COURT FILE NO.	
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED
	AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CLEO ENERGY CORP.
APPLICANT	CLEO ENERGY CORP.
DOCUMENT	BOOK OF AUTHORITIES OF CLEO ENERGY CORP.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue S.W. Calgary, AB T2P 4K9 Telephone: (403) 298-1946 / (403) 298-1938 Facsimile: (403) 263-9193 Email: sam.gabor@gowlingwlg.com / tom.cumming@gowlingwlg.com File No. G10010664 **Attention: Sam Gabor / Tom Cumming**

Tab

1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part IV — Property of the Bankrupt (ss. 67-101.2)
Stay of Proceedings

R.S.C. 1985, c. B-3, s. 69

s 69.

Currency

69.

69(1) Stay of proceedings — notice of intention

Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*, or

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

69(2)Limitation

The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;

(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or

(d) [Repealed 2012, c. 31, s. 416.]

69(3)Limitation

A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if

(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the notice of intention and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Note:

S.C. 2000, c. 30, s. 145(3), provides as follows:

(3) Subsections (1) [which replaced s. 69(1)(c) and added s. 69(1)(d)] and (2) [which replaced s. 69(3)] are deemed to have come into force on November 30, 1992 except that, before June 30, 1996, the references in subparagraphs 69(1)(c)(ii) and (3)(a)(ii) and (b)(ii) of the Act, as enacted by subsections (1) and (2), to the Employment Insurance Act *shall be read as references to the* Unemployment Insurance Act.

Note:

S.C. 1997, c. 12, s. 62(2), provides as follows:

(2) Application
Subsection (1) [S.C. 1997, c. 12, s. 62(1), which re-enacted s. 69(2)(b) and added (c)] applies to proceedings under Part III that are commenced after that subsection comes into force [September 30, 1997].

Amendment History
1992, c. 27, s. 36(1); 1997, c. 12, s. 62(1); 2000, c. 30, s. 145; 2005, c. 3, s. 12; 2005, c. 47, s. 60; 2007, c. 36, s. 34; 2009, c. 33, s. 23; 2012, c. 31, s. 416

Judicial Consideration (6)

Currency
Federal English Statutes reflect amendments current to July 3, 2024
Federal English Regulations Current to Gazette Vol. 158:14 (July 3, 2024)

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2000 BCSC 1316
British Columbia Supreme Court [In Chambers]

Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.

2000 CarswellBC 1802, 2000 BCSC 1316, [2000] B.C.W.L.D. 1297, 20 C.B.R. (4th) 166, 99 A.C.W.S. (3d) 209

Campbell, Saunders Ltd., Trustee in Bankruptcy of the Estate of Startek Computer Inc., Plaintiff and Samtack Computer Inc., Defendant

Harvey J.

Heard: August 30, 2000
Judgment: September 1, 2000
Docket: Vancouver S001120

Counsel: *C.L. Shaley*, for Plaintiff.
C. Tong, for Defendant.

Subject: Insolvency

Headnote

Bankruptcy --- Proposal — Effect of proposal — As binding on creditors

Bankrupt paid vendor for computer equipment by cheque — Cheque was returned for non-sufficient funds — Bankrupt provided replacement cheque for goods, which was negotiated by vendor — Bankrupt filed notice of intention to make proposal — Four days later, without knowledge or consent of bankrupt or its trustee, vendor renegotiated original cheque which was cleared by bankrupt's bank — Trustee in bankruptcy brought application for summary judgment against vendor — Application granted — Vendor liable to trustee on basis that renegotiating first cheque was remedy prohibited as result of stay of proceedings imposed by s. 69(1) of Bankruptcy and Insolvency Act — Cheques were issued to pay for same three invoices and not for additional goods sold to bankrupt — Knowledge of filing of notice of intention to make proposal is not necessary for stay to be effective as against creditor — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69(1).

APPLICATION by trustee in bankruptcy for summary judgment against vendor.

***Harvey J.* (In Chambers):**

1 The plaintiff applies for judgment pursuant to Rule 18A against the defendant Samtack Computer Inc. ("Samtack") in the amount of $20,098.88 plus interest and costs.

2 Startek Computer Inc. ("Startek") paid the defendant for certain goods, computer equipment, sold by it to Startek with a cheque. That cheque was returned to the defendant for non-sufficient funds.

3 Startek provided the defendant with a replacement cheque for the goods. The defendant negotiated the replacement cheque.

4 On June 17 two events occurred. Startek filed a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and pursuant to s. 69(2) of the said statute a stay of proceedings was in effect as of June 17, 1999.

5 On or about June 21, 1999 without the knowledge or consent of Startek or the trustee, the defendant renegotiated the original cheque which was cleared by Startek's bank.

6 The matter has a history.

7 On July 6, 2000 the matter came on for hearing before Pitfield J. At that time Samtack claimed that the first cheque and the replacement cheque were not issued to pay for the same three invoices. Samtack claimed it had evidence that supported its position but that evidence was not before the court. As a result, Pitfield J. ordered Samtack to produce this evidence and the application was adjourned accordingly.

8 In due course Samtack forwarded copies of the invoices it claims were paid by the first cheque and the replacement cheque.

9 The issue is framed in counsel for the plaintiff's outline of argument as follows:

> Is Samtack liable to the trustee in the amount of $20,098.88 for cashing both the first cheque and the replacement cheque on the basis that renegotiating the first cheque was a remedy prohibited as a result of the stay of proceedings imposed by section 69(1) of the BIA.

10 The answer to this question is yes.

11 The short answer to this application is that Samtack by renegotiating what has been referred to as the First Cheque on or about June 21, 1999, without the knowledge or consent of Startek or the trustee, exercised a remedy and violated the existing stay of proceedings. Further, upon a comparison of the invoices and particularly the further material ordered to be produced by Pitfield J. it is apparent the cheques were issued to pay for the same three invoices and not as alleged by Samtack invoices in relation to additional goods sold to Startek. In this perspective Samtack was paid twice for the same goods and the same invoices.

12 I do not accept Samtack's assertion that it has some form of defence based upon the fact it was not aware of the filing and the stay of proceedings referred to supra. In this regard in *Re Gene Moses Construction Ltd.* (1999), 9 C.B.R. (4th) 275 (B.C. Master) the Court of Appeal confirms that knowledge of the filing of the Notice of Intention to make a proposal is not necessary for the stay to be effective. It follows that in this case pursuant to the relevant provision of the BIA a stay of proceedings was in effect as of June 17, 1999 and no creditor, including Samtack, had any remedy against it for a claim provable in bankruptcy.

13 I grant the application for summary judgment in the amount as claimed together with interest and costs on Scale 3.

Application granted.

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2012 CarswellNB 204
New Brunswick Court of Queen's Bench

Chaulk Air Inc., Re

2012 CarswellNB 204, 215 A.C.W.S. (3d) 278

In the Matter of: The Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

In the Matter of: Chaulk Air Inc. a body corporate under the laws of the Province of Newfoundland

Stephen J. McNally J.

Heard: February 28, 2012
Judgment: March 1, 2012
Docket: NB17916, Estate No. 51-1588758

Counsel: Carl A. Holm, Q.C., for Chaulk Air Inc.
Mel K. Norton, for Canada Steamship Lines
No one for Xstrata Canada Corporation

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Motion by bankrupt under provisions of Bankruptcy and Insolvency Act for declaration that following filing of its notice of intention to make proposal to its creditors under provisions of Act, actions of its secured and unsecured creditors were stayed pursuant to s. 69(1) of Act — X. Corp. owned money to bankrupt — C. company obtained garnishment order requiring X. Corp. to pay any amounts due to bankrupt to C. company — None of garnisheed funds had been paid — Motion granted — Bankrupt would likely be unable to effectively pursue proposal process it adopted under Act if order was not granted, which would be significantly detrimental to bankrupt and to other unsecured creditors as well — C. company would be in no worse position as unsecured creditor than it presently was if requested order was granted.

***Stephen J. McNally J.*:**

1 This is an application brought by Chaulk Air Inc. under the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the *BIA*) in which it seeks a declaration that following the filing of its Notice of Intention to make a proposal to its creditors under the provisions of the act, all the actions of its secured and unsecured creditors are stayed pursuant to section 69(1) of the *BIA* including a Garnishment Order issued out of the Federal Court on December 21, 2011.

2 Chaulk Air Inc. provides global logistics and shipping services with its principal office located in Moncton, New Brunswick. Canada Steam Ship Lines (CSL) is a shipping company with headquarters in Montreal. On December 21, 2011, CSL obtained a garnishment order in the Federal Court of Canada, requiring Xstrata Canada Corporation (XCC) to pay any amounts due to Chaulk to CSL. XCC owed Chaulk $160,401.65 at the time of the garnishment order. XCC acknowledges that the debt is owed and has funds available to pay that amount to Chaulk.

3 To date none of the garnisheed funds have been paid by XCC to CSL pursuant to the garnishment order and the funds are still being held by XCC. On February 8, 2012, Chaulk filed a Notice of Intention to make a Proposal (NOI) with the Official Receiver under the provisions of the *BIA*. XCC refuses to release the garnisheed funds to Chaulk without a court order despite the stay imposed on the garnishment order pursuant to section 69(1) of the *BIA*.

4 By the present motion, Chaulk seeks an order of this court sitting in bankruptcy and insolvency, for an order:

a. [Abridging the time for service ... - already granted]

b. Declaring that pursuant to s. 69(1) of the *Bankruptcy and Insolvency Act*, all actions of secured and unsecured creditors of Chaulk Air Inc. are stayed, including actions under the Garnishment Order issued December. 21, 2011 by Richard Morneau, Protonotary in the Federal Court in Montreal Quebec;

c. Declaring that there is no impediment to Xstrata Canada Corporation paying amounts due to Chaulk Air Inc. notwithstanding the Garnishment order or the claims of any other secured or unsecured creditors of Chaulk Air Inc.; and

d. Ordering Xstrata Canada Corporation to pay $160,401. 65 to Chaulk Air Inc.

5 CSL opposes the granting of the requested order. CSL concedes that as a result of the filing of the notice of intention to file a proposal by Chaulk that CSL's remedies under the garnishment order issued out of the Federal Court are stayed pursuant to the provisions of section 69(1) of the *BIA* (see also *Lindholm v. Hy-Wave Inc.*, [1996] B.C.W.L.D. 2514 (B.C. S.C. [In Chambers]) [1996 CarswellBC 1896 (B.C. S.C. [In Chambers])]) CSL submits, however, that the requested order should not be issued as to do so would result in this Court exceeding its jurisdiction and improperly interfering with a valid order of the Federal Court.

6 Counsel for CSL relies on the decision of the Supreme Court of Canada in *Antwerp Bulkcarriers, N.V., Re*, [2001] 3 S.C.R. 951 (S.C.C.). In my view, that decision does not apply to the circumstances of this case. In *Antwerp Bulkcarriers, N.V.* the action was an action *in rem* where a Belgian registered ship had been seized and ordered sold by the Federal Court. In effect, the ship was the defendant in that case. The ship's owner was adjudged a bankrupt by the Belgian bankruptcy court and its trustee obtained an order out of the Quebec Superior Court recognizing the Belgian bankruptcy order. Notwithstanding this order, the Federal Court granted default judgment and proceeded to exercise its maritime jurisdiction to have the ship appraised and sold. The Supreme Court of Canada ruled that the Quebec Superior Court (the bankruptcy court) had no jurisdiction to enjoin the Federal Court in exercising its maritime law jurisdiction with respect to the ship.

7 In the case at bar, the Federal Court's garnishment order is unenforceable and cannot be acted upon by CSL pursuant to the provisions of section 69(1) of the *BIA* upon the filing of the NOI by Chaulk. The issuance by this court of the requested order would not result in differing and competing orders from two different jurisdictions. Subsection 69(1)(a) of the *BIA* provides:

69. Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person, (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[...]

8 By virtue of this section, all actions of creditors of Chaulk, both secured and unsecured, are stayed. This would include actions under the garnishment order issued out of the Federal Court in favour of CSL. This state of affairs is due to the filing of the NOI and the staying provisions of section 69(1). The stay of the actions of creditors, including actions under a previously obtained but unexecuted garnishment order, is not instituted by any order or by the exercise of any discretion of this Court. The stay comes into effect by virtue of the statutory provisions that Parliament included in section 69(1) of the *BIA* which were triggered with the filing of the NOI by Chaulk. Consequently, the issuance of the order requested by Chaulk in this instance would not interfere in any way with the enforceability of or the effect of the Federal Court's garnishment order in favour of CSL.

9 In such circumstances I am satisfied that the order requested by Chaulk can and should be issued. Again, there is no issue that the effect of Chaulk's filing the NOI together with the provisions of section 69 of the *BIA* stays all actions of CSL against Chaulk or its property, including any actions under the garnishment order. There is no disagreement on this point. Nor is there any issue as I understand it, that CSL is an unsecured creditor and is now in no better position than any other unsecured creditor of Chaulk. Normally with such circumstances one would expect that a declaratory order of the nature being sought by Chaulk would be neither necessary nor sought.

10 In the particular circumstances of this case, however, CSL opposes the release of the funds from Xstrata to Chaulk and Xstrata is apparently unwilling to release the funds without some court acknowledgement of the staying provisions of section 69 of the *BIA*. The purpose of the proposal sections of the *BIA* are to allow insolvent businesses to avoid bankruptcy by reorganizing their affairs such that payments may be made to creditors and the business can remain as a going concern. Obviously, there is a significant amount of money at stake and without it Chaulk will likely be unable to effectively pursue the proposal process it adopted under the *BIA*. This may be not only significantly detrimental to Chaulk but to other unsecured creditors as well. On the other hand CSL will be in no worse position as an unsecured creditor than it presently is if the requested order is granted.

11 Accordingly, Chaulk's motion is granted and the requested order will issue.

***Stephen J. McNally J.*:**

On the motion of Chaulk Air Inc., the following is ordered:

1) The time for service of the notice of motion and motion record is hereby abridged so that the motion is returnable on February 28, 2012, and further service hereof is hereby dispensed with;

2) It is declared that pursuant to s.69(1) of the *Bankruptcy and Insolvency Act*, all actions of secured and unsecured creditors of Chaulk Air Inc. are stayed, including actions under the Garnishment Order issued December 21, 2011 by Richard Morneau, Prothonotary in the Federal Court in Montreal Quebec;

3) It is declared that there is no impediment to Xstrata Canada Corporation paying amounts due to Chaulk Air Inc. notwithstanding the Garnishment Order or the claims of any other secured or unsecured creditors of Chaulk Air Inc.; and

4) It is ordered that Xstrata Canada Corporation to pay $160,401.65 to Chaulk Air Inc.

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2020 ABQB 652
Alberta Court of Queen's Bench

Accel Energy Canada Limited (Re)

2020 CarswellAlta 1995, 2020 ABQB 652, [2020] A.W.L.D. 3609, 21 Alta. L.R. (7th) 148, 325 A.C.W.S. (3d) 164

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Compromise or Arrangement of ACCEL Energy Canada Holdings Limited and ACCEL Energy Canada Limited

ACCEL Energy Canada Limited and ACCEL Canada Holdings Limited, BP Canada Energy Group ULC, TransAlta Energy Marketing Corp (Applicants) and TransAlta Energy Marketing Corp and BP Canada Energy Group ULC (Respondents)

B.E. Romaine J.

Judgment: October 27, 2020
Docket: Calgary 1901-16581

Counsel: Paul G. Chiswell, Kylan S. Kidd, for TransAlta Energy Marketing Corp.
Blair Carbert, Michael Bokhaut, for ACCEL Energy Canada Holdings Limited and ACCEL Energy Canada Limited
Matthew R. Lindsay, Q.C., Courtney C. Kachur, for BP Canada Energy Group ULC

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — Priority with respect to secured creditors

Funds totalling $1,414,393.05 (Disputed Funds) were part of net proceeds payable by BP pursuant to contracts between BP and A Ltd. — Under irrevocable direction to pay (IDP) dated June 2019, A Ltd. directed BP to pay applicant T Ltd. any net funds owing to A Ltd. under contracts, after set-off, at various times between June 28 and September 30, 2019 — A Ltd.'s indebtedness to T Ltd. arose from March 2019 judgment for non-payment of charges for electricity for operation of A Ltd.'s oil and gas operations — Almost entire amount of judgment of $1,159,246.18, together with additional judgement claim in amount of $255,146.87, was collected by T Ltd., but T Ltd. claimed additional amount for further services supplied until March 2019 — September 2019 order required BP to pay A Ltd. all but $193,165.32 of funds that BP owed and was holding for A Ltd. — T Ltd. sought payment from BP under IDP of further amounts owed by A Ltd. — In November 2019, A Ltd. commenced Companies' Creditors Arrangement Act (CCAA) proceedings — Order was made directing BP to pay Disputed Funds to Monitor in trust — A Ltd. brought application for payment of funds held in trust and order that T Ltd. was unsecured creditor with no right of payment from BP; T Ltd. brought cross-application for order that BP was in breach of IDP and for payment of Disputed Funds — Application granted; cross-application dismissed — IDP was executed in accordance with concurrent payment plan to prevent T Ltd. from pursuing collection efforts — There was no language in IDP or in payment plan that referenced assignment of funds to T Ltd. and nothing in IDP and payment plan that gave T Ltd. priority over A Ltd.'s claim to Disputed Funds — Disputed Funds would become part of A Ltd.'s estate in insolvency, and be paid out in accordance with established priorities — T Ltd. was free to participate as unsecured creditor — T Ltd. had no independent right to payment from BP in respect of Disputed Funds or cause of action against BP in relation to IDP or Disputed Funds.

APPLICATION by A Ltd. for payment of funds held in trust and order that T Ltd. was unsecured creditor with no right of payment from BP; CROSS-APPLICATION by T Ltd. for order that BP was in breach of irrevocable direction to pay and for payment of fund held in trust.

***B.E. Romaine J.*:**

I Introduction

1 The essence of this application is a priority dispute between TransAlta Energy Marketing Limited and ACCEL Energy Canada Limited and its other creditors over funds totaling $1,414,393.05 (the "Disputed Funds"), currently held by the Monitor of ACCEL Energy Canada Limited, which is under the protection of the *Companies Creditors Arrangements Act*, RSC 1985 c. c-36.

II Relevant Facts

2 The Disputed Funds are part of the net proceeds payable by BP Canada Energy Group ULC pursuant to contracts between BP and ACCEL Energy.

3 At issue is an irrevocable direction to pay (the "IDP") dated June 12, 2019, pursuant to which ACCEL Energy directed BP to pay TransAlta any net funds owing to ACCEL Energy under the contracts, after set-off, at various times between June 28 and September 30, 2019.

4 ACCEL Energy's indebtedness to TransAlta arose from a judgement TransAlta obtained in March, 2019 relating to non-payment of charges incurred by reason of TransAlta supplying electricity to ACCEL Energy to enable it to operate its oil and gas operations. TransAlta agreed to stop enforcement proceedings against ACCEL Energy in exchange for ACCEL Energy issuing two irrevocable directions to pay, one dated March 27, 2019 and the other the IDP. Almost the entire amount of the judgement of $1,159,246.18, together with an additional judgement claim in the amount of $255,146.87, has been collected by TransAlta, but TransAlta claims an additional amount for further services supplied until March 12, 2019.

5 BP complied with the IDP from June 2019 until it was advised on July 30, 2019, by ACCEL Energy by way of a reference to an email exchange between TransAlta and ACCEL Energy that the parties had agreed that the date of the July 30, 2019 payment that BP was to pay under the IDP would be extended to August 2, 2019, and that ACCEL Holdings would pay TransAlta directly the $1.25 million that was to be paid by BP on ACCEL's behalf. The new payment plan provided that TransAlta would not escalate enforcement steps against ACCEL Energy so long as ACCEL Energy paid in full and on time. Therefore, BP did not pay the July 30, 2019, payment specified by the IDP. The next payment under the IDP was to be made on August 30, 2019.

6 During August, 2019, BP received conflicting payment instructions from ACCEL Energy and demands from ACCEL's other creditors. On August 26, 2019, BP paid the net July 2019 production proceeds it owed to ACCEL Energy, and left it to ACCEL Energy to deal with its creditors.

7 On September 4, 2019, BP received an email from ACCEL Energy indicating that it considered all IDPs previously provided to BP to be suspended, and that BP should deem the email as a release by ACCEL Energy from performance of any previous IDPs. BP received no communication from TransAlta until September 30, 2019.

8 On September 27, 2019, Grosse, J, ordered BP to pay ACCEL Energy all but $193,165.32 of the funds that BP owed and was holding for ACCEL Energy and BP did so. Pursuant to that Order, ACCEL Energy was at liberty to re-set for hearing its application for an order authorizing and directing release of these remaining funds.

9 On October 1, TransAlta demanded payment from BP under the IDP. TransAlta's counsel was sent a copy of the September 27 Order on October 4, 2019. TransAlta's counsel was also sent notice of ACCEL Energy's re-set application to be heard on October 8, 2019. On October 7, 2019 TransAlta responded that it intended to apply to set the September 27 Order aside but no materials were filed and no such application was made. ACCEL Energy did not pursue the re-set application.

10 On October 21, 2019, ACCEL Energy filed a Notice of Intention to make a Proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

11 As of October 23, 2019, approximately 2/3 of the Disputed Funds were in the possession of BP. The remaining portion of the Disputed Funds were earned by ACCEL Energy after the commencement of these insolvency hearings.

12 On October 25, 2019, funds that BP held in trust for ACCEL Energy and ACCEL Holdings, without further off-set were paid to Deloitte Restructuring Inc. in trust pursuant to an order of Graesser, J., pending the determination of the priority dispute between claimants to the Disputed Funds.

13 The Order provides that "BP shall not be liable to any person as a result of having complied with this Order". It also provides that the:

> . . . funds to be held by Deloitte will stand in the place and stead of the funds previously held by BP, and the interests of all parties will attach to those funds in the same regard and with the same priority as they did when the funds were held by BP. This Order will be without prejudice to the substantive right of the parties.

14 This Order was made responding to claims of other creditors of ACCEL Energy, and TransAlta was not a party to the application.

15 On November 22, 2019, ACCEL Energy commenced proceedings under the CCAA. By order dated January 21, 2020, Horner, J., directed BP to deposit $1,414,393.06 with the Monitor in trust until further order of the Court. This Order provides that "[a]ny and all rights which BP may have to claim set-off in relation to [these funds] are hereby preserved". It also provides that:

> BP's liability and obligations to Energy with respect to [the amount of $1,414,393.06] are satisfied as a result of payment of the Amount to the Monitor. Any and all obligations which BP may have to TransAlta under the IDP are hereby preserved.

16 ACCEL Energy seeks an order:

> a) directing the Monitor to pay the Disputed Funds to ACCEL Energy, or any receiver or trustee appointed;
>
> b) declaring that TransAlta's claim is that of an unsecured creditor, to be dealt with in accordance with any plan of arrangement or distribution applied in these insolvency proceedings; and
>
> c) declaring that TransAlta has no independent right to payment from BP in respect of the Disputed Funds under the IDP or any payment plan.

17 BP seeks an order declaring that:

> a) the Disputed Funds form part of ACCEL Energy's estate, and are to be administered according to the Court's direction; and
>
> b) TransAlta has no cause of action against BP in relation to the IDP, the Disputed Funds or these proceedings.

18 TransAlta seeks an order:

> a) declaring that BP is liable to TransAlta for breaches of the IDP;
>
> b) declaring that the IDP irrevocably assigned the August payments and the September payments to TransAlta;
>
> c) directing that BP must pay TransAlta at least $1,414,393.05 and pre- and post- judgment interest under the *Judgments Interests Act*, whether from the funds held by the Monitor or otherwise; and
>
> d) alternatively, granting TransAlta permission to commence separate proceedings against BP for breach of the IDP.

III Analysis

A. Status of IDP and TransAlta's claim in the insolvency

19 Although TransAlta argues that insolvency issues are a red herring in this application, in that its claim is essentially to collect the amount of the Disputed Funds from BP, ACCEL Energy seeks to have the Disputed Funds paid for the benefit of the estate in these insolvency proceedings and a declaration that TransAlta's claim is that of an unsecured creditor. Therefore, the effect, if any, of the IDP on the Disputed Funds in the context of the insolvency is an issue.

20 TransAlta has made it clear that it does not argue that the IDP creates a trust. It does, however, submit that the IDP irrevocably assigned the funds that make up the Disputed Funds to TransAlta, in the form of the payments that it says should have been made in August and September.

21 The language of the IDP is relevant:

> RE: Any amounts owing whatsoever from BP Canada to ACCEL Energy
>
> You are hereby irrevocably authorized and directed to pay out any net funds owing now, or that may be owing in the future to ACCEL Energy from BP Canada, netting any set-off and other rights and remedies available to BP Canada under any currently existing agreement between BP Canada and Accel Energy or under law, as follows:
>
> 1. $1,250.000 to BD&P in trust for TransAlta by June 28. 2019;
>
> 2. $1,250,000, to BD&P in trust for TransAlta by July 30. 2019;
>
> 3. $1,250,000 to BD&P in trust for TransAlta by August 30, 2019;
>
> 4. $322,880 to BD&P in trust for TransAlta by September 30, 2019;
>
> to satisfy the outstanding balance of TransAlta's writ of enforcement against Accel Energy; and
>
> 5. $32,886 to BD&P in trust for TransAlta by September 30, 2019.
>
> to satisfy the outstanding balance of interest owed to TransAlta and TransAlta's legal fees and collection costs under the Retail Electricity Services Agreement dated September 29, 2017 between ACCEL Energy and TransAlta;
>
> with the balance to be paid to ACCEL Energy, and for so doing this shall be your full and irrevocable authority.

22 It is signed by ACCEL Energy, but not by BP. The IDP was executed in accordance with a concurrent payment plan, which provided that, if the payments set out in the IDP were made, TransAlta would not pursue various collection efforts it had instigated, including garnishees and questioning of an ACCEL Energy officer. The June and July payments are not in issue.

23 There is no language in the IDP or in the payment plan that references an assignment. As noted by ACCEL Energy, ACCEL Energy and TransAlta are sophisticated parties capable of using clear language to affect an assignment. This was, in fact, the second IDP that had been drafted by the parties. When payments were not made under the first IDP executed in March, TransAlta did not pursue BP on the basis that the IDP constituted an assignment, and did not change the language of the IDP that is the subject of this application to add assignment language. It is also relevant that TransAlta undertook additional enforcement efforts against ACCEL Energy after payments under the March IDP had been missed, which it would not have been able to do had that IDP been an assignment of property.

24 TransAlta submits that the IDP creates an "irrevocable assignment" of the funds to TransAlta, and that the funds were thus TransAlta's property. It references cases where the instrument or instruments between the parties uses the term "assign irrevocably": *Pythe Navis Adjusters Corp. v. Columbus Hotel Co. (1991) Ltd.*, 2014 BCCA 262 (B.C. C.A.). *Gateway Mortgage Investment Corp. v. 1384125 Alberta Ltd.*, 2014 ABQB 45 (Alta. Q.B.) at appendix B and appendix C.

25 It is noteworthy that the Court in *Pythe Navis* relies on the language of the contract as a whole, noting that it "includes clear language of irrevocable assignment": para 31. The issue in that case was whether the instrument transferred property to

the assignee, or only created a collateral security interest such that the bankrupt assignor retained some interest. In that context, the term "irrevocable" led to a decision in favour of the assignee.

26 In *Gateway Mortgage*, the question was whether the recipient of a direction to pay (which did not include assignment language) and an assignment (which did) was liable to the assignee. The issue was whether holding funds under a mortgage were an "interest" capable of assignment.

27 A secondary issue was whether the assignment was a legal assignment or an equitable one, which is where the significance of the word "irrevocable" was relevant. The comments made by the Court that are relied upon by TransAlta in this application, that if a recipient of an assignment "pays the assignor, he does so at his peril", and "[i]f the assignor does not account to the assignee for the money, the debtor will have to pay a second time" refer to an assignment, not a mere direction to pay: para 22.

28 Clear and unambiguous wording is required in order for a direction to pay to qualify as an assignment of a debt: *Colonial Bank v. Butec International Chemical Corp.* (1986), 7 B.C.L.R. (2d) 381 (B.C. S.C.); *Nicolson v. Trozzo*, 2014 SKQB 182 (Sask. Q.B.) at para 3.

29 In order for a direction to pay to constitute an assignment:

> It must expressly or implicitly record the fact of assignment, and must plainly indicate to the debtor that by virtue of the assignment the assignee is entitled to receive the money.
>
> If it merely indicates that on grounds of convenience payments should be made to a third party as agent for the creditor, the debtor is not liable if he pays the creditor direct. (emphasis added):
>
> *Colonial Bank*, at para 23, citing the Court of Appeal in England (*James Talcott Ltd. v. John Willis & Co.*, [1940] 3 All E.R. 592 (Eng. C.A.)).

30 While the IDP uses the word "irrevocable", that is not sufficient to turn it into an assignment. As noted in *Accel Canada Holdings Limited, Re*, 2020 ABQB 204 (Alta. Q.B.), Horner, J. held that a substantially similar IDP, "created a simple commercial agreement" for funds to be paid from BP Canada directly to Third Eye Capital, instead of to Holdings: para 55. The same is true of the IDP of this case.

31 TransAlta seeks to distinguish the decision in *Accel Canada Holdings Limited, Re*. It suggests that the IDP in that case did not involve BP other than a recipient, and by contrast BP had extensive involvement with the IDP in this case. This issue is discussed later in this decision. TransAlta notes that it is not arguing that the IDP created a trust, like TEC did in ACCEL; and that BP was not a party to the application, as it is here. None of these factors make the Court's ruling in *Accel Canada Holdings Limited, Re* distinguishable, as the important facts, the similarities of language used in both IDAs, and the absence of trust language make the findings in *Accel Canada Holdings Limited, Re* relevant and persuasive.

32 Nor is the IDP an equitable assignment. As was the case with the direction in *Frankel Structural Steel Ltd. v. Goden Holdings Ltd.*, [1969] 2 O.R. 221, 5 D.L.R. (3d) 15 (Ont. C.A.), affirmed [1971] S.C.R. 250, 16 D.L.R. (3d) 736 (S.C.C.).

33 The IDP in this case has no subject matter that could be equitably assigned: *Frankel* trial, para 8. It is not couched in language of present operation but envisages future indebtedness as a precondition: para 11 and *Frankel* SC at para 14.

34 The IDP does not constitute an assignment. ACCEL submits that, even if it did, it was replaced by a new payment plan entered into on July 30, 2019, referencing the email exchange of that date between ACCEL Energy and TransAlta.

35 It is noteworthy that on August 20, 2019, TransAlta emailed ACCEL Energy inquiring: "if [ACCEL Energy] had clarity on where you expect this month's payments to be made from. Will they be paid through the IDP with BP for ACCEL Energy or do you expect to pay both payments directly through ACCEL Holdings — the same as last month?" Despite emails back and forth, ACCEL Energy had not answered the inquiry by August 29, 2019, the day before the payments were due. On September

4, 2019, ACCEL Energy emailed directions to BP to suspend all IDPs, indicating that "BP Canada should deem this note as a release by ACCEL Energy from performance of any and all IDPs.

36 There is therefore nothing in the IDA and the payment plan that gives TransAlta priority over the estate's claim to the Disputed Funds. Section 70(1) of the BIA provides that every bankruptcy order takes precedence over "all judicial and other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or *other process against the property of a bankrupt*, except those that have *been completely executed by payment to the creditor* or the creditor's representative, and except the rights of a secured creditor". [emphasis added]

37 Section 70(1) applies to both judicial and non-judicial proceedings. The IDP is a non-judicial process against the property of the bankrupt, essentially a form of extra-judicial garnishment which was entered into in lieu of existing garnishees. Since it had not been completely executed by payment to the creditor, the ACCEL insolvency proceedings take precedence:

> *Stone Sapphire Ltd v Transglobal Communications Group Inc*, 2008 ABQB 575 at paras 11,12,13,14,15 and 34.
>
> VI *International Holdings Ltd v Henbar Investments Ltd*, [1982] AJ No 989, at paras 8, 11.

38 A similar issue has already been decided in those proceedings in Action No. 1901-07043. A judgment creditor, ERM, obtained a judgment against ACCEL Holdings and issued a garnishee summons. Approximately $110,000 was paid into Court. The garnished funds were still held by the Court when the NOI was filed. Those funds were ordered retuned to ACCEL Holdings by Horner, J. on April 24, 2020.

39 The IDP is not a form of security, whether the funds it refers to are payments on a judgement or money earned by ACCEL Energy after the commencement of these insolvency proceedings. TransAlta is an unsecured creditor. Payment of the Disputed Funds to TransAlta would violate the principle of equality among unsecured creditors, and would offend the priority scheme established by the BIA, which ought to be followed whether a distribution of the estate occurs under the BIA, the CCAA or a receivership: *Nortel Networks Corp., Re*, 2015 ONSC 2987 (Ont. S.C.J. [Commercial List]) at para 209, leave to appeal ref'd *Nuspor Investments Partnership v. 1597180 Ontario Inc.*, 2016 ONSC 332 (Ont. S.C.J.); Lloyd W. Houlden, Geoffrey B. Morawetz, and Janis P. Sarra, *The 2019-2020 Annotated Bankruptcy and Insolvency Act* (Toronto; Thomson Reuters, 2019) at p. 825 citing *Keele-Wilson Supermarkets Ltd., Re* (1990), 78 C.B.R. (N.S.) 189 (Ont. S.C.).

40 Interpreting the IDP to mean that TransAlta is paid ahead of the secured creditors or without sharing equally with unsecured creditors of ACCEL Energy also violates the fraud on the bankruptcy law principle, because it would alter the scheme of distribution of creditors. The IDP should not overturn established priorities: *Capital Steel Inc v. Chandos Construction Ltd*, 2019 ABCA 32 (Alta. C.A.), at paras 19-22, affirmed *Chandos Construction Ltd. v. Deloitte*, 2020 SCC 25 (S.C.C.) at para 12.

41 Given my decision on the status of the IDP in an insolvency, it is not necessary that I decide whether the IDP would constitute a fraudulent preference. The Disputed Funds will become part of ACCEL's estate in insolvency, and paid out in accordance with established priorities. TransAlta is free to participate as an unsecured creditor.

B. Does TransAlta have a cause of action against BP in relation to the IDP, the Disputed Funds, or these proceedings?

42 Both ACCEL Energy and BP submit that TransAlta has no independent obligation in relation to the IDP. They note that in *Accel Canada Holdings Limited, Re*, Horner, J. made the following comment at para 50 about TEC's claim that a substantially similar IDP created a trust:

> If the August IDP constituted a trust arrangement and BP Canada failed to pay [TEC - a secured creditor], then TEC would gain the unfair advantage of having recourse against both BP Canada as trustee and Holdings as debtor for the same funds.

43 ACCEL Energy submits, and I agree, that TransAlta is attempting to do what the Court in *Accel Canada Holdings Limited, Re* said was unfair: pursue BP because it lost a priority dispute to the Disputed Funds.

