (as opposed to s. 242(3) C.B.C.A. : see Tsuru v. Montpetit, supra).

Further, s. 248 C.B.C.A. specifically mentions the rules of civil procedure. This provision reads as follows:

248. [Summary application to court] Where this Act states that a person may apply to a court, the application may be made in a summary manner by petition, originating notice of motion, or otherwise as the rules of the court provide, and subject to any order respecting notice to interested parties or costs, or any other order the court thinks fit. [Emphasis added.]

With respect, I cannot concur in the view of Nichols J.A. that the foregoing section incorporates by reference the rules of the Code of Civil Procedure into the Canada Business Corporations Act so as to make orders made under the Code orders pursuant to the Act covered by s. 249 .

On the one hand, s. 248 C.B.C.A. deals primarily with the procedure for making an application to the court (see the reasons of Cory J.A., as he then was, in Sparling v. Royal Trustco Ltd. (1984), 6 D.L.R. (4th) 682 (Ont. C.A.), at pp. 691-92, affirmed by this Court at [1986] 2 S.C.R. 537). It does not contain any express general reference. We may compare this with s. 4 of the Bankruptcy Rules, C.R.C. 1978, c. 368, which reads:

4. The practice of the court in civil actions or matters, including the practice in chambers, shall, in cases not provided for by the Act or these Rules, and so far as it is applicable and not inconsistent with the Act or these Rules, apply to all proceedings under the Act or these Rules.

On the other hand, s. 248 C.B.C.A. should be read in conjunction with s. 249 C.B.C.A. which, for reasons I shall discuss later, must be understood as applying only to judgments rendered pursuant to powers expressly conferred by the Canada Business Corporations Act . Thus, s. 248 confirms in explicit terms the essentially suppletive nature of the rules contained in the Code of Civil Procedure. That being the case as regards the right of appeal, it seems to me that the proper approach should be the following: it must be determined whether or not, in light of the relevant provisions of the Canada Business Corporations Act , the trial judgment is governed by the right of appeal set out therein. If the judgment is not so governed, the rules of civil procedure will

apply on account of their suppletive nature. Following this approach, arts. 29 and 511 C.C.P., which require leave of a judge of the Court of Appeal in the case of an interlocutory judgment, will govern the appeal from that judgment.

The Trial Judgment and the Canada Business Corporations Act

The following provisions of the Canada Business Corporations Act , found in Part XX, entitled "remedies, offences and punishment", are relevant:

242. . . .

(2) [Court approval to discontinue] An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given on such terms as the court thinks fit and, if the court determines that the interests of any complainant may be substantially affected by such stay, discontinuance, settlement or dismissal, the court may order any party to the application or action to give notice to the complainant.

249. [Appeal] An appeal lies to the court of appeal from any order made by a court under this Act.

Additionally, arts. 29 and 511 C.C.P. govern appeals from an interlocutory judgment:

29. An appeal also lies, in accordance with article 511, from an interlocutory judgment of the Superior Court or the Court of Québec but, as regards youth matters, only in a matter of adoption:

- (1) when it in part decides the issues;
- (2) when it orders the doing of anything which cannot be remedied by the final judgment; or
- (3) when it unnecessarily delays the trial of the suit.

However, an interlocutory judgment rendered during the trial cannot be appealed immediately and it cannot be put in question except on appeal from the final judgment, unless it disallows an objection to evidence based upon article 308 of this Code or on section 9 of the Charter of human rights and freedoms (chapter C-12), or unless it allows an objection to evidence.

Any judgment is deemed to be interlocutory which is rendered during the suit before the final judgment.

511. An appeal lies from an interlocutory judgment only on leave granted by a judge of the Court of Appeal if he is of opinion that the case is one that is contemplated in article 29 and that the pursuit of justice requires that leave be granted; the judge must then order the continuation or suspension of the proceedings in first instance.

The cases relied on by the majority in the Court of Appeal hold that s. 249 C.B.C.A. applies only to judgments rendered pursuant to powers expressly conferred by the Canada Business Corporations Act (*Doyle v. Sparling*, *Kruco Inc. v. Kruger and Kruger Inc. v. Kruco Inc.*, *supra*). Since the reasons in *Doyle* form the basis for the subsequent decisions, I will limit myself to a discussion of those reasons.

In that case, the Court of Appeal was dealing with an appeal from a trial judgment dismissing five preliminary exceptions made by the appellant. The latter argued that s. 249 C.B.C.A. (formerly s. 242) was drafted in broad enough language to cover any judgment rendered in proceedings instituted under the Canada Business Corporations Act . *Montgomery J.A.* rejected this argument (at p. 649):

There is no question that the judgements a quo are interlocutory and that, under the Code of Civil Procedure, no appeal would lie against them without leave (article 511). The burden is then upon Appellant to show that there is some other applicable provision of law giving him the right to appeal without leave. I cannot find that he has established this. The Canada Business Corporations Act appears to be designed, in part, to enable certain classes of people, notably minority shareholders, to take quick action to obtain an order to protect their rights. In my opinion, Parliament did not intend them to create the possibility of frustrating these rights by giving a greater right of appeal against interlocutory judgments than that granted by provincial law,. We have here interlocutory judgments based on the Civil Code and the Code of Civil Procedure, not orders under the Act. [Emphasis added.]

I entirely concur in this conclusion. In my opinion, this conclusion follows from an interpretation which is supported both by the wording of the provision and by the philosophy underlying the Canada Business Corporations Act .

1. Section 249 C.B.C.A.

First, it seems to me that this interpretation is the only one which is consistent with the actual language of s. 249 C.B.C.A. This section allows only for appeals of orders made "under this Act". Unlike certain provisions governing appeals in other federal statutes, this provision thus does not derogate from the provincial rules in broad and express language. By way of comparison I refer to s. 193 of the Bankruptcy Act, R.S.C., 1985, c. B-3 . This provision reads as follows:

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
- (a) if the point at issue involves future rights;
 - (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
 - (c) if the property involved in the appeal exceeds in value five hundred dollars;

- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

Bisson C.J., dissenting on another point, distinguished the two provisions by stressing the general nature of the foregoing section: *Cockfield Brown Inc. (Trustee of) v. Réseau de Télévision TVA Inc.* (1988), 70 C.B.R. (N.S.) 59, at p. 65. Unlike s. 249 C.B.C.A., s. 193 of the Bankruptcy Act does not specify that the trial judgment must have been rendered under any particular piece of legislation.

However, the absence of any distinction based on the interlocutory or final nature of the judgment in question is a common feature of both provisions: *In re Plotnick Brothers Ltd.* (1961), 2 C.B.R. (N.S.) 126 (Que. Q.B.). The courts have thus confirmed that the scope of s. 249 C.B.C.A. is not limited to a final judgment rendered under a power expressly conferred by the Act: *McKechnie v. Équipement de pollution Hurum Ltée*, [1991] R.D.J. 6 (C.A.), *Bellman v. Western Approaches Ltd.* (1981), 17 B.L.R. 117 (B.C.C.A.), and *Ferguson v. Imax Systems Corp.* (1982), 38 O.R. (2d) 59 (Div. Ct.). In the last case, the judgment being appealed was interlocutory in nature and took the form of an order expressly provided for in s. 190(21) C.B.C.A. (formerly s. 184(21)). This made it appealable as of right. I therefore cannot subscribe to the appellant's arguments that this decision has moved away from *Montgomery J.A.*'s conclusion in *Doyle*. As I see it, the interlocutory nature of the order is quite consistent with the language of s. 249 C.B.C.A.: the criterion it sets out is not whether the judgment in question is interlocutory or final, but the legislative origins of the power from which the judgment is derived.

McKechnie v. Équipement de pollution Hurum Ltée, *supra*, illustrates this principle. Dealing with an application for leave to appeal from a judgment rendered pursuant to s. 241(3) (a) C.B.C.A., *Brossard J.A.* first reviewed the distinction analyzed above (at p. 8):

[translation] I would have had no hesitation in granting leave to appeal if this had been a judgment which by its nature required such leave.

Unfortunately for the applicants, that is not the case. Section 249 of the Canada Business Corporations Act provides that an appeal lies from any order made under that Act. On many occasions in recent years, this Court has interpreted that provision as conferring a *de plano* right of appeal from any judgment rendered by virtue of the authority expressly conferred by the Act, as opposed to judgments rendered on points of procedure or in an interlocutory proceeding under the provisions of the Code of Civil Procedure.

After reviewing the principles set out in *Doyle v. Sparling*, *Kruco Inc. v. Kruger*, *supra*, and the Court of Appeal decision now before this Court, *Brossard J.A.* concluded (at p. 8):

[translation] It seems beyond question in the case at bar that the order against which an appeal is sought is one made by virtue of the powers "specially" conferred on the trial judge by s. 241(3) (a), which reads as follows:

- (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
 - (a) an order restraining the conduct complained of . . .

This judgment is therefore appealable as of right under s. 249 of the said Act.

The scope of s. 249 C.B.C.A. is thus clearly circumscribed. Any judgment, whether interlocutory or final, will be appealable as of right provided it was made pursuant to a power expressly conferred by the Canada Business Corporations Act . That being so, it becomes essential to determine the legislative origin of the power exercised by the trial judge. Counsel for the appellant relied heavily in this regard on s. 21 of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp .) (formerly s. 17), and on the interpretation to the effect that the legislative source of the power exercised does not affect the right of appeal de plano set out therein: see the opinion of Montgomery J.A. in *Martel v. Chassé*, [1975] C.A. 210, at p. 211; *Droit de la famille -- 203*, [1985] C.A. 339, and *Droit de la famille -- 572*, [1989] R.J.Q. 22 (C.A.). While expressing no opinion on this question, it does not seem that the scope of s. 21 has been definitely settled (see, for example, *Peacock v. Peacock*, Ont. C.A., November 13, 1969 (reproduced at 11 O.R. (2d) 764)); *Gleeson v. Gleeson* (1976), 11 O.R. (2d) 757 (Div. Ct.); *Wygant v. Wygant* (1979), 99 D.L.R. (3d) 154 (Ont. C.A.), and *Cecconi v. Cecconi* (1977), 15 O.R. (2d) 142 (C.A.), at p. 144). Furthermore, if there were to be a jurisprudential dispute on this point, it would arise in the particular context of the Divorce Act . In the circumstances of the case at bar it does not appear necessary or desirable to go beyond the Canada Business Corporations Act .

In his argument in this Court, counsel for the appellant also pointed out that art. 397 C.C.P. does not provide for any examination on discovery at the request of a *mis en cause* (which Sparling was at trial). This provision reads as follows:

397. The defendant may, before the filing of the defence and after one clear day's notice to the attorneys of the other parties, summon to be examined before the judge or prothonotary upon all facts relating to the issues between the parties or to give communication and allow copy to be made of any document relating to the issues:
- (1) the plaintiff, or his agent, employee or officer;
 - (2) in any civil liability action, the victim, and any person involved in the commission of the act which caused the damage;
 - (3) the person for whom the plaintiff claims as tutor or curator, or for whom he acts as *prête-nom*, or whose rights he has acquired by transfer, subrogation or other similar title;
 - (4) with the permission of the court and on such conditions as it may determine, any other person.

The examination must be held within the delay allowed for the filing of the defence, unless the permission of the judge, prothonotary or, in the case referred to in subparagraph 4 of the first paragraph, the court, is obtained. [Emphasis added.]

Counsel argued that, when this provision is considered along with the absence of Code of Civil Procedure provisions relating to the approval of an out-of-court settlement by the court, one is led to the conclusion that the legislative source of the trial judgment is to be found in s. 242(2) C.B.C.A.

I cannot agree. First, the presence of the word "defendant" in art. 397 C.C.P. does not have the effect of barring a mis en cause from relying on this provision. To say the contrary would amount to denying any concrete effect to art. 20 C.C.P., which reads as follows:

20. Whenever this Code contains no provision for exercising any right, any proceeding may be adopted which is not inconsistent with this Code or with some other provision of law.

Moreover, although the respondent was authorized to examine Atkinson and Sharpe in the general context of an application for the approval of a settlement, this interlocutory judgment does not thereby become an order made under the Canada Business Corporations Act . The relationship between the power which is in fact exercised and the legislative source must, in my opinion, be much closer for s. 249 C.B.C.A. to apply. For example, if the trial judge had approved or rejected the proposed settlement, this would have been an order which, under s. 242(2) C.B.C.A. , derived its source from a power specifically conferred by the Canada Business Corporations Act . On the other hand, saying that an examination authorized to collect information on discovery is no different for the purposes of an appeal from an order provided for in the provision in question amounts to confusing means and ends. In the absence of any express provision to the contrary, those means remain covered by the Code of Civil Procedure rules. In the context of the case at bar, since the Canada Business Corporations Act does not specify the procedure to be followed to obtain the court's approval, arts. 20 and 397 C.C.P. apply on account of their suppletive nature.

I therefore conclude that this textual argument does not stand up to analysis. Quite apart from the wording of the provision, an examination of the philosophy underlying the Canada Business Corporations Act reinforces this conclusion.

2. The Philosophy Underlying the Canada Business Corporations Act

While the action under s. 241 C.B.C.A. was discontinued in this case, the remedy provided for in s. 241 C.B.C.A. occupies a special place in the Canada Business Corporations Act . That provision reads as follows:

241.(1) [Application to court re oppression] A complainant may apply to a court for an order under this section.

- (2) [Grounds] If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

- (a) any act or omission of the corporation or any of its affiliates effects a result,
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

- (3) [Powers of court] In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

- (a) an order restraining the conduct complained of;
- (b) an order appointing a receiver or receiver-manager;
- (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
- (d) an order directing an issue or exchange of securities;
- (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
- (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
- (g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for securities;
- (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
- (i) an order requiring the corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
- (j) an order compensating an aggrieved person;
- (k) an order directing rectification of the registers or other records of a corporation under section 243;
- (l) an order liquidating and dissolving the corporation;
- (m) an order directing an investigation under Part XIX to be made; and
- (n) an order requiring the trial of any issue.

D. H. Peterson summarizes the basis of this action as follows:

The oppression remedy may be considered the Charter of Rights and Freedoms of corporate law. It is a relatively new creature of statute, so it is little developed. It is broad and flexible, allowing any type of corporate activity to be the subject of judicial scrutiny. The potential protection it offers corporate stakeholders is awesome. Nevertheless, the legislative intent of the oppression remedy is to balance the interests of those claiming rights from the corporation against the ability of management to conduct business in an efficient manner. The remedy is appropriate only where, as a result of corporate activity, there is some discrimination or unfair dealing amongst corporate stakeholders, a breach of a legal or equitable right, or appropriation of corporate property.

(Shareholder Remedies in Canada (1989), [SS] 18.1, at p. 18.1.)

This remedy thus requires an interpretation consistent with its purpose. Cory J.A., as he then was, summarized this principle in *Sparling v. Royal Trustco Ltd.*, *supra*, at p. 693:

Here the C.B.C.A. has sought to provide a remedy. An interpretation which gives effect to the remedy is preferable to one which seeks to restrict or eliminate the remedial provision of the Act.

And at p. 694:

Where a statute provides a remedy, its scope should not be unduly restricted. Rather, the courts should seek to provide the means to effect that remedy.

(See to the same effect *Re Ferguson and Imax Systems Corp.* (1983), 43 O.R. (2d) 128 (C.A.), at p. 137, and *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374.)

Further, as Malouf J.A. points out in his reasons, the fact that applications under the Canada Business Corporations Act may be made in a summary manner (s. 248 C.B.C.A.) is indicative of the legislative purpose. The procedural formalities are tied to the effectiveness underlying the remedy available to the aggrieved shareholder.

Finally, these rules cannot be separated from s. 242(2) C.B.C.A. , since, for the purposes of this provision, a discontinuance of the action gives rise to intervention by the court. The function assigned to the court derives from the same objective, which is the protection of the rights of shareholders:

In deciding whether or not to approve a proposed settlement under s. 235(2) [now 242(2)] of the Act, the Court must be satisfied that the proposal is fair and reasonable to all shareholders. In considering these matters, the Court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.

In cases such as this, it is not the Court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the Court's function to litigate the merits of the action. I would also state that it is not the function of the Court to simply rubber-stamp the proposal.

The Court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement. [Emphasis added.]

(Sparling v. Southam Inc. (1988), 41 B.L.R. 22 (Ont. H.C.), at pp. 28-29.)

An interpretation whereby a judgment such as that in the present case falls within the right of appeal de plano conferred by s. 249 C.B.C.A. , seems to me at the very least to be inconsistent with the foregoing.

First, in view of the almost unlimited number of interlocutory judgments that may be rendered in the course of a proceeding, such an interpretation would be contrary to the legislature's primary objective of providing a fast and effective remedy to protect shareholders vulnerable to oppression by the majority. Second, when the function of the court under s. 242(2) C.B.C.A. is considered together with the correlative necessity of collecting information in advance, it is clear that this interpretation could only lead to an impeding if not a paralysation of the function vested in the judiciary.

On the contrary, an interpretation in keeping with the purpose of the Canada Business Corporations Act requires that the de plano appeal contribute to the ultimate objective of the accompanying action while taking into account inter alia the effective conduct of the proceeding. Limiting the scope of s. 249 C.B.C.A. to those judgments arising from a power specifically conferred by the Canada Business Corporations Act , to the exclusion of the variety of interlocutory decisions made under the Code of Civil Procedure, corresponds exactly with such an objective. This approach has the further merit of being consistent with the right of appeal by leave governed by arts. 29 and 511 C.C.P. As LeBel J.A. explains:

[translation] Each chapter of the Code of Civil Procedure is liable to give rise to various judicial decisions, and, from time to time, the wish to appeal and obtain a decision from another level of jurisdiction.

The Code of Civil Procedure does not intend all such interlocutory decisions to be subject to appeal. It only makes provision for an appeal in the three cases described in art. 29. As we have seen, the decision in question must be one which in part disposes of the issue or which cannot be remedied by the final judgment or which entails unnecessary delay in the trial. The right of appeal depends not on an abstract classification of judgments, but on their concrete effect on the conduct of the proceeding. [Emphasis added.]

("L'appel des jugements interlocutoires en procédure civile québécoise" (1986), 17 R.G.D. 391, at p. 399.)

(See also D. Ferland, B. Emery and J. Tremblay, Précis de procédure civile du Québec (1992), at pp. 29-33.)

Moreover, this factor cannot be separated from the condition stated in art. 511 C.C.P. that the pursuit of justice must require that leave to appeal be granted. Accordingly, the relationship between the objective of the Canada Business Corporations Act and that of arts. 29 and 511 C.C.P. seems to me not only consistent but closely complementary.

Aside from the purpose of the Canada Business Corporations Act , the interpretation set out above is in keeping with sound judicial policy as it contributes to the effective administration of justice. Callaghan A.C.J.H.C. (as he then was) summarizes as follows the approach the courts should favour with respect to s. 242(2) C.B.C.A. :

In approaching this matter, I believe it should be observed at the outset that the Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system. [Emphasis added.]

(Sparling v. Southam Inc., supra, at p. 28.)

Bearing in mind the inherent connection between the right of appeal and the effective conduct of the proceeding, I consider that this factor plays an equally key role in the context of s. 249 C.B.C.A. and the remedial actions associated with it.

Conclusion

For all these reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Mackenzie Gervais, Montréal.

Solicitors for the respondent: Desjardins Ducharme, Montréal.

Solicitors for the mis en cause Nalcap Holdings Inc.: Langlois Robert, Montréal.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/924/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kelvin-energy-ltd-v-lee-1992>

Prepared on 26 October 2026 · Esheria