

CANADA / JUDGMENT

Nesmont Precious Metals Corporation (Re)

2001 BCSC 1240

COURT

Supreme Court of British Columbia

DECIDED

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2001 BCSC 1240 Docket:

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Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE COMPANY ACT,

R.S.B.C. 1979, c. 59

and:

IN THE MATTER OF
THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.s.c. 1985, c. C-36

and:

IN THE MATTER OF:

NESMONT PRECIOUS METALS CORPORATION AND
INTERNATIONAL NESMONT INDUSTRIAL CORPORATION
PETITIONERS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE LYNN SMITH

(IN CHAMBERS)

Counsel for Brink's Inc.: R.W. Grant

M.J. Westphal

Counsel for the Petitioners: J.W. Bilawich

Place and Date of Hearing: Vancouver, BC

November 23, 2000,

April 27, 2001, June 27, 2001

INTRODUCTION:

- [1] The issue in this appeal from the order of a Master is entitlement to 3,900 fine troy ounces of silver. The petitioners ("Nesmont"), owners of the silver, obtained an order in 1994 under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA"), at a time when Brink's Inc. ("Brink's") had the silver in its Los Angeles office pursuant to an agreement between the two parties. Brink's claims that it is entitled to set off the value of the silver against money owed to it by Nesmont under that agreement. Brink's claims in the alternative that Nesmont is estopped from seeking the return of the silver.

BACKGROUND:

- [2] The two petitioners will together be referred to as "Nesmont" and will be treated as the same entity. Nesmont was a producer of silver. Nesmont and Brink's agreed on October 29, 1993 that Brink's would provide "window vault services" to Nesmont. Under this arrangement, Brink's was to pick up the silver from Nesmont, store it, and act as Nesmont's sales agent. There is no suggestion that property in the silver passed to Brink's. Instead, a client who wished to purchase silver from Nesmont could come to one of Brink's locations with a cashier's cheque. A copy of the cheque would be faxed to Nesmont, which would confirm the funds to cover the cheque and then give approval for Brink's to deliver the silver to the client at the window, receive the cheque and deposit it in Nesmont's account. Nesmont would pay fees to Brink's for each transaction and for storage and transportation.
- [3] On August 22, 1994 Nesmont brought a petition under the CCAA. Mr. Justice Harvey made the initial order on August 24, 1994. The order permitted Nesmont to file a formal plan of compromise or arrangement under the CCAA and the Company Act, R.S.B.C. 1979, c. 59. One of the terms of the initial order is:

[A]ll persons, firms, corporations and other entities are restrained from exercising any extra-judicial remedy against the Petitioner, including the registration or re-registration of any securities owned by the Petitioner into the name of such persons, firms, corporations or other entities or their nominees, the exercise of any voting rights attached to securities owned by the Petitioner, any right of distress, repossession, set off or consolidation of accounts in relation to amounts due or accruing due in respect of or arising from any indebtedness or obligation of the Petitioner as at the Filing Date;

The initial order also stated:

THIS COURT SEEKS AND REQUESTS the aid and recognition of any court or administrative body in any province of Canada and the Federal Court of Canada and any administrative tribunal or other court constituted pursuant to the authority of the Parliament of Canada and any Federal or State court or administrative body in the United States of America or any other foreign courts and administrative bodies to act in aid of and to be complementary to this Court in carrying out the terms of this Order including, without limitation, assisting the Petitioner in:

- (a) obtaining the return of its property, monies and assets; and
 - (b) avoiding or setting aside any payments or dispositions of its property, monies or assets made with the intent of (sic) effect of depriving the Petitioner of the benefit of such property, monies or assets or benefiting a third party at the expense of the Petitioner and its creditors.
- [4] The initial order was made without notice to Brink's. On August 22, 1994, Nesmont owed Brink's \$37,247.24 US in unpaid fees, and Brink's held 3,900 fine troy ounces of Nesmont's silver at its Los Angeles storage facility. On that date, the silver was worth \$20,475.00 US.
- [5] On a number of occasions in September and October of 1994, Mr. John Williams, Controller of Nesmont, contacted Brink's and demanded the return of the silver. However, Brink's, which is a United States corporation, took the position that under U.S. law it was entitled to retain the silver in Los Angeles to offset Nesmont's debt. As well, Brink's took the position that it was entitled to a set-off under Canadian law. Nesmont claimed that Brink's was not entitled to exercise any right of set-off.
- [6] On March 10, 1995, Madam Justice Allan approved the amended reorganization plan of Nesmont.
- [7] On March 21, 1995, Brink's submitted a proof of claim in the CCAA proceeding, claiming \$37,487.24 US for services rendered to Nesmont. The proof of claim attaches copies of the unpaid invoices. It does not make a claim to set off the silver against the amount owed to Brink's.
- [8] John Williams wrote to Ann M. Flannery of Brink's on May 1, 1995. This letter is of importance and I will quote it in its entirety:

Re: Disallowance of Claim on Claim Filed for \$37,487.24 USD

We have adjudicated your proof of claim as filed and we are disallowing \$37,487.24 USD of the claim, thereby reducing the total of your claim to \$0.00. Your claim has been disallowed in its entirety as Mr. Charles Krammer of your New York office has refused to release our silver on hand at you [sic] Los Angeles distribution centre. Mr. Krammer has repeatedly claimed that US Bankruptcy Law, which we believe is not applicable in this situation, allowed such an offset.

You are not required to respond to this letter unless you choose to object to the adjudication and disallowance. If you object to the adjudication or have any other questions, please contact the writer within 30 days of receipt of this letter.

Yours very truly, ...

- [9] The letter is silent as to whether Nesmont considered that it was retaining its right to claim re-possession of the silver from Brink's. Mr. Richard Eskew, Manager of Precious Metals for the Global Services Division for Brink's, deposed that Nesmont at no time advised of any dispute with Brink's claim other than that regarding Brink's withholding of the silver; it did not dispute the invoices or the total amount of Brink's bill. He also deposed that, so far as he was aware, Brink's was not entitled to vote with respect to the proposed restructuring of Nesmont and Brink's had not received any dividend or distribution of shares in accordance with the plan of arrangement approved in the proceedings.
- [10] On November 9, 1995, Nesmont obtained an order from the United States Bankruptcy Court enforcing the initial CCAA order. Its wording regarding set-off claims is similar to that in the Canadian order.
- [11] There was a long hiatus. More than four years after the letter disallowing Brink's proof of claim, Nesmont's solicitors wrote to Brink's and demanded that it return the silver pursuant to both the initial CCAA order and the United States Bankruptcy Court order. It followed up with an application to this Court.
- [12] On June 29, 2000, Master Baker ordered Brink's to return the silver to Nesmont. Brink's did not immediately do so, but appealed the Master's order on October 19, 2000. Nesmont took the position that Brink's could not proceed with the appeal until it obeyed the order. Nesmont brought proceedings for contempt of court. Those proceedings and the appeal came before me. On November 23, 2000, I ordered that the appeal was not to be heard until Brink's had complied with Master Baker's order or had posted security with the court equivalent to the market value of the silver as of November 23, 2000.
- [13] On April 27, 2001, the parties appeared before me again. Nesmont objected that Brink's still had not complied with the order under appeal nor had it posted security with the court. I ordered that Brink's deliver the silver to Nesmont by May 4, 2001; otherwise its appeal from Master Baker's order would be dismissed. Later on April 27, 2001, Brink's did deliver the silver to Nesmont's agent. Counsel advised at the June 27, 2001 hearing that Nesmont had sold the silver for \$17,023.50 US.

ISSUES:

1. Is the Brink's appeal moot?
2. What is the power of the court on this appeal from a Master's order?
3. Does Brink's have the right to legal or equitable set-off with respect to the silver?
4. Is Nesmont estopped from seeking the return of the silver?

ANALYSIS:

1. Is the Brink's appeal moot?

[14] Nesmont's position is that the appeal is moot because there is no longer a live controversy between the parties. Mr. Bilawich for Nesmont submitted that because the relief Brink's seeks is an order setting aside Master Baker's order for the return of the silver, silver which was returned to Nesmont on April 27, 2001, and then sold, the dispute is now purely academic. He referred to *Borowski v. Canada (A.G.)*, [1989] 1 S.C.R. 342 and said that here "the essential ingredient" for Brink's claim against the silver (its possession of the silver) was lost when Brink's gave up possession. He argued that Brink's has brought this circumstance upon itself by neither applying for a stay of Master Baker's order nor posting security, and instead giving up possession of the silver.

[15] I am not persuaded by this argument. I think that there is a live controversy between the parties. Indeed, as counsel for Brink's suggested, it would be a startling result if whenever a plaintiff succeeds at trial and the defendant does not seek a stay but obeys the order and for example, pays money to the plaintiff, the appeal then becomes moot. Since Master Baker pronounced his order in June 2000, Nesmont has insisted that Brink's turn over the silver before being allowed to proceed with its appeal. It is my view that there remains a live issue between the parties as to whether Brink's or Nesmont was entitled to the silver, and that this court is still in a position to grant a remedy such as an order requiring Nesmont to compensate Brink's for the silver's value.

2. What is the power of the court on this appeal from a Master's order?

[16] It was common ground that this appeal is a rehearing, that it is open to the appellant to raise arguments that were not made to the Master, and that the burden is on the petitioners to satisfy me that Nesmont should have an order for possession of the silver.

3. Does Brink's have the right to legal or equitable set-off with respect to the silver?

(a) In general

[17] The initial order pronounced by Mr. Justice Harvey states that all persons and incorporations are "restrained from exercising any extra-judicial remedy against the Petitioner, including ... any right of ... set off ... in relation to amounts due or accruing due in respect of or arising from any indebtedness or obligation of the Petitioner as at" August 22, 1994.

[18] Brink's position is that, nevertheless, Brink's does have the right to set off the value of the silver. Mr. Grant for Brink's argued that the court orders made in these proceedings, both in the United States and Canada, are not conclusive with respect to Brink's right to assert set-off regarding the silver. He argued that the prohibitions on set-off only apply to debts arising after the petition or order. He referred to *728835 Ontario Ltd., Re* (1998), 3 C.B.R. (4th) 211 (Ont. Gen. Div.) in which Mr. Justice Lederman, considering section 97(3) of the Bankruptcy

and Insolvency Act, R.S.C. 1985, c. B-3 (which, in wording very similar to that of section 18.1 of the CCAA, specifically preserves the right of set-off) stated at paras. 5-6:

It is customary in a Proposal to provide that creditors shall have no right of setoff. As pointed out by Houlden & Morawetz in Bankruptcy and Insolvency Law of Canada at p. 4-98:

This is done to prevent creditors from purchasing goods from the debtor after the date of the proposal and claiming a right of setoff.

The authors emphasize at p. 2-168 that the prohibition as to set-off relates to debts arising after making a Proposal.

In view of section 97(3) and because the mutual debts in question here existed prior to the date of the Notice of Intention to file a Proposal, Cantel may assert rights of setoff.

[19] The Ontario Court of Appeal at (1998), 3 C.B.R. (4th) 214 upheld the trial decision. It stated at para. 4:

Accordingly, in our view, Lederman J. correctly concluded that Cantel could exercise its right of set-off. The appellant cannot point to any case where a creditor in the position of Cantel was prohibited from exercising a right of set-off that it had contracted for with the debtor. The cases relied on by the appellant concerned debts arising after bankruptcy.

[20] A possible distinction between 728835 Ontario Ltd. and the case before me is that in the former case, the issue regarding set-off arose much earlier, at the time the applicant filed a Notice of Intention to make a Proposal. Cantel objected to an order being made that would restrain it from exercising any right of set-off as against amounts due or accruing due to the applicant. As well, the case involved a contractual right of set-off as opposed to a legal or equitable set-off. Mr. Grant submitted, however, that the same statutory and policy considerations apply. His position was that the policy behind the CCAA is to promote the orderly and fair treatment of creditors, including the recognition of offsetting claims by creditors where those claims arise in the context of past transactions between the parties rather than in ex post facto attempts to manoeuvre one creditor into a situation of preference over others. He argued that this policy is also reflected in s. 97(3) of the Bankruptcy and Insolvency Act, which states that the "law of set-off applies ... except in so far as any claim for set-off is affected by the provisions of this Act respecting frauds or fraudulent preferences".

[21] Mr. Bilawich on behalf of Nesmont argued that the purpose of the CCAA, which is to promote the orderly and fair treatment of all creditors, is undermined if particular creditors are allowed to take positions that are advantageous to them but prejudicial to other creditors. He relied on *Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.) and *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C.C.A.), affirming (1990), 2 C.B.R. (3d) 291 (B.C.S.C.).

[22] In *Meridian Developments*, Mr. Justice Wachowich described the purpose of the CCAA and of ex parte orders restraining proceedings against the debtor company as follows (at p. 114):

This order is in accord with the general aim of the Companies' Creditors Arrangement Act. The intention was to prevent any manoeuvres for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed.

The order was obviously intended to cast a wide net and catch all creditors.

[23] In *Quintette*, the petitioner coal mining company had obtained protection under the CCAA. As in the present case, the initial order provided that there would be no relief by way of set-off. Nippon Steel was involved in contracts with Quintette for the ongoing purchase of Quintette's coal production. As a result of an arbitration regarding pricing, it was determined that Quintette had overcharged Nippon Steel for past deliveries and now owed Nippon Steel a refund of \$46 million. Quintette continued to supply coal to Nippon Steel and Nippon Steel purported to set off what it owed for those deliveries against the refund Quintette owed Nippon Steel for past deliveries. The Court of Appeal agreed with the chambers judge that the set-off should not be permitted, based on the discretionary power to restrain proceedings against the debtor company pursuant to s. 11 of the CCAA. Gibbs J.A. reviewed numerous decisions dealing with the intent and purpose of the CCAA, including *Meridian Developments*, and concluded at pp. 311-12:

[I]t would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra-judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period. The power is discretionary and therefore to be exercised judicially. It would be a reasonable expectation that it would be extremely unlikely that the power would be exercised where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries, whereas it would not be unlikely when the result would be to enforce payment for goods thereafter taken from, or services thereafter received from, the debtor company, as the case is here.

[24] Gibbs J.A. then stated that the order of the chambers judge denying the claimant a right of set-off was in accord with the intent and purpose of the CCAA. He quoted with approval the following passage at p. 297 of the Supreme Court judgment:

I must look to the overall intention of the Act ... Unless there is a sound legal principle for doing so, I must not carve out one portion of the order and give an advantage to one creditor over another.

- [25] Mr. Bilawich emphasized this statement in his written argument. He submitted that it was within Mr. Justice Harvey's discretion to disallow any claim of set-off against Nesmont in the initial order. The gist of the argument appeared to be that permitting Brink's to succeed in its set-off claim would be unfair to other creditors and thus inconsistent with the purpose of the CCAA.
- [26] Whether or not Brink's has a valid claim for legal or equitable set-off under the appropriate tests is an issue that I will address below. But can it make a claim at all, given the wording of the order made by Harvey J. in 1994?
- [27] Section 18.1 of the CCAA was introduced in 1997 when the CCAA was substantially amended by An Act to Amend the Bankruptcy And Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, S.C. 1997, c. 12. Section 125 of the amending statute added sections 18.1 through 18.6 to the CCAA. Section 18.1 of the CCAA preserves the right of set-off in CCAA proceedings. It reads:

18.1 Law of Set-off to Apply - The law of set-off applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

Section 125 of the amending statute (and thus s. 18.1 of the CCAA) came into force on September 30, 1997, well after the 1994 order in this case.

- [28] In *Re Blue Range Resource Corp.*, [2000] 11 W.W.R. 117 (Alta. C.A.), the court seemed to suggest at pp. 121-22 that s. 18.1 of the CCAA had changed the law regarding proceedings against companies under CCAA protection. In overruling the decision of the chambers judge in *Blue Range*, who had relied on the decision of the chambers judge in *Quintette*, the Alberta Court of Appeal remarked that *Quintette* had been decided before s. 18.1 came into force (thus suggesting that the result in *Quintette* may have been different if s. 18.1 had been in effect). The court stated at p. 121:

The chambers judge noted that *Quintette* was decided prior to the enactment of s. 18.1 of the CCAA ... This section was added to the CCAA in 1997 and the chambers judge recognized that even if the application of set-off had the result of preferring one creditor over others, parliament, by enacting s. 18.1, made the decision that the general law of set-off is to apply in CCAA proceedings. It is apparent that the chambers judge had difficulty with this concept and was clearly of the view that allowing set-off was contrary to the purposes of insolvency legislation.

The court found that the transactions at issue were so closely connected that it would be unfair in the circumstances to deny the claim for equitable set-off. In this respect, the result in *Blue Range* is different than that in *Quintette* because of a difference in the degree of connection of the relevant obligations, not because of a difference in the state of the law of set-off. In *Blue Range*, the respondent company was a producer of natural gas, and the applicants had long term contracts with the respondent for the purchase of its gas supply. The applicants were in debt to

the respondent for past deliveries of gas, and, after the respondent obtained CCAA protection and terminated its gas supply contracts, the applicants sought to set off anticipated damages for breach of those contracts against the payments owed. The Alberta Court of Appeal permitted this set-off despite the fact that the initial order in the CCAA proceeding prohibited the exercise of any right of set-off.

- [29] The court in *Blue Range* referred to and followed the decision of the Court of Appeal of this province in *Cam-Net Communications v. Vancouver Telephone Co.* (1999), 71 B.C.L.R. (3d) 226 (C.A.). In that case, Cam-Net had provided long distance telephone services to Vancouver Telephone, and claimed that Vancouver Telephone owed it payments of over \$500,000 for those services. Cam-Net sued the defendant in debt in November, 1996. Cam-Net sought and obtained CCAA protection in January, 1997, and the initial order purported to prevent its creditors from exercising any right of set-off. Vancouver Telephone filed its defence to the debt claim later in January, 1997, alleging an equitable set-off based on breaches of contract by Cam-Net. All of these events occurred before the coming into force of s. 18.1. Nonetheless, the Court of Appeal in its decision of December 1999 held that the defence of equitable set-off was, in principle, available to the defendant. Madam Justice Rowles held (at pp. 240-41), without any reference to s. 18.1, that the fact that the issue arose in a CCAA context was irrelevant. On the facts of the case, the Court of Appeal disagreed with the chambers judge, who had ruled that the pleadings did "not disclose a true set-off". Rowles J.A. held that the obligations in question were so closely connected that it would be unfair to separate them and to disallow a defence of equitable set-off.
- [30] Cam-Net supports the view that the law of set-off did apply and does apply in a CCAA context, even in the absence of s. 18.1. The policy considerations important to the court's decision are evident in this passage at pp. 240-41:

Does the fact that the issue arises in the context of a CCAA reorganization make any difference in this case? In my view, it does not. Far from raising competing policy concerns, it appears to me that the existence of the CCAA reorganization and compromise illustrates why the doctrine of equitable set-off must be given its full and proper reach in the present case.

As the jurisprudence discussed above explains, the doctrine of equitable set-off seeks to perform in essence a single task: to distinguish, on one hand, separable and independent cross-claims from, on the other hand, those which equity and justice cannot countenance separating. Thus, if a claim by the defendant is found under the jurisprudence to be properly an equitable set-off, then it follows that it would be inequitable and unjust to treat the plaintiff's claim in isolation from it. In the case at bar, the fact that the CCAA compromise would discount the appellant's set-off claim only increases the importance of the court's ensuring that a valid claim of equitable set-off is recognized and treated as such. If it is not, then the injustice of separating the two claims will be all the more suffered by the appellant.

Equitable set-off, operating as it does as a true defence, is really a means of denying the plaintiff's claim in whole or in part and is not an attempt to raise an independent claim of the sort which should be compromised in a CCAA reorganization. If the appellant fails to show that its claim is truly an equitable set-off, then its claim would be an independent action which must be compromised by the CCAA plan. In either event the doctrine of equitable set-off should be given its proper reach in the context of a CCAA reorganization.

- [31] If I am correct that Cam-Net holds that, at least with respect to equitable set-off (which is what was at issue in the case), the enactment of s. 18.1 in 1997 did not alter the legal position of one who claims set-off relating to events prior to the CCAA order, then it does not matter that s. 18.1 was not in existence at the time the order was made in the case before me. Based on Cam-Net and *Re 728835 Ontario Ltd.*, I conclude that Brink's claims of both legal and equitable set-off should be considered.
- [32] Is there a valid claim of set-off here? In brief, a right of set-off may arise by agreement (contractual set-off), by law (legal set-off), or in equity (equitable set-off). Contractual set-off is irrelevant in this case because it is not suggested that there was an agreement regarding set-off.
- [33] The Supreme Court of Canada in *Telford v. Holt* (1987), 41 D.L.R. (4th) 385 set out the legal principles governing the two other forms of set-off. Citing with approval *Canadian Imperial Bank of Commerce v. Tucker Industries Inc.; Benyan & Co., Claimant* (1983), 46 B.C.L.R. 8 (C.A.) at p. 10, Madam Justice Wilson, for the court, held at p. 393 that a right of legal set-off requires that both obligations be debts and that they be mutual cross-obligations. The mutual debts must be obligations from either party to the other for liquidated sums. Continuing at p. 394, Madam Justice Wilson observed that equitable set-off can apply where the element of mutuality is lost or never existed, and where the cross obligations are not debts. She stated that equitable set-off "is available where there is a claim for a money sum whether liquidated or unliquidated". At pp. 398-99, she cited with apparent approval the following principles of equitable set-off set out by Macfarlane J.A. in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689 (B.C.C.A.) at p. 696-97:
1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands...
 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed...
 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim...
 4. The plaintiff's claim and the cross-claim need not arise out of the same contract...
 5. Unliquidated claims are on the same footing as liquidated claims...

[34] It is on this basis that the courts in *Blue Range* and *Cam-Net* determined that the respective applicants were entitled to set off anticipated damages for the debtor company's breach of contract against amounts owed to the debtor company. In both cases, the courts held that the first, second, fourth and fifth elements of equitable set-off as set out in *Coba Industries* and *Telford v. Holt* were satisfied. The courts focused on the third element, examining whether the "close connection" or "degree of interrelatedness" of the obligations warranted an equitable set-off. At p. 123 of *Blue Range*, the court stated:

The important point for invoking equitable set-off is the close connection of the transactions. Would it be manifestly unjust to require [the applicants] to pay the cost of the February and March deliveries in view of the fact that they will suffer significant losses due to the early termination of the same contract that called for the delivery of the gas in February and March? In our view, such a requirement would be unjust.

[35] Similarly, Rowles J.A. concluded at pp. 240-41 of *Cam-Net*:

The authorities are clear that a defendant's claim will not be viewed as an equitable set-off (as opposed to a counterclaim) unless it is closely or intimately connected with, or directly impeaches, the plaintiff's claim. ... In the present case, the appellant's claim does appear intimately connected with that of *Cam-Net*. The appellant has alleged damages caused by *Cam-Net*'s breach of the very contract and of the very obligations on which [*Cam-Net*] seeks to recover payment.

...

In the present case it appears to me that the claims are closely related, and that the appellant's claim directly impeaches the plaintiff's demands for payment.

[36] Mr. Bilawich for *Nesmont* argued that no form of set-off is available to *Brink's* because it is being wielded in this case as a "sword" rather than a "shield": *Nesmont* was not pursuing *Brink's* for breach of a contractual duty to supply silver, or for payments - it was simply asking for the return of property it already owned. Nor, he urged, was it claiming the silver because of the agreement with *Brink's*, given that it already owned the silver.

[37] He relied on *Quintette*, where the Court of Appeal held that set-off was only available as a defence and that, since *Quintette* had not sued for the amounts withheld, the Japanese companies had not been put in the position where they could raise a set-off defence.

[38] I am not persuaded by the argument that *Brink's* is using set-off as a "sword". *Nesmont* did demand the return of the silver and did go to court in pursuit of that demand, obtaining the Order on June 29, 2000 that the silver be returned to it. It was in response to that demand and action that *Brink's* has claimed set-off. I will proceed to consider whether the claim here meets the criteria established for either legal or equitable set-off.

(b) Legal set-off

- [39] Were there mutual debts, entitling Brink's to claim legal set-off? In *Telford v. Holt*, Madam Justice Wilson quoted from Halsbury's Laws of England, 4th ed., vol. 42, para. 421 regarding set-off at law (or statutory set-off):
421. Nature of the right. The right conferred by the Statutes of Set-off was a right to set off mutual debts arising from transactions of a different nature which were due and payable and could be ascertained with certainty at the time of pleading. Thus no legal set-off could exist against a claim which sounded in unliquidated or uncertain damages, nor could a claim which sounded in such damages be set off at law against a plaintiff's claim. The fact that a claim was framed in damages precluded the raising of a set-off at law, notwithstanding that the claim might have been differently framed in a way which would have permitted such a set-off. Where a claim for a liquidated debt was joined by a plaintiff with a claim for damages, set-off at law might only be pleaded in defence to the former claim. Set-off at law operates as a defence.
- [40] Wilson J. described the term "mutual debts" by referring to *Royal Trust v. Holden* (1915), 22 D.L.R. 660 (B.C.C.A.), where it was held at pp. 662-63 that "'mutual debts' mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading". Professor Dunlop, in *Creditor-Debtor Law in Canada*, 2nd ed. (Toronto: Carswell, 1995) at p. 16 describes a debt as "an obligation to pay a sum certain or a sum readily reducible to a certainty" which "may or may not depend on an express or implied contract, depending on the context in which the word is used". Mr. Bilawich argued that Nesmont's demand for the return of the silver was neither a demand for a liquidated sum nor a money demand which could be ascertained with certainty at the time of pleading. Mr. Grant's position, however, was that courts have not exhaustively defined what claims can constitute debts for the purposes of set-off. He suggested that the policy rationale behind the defence of legal set-off is satisfied wherever the amount of the set-off is ascertainable with certainty. He further argued that silver is a publicly traded commodity whose value can be determined with certainty at any time; thus, it should be treated the same way as money.
- [41] I am not prepared to interpret the term "debt" with extreme elasticity simply because it arises in the context of set-off. I am not persuaded that Nesmont's claim against Brink's is a claim in debt. In my view, the "window vault services" arrangement between Nesmont and Brink's did not involve Nesmont becoming a creditor of Brink's. Nesmont did not grant a loan of silver to Brink's. On the contrary, it placed its silver in the hands of Brink's. Brink's was obliged to keep the silver safe and deliver it only to persons who had completed transactions of purchase and sale with Nesmont. The exact legal description of the relationship between the parties is not at issue; the issue is whether the relationship was one of debtor-creditor. Brink's might be considered an agent, a trustee, or a bailee, but not a debtor. In my view, calling its obligation to return Nesmont's property a "debt" stretches the concept of debt too far.

- [42] Mr. Grant pointed to *Can. Commercial Bank v. Parlee McLaws* (1989), 72 C.B.R. (N.S.) 39 (Alta. Q.B.), where it was held that certain funds held in a solicitor's account constituted a debt to the client rather than a trust obligation. In my view, that case was decided on very particular facts. First, the case involved funds held in an account, not physical objects held in a vault. Second, the court began with the general observation that a trust obligation and a debt obligation are fundamentally inconsistent and held at pp. 44-45 that funds which are actually held in trust cannot be subject to a set-off.
- [43] I conclude that Brink's, when demanding return of the silver, was seeking repossession of that which it already owned and had placed in the hands of Brink's as agent, trustee, or bailee. It was not attempting to recover a debt due to it. Thus, Brink's is not entitled to a legal set-off.
- (c) Equitable set-off
- [44] Is Brink's entitled to equitable set-off? Mr. Grant for Brink's argued that the elements necessary for equitable set-off are present in this case. For convenience, I repeat what those elements are (as set out in *Telford v. Holt*):
1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands...
 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed...
 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim...
 4. The plaintiff's claim and the cross-claim need not arise out of the same contract...
 5. Unliquidated claims are on the same footing as liquidated claims...
- [45] Counsel submitted that the essence of the arrangement between these parties was that Brink's would transport, keep safe, and deliver Nesmont's silver, assuming the risks inherent in such functions. In return, Nesmont would pay the agreed fees. He urged that it would be inequitable to permit Nesmont to claim the return of the silver while owing Brink's far more than its value for Brink's past services relating to the silver.
- [46] Mr. Bilawich argued that there could not be equitable set-off here since it only applies where there are cross-claims for money sums, whether liquidated or unliquidated. He referred to *Telford v. Holt* at p. 394 where Wilson J. stated that "[e]quitable set-off is available where there is a claim for a money sum whether liquidated or unliquidated ...", citing *Aboussafy v. Abacus Cities Ltd.* (1981), 124 D.L.R. (3d) 150 (Alta. C.A.).

[47] The requirement that both claims be for money sums is stated by the Supreme Court of Canada and counsel did not bring to my attention any case in which equitable set-off has been extended beyond the ambit of claims for sums of money. Nor have my own researches disclosed any instance in which a claim such as the one in this case, for the return of chattels, has been accepted as a basis for equitable set-off against a sum of money.

[48] Although the claim seems otherwise to meet the criteria set out in *Telford v. Holt*, including the crucial requirement that there is a "close connection" between the claims, it does not meet this preliminary requirement that the claims be for sums of money, whether liquidated or unliquidated. I find that Brink's cannot assert equitable set-off.

4. Is Nesmont estopped from seeking the return of the silver?

[49] Brink's argued in the alternative that Nesmont is estopped from both valuing Brink's proof of claim at zero and seeking the return of (or retaining) the silver. Counsel referred to the following statements by Mr. Justice Sopinka, for the court, in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at p. 57:

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

[50] This statement of the law contemplates either words or conduct as promises and representations. Another general statement concerning promissory estoppel appears in *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607 at p. 615, where Mr. Justice Ritchie wrote:

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

[51] In the present case, is there evidence that Nesmont "entered into a course of negotiation", whether by words or conduct, which led Brink's to believe that Nesmont would not both deny Brink's proof of claim and seek return of the silver? Second, did Brink's reasonably rely on that representation or promise so as to change its legal position?

[52] Counsel for Brink's pointed to the May 1, 1995 letter from Mr. Williams as the source of the representation or promise. In that letter, Mr. Williams wrote that Nesmont had disallowed the entirety of Brink's claim, stating "[y]our claim has been disallowed in its entirety as Mr. Charles Krammer of your New York office has refused to release our silver" [emphasis mine]. The word "as" in that sentence connotes "because" or "since". Mr. Williams provided no other

reason why the proof of claim had been denied. According to the letter, the claim was denied because Brink's had not given up possession of the silver. This indicates either that Nesmont viewed the two obligations as related or that Nesmont was simply acting out of petulance. I find the former to be more probable. Later in the May 1, 1995 letter, Mr. Williams informed Brink's that "[y]ou are not required to respond to this letter unless you choose to object to the adjudication and disallowance". He did not state that Nesmont was preserving its right to seek return of the silver. I agree with counsel for Brink's that a logical interpretation of the May 1, 1995 letter was that Nesmont, while not admitting that Brink's had a valid set-off, disallowed the proof of claim on the basis that Brink's claim was satisfied by its retention of the silver.

- [53] Mr. Bilawich pointed to the fact that in the letter, Mr. Williams did not overtly promise not to pursue Brink's for the silver. However, the law of promissory estoppel does not require an overt promise by way of words. In my view, the letter constituted a "course of negotiations" which led Brink's to believe that Nesmont would not seek return of the silver.
- [54] This view of the letter is strongly reinforced by subsequent conduct of Nesmont. Between May, 1995 and August, 1999 Nesmont did not communicate with Brink's and made no demands to obtain the silver. Although it obtained the U.S. Order on November 9, 1995 it made no effort to enforce it against Brink's until August 24, 1999. This four year period of silence constituted a course of conduct that must have confirmed Brink's belief that Nesmont was satisfied with the trade-off of its silver for Brink's claim.
- [55] As to the element of reliance, counsel for Brink's argued that it is apparent that Brink's relied on Nesmont's representation or promise in that it did not appeal Nesmont's disallowance of its proof of claim. Mr. Grant submitted that Brink's changed its legal position by risking the loss of its right to appeal and to participate in any payments to creditors pursuant to Nesmont's plan of arrangement.
- [56] On the other hand, Mr. Bilawich argued that Brink's did not rely on the letter or Nesmont's subsequent course of conduct; rather, Brink's took the view that it had a greater advantage holding on to the silver than it would have had if it returned the silver as requested and taken part in the CCAA proceedings. He argued that there is an absence of evidence showing reliance by Brink's, and thus that Brink's has failed to establish an essential piece of the factual basis for its argument in promissory estoppel.
- [57] The evidence as to the state of mind of Brink's is in the affidavit of Mr. Eskew. He deposed: that Nesmont at no time disputed Brink's proof of claim, although it disputed Brink's withholding the silver; that Brink's was not entitled to vote with respect to the proposed restructuring of Nesmont; and that Brink's has not received any dividend or distribution of shares in accordance with the plan of arrangement approved in the CCAA proceedings.
- [58] It is common ground that Brink's did not appeal the disallowance of its proof of claim in the substantial period of time following the disallowance. In my view, this is an adequate factual basis upon which to conclude that Brink's relied on Nesmont's promise or representation in

the May 1, 1995 letter. If Nesmont had sought return of the silver soon after the disallowance of claim, presumably Brink's would have raised the set-off arguments that it raised in this application, and if it had been ordered to return the silver to Nesmont, it would have appealed the disallowance of its proof of claim. Brink's accepted that state of affairs based on Nesmont's course of conduct and changed its legal position by not appealing the disallowance of its proof of claim.

- [59] Counsel for Nesmont also argued that Brink's was attempting to gain an advantage for itself by operating outside the CCAA process and thus Brink's was the author of its own misfortune if it found itself with neither a valid proof of claim nor the silver. He referred me to *Lindsay v. Transtec Canada Ltd.* (1994), 99 B.C.L.R. (2d) 73 (S.C.), where a creditor had intentionally delayed presenting his claim to a company under CCAA protection until after approval of the plan. When the creditor tried subsequently to obtain leave to commence an action against the protected company in order to obtain a judgment for an amount greater than he would have received as a general creditor under the plan, Huddart J. (as she then was) held that the creditor was bound by the plan and its provisions extinguished his claim. She commented at p. 92:

As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything.

- [60] In contrast, counsel for Brink's argued that it was Nesmont that acted inequitably, by seeking to avoid making any payment to Brink's of the undisputed debts represented by the proof of claim, while seeking to retain the silver. Whether or not that argument has merit, I am not persuaded that Brink's conduct disentitles it from making the estoppel argument. Brink's did not attempt to remain outside the CCAA process; it provided a proof of claim which was rejected. Further, it did not "lie in the weeds" with respect to its claims of set-off, but raised them from the outset.
- [61] I conclude that Nesmont is estopped from resiling from its May 1, 1995 position that Brink's would keep the silver but not participate as a creditor in the CCAA proceedings.

CONCLUSION:

- [62] Nesmont's course of conduct estops it from seeking the return of the silver, and thus from retaining the silver or its value. Brink's appeal is allowed, and Nesmont is ordered to pay Brink's the equivalent market value of 3,900 fine troy ounces of silver as at the final date of the hearing, June 27, 2001.
- [63] As to costs, there has been mixed success. Brink's was unsuccessful in its arguments regarding set-off. It succeeded in its estoppel argument, which was raised for the first time late in these proceedings. Brink's prolonged these proceedings substantially by not complying with the Master's order or with my order of November 23, 2000. In these circumstances, each party should bear its own costs.

"Lynn Smith, J."

The Honourable Madam Justice Lynn Smith

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