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April 14, 2016

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
Suite 2700
2300 Yonge Street
Toronto, ON
M4P 1E4

VIA E-Mail

Dear Ms. Walli:

Re: Board File No. EB-2014-0105
Ottawa River Power Corporation
Attachment to Final Submission of Vulnerable Energy Consumers Coalition (VECC)

Please find attached a copy of the *Bank of Montreal and Abrahams et.a*l case referenced in the VECC submissions. We apologize for its omission when the argument was submitted.

Yours truly,

Michael Janigan
Counsel for VECC

Cc: All Intervenors

1204-ONE Nicholas Street, Ottawa, ON K1N 7B7 Tel: 613-562-4002 Fax: 613-562-0007 piac@piac.ca www.piac.ca
Michael Janigan - Direct: 31 Hillsdale Avenue E, Toronto, ON M4S 1T4 Tel: 416-840-3907 mjanigan@piac.ca

Bank of Montreal v. Abrahams et al.*
[Indexed as: Bank of Montreal v. Abrahams]

68 O.R. (3d) 34

[2003] O.J. No. 4381

Docket Nos. C38267, C38263, C38264, C38265, C38266, C38268,

C38269, C38270, C38271, C38272, C38273 and C38274

Court of Appeal for Ontario

Simmons, Gillese and Armstrong JJ.A.

November 20, 2003

*Application for extension of time granted and application for leave to appeal dismissed with costs May 6, 2004 (McLachlin C.J.C., Major and Fish JJ.).

Banks and banking -- Negotiable instruments -- Bills of exchange -- Promissory notes -- Defendants entering into agreements to purchase condominium units -- Balance of purchase price paid by delivery of promissory notes -- Notes unconditional promises to pay on their face -- Vendor assigning promissory notes to plaintiff bank -- Bank having no knowledge that vendor would be unable to convey title to condominium units -- Title not conveyed -- Bank suing to enforce promissory note -- Promissory notes qualifying as promissory notes under Bills of Exchange Act -- Defendants liable to pay promissory notes -- Bills of Exchange Act, R.S.C. 1985, c. B-4, s. 176(1).

Negotiable instruments -- Bills of exchange -- Promissory notes -- Holder in due course -- Defendants entering into agreements to purchase condominium units -- Balance of purchase price paid by delivery of promissory notes -- Notes unconditional promises to pay on their face -- Vendor assigning promissory notes to plaintiff bank -- Bank having no knowledge that vendor would be unable to convey title to condominium units -- Title not conveyed -- Bank suing to enforce promissory note -- Promissory notes qualifying as promissory notes under Bills of Exchange Act -- Defendants liable to pay promissory notes -- Bills of Exchange Act, R.S.C. 1985, c. B-4, s. 176(1).

The appellants were investors who in 1989 each signed a General Agreement and seven other agreements to purchase condominium units in British Columbia from one of a group of companies owned by Reemark. The agreements projected a transfer of title on September 30, 1990. The pur-

chase agreement provided for payment of the purchase price by: a $1,500 deposit; a first mortgage from a financial institution for approximately 72 per cent of the price; and a promissory note in favour of Reemark for the balance. The notes were contained in a bound volume of contractual documentation and, although the investors did not notice at the time they signed, the notes had a perforated edge. After they were signed, [page35] Reemark assigned the notes to the Bank of Montreal, which had no contact with any of the defendants before the assignment. After receiving notice of the assignment of their respective notes, the investors made their payments to the bank.

In December 1991, the investors learned that the first mortgage, which was to be paid from rental income, was in default. Subsequently, the investors learned that Reemark had not transferred title. Within a short period of time, all of the investors stopped making payments on the notes. In May 1994, after the condominiums were sold under power of sale, the Bank of Montreal sued the investors on the notes. For the trial, in the statement of facts, it was agreed that the Bank was not, and could not have been, aware of Reemark's problems when the Bank purchased the notes and the Bank did not contemplate nor did it have any reason to believe that the investments would fail.

The investors were found liable under their respective promissory notes. They appealed. The main issue on the appeal was whether the trial judge erred in concluding that the notes were unconditional promises to pay within the meaning of s. 176(1) of the Bills of Exchange Act. In particular, the investors contended that the trial judge erred by distinguishing the case from the Supreme Court of Canada decision in Range v. Belvedere Financial Corp., in which a promissory note was interpreted along with the conditional sale contract to which it was appended.

Held, the appeal should be dismissed.

The trial judge did not err in holding that the notes were unconditional promises to pay within the meaning of s. 176(1) of the Bills of Exchange Act, and he did not err by distinguishing the Range judgment. The notes met the statutory requirement of being an unconditional promise to pay for four reasons. First, the notes did not contain conditions and on their face were unconditional promises to pay. Second, the decision in Range was based on more than the simple fact that the contract and the note were appended. Most significantly, the conditional sale contract in Range specified that the note was given as evidence of the deferred payments but not in payment of them and this implied that the note did not stand independently of the conditional sales contract. There was no similar provision in the immediate case. Moreover, a clause in the Purchase Agreement requiring that the investors provide the notes, in effect recognized the notes as separate instruments. The absence of a cut-off clause was a neutral factor. Third, the trial judge was correct in stating that, apart from consumer transactions, the fundamental purpose of the Bills of Exchange Act is to facilitate business transactions and to create flexible negotiable instruments and that it would frustrate the purpose of the Act to hold that an apparently unconditional promissory note must be interpreted in conjunction with a related contract on the sole ground that it is appended to that contract by a perforated edge. Fourth, even if the notes were not severable from the other documents, it was not the case that the promise to pay must be read as being subject to an implied condition as in the Range case. The provisions in the immediate case were not similar to those in Range, and there was no basis for implying a term that payment on the notes was conditional on Reemark fulfilling its obligation to transfer registered title. Accordingly, the appeal should be dismissed with costs.

Cases referred to

Killoran v. Monticello State Bank (1921), 61 S.C.R. 528, 57 D.L.R. 359, [1921] W.W.R. 988; Range v. Belvedere Finance Corp., [1969] S.C.R. 492, 5 D.L.R. (3d) 257

Statutes referred to

Bills of Exchange Act, R.S.C. 1985, c. B-4, s. 176(1) [page36]

Authorities referred to

Ziegel, J.S., B. Géva, and R.C.C. Cuming, Commercial and Consumer Transactions, 2nd ed. (Toronto: Emond Montgomery, 1990)

APPEAL from a judgment in an action to enforce payment of promissory notes.

Larry J. Levine, Q.C., and Kevin D. Sherkin, for appellant.

R. Bruce Smith, for respondent.

The judgment of the court was delivered by

SIMMONS J.A.: --

I. Overview

[1] In 1989, each of the appellants (the "investors") gave a promissory note to one of the Reemark group of companies ("Reemark") as partial payment for a residential condominium unit purchased for investment purposes. At the time the individual promissory notes were signed, each of the notes was included in a document booklet containing a series of agreements relating to the investor's condominium purchase. Reemark later assigned the promissory notes (the "Notes") to the Bank of Montreal.

[2] Following the assignments, the investors made the regular instalment payments under the Notes to the Bank of Montreal for several months. However, in early 1992, the investors discovered that Reemark had never transferred registered title to the condominium units into their respective names and they stopped paying the Notes. On April 24, 2002, the Bank of Montreal obtained judgment on the Notes against the investors.

[3] The main issue on the investors' appeal is whether the trial judge erred in concluding that the Notes are "unconditional promises . . . to pay" within the meaning of s. 176(1) of the Bills of Exchange Act, R.S.C. 1985, c. B-4.[1] at the end of the document] In particular, the investors contend that the trial judge erred by distinguishing this case from the Supreme Court of Canada's decision in Range v. Belvedere Finance Corp.[2] at the end of the document] In Range, Pigeon J. held that a promissory note should not be interpreted independently from the conditional sale contract to which it was appended and therefore found that the note was conditional. [page37]

[4] For the reasons that follow, I conclude that the trial judge did not err. I would accordingly dismiss the appeal.

II. Background

[5] Between May 1989 and December 1989, each of the investors signed a General Agreement and seven other agreements (the "General Agreement and Appended Contracts") agreeing to purchase a residential condominium unit and related services from Reemark. The condominium units were located in one of four existing British Columbia residential condominium apartment buildings and were occupied by tenants.

[6] The seven contracts appended to the General Agreement were the following:

i. Purchase Agreement;
ii. Financial Schedule;
iii. Trust Agreement;
iv. Services Agreement;
v. Rental Pooling and Management Agreement;
vi. Guarantee Agreement; and
vii. Appliance Lease.

[7] The individual Purchase Agreements provided that the investors would purchase beneficial ownership in their condominium units on December 30, 1989 (the "Closing Date"), and that they would acquire registered title to their units on the Transfer Date, projected to be September 30, 1990.[3] at the end of the document]

[8] Under the Purchase Agreements, the purchase price of the individual condominium units was payable as follows:

i. a $1,500 cash deposit on signing the General Agreement and Appended contracts;
ii. cash equal to approximately 72 per cent of the purchase price of the unit to be raised by way of a first mortgage from a financial institution; and[page38]
iii. the balance by way of a promissory note from each of the investors to Reemark.

[9] Pending the Transfer Date, Reemark was entitled to register an Interim Mortgage encumbering individual condominium units up to the amount of the purchase price of that unit less the deposit. In addition, the General Agreement and Appended Contracts provided that a Manager would collect and pool the rents for each building, applying the rent first, in payment of building expenses[4] at the end of the document] and then in payment of the unit mortgages. During a Guarantee Period, Reemark agreed to pay shortfalls in building expenses and in the unit mortgages by way of a Cash Flow Loan to be advanced to each of the investors.

[10] The investors signed the Notes on the same day as they executed the General Agreement and Appended Contracts. On the day the documents were signed, representatives of Reemark presented to each investor a blue booklet (the "Booklet") containing copies of the General Agreement and Appended Contracts and the promissory note. Each of the investors signed the documents in the Booklet and left the Booklet with Reemark. Although the investors did not notice it at the time they signed the Notes, the promissory note in each Booklet was attached to the Booklet by a perforated edge.

[11] Between November 22, 1989 and June 29, 1990, Reemark sold the investors' Notes[5] at the end of the document] to the Bank of Montreal pursuant to the Purchase Agreements and Assign-

ment. Under the Purchase and Assignment Agreements, Reemark assigned all of its rights and benefits but not its obligations under the investors' Purchase Agreements to the Bank of Montreal.[6] at the end of the document] After receiving notice of the assignment of their respective promissory notes, the investors made their monthly payments to the Bank of Montreal. [page39]

[12] In December 1991, each of the investors received a letter from the first mortgagee demanding payment of their unit mortgages, which were in arrears. Subsequently, the investors also learned that Reemark had not transferred registered title to the individual condominium units into their respective names. Within a short period, all of the investors stopped paying the instalments on the Notes.

[13] In March 1992, Reemark sent a letter to the investors, setting out a proposal whereby the investors could acquire title to their respective condominium units. The investors rejected the proposal, claiming that Reemark's failure to convey registered title amounted to a total failure of consideration and that it released them from their obligations under the General Agreement and Appended Contracts. In addition, the investors disputed the first mortgagee's claim that they were liable on the unit mortgages.

[14] In May 1994, after the buildings were sold under power of sale, the Bank of Montreal sued the investors on the Notes.

[15] The trial proceeded, based in part, on an Agreed Statement of Facts. In addition to many of the facts noted above, the Agreed Statement of Facts includes the following significant statements:

> -- The Investors were not aware of the legal concepts of negotiable instruments or holder in due course or the provisions of the Bills of Exchange Act in that regard.
>
> -- Prior to the Bank purchasing the Reemark Notes, none of [the] Investors had any direct contact or communication with the Bank.
>
> -- The Bank was not, and could not have been, aware of Reemark's problems when the Bank purchased the Promissory Notes. The Bank did not contemplate, nor did it have any reason to believe that the Investors' investment would fail at the time when the Bank bought their Promissory Notes.

III. Section 176(1) of the Bills of Exchange Act

[16] Sections 176(1) of the Bills of Exchange Act provides as follows:

> 176(1) A promissory note is an unconditional promise in writing made by one person to another person, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer.

(Emphasis added)

IV. Range v. Belvedere Finance Corp.

[17] The investors contend that the trial judge erred by failing to find that this case is governed by the result in [page40[]cf2]Range v. Belvedere Finance Corp. As Range forms the underpinning of the investors' position, I will summarize that decision in some detail.

[18] In April 1960, Mr. Range signed a conditional sales contract and promissory note for the purchase of a fur coat. The promissory note and conditional sales contract were on a printed form supplied by a finance company. The promissory note was at the bottom of the form, separated from the conditional sale contract by a perforated line. The words, "Negotiable Instrument", appeared on the side of the note.

[19] The conditional sale contract provided that the purchase price of the coat was payable in 24 monthly instalments, commencing on May 10, 1960, at the office of a finance company. It also included the following provision:

> A negotiable promissory note has been delivered by the purchaser to the vendor as evidence of the said total deferred payments, but not in payment thereof.

[20] At the time the documents were signed, the vendor promised to deliver the coat within two to three weeks. However, the vendor went bankrupt a few months later, and the coat was never delivered.

[21] After the documents were signed, the vendor endorsed the note and delivered it to the finance company, still appended to the conditional sale contract. Prior to the due date of the first payment on the note, an employee of the finance company contacted Mrs. Range and learned that the coat had not been delivered. Subsequently, the finance company delivered the conditional sales agreement/promissory note to its bank as part of a collateral security package for the finance company's loans. When the finance company later became insolvent, Belvedere Finance Corp. purchased the finance company's claim against Mr. Range.

[22] At the time of purchasing the claim, Belvedere received the form comprising the conditional sales contract and the note as well as an account card, with the words "non-delivery" noted on the card. Belvedere detached the note from the conditional sales contract and commenced an action against Mr. Range.

[23] Justice Pigeon determined that the note could only be construed as an unconditional promise to pay if read independently of the conditional sales contract. On that issue, Pigeon J. noted, at p. 262 D.L.R., that Belvedere "wished to be in a position to exercise rights arising out of the contract of sale, as well as those arising out of the 'note'", and found that "[w]hat was transferred . . . was the entire documentation as a whole . . .". [page41]

[24] Considering the documents as a whole, Pigeon J. concluded that a printed condition on the back of the contract' at the end of the document] made it clear that the promise to pay was conditional. He said, at p. 261 D.L.R.:

> If, on the other hand, the note and the contract are considered as a whole, the first condition indicates that the promise to pay is conditional: in the event of repossession of the article sold, the purchaser is exonerated from further liability. There is no doubt that the same result must obtain in the event of non-delivery.

[25] In light of those findings, Pigeon J. determined that the note in issue was not a bill of exchange.

[26] Justice Pigeon then considered whether Range was distinguishable from Killoran v. Monticello State Bank.[8] at the end of the document] Killoran was an earlier decision of the Supreme Court of Canada in which the court found that a promissory note appended to a conditional sales contract on a perforated page was severable from the conditional sales contract, and that the promissory note met the statutory requirement of being an unconditional promise to pay. Justice Pigeon relied on the presence of a cut-off clause in the Killoran conditional sales contract expressly stipulating that the obligation under the note was unconditional, and that it "would enure to the benefit of any holder of the note, notwithstanding anything which might take place between the purchaser and the vendor as a result of the conditional sale". Justice Pigeon said, "[n]o such provision appears in the case at bar, and I would even go so far as to say that the clause in the contract relating to the "note" implies the contrary" (emphasis added). [page42]

V. The Trial Judge's Reasons[9] at the end of the document]

[27] The trial judge found that the Notes were unconditional on their face and therefore concluded that they were promissory notes within the meaning of s. 176(1) of the Bills of Exchange Act. He distinguished this case from Range on the basis that, unlike Belvedere Finance Corp., at the time the Bank of Montreal negotiated the Notes, it did not have notice of a failure of consideration. Further, the trial judge held that the decision in Range was directed at consumer notes made on the same piece of paper as the underlying instalment contract. He also said, at p. 11, of the reasons for judgment:

> Ignoring the fact that the Notes in question clearly constitute unconditional promises to pay on their face would frustrate the fundamental purpose of the statute to facilitate business transactions and to create flexible negotiable instruments.

V. Analysis

Did the trial judge err in holding that the Notes were unconditional promises to pay within the meaning of s. 176(1) of the Bills of Exchange Act?

[28] The investors' main submission on appeal is that the trial judge erred in concluding that this case is distinguishable from Range. In particular, the investors contend that, in determining whether the Notes are unconditional promises to pay, the trial judge erred by referring to the fact that the Bank of Montreal did not have notice of a total failure of consideration.

[29] Relying on Range, the investors claim that the Notes cannot be read separately from the other documents that were included in the Booklets. They submit that this case should not be decided based on any superficial distinction that may exist between a contract and a note contained on one page, separated by a perforated line (Range), and a longer agreement in a bound volume containing a note with a perforated edge (this case). Moreover, the investors contend that the absence of a cut-off clause, such as was present in Killoran, supports their position that the Notes should be construed in conjunction with the General Agreement and Appended Contracts.

[30] Finally, the investors submit that, just as in Range, the circumstances of this case require that their promises to pay be read as being subject to an implied condition, namely that payment was

contingent on delivery of the article that was sold, which, in this case, is registered title to the condominium units.

[31] I do not accept the investors' submissions. In my view, this case is distinguishable from Range. I conclude that the Notes meet the statutory requirement of being unconditional promises to pay for four reasons.

[32] First, as the investors acknowledged at trial, the Notes themselves contain no conditions. Accordingly, on their face, the Notes meet the statutory requirement of being unconditional promises to pay.

[33] Second, in my view, the conclusion in Range that the note should not be read independently from the conditional sales contract was based on more than the simple fact that the contract and the note were appended. Most significantly, when distinguishing Range from Killoran, Pigeon J. referred to the clause in the conditional sale contract specifying that the note was given as evidence of the deferred payments but not in payment of them and found that that clause implied that the note did not stand independently from the conditional sales contract. There is no similar provision in the General Agreement and Appended Contracts. Moreover, the clause in the Purchase Agreement requiring that the purchasers provide the Notes, in effect recognizes them as separate instruments. In my view, the absence of a cut-off clause is a neutral factor, which neither supports nor detracts from the investors' position.

[34] Third, I agree with the trial judge's statement that, apart from consumer transactions, "the fundamental purpose of the [Bills of Exchange Act is] to facilitate business transactions and to create flexible negotiable instruments".[10] at the end of the document] I also agree that it would frustrate the purposes of the Bills of Exchange Act to hold that an apparently unconditional promissory note must be interpreted in conjunction with a related contract on the sole ground that it is appended to that contract by a perforated edge. I conclude that additional factors, such as the clause in the Range conditional sale contract referred to by Pigeon J., are necessary to mandate such an interpretation. As there are no such factors present in this case, I conclude that the Notes are severable from the other documents contained in the Booklets and that they should be read independently from those documents. [page44]

[35] Fourth, even if the Notes are not severable from the other documents in the Booklets, I specifically reject the investors' submission that, just as in Range, the circumstances of this case require that their promises to pay be read as being subject to an implied condition. The investors submit that Range stands for the proposition that the courts will imply a term that a promise to pay is conditional where it is necessary and appropriate to do so. They say that, in Range, Pigeon J. acted to remedy a problem relating to consumer vulnerability and they rely on the acknowledgement in the Agreed Statement of Facts that they had no understanding of the legal consequences of signing a promissory note to assert that their circumstances are similar.

[36] Assuming that Pigeon J. implied a term into the conditional sale contract in Range, in my view, he did so to interpret the contract in a commercially reasonable way and not to address any issue of consumer vulnerability. In Range, the conditional sale contract contained an explicit term releasing the purchaser from further liability for payment in the event the vendor repossessed the coat. In light of that provision, Pigeon J. found, as a matter of logic, that, if the coat was never delivered, there could be no obligation to pay.

[37] Here, not only is there no provision similar to that relied on by Pigeon J., the investors' Purchase Agreements and the Notes make it clear that the investors were obliged to commence paying the Notes prior to the Transfer Date. In my view, there is no basis for implying a term that payment of the Notes was conditional on Reemark fulfilling its obligation to transfer registered title.

[38] Accordingly, I would not give effect to this ground of appeal." at the end of the document]

VII. Disposition

[39] For the foregoing reasons, the appeal is dismissed with costs fixed at $12,450 plus G.S.T. and disbursements as agreed by the parties.

Appeal dismissed. [page45]

Notes

Note 1: The trial judge's conclusion entitled the Bank of Montreal to claim the status of a holder in due course and precluded the investors from raising personal defences.

Note 2: [1969] S.C.R. 492, 5 D.L.R. (3d) 257.

Note 3: The sample Purchase Agreement included in the Joint Compendium stipulates a projected Transfer Date of December 30, 1990 in para. 11.03 and in para. 12.01. However, the Agreed Statement of Facts and the trial judge refer to a projected Transfer Date of September 30, 1990. The projected Transfer Date was subject to acceleration or extension as specified in the Purchase Agreement, but no such change took place.

Note 4: A sample Offering Memorandum for one of the buildings indicates that it was anticipated that that building would operate at a loss for at least an initial period.

Note 5: The Agreed Statement of Fact indicates that "all but one of the Investors' Promissory Notes were sold by Reemark to the Bank" during this period. However, no separate issues were raised on appeal concerning the remaining promissory note.

Note 6: Paragraph 2 of a sample Purchase Agreement and Assignment provides as follows:

> 2. The Vendor hereby assigns to the Bank all its rights and benefits, but none of its obligations, under the Investor Agreements with respect to the Notes and the Purchased Lots including, without limitation, its vendor's lien with respect to each of the Purchased Lots ...

Note 7: The condition read as follows:

> 1. Title to the articles being sold pursuant to this contract shall remain in the vendor until the full purchase price with respect to this conditional sale has been paid: in the event of default by the purchaser in making payments in accordance with the conditions contained herein, vendor shall have the option of demanding immediate payment of the instalments which have fallen due, or of repossessing the said articles without liability, and without being required to repay money already received by it on account of the purchase price under this conditional sale, in which case purchaser shall not be liable for the balance of the purchase price owing on this conditional sale.

Note 8: (1921), 61 S.C.R. 528, 57 D.L.R. 359.

Note 9: The investors raised three issues at trial. However, it is unnecessary that I set out a complete summary of the trial judge's reasons in order to dispose of the issues raised on this appeal.

Note 10: See for example, J.S. Ziegel, B. Géva and R.C.C. Cuming, Commercial and Consumer Transactions, 2nd ed. (Toronto: Emond Montgomery, 1990), pp. 619-23.

Note 11: The investors raised a second ground of appeal relating to whether they had a valid defence to the Notes if the Notes are not valid bills of exchange. As their second ground of appeal was premised on the success of their first ground, it is unnecessary that I deal with the second ground.

---- End of Request ----
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