
CANADA / JUDGMENT

SR Telecom & Co. v. Apex - Micro Manufacturing

2008 BCSC 1768

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1768 SR Telecom & Co. v. Apex - Micro Manufacturing Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

SR Telecom & Co. v. Apex - Micro Manufacturing Corporation ,

2008 BCSC 1768

Date:20081222

Docket: SO86953

Registry: Vancouver

Between:

SR Télécom & Co., S.E.C.

Plaintiff

And

Apex - Micro Manufacturing Corporation

Defendant

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

Counsel for the Plaintiff:

David R. Brown

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Counsel for the Defendant:

J. Kenneth McEwan, Q.C.

Gib van Ert

Date and Place of Trial/Hearing:

Vancouver, B.C.

INTRODUCTION

- [1] This application is brought pursuant to Rule 46(4) of the Rules of Court and s. 57(1) of the Law and Equity Act, R.S.B.C. 1996, c. 253. The plaintiff SR Telecom & Co., S.E.C. ("SRT") seeks an order that the defendant Apex - Micro Manufacturing Corporation ("Apex") return to it certain chattels (the "disputed property") belonging to SRT but currently in Apex's possession.
- [2] There is no dispute that the disputed property has at all times been the property of SRX or SRT, despite Apex's actual possession. Apex purports to hold the items as security for a debt owed by SRT to Apex pursuant to an outstanding invoice for approximately \$1.48 million.
- [3] Apex is not opposed in principle to returning the disputed property to SRT and, indeed, claims to have offered several times to hand it all back in return for replacement security, but SRT has refused to give any security. Apex contends that the reason for SRT's refusal to provide a letter of credit or other security is not only because SRT is unwilling, but because it is unable.

FACTS

- [4] SRT's business is the design and marketing of broadband wireless access parts, including wireless telecommunication devices known as customer premises equipment ("CPEs"). SRT does not itself assemble the CPEs. Instead it outsources the job to other companies, including Apex. Apex assembles the CPEs from components provided by SRT and other third party sources.
- [5] SRT acquired the disputed property, through an asset purchase agreement with another company dated April 4, 2008 (the "APA") and an assignment agreement, also dated April 4, 2008. It had previously belonged to SR Telecom Inc., now called SRX Post Holdings Ltd ("SRX"), which had for some time been operating under the protection of the Companies' Creditors Arrangement Act ("CCAA"), R.S. 1985, c. C-36.
- [6] The disputed property included an inventory of these components. The precise number included in the disputed property and their aggregate value is unknown at this point. It also included testing equipment and eight outstanding purchase orders issued by SRX to Apex. If necessary, an accounting will be held on further application to establish the quantum.

- [7] The APA was approved in advance of its completion by the Quebec Superior Court on March 31, 2008 by way of a "Vesting Order". The deal closed as agreed April 4, 2008 and the order was registered April 15, 2008 by the court-appointed monitor in the CCAA Proceeding. Apex was aware of the CCAA status of SRX and Apex itself is listed as a creditor in the SRX CCAA proceedings, but it has not participated in them.
- [8] Apex began its business of assembling CPEs for SRX in 2005, and in May, 2005 entered into a Memorandum of Understanding (the "MOU") with SRX. The MOU established that SRX would send Apex certain minimum quantities of the CPE components monthly and deal exclusively with Apex. Allegedly, SRX agreed to pay more per unit when it failed to deliver and pay for assembly of the agreed minimum. This additional payment was called the "short build premium".
- [9] At the time of the APA transaction, one of SRX's officers was a certain Mr. Paul Simard. Upon completion of the APA, Mr. Simard became an employee of SRT and was subsequently further promoted to vice-president of operations. He was actively involved in managing SRX's and, later, SRT's relationship with Apex. On April 10, 2008, Mr. Simard sent an email to Apex confirming SRX's sale of the assets to SRT and that SRX would no longer be requiring further services from Apex. He indicated that the purchaser of the assets, SRT, would be pleased to discuss new arrangements with Apex. Negotiations followed, during which Apex evidently continued to do business as if SRT had slipped into SRX's shoes.
- [10] Also on April 10, 2008, SRT sent to Apex a request for a quotation for the assembly of 12,000 CPEs that had recently been ordered by a customer of SRT, Axtel S.A. de C. V. In the request for a quotation, SRT also requested that Apex's answer include approval of payment on 30 days' net credit terms. On behalf of Apex, an officer, Mr. de Jaray, replied on April 18 declining the credit request on the basis that Apex held no security from the "new company" (SRT) that now owned the ex-SRX assets. He suggested that SRT instead secure delivery by way of insurance. He indicated, however, that if insurance could not be obtained, Apex would be prepared to discuss "alternative security surrounding inventory" such as an irrevocable letter of credit.
- [11] Apex continued to build CPEs for SRT on a prepaid basis until July of 2008.
- [12] On July 11, 2008, Apex advised Mr. Simard that Apex had shut down assembly of CPEs for SRT and would not restart assembly unless SRT paid, in full and in advance, for the July short build premium and for assembly of 2000 CPEs.
- [13] On July 15, 2008, Mr. Simard, on behalf of SRT, tendered a written proposal in an email to Apex that the parties would agree to close down their relationship. The proposal provided, amongst other things, that SRT would pay in advance for the remaining 2000 CPEs and the short build premium in July. These amounts were allegedly paid by SRT in full by August 12, 2008, but the 2000 CPEs were not delivered by Apex.

[14] On September 19, 2008, Apex billed SRT for all outstanding amounts, including not only post-APA accounts, but also a number of short build premiums pursuant to the MOU, and more. The total was \$1,481,698.

[15] This action was commenced on October 6, 2008 after a demand letter from SRT to Apex was unsuccessful in securing the return of the disputed property.

POSITIONS OF THE PARTIES

a) SRT

[16] SRT rejects Apex's claim of a security interest and seeks return of the assets in question unconditionally.

[17] SRT argues that most of the debt said to be owed by SRT arises from SRX's alleged failure to meet the volume estimates set out in the MOU. SRT argues that those estimates were expressly stated in the MOU to be non-binding on the parties to it, and SRT was not a party to the MOU. SRX's debts owed to Apex could not become obligations of SRT unless SRT was a party to the MOU and promised Apex to pay them, which was not the case. Having never represented to Apex that it would assume such an obligation, or order any particular number of CPEs, SRT maintains that it has fully compensated Apex through the payments that it has made on its own orders to Apex since taking over the business. SRT contends that, in any event, the negotiations of July 2008 established an agreement that settled and relieved SRT of any of the burden of those earlier claims.

[18] SRT further argues that, because the transfer of the disputed property was effected by a vesting order of the Quebec Superior Court, the vesting order cancelled any alleged security interest and conveyed to SRT absolute and unencumbered title to the disputed property.

[19] According to SRT, the CCAA as a federal Act prevails by the doctrine of paramountcy in the case of conflict with a provincial statute such as the Personal Property Security Act, R.S.B.C. 1996, c. 359 ("PPSA"):

It is important to note that the CCAA is a federal statute and thus the rights and remedies provided in provincial legislation may be superseded by the federal Act. The general goals and intentions of the Act cannot be subverted by provincial legislation.

See McLaren: Canadian Commercial Reorganization, at para. 2.2700 and Collins & Aikman Automotive Canada Inc. (Re.), [2007] O.J. No. 4186, 37 C.B.R. (5th) 282 (Sup. Ct. Jus.), at para. 42.

[20] In support of this proposition, SRT relies on Royal Bank of Canada and Body Blue Inc., [2008] O.J. No. 1628, 42 C.B.R. (5th) 125 (Sup. Ct. Jus.), a case in which a party (Body Blue), which had taken title to certain intellectual property pursuant to a CCAA vesting order, sought a declaration that title was taken free of certain licensing agreements in favour of a third party, Herbal Care, which had not been represented at the CCAA proceedings. The court cited Extreme Retail (Canada) Inc. v. Bank of Montreal, [2007] O.J. No. 3304, 37 C.B.R. (5th) 90 (Sup. Ct. Jus.), and agreed, at paras. 20-22, that the vesting order destroyed the licensing

rights:

- [20] In this case, the A&V Order determined the rights of the parties represented in that proceeding in respect of the assets that were the subject of the sale. Although Herbal Care had not been given notice and was not represented at the hearing giving rise to the A&V Order, this non-participation does not, in my view, impact on this motion. Herbal Care took no steps after becoming aware of the A&V Order to set aside or vary the A&V Order and did not appeal the A&V Order. Herbal Care is, in my view, bound by the terms of the A&V Order.
- [21] The claim of Herbal Care is one of contract. It is a claim against Old Body Blue. It does not affect the transfer of title to the property, assets and undertaking of Old Body Blue to Body Blue 2006.
- [22] Body Blue 2006 holds the transferred assets free and clear of any claim of Herbal Care. Paragraph 6 of the A&V Order clearly provides that after the filing of the Receiver's Certificate, which evidences that the transaction has been completed, any and all "claims" of any "claimant" in or to the "purchased assets" shall vest in the proceeds derived from the completion of the transaction.
- [21] SRT also relies on *Canadian Red Cross Society (Re)*, [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Ct. Jus.), leave to appeal dismissed, [1998] O.J. No. 6562, 32 C.B.R. (4th) 21 (C.A.), in which the Red Cross sought court approval for a transfer of assets. The opponents of the order, while not opposing the transfer, argued that the transfer could not "sanitize" the assets. The court rejected that argument, stating, at para. 42:
- [42] In my view, however, the assets either have to be sold free and clear of claims against them - for a fair and reasonable price - or not sold. A purchaser cannot be expected to pay the fair and reasonable purchase price but at the same time leave it open for the assets purchased to be later attacked and, perhaps, taken back. In the context of the transfer of the Canadian blood supply operations, the prospect of such a claw back of assets sold, at a later time, has very troubling implications for the integrity and safety of that system. I do not think, firstly, that the argument is a jurisdictional one, and secondly, that it can prevail in any event. [emphasis added]
- [22] SRT argues that that the discretion exercised by courts in CCAA proceedings when granting vesting orders is statutory, as distinguished from inherent discretion. Such discretion when exercised under a federal statute is paramount to conflicting provincial statutes and will override conflicting rights of creditors secured pursuant to provincial statutes.
- b) Apex
- [23] Apex claims that in its transactions with SRX it acquired a security interest in all of the disputed property in its possession. According to Apex, the security rights were created by the following documents:

- a) an email dated April 9, 2006, from Steve de Jaray, then Apex's CEO, to Bill Aziz who was then SRX's chief restructuring officer;
- b) Mr. Aziz's email reply dated April 10, 2006, which stated as follows:

We will be able to provide a domestic bond through EDC. What you and I discussed was \$1 million though. We will need the detailed buildup and will have to agree on the amount of NCNR inventory. The sooner this is available and agreed, the sooner the bond can be put in place. We are currently working with EDC and other lenders to finalize these arrangements. In the interim, as you and I agreed, you have our materials and equipment as security for any risk or exposure you may have;

- c) an email dated January 3, 2008, from Mr. de Jaray to Cindy Watson wherein he confirmed the previous email discussion with Mr. Aziz.

- [24] In paragraphs 8 and 9 of the Statement of Defence, Apex pleads that SRT took by way of assignment from SRX the obligations of SRX to Apex. It claims its right to follow its security pursuant to s. 28(1) of the PPSA. Under subsections 10(1) and (2) of the PPSA, a security agreement will be enforceable against third parties if the collateral is in the possession of the secured party or the debtor has signed a security agreement. Here, Apex is in possession of the collateral, and so it submits that the security agreement is enforceable against SRT. Apex registered its security interest on or about 21 January, 2008, three months before SRT purchased SRX's assets.
- [25] Apex's security interest and statutory rights in the disputed property have not, according to them, been cancelled, relinquished or otherwise discharged by the APA or any subsequent dealing, including the CCAA proceedings. Section 28(1) of the PPSA provides that where collateral is "dealt with" the secured party's secured interest continues to exist against the original collateral unless the secured party authorizes the debtor to deal with the collateral. In short, a security interest is "not affected by a sale and can be enforced against the buyer". This is a statutory formulation of the nemo dat rule that one cannot give away more than one possesses: see *Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp.*, 2002 ABCA 79, 1 Alta. L.R. (4th) 14, at para. 11.
- [26] Under s. 30(2) of the PPSA, a buyer of goods in the ordinary course of the seller's business takes the goods free from any security interest given by the seller. However, this exception, according to Apex, is inapplicable in this case for two reasons. First, SRX's sale of the disputed property was not in the ordinary course of business. It was a court-ordered sale of SRX's assets concluded while SRX was under CCAA protection. Second, the exception does not apply where a seller was not the person who gave the security interest: see, to this effect, *New World Screen Printing Ltd. v. Xerox Canada Ltd.* 2003 BCSC 1685, at paras. 25-26. SRT acquired the assets from a third party, Lagassé Communications & Industries, Inc. ("Lagassé"), which bought the collateral from SRX.

- [27] Apex argues that the doctrine of paramountcy is only effective in the case of operational conflict between federal and provincial statutes, in which cases only then is the conflict resolved in favour of the federal enactment. And there can only be an issue of paramountcy where one enactment says "yes" and the other says "no", where the same citizens are being told to do inconsistent things, and compliance with one is defiance of the other: see *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 191, 138 D.L.R. (3d) 1. In the case at bar, argues Apex, no such operational conflict exists between the applicable provisions of the CCAA and the PPSA.
- [28] Further, the vesting order of the Quebec Superior Court was made in an exercise of the broad discretion granted to judges in CCAA proceedings by s. 11. Such an exercise of discretion cannot defeat Apex's express rights under a provincial statute because the discretion of a CCAA judge under s. 11 does not extend to removing or interfering with those rights. It would be a different matter had the vesting order been made under statutory authority expressly allowing the Quebec court to defeat existing statutory interests. But the Quebec Order was not made under any such express authority.
- [29] For this proposition, Apex relies on *Baxter Student Housing Ltd. v. College Housing Co-operative*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1 ("Baxter"). That case involved an appeal of an order appointing a receiver under s. 59 of the Manitoba Queen's Bench Act, and granting priority over monies paid to the receiver of the Central Mortgage and Housing Corporation. The order was challenged for being contrary to the priority scheme established by another Manitoba statute, the Mechanics' Lien Act. Dickson J. (as he then was), for the Court, allowed the appeal and set aside the order. In doing so, he observed, at 480:

[T]he inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities, which a Court simply cannot do.

LAW

- [30] The test for return of property on an application under Rule 46(4) and s. 57 of the Law and Equity Act, where there is no intention to preserve the property prior to trial, is the same as the test for granting an interlocutory injunction: *Midland Walwyn Capital Inc. v. Global Securities Corp.*, [1997] B.C.J. No. 2541 (S.C.), at para. 10. The plaintiff must establish a prima facie case, or serious question to be tried, and the balance of convenience must weigh in favour of granting the order: *Midland*, at para. 12.
- [31] In assessing the balance of convenience, the court may consider various factors, including: the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to

alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

See *Canadian Broadcasting Corporation v. CKPG Television Ltd.*, [1992] 3 W.W.R. 279, 64 B.C.L.R. (2d) 96 (C.A.), at para. 24.

ANALYSIS

- [32] In my view, SRT has established a *prima facie* case on the facts. There is, indeed, a serious case to be tried. The parties agree that SRT owns the disputed property. It is open to doubt whether there were communications sufficient to establish a security interest, but considering the low threshold required, I would not at this point rule it out. However, I have a very strong doubt that all of the debt alleged to be owed to Apex by SRT, or SRX for that matter, is in fact owed because I am not certain that the MOU terms are clearly binding to that extent.
- [33] As to whether the vesting order had the effect of relinquishing, cancelling or waiving the security interest, I find myself in agreement with the argument of counsel for SRT. It is not, in my view, beyond the authority of a Court to make a CCAA order contrary to the express terms of a provincial statute such as the PPSA.
- [34] Dealing firstly with the decision in *Baxter*, that case did not have anything to do with the statutory discretion conferred by the CCAA. Rather, it was dealing with inherent jurisdiction. In *Baxter*, the contest concerned the court's inherent jurisdiction pursuant to s. 59 of the Manitoba Court of Queen's Bench Act, a provincial statute, and the Mechanics' Lien Act, also a provincial statute. The Supreme Court of Canada noted that the Queen's Bench Act was not intended to empower the court to negate the unambiguous expression of the legislative will found in the Mechanics' Lien Act.
- [35] In *Re Skeena Cellulose Inc.*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, the Court concluded, at para. 46:
- [46] Applying this distinction to the issue at hand, I think the preferable view is that when a court approves a plan of arrangement under the CCAA which contemplates that one or more binding contracts will be terminated by the debtor corporation, the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of a corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, rather than the integrity of their own process. [underline emphasis in original; boldface emphasis added]

- [36] The occasional confusion between inherent jurisdiction and statutory jurisdiction in the case law was clarified in *Re Richtree Inc.*, [2005] O.J. No. 251, 74 O.R. (3d) 174 (Sup. Ct. Jus.), at para. 7:
- [7] The concept of "inherent jurisdiction" within CCAA proceedings is discussed in the recent decision of the British Columbia Court of Appeal in *Re Skeena Cellulose Inc.* The court concludes that when one analyzes cases such as *Re Royal Oak Mines*, as well as others referred to by Farley J. such as *Re Westar Mining Ltd.*, the court's use of the term "inherent jurisdiction" is a misnomer. In these cases, the courts are exercising a statutory discretion given by the CCAA rather than their inherent jurisdiction. [emphasis added]
- [37] On the issue of paramountcy, although the Court of Appeal in *Re Skeena Cellulose* ultimately found that the CCAA and the provincial legislation were not in conflict, the court, at paras. 42 and 50, reiterated that if there were conflict, paramountcy would apply:
- [42] It might be unnecessary to add that in cases of direct or express conflict between the CCAA itself and a provincial statute, the doctrine of paramountcy would apply and the federal statute would prevail.
- [50] [I]n approving an arrangement in which the debtor corporation terminates a replaceable logging contract, a CCAA court is not overriding "provincial legislation" as the intervenor contends. Nor is the court "overriding" the terms of the contract: it is merely exercising the discretion given to it by the statute to approve a plan of arrangement. [E]ven if the Forest Act or Regulation did prohibit the termination of replaceable contracts, the federal government's powers with respect to bankruptcy and insolvency would become applicable once the CCAA was invoked and the doctrine of paramountcy would operate to resolve any direct conflict.
- [38] In *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*, [1995] B.C.J. No. 1535, 10 B.C.L.R. (3d) 62 (C.A.), Cumming J.A. noted, at paras. 26 and 27:
- [26] The jurisprudence which deals with the C.C.A.A. establishes two propositions: (a) first, this legislation is to be broadly interpreted so as to give a Supreme Court justice exercising jurisdiction a good deal of power and flexibility; and, (b) the C.C.A.A. will prevail should a conflict arise between this statute and another federal or provincial statute.
- [27] In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* the court, in deciding upon the scope of the power to stay proceedings brought by creditors pursuant to the C.C.A.A. :

In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word "creditor" occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails. [emphasis added by Cumming J.A.]

- [39] Counsel for Apex submits that even in the case of statutory discretion, the paramountcy doctrine may not apply in the federal government's favour. It is submitted that where specific and operative provisions of provincial legislation exist, the power of a court to pronounce federal legislation paramount must derive from more than the inherent jurisdiction of the court or even from statutorily-derived jurisdiction. The federal legislation itself must also be specific and operative. In other words, a general federal statutory discretion may not be treated as paramount over specific and operative provincial legislation.
- [40] The authorities cited by Apex for this proposition included *Baxter, Re Royal Oak Mines Inc.*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div.), and *Re Stelco Inc.* (2005), 75 O.R. (3d) 5, 9 C.B.R. (5th) 135 (C.A.). In *Re Stelco Inc.*, the Ontario Court of Appeal stated, at para. 48:
- [48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. [emphasis deleted]
- [41] In *Re Stelco Inc.*, the motion judge had rescinded the appointments of two of the company's directors on the basis of his inherent jurisdiction and the discretion of the court pursuant to the CCAA. The Court of Appeal found that s. 11 of the CCAA did not permit the exercise of such a discretion in and of itself. The court noted that the discretion under s. 11 was not "open-ended and unfettered". Moreover, "[i]ts exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues [T]he court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts": at para. 44 [emphasis deleted].
- [42] Firstly, the argument in *Re Stelco Inc.* did not concern paramountcy, as the statutes in question, the Canada Business Corporations Act and the CCAA, are both federal statutes. Secondly, the case pertained to the reasonable limits applicable to the CCAA's jurisdiction per se. In the case at bar, there is no such issue. The discretion exercised by the Quebec court was clearly within the bounds of the statutory authority.
- [43] I am thus not persuaded by Apex's argument. The CCAA gives broad latitude to the courts to intrude on the affairs of companies under its protection, in priority over other legislation, operational and otherwise, including provincial legislation such as the PPSA.

- [44] As for the quantum of Apex's claims, it was very late in the day that they sky-rocketed from basic amounts remaining to be paid for the materials in the hands of Apex to a claim for nearly \$1.5 million mainly, if not wholly, on the account of SRX. If the disputed property is not returned, the evidence is that SRT will be exposed to liquidated damages claims under an agreement with another customer, Axtel, for failure to deliver a stipulated number of CPEs on time. As it is now clear that Apex will not deliver the 2000 CPEs in sufficient time for SRT to fulfil its obligations under the other contract, and SRT must deal with another assembler. On these grounds I accept that there is potential for irreparable harm to SRT.
- [45] If the disputed property in Apex's hands is ordered to be returned to SRT, Apex submits that it must have security of more than an undertaking. Otherwise, the risk of loss will be very high to Apex, SRT having no resources of its own that have been disclosed. Counsel for Apex argued for security in an amount equal to that owed on the outstanding invoice.
- [46] SRT evidently has been funded generously to date by a prosperous parent company, but there is no evidence of any obligation upon the parent company that can be enforced in court. There is a risk that SRT may not be capable of performing its undertaking. I conclude that the facts warrant an order for an undertaking for damages, but nothing in the magnitude sought. I considered a figure closer to Apex's notional loss of profit on the transaction for assembly of 2000 or more CPEs but I find that as well to be more than is appropriate. I will order SRT to give an undertaking to pay damages, of which it must fund as security CDN \$25,000. The merits of Apex's position and the balance of convenience do not weigh heavily enough in Apex's favour on this issue to justify greater security.

ORDERS

- [47] The disputed property currently in Apex's possession is to be returned to SRT forthwith at Apex's cost, which shall become a cost that may be claimed in this action.
- [48] SRT shall give an undertaking for damages, of which \$25,000, in cash or by letter of credit, shall be posted as security.
- [49] I will leave costs to be decided by the trial judge, subject to the right of either party to apply to speak on that issue within ten days of this order.

"The Honourable Mr. Justice Rice"

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