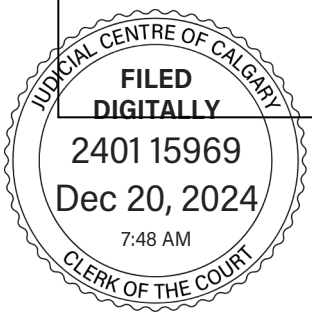
Clerk's Stamp



COURT FILE NUMBER	2401-15969
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LCC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.
DOCUMENT	**BENCH BRIEF OF CANADIAN REP COUNSEL on behalf of CANADIAN INVESTORS (BOTH AS DEFINED IN THE AMENDED AND RESTATED INITIAL ORDER)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No.: 340252.00001

BENCH BRIEF OF CANADIAN REP COUNSEL

Friday, December 20, 2024, at 2:00 p.m.

Before the Honourable Justice C. Feasby

CONTENTS

I. INTRODUCTION

1. This Bench Brief is submitted by Canadian Rep Counsel on behalf of Canadian Investors in response to the application filed by the Debtor Companies in the within proceedings seeking, among other things, an extension of the prescribed time to file Applications for Permission to Appeal and Civil Notices of Appeal of the Initial Order, granted November 14, 2024 (the "**Initial Order**"). This Bench Brief is intended to provide the Court with assistance as to the law applicable on this application.

2. All capitalized terms used but not otherwise defined herein have the meaning ascribed to them in the Amended and Restated Initial Order, granted November 25, 2024 (the "**ARIO**").

3. The official transcript of the reasons of the Honourable Justice C. Simard for granting the ARIO, dated November 25, 2024, is attached hereto as **Schedule "A"**.

II. APPLICABLE LAW

A. Extension of the Time to Appeal

4. Pursuant to subsection 14(2) of the *CCAA*, a party must take steps to appeal within 21-days after the decision was rendered. If the party fails to perfect its appeal within the prescribed time period, it must bring an application before the Court that granted the order in question, to request an extension of time.[1]

5. Justice Fitzpatrick stated the test for an extension of time to appeal under the *CCAA* in *Port Capital* noting the following relevant factors:

   (a) Was there an intention to apply for leave before the expiry of the time for doing so?

   (b) Did the appellant communicate that intention to the respondents?

   (c) Was the delay lengthy?

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[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 at s 14(2) [*CCAA*] [**TAB 1**]; *Port Capital Development (EV) Inc (Re)*, 2022 BCSC 1655 at para 14 [*Port Capital*] citing to *Bank of Montreal v Cage Logistics Inc*, 2003 ABCA 36 and *Vanguard Inc v Royal Bank of Canada*, 2004 SKCA 99 [**TAB 2**].

(d) Did the applicant act expeditiously to seek an extension of time?

(e) Is there an explanation for the delay?

(f) Is there prejudice to the respondents consequent on the delay?

(g) Is there merit to the application for leave?

(h) Is it in the interests of justice that the extension be granted?[2]

6. The B.C. Court of Appeal has stated that the answers to the above questions are not to be considered together through a mathematical or algorithmic approach but rather used to guide judicial discretion.[3]

7. In *Industrial Alliance*, the Appellate Court further noted that given the parties were sophisticated and their counsel specialized in bankruptcy and insolvency, the Court could not assume that the applicant was unaware of the relevant statutory provisions governing appeals in insolvency matters.[4]

8. The party seeking an extension of time bears the onus of satisfying the above noted factors and such factors must be considered within the unique circumstances that apply in insolvency proceedings.[5]

9. The period to assess whether the respondents suffered prejudice as a result of the applicant's delay is the time between the end of the appeal period and the date that the leave application was filed.[6]

10. While it is awkward for a Court to analyze the merits of its own decision, the merit analysis is to focus on whether the leave to appeal application is bound to fail for being frivolous,

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[2] *Port Capital*, *supra* at para 21 [**TAB 2**].

[3] *Industrial Alliance Insurance and Financial Services Inc v Wedgemount Power Limited Partnership*, 2018 BCCA 283 at para 31 [*Industrial Alliance*] [**TAB 3**].

[4] *Industrial Alliance*, *supra* at para 37 [**TAB 3**].

[5] *Port Capital*, *supra* at paras 19, 22 [**TAB 2**].

[6] *Port Capital*, *supra* at para 38 citing to *Industrial Alliance*, *supra* at para 38 [**TAB 2**].

vexatious, or entirely without merit.[7] The interests of justice factor is to act as an overarching consideration in the analysis that takes into consideration the answer to all of the other factors.[8]

i. The Test for Leave to Appeal

11. At this stage of the within proceedings, the test for leave to appeal is pertinent as the merits of the application for leave are to be considered when determining whether to extend the period of time to appeal.

12. Pursuant to section 13 of the *CCAA*, a party seeking to appeal from an order or decision is required to obtain leave of the judge appealed from or of the court or judge of the court to which the appeal lies.[9]

13. The test to obtain leave to appeal under section 13 of the *CCAA* requires the applicant to demonstrate "serious and arguable grounds that are of real and significant interest to the parties"[10] by considering the following:

    (a) whether the point on appeal is of significance to the practice;

    (b) whether the point raised is of significance to the action itself;

    (c) whether the appeal is *prima facie* meritorious or whether it is frivolous; and

    (d) whether the appeal will unduly hinder the progress of the action.[11]

14. The above analysis is grounded in the four concepts of serious grounds, arguable grounds, real interest to the parties, and significant interest to the parties.[12]

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[7] *Port Capital*, *supra* at para 42 [**TAB 2**].

[8] *Port Capital*, *supra* at para 97 [**TAB 2**].

[9] *CCAA*, *supra* at s 13 [**TAB 1**].

[10] *Mudrick Capital Management LP v Lightstream Resources Ltd*, 2016 ABCA 401 at para 11 [*Mudrick*] [**TAB 4**].

[11] *NewGrange Energy Inc v Invico Diversified Income Limited Partnership*, 2024 ABCA 244 at para 11 [*NewGrange*] [**TAB 5**]; *BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264 at para 7 [*BMO Nesbitt*] [**TAB 6**].

[12] *Mudrick*, *supra* at para 11 [**TAB 4**].

15. On the question of whether the point on appeal is of significance to the practice, the Alberta Court of Appeal has noted a direct correlation between the likelihood permission to appeal will be granted and the size of the group affected by the point at issue and the gravity of the impact.[13]

16. When determining whether the point raised is of significance to the action itself, the Courts will consider if the applicant can even be granted the remedy that it seeks or if the appeal is moot.[14] *CCAA* proceedings often involve real time litigation where judges are required to make decisions in constantly evolving circumstances.[15] As such, it may be difficult, if not impossible, to reverse certain effects of an order once granted, such as where an interim lender has relied on an order to advance financing. In the absence of a stay of the order in dispute, it may be "virtually impossible to 'unscramble the egg'".[16]

17. The applicant must show that its appeal is sufficiently meritorious that delaying the ultimate disposition of the issues under review and asking for the attention of a panel of judges and counsel is then justified.[17] This question must be answered in light of the high costs associated with appeals and the deference that must be owed to the decision of the supervising judge.[18]

18. It is "without question" that Canadian courts are to approach applications for leave to appeal decisions made under the *CCAA* with caution.[19] Leave is to be granted sparingly when the decision being appealed from is a discretionary one.[20] As such, the Courts should adopt a highly deferential approach to discretionary decisions in *CCAA* proceedings and only intervene if the supervising judge acted unreasonably, erred in principle, or made a

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[13] *Mudrick*, *supra* at para 11 [**TAB 4**].

[14] *Resurgence Asset Management LLC v Canadian Airlines Corp*, 2000 ABCA 238 at para 32 [**TAB 7**]; *Canada v Temple City Housing Inc*, 2008 ABCA 1 at para 14 [*Temple City*] [**TAB 8**].

[15] *Temple City*, *supra* at para 14 [**TAB 8**].

[16] *Temple City*, *supra* at para 14 [**TAB 8**].

[17] *NewGrange*, *supra* at para 14 [**TAB 5**]; *BMO Nesbitt*, *supra* at para 14 [**TAB 6**]; *Mudrick*, *supra* at para 11 [**TAB 4**].

[18] *Mudrick*, *supra* at para 11 [**TAB 4**].

[19] *Port Capital*, *supra* at para 44 [**TAB 2**]; *NewGrange*, *supra* at para 13 [**TAB 5**].

[20] *Port Capital*, *supra* at para 44 [**TAB 2**]; *BMO Nesbitt*, *supra* at para 8 [**TAB 6**]; *Mudrick*, *supra* at para 11 [**TAB 4**].

manifest error.[21] The applicant must point to an error on a question of law or a palpable and overriding error in findings of fact or in the supervising judge's exercise of discretion.[22] This approach also ensures that the Courts remain mindful of the real time dynamics of insolvency proceedings.[23]

19. A frivolous appeal is one where the likelihood of success is extremely low, if it is not arguable, or it does not make sense for the appellate court to hear the appeal. While this is a low standard, the applicant must still meet it.[24]

20. If the appealed decision is not "clearly wrong" then the applicant will need to satisfy all four stages of the leave to appeal test. A hopeless case cannot succeed.[25]

21. In *Port Capital*, Fitzpatrick J expressly addressed the applicant's argument of insufficient notice in the analysis of the merits of the leave to appeal application. While procedural fairness remains an important component of insolvency proceedings, the inherent nature of *CCAA* proceedings does not always allow for the parties and the Courts to follow "strict and immutable notice periods" given decisions often must be made in urgent and complex circumstances.[26] Procedural decisions in *CCAA* proceedings, including dispensing with or shortening notice periods, are to be afforded considerable deference.[27]

22. As stated by Dr. Janis P. Sarra, the comeback hearing in *CCAA* proceedings is an opportunity for parties that did not receive notice, or only received abbreviated notice of the initial application to appear before the Court and make submissions on the initial order that was previously granted.[28]

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[21] *Port Capital*, *supra* at paras 46-47 [**TAB 2**]; *BMO Nesbitt*, *supra* at para 8 [**TAB 6**].

[22] *NewGrange*, *supra* at para 13 [**TAB 5**]; *BMO Nesbitt*, *supra* at para 8 [**TAB 6**].

[23] *Mudrick*, *supra* at para 49 citing to *Re Stelco Inc*, 261 DLR 4th 368 at 374 (Ont CA) [**TAB 4**].

[24] *Mudrick*, *supra* at paras 51-52 [**TAB 4**].

[25] *Mudrick*, *supra* at para 12 [**TAB 4**].

[26] *Port Capital*, *supra* at para 65 [**TAB 2**].

[27] *Port Capital*, *supra* at para 71 citing to *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 218 [**TAB 2**].

[28] Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Thomson Reuters Canada Limited, 2013) at 59 [**TAB 9**].

III. CONCLUSION

23. Canadian Rep Counsel respectfully requests that this Honourable Court dismiss the Debtor Companies' application for an extension of time to file the Application for Permission to Appeal and Civil Notice of Appeal of the Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th DAY OF DECEMBER, 2024.

FASKEN MARTINEAU DuMOULIN LLP

Per: 

Robyn Gurofsky and Kaitlyn Wong,
Canadian Rep Counsel

LIST OF AUTHORITIES

TAB	CASE LAW
1.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36.
2.	*Port Capital Development (EV) Inc (Re),* 2022 BCSC 1655.
3.	*Industrial Alliance Insurance and Financial Services Inc v Wedgemount Power Limited Partnership,* 2018 BCCA 283.
4.	*Mudrick Capital Management LP v Lightstream Resources Ltd*, 2016 ABCA 401.
5.	*NewGrange Energy Inc v Invico Diversified Income Limited Partnership*, 2024 ABCA 244.
6.	*BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264.
7.	*Resurgence Asset Management LLC v Canadian Airlines Corp,* 2000 ABCA 238.
8.	*Canada v Temple City Housing Inc,* 2008 ABCA 1.
9.	Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Thomson Reuters Canada Limited, 2013).

Schedule "A"

Action No.: 2401-15969
E-File No.: CVK24ANGUS
Appeal No.: _____

IN THE COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, C. C-36, AS AMENDED.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LCC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. AND A2A CAPITAL SERVICES CANADA INC.

P R O C E E D I N G S

Calgary, Alberta
November 25, 2024

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Proceedings taken in the Court of King's Bench of Alberta, Courthouse, Calgary, Alberta

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November 25, 2024 — Afternoon Session

The Honourable Justice Simard — Court of King's Bench of Alberta

D. Jukes (remote appearance)	For the A2A Companies
J.L. Oliver (remote appearance)	For the Court Monitor
N.E. Thompson (remote appearance)	For the Court Monitor
R. Donnelly (remote appearance)	For the Court Monitor
D. Jorgenson (remote appearance)	For the Court Monitor
H. Gorman, KC (remote appearance)	For the Offshore Investor
O. Konowalchuk (remote appearance)	For the Court Monitor
K. Kashubahuk (remote appearance)	For Piller Capital Corp.
R. Gurofskyuk (remote appearance)	For the Canadian Ambassadors
K. Wong (remote appearance)	For the Canadian Ambassadors
A. McClelland (remote appearance)	For the Canadian Ambassadors
J. Ku (remote appearance)	For the Debtor Company
E. Choi (remote appearance)	For the Debtor Company
S. Lee (remote appearance)	For the Debtor Company
I. Cyr	Court Clerk

THE COURT: I think everyone can hear me all right?

MR. JUKES: I can hear you, Sir. Dan Jukes, from Miles Davison here. My apologies, I think the delay there was my fault. I had not realized that my friends from Ontario (INDISCERNIBLE) link, so I have forwarded it to them. I see at least one of them has since logged in. I hope the others will be here in a moment.

THE COURT: Okay. Where, Madam Clerk, where is the camera that is picking me up? Is it the one at the back of the courtroom?

THE COURT CLERK: It's the forward one.

THE COURT: Okay. I will face forward, because I see counsel over here -- okay.

Decision

THE COURT: Well, you are here, Mr. Jukes, so I will start. The punch line comes at the end, so hopefully your colleague will join by then.

Any preliminary matters before I give everyone my decision from last Thursday? Hearing nothing and seeing nothing -- and I did receive, I received the supplemental affidavit of Mr. Ambrose on Friday, and then I got the monitor's second supplement to the first report this morning. So thank you for that. I did have a chance to briefly review those.

So I am going to give you -- given the urgency of these applications -- I am going to give you my decision and my reasons today orally. And at the end, there will probably be some questions about the details to go in a Court order. I will ask Mr. Oliver to draft that Court order. I know he is not here, but I see his colleague is here.

If anyone requests a transcript of this decision, obviously I reserve my rights to make any minor proof reading or clean-up changes, but I will not, obviously, change anything substantive.

So Introduction.

On November 14th, 2024, this Court granted an initial order under the CCAA against 11 debtor companies -- 4 Alberta corporations, 4 Ontario corporations, and 1 corporation incorporated under the laws of Canada, 2 limited liability corporations incorporated the Texas.

The initial order also covered certain affiliated entities: 4 limited partnerships -- 3 registered in Alberta, 1 in Ontario; and 2 trusts, one of which was established in Ontario, and the other in Alberta.

I will collectively refer to the entities, all of entities covered by the initial order as the A2A Group.

The application for the initial order was made by five individuals who had invested in the A2A Group's project. I will call them the applicant investors. On November 21st, 2024, I heard two applications: The application of Alvarez and Marsal Canada Inc. -- the Court-appointed monitor, for an extension of the stay of proceedings and other relief; and the application of the A2A Group, asking that I set aside or stay the initial order, or adjourn the hearing to allow for more fulsome evidence and argument.

Background, first, with respect to the applicant investors.

The five applicant investors personally invested $76,000 in A2A's projects. They also

gave evidence about their family members or clients who had invested a further $105,500 in the projects.

The structure of the A2A Group and the projects.

The A2A Group raised money for the purpose of purchasing real estate that has a potential for large-scale residential development. The applicant investors have invested in three A2A real estate projects that have consequently been included in the initial order. I was advised that there might be as many as eight other A2A projects.

The three projects are Angus Manor, which is a 167-acre project north of Toronto; Fossil Creek, a 93-acre project in Fort Worth, Texas; and Windridge, a 415-acre project in Texas in the Dallas/Fort Worth area. The structure of the Angus Manor project is as follows: A development corp. -- or DevCo -- originally held title to the Angus Manor lands. Undivided fractional interests -- or UFIs -- in the lands were then transferred to be held by or for investors in the following ways: In the first offering, Canadian investors purchased units in a limited partnership. The limited partnership used the proceeds of those unit sales to purchase UFIs from the DevCo, and foreign investors did not invest through the limited partnership; rather, they bought UFIs directly from the DevCo.

In the second offering, Canadian investors bought bonds issued by a capital corp.. The capital corp. used the proceeds of those bond sales to buy limited partnership units in a second limited partnership, and that second limited partnership bought UFIs in the lands from DevCo.

The title to the Angus Manor lands was in evidence. It shows 2,300 UFIs owned as follows: 893 by the DevCo, 212 held in the first limited partnership structure, 65 in the second limited partnership structure, and 1,130 by foreign UFI owners.

The applicant investors say that the numbers held by the limited partnerships for Canadian investors are lower than promised. According to the offering memoranda, the two offerings were to raise about $17 million, of which $4.2 million was used to purchase the lands, $1.15 million was to get lands to the development-ready stage, and the rest was made up of different fees and commissions.

The structure of Windridge and Fossil Creek is different than Angus Manor, but generally the same as between those two Texas projects. For each project, a Texas limited liability corporation -- a DevCo -- originally held title to the entirety of the lands. UFIs were then transferred to be held by or for investors in the following ways: Canadian investors purchased units in a trust -- those were the Windridge A2A Trust and the Fossil Creek A2A Trust respectively. The trust used the proceeds of those unit sales to purchase units

of a limited partnership. The limited partnership used those proceeds to purchase UFIs from the DevCo. And then, foreign investors did not invest through the limited partnership or trust structure; rather, they bought UFIs directly from the DevCo.

A title search of Windridge lands was put in evidence by the applicant investors, but the registered ownership picture is not clear. One of the applicant investors, Mr. Edwards, says that title to the property is split between the DevCo Dirk Foo, as trustee of another trust called the Hills of Windridge Trust, and various individual and corporate owners of specific lots.

The Hills of Windridge Trust is one of the two newly identified trusts that the monitor asks me to include in these proceedings. There's no evidence about the structure of this trust, other than the fact that Mr. Foo -- an individual -- is believed to be the trustee.

No title search of Fossil Creek lands was put in evidence, so the registered ownership picture for those lands is unknown. The Fossil Creek Trust is the other newly identified trust that the monitor asks to be included in these proceedings. Similarly, there is no evidence about the structure of that trust, other than the fact that Mr. Foo is believed to be the trustee.

So next, the November 14th application.

The applicant investors' application was heard on November 14th. It was essentially ex parte. The materials filed and relied on were about 2,000 pages long. Service was attempted on November 12th by email and courier on various members of the A2A Group, or their directors or representatives. No service ex juris order was sought for the parties outside of Alberta.

Counsel for at least some of the A2A Group appeared and requested an adjournment. The applicant investors opposed to adjournment request, mostly on the basis that there was evidence of an imminent sale of the Angus Manor pending, so that urgent relief was necessary.

The primary complaint of the investors -- which was amply established on the evidence -- is an almost total lack of communication from the A2A Group, and extremely derelict governance. A large number of the companies involved in the investments and the project have been struck from the relevant corporate registries.

The applicant investors also pointed to what they called red flags in the evidence about the misconduct of the A2A Group -- although the vast majority of that was hearsay evidence.

The urgent circumstances of the application that justified the short service was evidence that the applicant investors had discovered a Facebook post indicating that a sale of the Angus Manor property with respect to which they held limited partnership units was imminent, but that none of them had heard about this sale or asked to approve it. There was evidence that investor voting had been called for any November 12th, and were to be tabulated on November 15th. The applicant investors had not been asked to vote.

The record before me on November 21st.

By November 21st, the respondents were represented by counsel in Toronto and Calgary -- although they had only been retained earlier in the week, and were still getting up to speed. The evidence before me was comprised of the affidavits of the five applicant investors from the November 14th application; the monitor's pre-filing report, first report, and supplement to the first report; and three affidavits submitted by the respondents -- two from directors of A2A Group entities, and one from the real estate agent involved in the sale of the Angus Manor lands.

No party asked for an adjournment of the November 21st hearing to cross-examine or for any other reason, despite the fact that there are substantial factual disputes on the evidence; therefore, my ability to assess the credibility of the affiants is limited.

After the hearing, the respondents sent me, on November 22nd, a supplemental affidavit of Mr. Ambrose, in which he provides what he says are the investors' proxies approving the sale of the Angus Manor lands.

On November 25th, the monitor sent a second supplement to its first report, commenting on discrepancies in those proxies, and attaching more correspondence received from UFI owners.

I will now outline the parties' positions.

The monitor asks for an order granting an amended and restated initial order; extending the stay of proceedings to February 28th, 2025; adding the two trusts I have named to the initial order -- that is, the Hills of Windridge Trust and the Fossil Creek Trust -- I will refer to those as the two new trusts; next, the monitor asked that I authorize it to register a copy of the amended and restated initial order on title to the Angus Manor lands in Ontario; increasing the administration charge from 250,000 to 500,000; increasing the interim financing charge from 500,000 to 2 million; attaching all UFIs with those two charges; removing the trustees of the two trusts already included in the initial order and the two new trusts.

The respondents ask that I said aside or stay the initial order, or adjourn the hearing for the following reasons: They say the initial order was effectively granted ex parte, without due process; service of foreign members of A2A Group was invalid because no service ex juris order was obtained, so the Court has no jurisdiction over those parties; the evidence before the Court in the November 14th application was incorrect, misleading, and speculative, and it did not prove malfeasance by the A2A Group; they say the A2A Group is not insolvent; some members of the A2A Group are not properly included in these proceedings; the properties are being marketed and sold for fair market value in arm's length transactions, fully in accordance with the bargained-for rights of all investors, including the applicant investors; and finally, that the applicant investors lacked standing to commence these proceedings, and they represent only a tiny fraction of investors; the rights they are entitled to as investors has not been infringed upon, and their commencement of these proceedings is prejudicing a much larger group of investors who have no notice of these proceedings.

So next, the issues.

The issues I must decide are whether I should extend the initial order; if so, on what terms. And whether I should grant the respondent's application to set aside or stay or adjourn.

Next, my analysis.

I will make some initial observations at the start. First of all, with respect to real-time litigation, this is a genuine case of real-time litigation. The applicant investors brought their application because they had received information indicating that the Angus Manor property was going to be sold imminently, and they had not received prior notice.

The A2A Group's position is that they are in the midst of marketing, selling, and distributing the proceedings of the properties, all of which is being done with arm's-length parties for fair market value, and in accordance with the investors' rights and entitlements. However, they say that the existence of these proceedings is hampering those efforts, and could result in extreme prejudice to the vast majority of investors and UFI owners who did not start these proceedings, and indeed, are unaware of them.

The parties will need ongoing access to the Court to ensure that this matter proceeds in a timely way so that stakeholders' interests are protected, and unwarranted prejudice is avoided or minimized. I will ensure that that happens in the order I am granting today.

Secondly, some comments on the purpose of the CCAA. The CCAA is broad and

remedial legislation that I must interpret in a large and liberal manner. However, there are limits to the *Act*'s flexibility. As its name suggests, the purpose of the *Act* is to assist insolvent companies in developing and seeking compromises and arrangements with their creditors. The continuation of a stay may not be appropriate if the purpose of the proceedings is not to further that fundamental purpose of the *Act*.

And the authority for that proposition is *Cliffs Over Maple Bay* 2008 BCCA 327. That decision must be read with caution because it was decided before the 2009 amendments to the *Act*. However, the principle it stated is still sound. The CCAA is not a statute that exists to serve the purpose of all parties who have disputes with insolvent entities.

As the applicant investors advised the Court on November 14th, this is not a conventional CCAA proceeding. It was not commenced in the way the vast majority of these cases are, by an insolvent debtor entity who needs protection from its creditors to be able to put together a plan.

It was also not commenced by creditors. It was commenced by investors whose rights and entitlements are unclear, based on the evidence before me presently.

The applicant investors' complaints are not that they are owed debts that are not being paid; but instead, that the respondents have completely failed to communicate with them, and that their governance appears to be highly deficient. The initial order effectively supplanted management on day one of this case by giving the monitor very wide-ranging enhanced powers. Two of the three projects covered by the initial order are not in Canada, but are located in Texas.

There is no hint that the applicant investors have any plan for a compromise or arrangement of the debtors, or even a process that would lead to out of the ordinary course sales. They essentially started this action to try to stop sales and to investigate the facts.

I will discuss these issues in more detail later in my decision, but at this point, I want to acknowledge that the concerns raised by the respondents are legitimate, and they cannot be dismissed out of hand. It is possible that the continuation of these proceedings -- while unquestionably driven by the genuine desire to protect investors' interests -- might be stretching the CCAA beyond its proper limits.

Next, my analysis of the issues.

Many of the issues raised in the parties' competing applications overlap, so I will analyze them in the order that seems most logical.

First, jurisdiction and authority.

The applicant investors' service of their November 14th application for the initial order was imperfect, short, and with respect to the Texas LLCs, defective because no service ex juris order was sought. However, there was legitimate urgency to the application, as I have already described.

The respondents now all have substantive notice of these proceedings and are represented by counsel. The two Texas LLCs are proper respondents, because they are inextricably intertwined in the corporate and investment structure of the Windridge and Fossil Creek projects that were marketed to Canadian investors in Canada through Alberta and Ontario corporations, limited partnerships, and trusts.

Despite the deficiencies in service of the application for the initial order, I find that I have jurisdiction over all of the existing respondents, include the two Texas LLCs. I will address the two new trusts later in this decision.

The standing of the applicant investors.

Section 11 of the CCAA states, quote:

> If an application is made under this *Act* in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this *Act*, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

That section is silent about who can make an application under the CCAA. Section 11.02(1), which governs applications for initial orders is also silent on who may apply for an initial order, but it repeats the same language:

> On an application in respect of a debtor company.

So there is no prohibition in the CCAA on investors applying for an initial order.

The applicant investors and the monitor have argued that the applicant investors are also creditors because they have contingent claims against the respondent. The basis for this argument seems to be that the amount of money raised with respect to the Angus Manor project exceeds the current proposed purchase price. There are many assumptions built into that chain of reasoning for which there is no supporting evidence.

Based on the evidence that is before me at this time, I am not satisfied that the applicant investors have contingent claims as creditors, but I do not have to decide that issue now.

The applicant investors are persons interested, as described in Section 11.02(1) of the *Act*; and as a result, I find that the applicant investors had standing to make the initial order application.

Next, insolvency.

Section 3(1) of the *Act* states that:

> This *Act* applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

There is ample case law for the proposition that affiliates that are not companies, but instead are partnerships, can be included within the group that is covered by the initial order.

I am satisfied by the evidence that all of the respondents are affiliated, and their businesses are inextricably intertwined with respect to the three projects. The respondents did not challenge that assertion.

However, the respondents say that they are not insolvent because the approximate $12,000 tax liability owed on the Angus Manor lands has been paid, the approximate $1.3 million liability to the Angus Manor bond holders, quotes, "is not an actual liability and is not owed"; and finally, the US $3.8 million judgment was a default judgment. The respondents say that it was not challenged, as it did not pose a risk to any active A2A entities.

Mr. Lind, one of the respondent's affiants, said in his affidavit that this judgment does not effect title to the Windridge property, quote: (as read)

> And this has been confirmed by vigorous title reviews in relation to the ongoing negotiations to sell the Windridge property.

The monitor and the applicant investors agree that the $12,000 property tax bill was paid, although they note that this was only done after the interim order was granted.

The respondents' argument that the $1.3 million bond liability, quote, "Is not an actual

liability," is not supported by the evidence. The evidence they pointed to in the second Angus Manor offering memorandum does establish that the principle and interest on the bonds is not currently due and owing, and will only become owing on the maturity date, which is September 30th, 2026.

It is clear in the current negotiated purchase price for the Angus Manor lands that if that sale closes and those proceeds are brought in, the bonds will not be repaid in full. The bonds are to be repaid pari-passu with the limited partnership investments, and the purchase price from which significant fees are to be deducted, is well below the total amounts to be repaid to the LP unit owners and the bond holders. It is not possible to determine at this time what portion of the bonds would not be repaid.

Similarly, the respondents' assertion that the $3.8 million US judgment does not affect title to the Windridge property is not borne out by the evidence. Mr. Edwards, one of the applicant investors attached an August 2024 title search showing the property registered to the Windridge DevCo -- one of the debtor companies -- the judgment was registered on title as an encumbrance. The respondents do not contest the existence of the judgment, or that it remains unpaid. At the current exchange rate, this debt exceeds $5 million Canadian.

So based on the evidence currently before me, I am satisfied that the respondents are insolvent.

Extending the stay.

Pursuant to Section 11.02(3) of the CCAA, the Court may grant an extension of a stay of proceedings where:

> Circumstances exist that make the order appropriate; and
>
> The applicant satisfies the Court that it has acted and is acting in good faith and with due diligence.

The monitor is the applicant in this come-back application, and there is no question that it is acting in good faith and with due diligence. The real issue here is whether extending the day and permitting this very unusual CCAA proceeding to continue is appropriate in all the circumstances.

The following matters raised by the respondents are among the factors I must consider in deciding whether a stay extension is appropriate.

The applicant investors hold only a very small fraction of the investments in these projects. Their collective investments, including the investments of others that they've been in contact with, and that they describe in their affidavits, appear to amount to the following: First, with respect to Angus Manor, they hold 700 limited partnership units in the Angus Manor limited partnership. The title search discloses that there are 2,300 UFI interests, and the limited partnerships hold 212 -- although Mr. Edwards said this should be 424.

Based on Mr. Edwards' evidence, it seems that the applicant investors speak for about 2.2 percent of the limited partnership unit holders, and an aggregate of about 0.2 interest in the total UFIs. Although, if Mr. Edwards is correct about the miscounting, that may be twice as high, as much as 0.4 percent of the total UFIs.

With respect to Windridge, the applicant investors and those they describe hold 665 trust units in the trust. The respondents say there were 21,615 trust units sold, so the applicant investors speak collectively for about 3.1 percent of the trust beneficiaries.

The limited partnership that is owned by the trust bought 209 UFIs out of a total of 4,412, so the applicant investors speak collectively for about 0.1 percent of the total investors in the Windridge property.

With respect to Fossil Creek, the applicant investors and those they speak for bought 300 trust units in the trust. It's impossible to determine exactly what interest in the Fossil Creek lands that equates to on the evidence that I have. These 300 units likely represent between 1.8 percent of the total limited partnership units, and 1.1 percent of the limited partnership units, depending on whether the minimum or the maximum amount was raised. Mr. Lauzon's evidence suggests that depending on the amount raised, the limited partnership would hold between 209 and 349 UFIs in the land. 1,826 UFIs were sold directly to foreign investors, so it seems likely that the applicant investors probably speak for about 0.18 percent of the total UFIs in the Fossil Creek lands.

This extremely small proportionate interest raises three important considerations -- and maybe more than these three -- but the three I have identified are as follows:

> First, is it appropriate that a process started by these applicant investors should be allowed to continue with the risk that the potentially very large costs of the process will be borne by a much larger group of stakeholders who have not consented and are not even aware that this is happening?
>
> Second, in the overall context of the investments, are these applicant

> investors' rights being infringed? What rights did they bargain for, as extremely small fractional unit owners? Do they have the power to hold up sales if the majority has approved them?
>
> And third, a related question: It is one thing to say your investment is being managed poorly, and that you are not receiving any communications. There are corporate and common law remedies for that kind of wrong. It is quite another thing to say that your extremely fractional interest being ignored entitles to you freeze the totality of the investments and effectively take control of the entities out of the hands of management and directors.

The respondents' evidence is that the Fossil Creek property has been sold, the Angus Manor property is under contract for sale, and negotiations are being held to sell the Windridge property. As I have mentioned, the respondents say that all of these sales or sale processes are arm's-length for fair market value and in accordance with the investors' rights and entitlements. They might be. If they are, it may be difficult for the applicant investors to justify the continuation of these proceedings.

At this time, I do not have enough evidence to definitively decide these issues. The monitor and the applicant investors say this dearth of evidence is because the A2A Group never reported to investors, and since November 14th, have not complied with the provisions in the initial order requiring them to give information to the monitor.

The respondents say that they have not failed to comply and have corresponded with the monitor, but have had very little time to take meaningful steps, as they've been occupied with responding to the application.

I find that it is appropriate to continue the stay, considering these circumstances, but only for a limited time, and only for a limited purpose.

I extend the stay to and including December 18th, 2024. The purpose of this extension is to allow the respondents to provide the monitor with the necessary information to allow the monitor to create a comprehensive report for me and for the other stakeholders, so that we have a proper record, and I can properly decide whether continuation after that date is appropriate; and if so, on what terms.

Based on the respondents' evidence, this relatively short extension will not prejudice any of the existing sales or sale processes. It will also provide what both parties want, and what I need: Time for all of the relevant information to be brought forward.

I will not be overly prescriptive as to the contents of this comprehensive report from the monitor, but I expect that the report will provide a full picture about the following things:

> The respective rights and entitlements of each class of investors, including the investors' rights to approve property sales;
>
> The ownership of the properties;
>
> The value of the properties;
>
> The marketing processes that were conducted or are being conducted for the properties; and.
>
> The investor approval process conducted for any sales, including how investors were notified of sales, what they were told, what opportunities they were given to approve sales, and how sales were approved, including by whom, and under what authority.

I'm adjourning the respondents' application and those parts of monitor's application that I am not deciding today to 10 AM on Wednesday, December 18th , for a half-day hearing before me.

I will now outline the parts of the monitor's application that I am deciding today, because clarity on these points will help the parties decide what they need to do as this matter moves forward.

So first, the monitor's request to extend the charges to attach to the UFIs. The monitor asks that I extend the administration charge and the interim financing charge to attach to the interests of UFI owners in the three projects. As I explained earlier, it appears that the vast majority of each of the three projects is owned directly by many hundreds, or maybe even thousands of foreign purchasers of UFIs.

After the interim order was granted, the monitor implemented a communication plan to try to reach other investors, including these foreign UFI owners. By the time of the hearing on November 21st, the monitor said it had heard from 72 UFI owners. By today, November 25th, it said that had increased to 126 UFI owners.

The monitor included samples of correspondence with those parties in its first and second supplement to its first report. These communications generally raise similar concerns, as those voiced by the applicant investors. Allegations of fraud or misconduct by the A2A Group, and complaints about a lack of disclosure and reporting. However, there was

some reluctance expressed in some of the communications about the costs to the UFI owners of participating in the process.

These 126 investors who have been in touch with the monitor are still a very small fraction of the total group of UFI owners. No party provided me with any precedent authority for the proposition that I can extend charges under the CCAA to property owned by third-party. And the *Act* does not allow that.

In Section 11.2, which deals with interim financing charges, that section authorizes the Court to grant an order declaring that, quote:

> All or part of the company's property is subject to a security or charge.

Section 11.52, which covers administration charges, uses the exact same language.

While Section 11 authorizes me to make any order I see fit, my authority under that section is expressly subject to the restrictions set out in the *Act*. Section 11.2 and Section 11.52 set out very clear restrictions on the property that can be made subject to an administration charge or an interim financing charge. It is only the property of the debtor companies.

In the context of this case, that is the interests held by the debtor companies and their affiliates in each of the three properties, and any other property of those members of A2A Group.

Therefore, the monitor's request to charge the UFI owners' interests is dismissed.

I am going to ensure that it is open to the monitor or to any other party to make an application under the costs allocation provision in the interim order, of the costs of these proceedings shared by UFI owners.

So I will give you a moment, counsel, to pull up the interim order, but I am going to direct that paragraph 55 be amended. Paragraph 55 currently reads: (as read)

> Any interested person may apply to this Court on notice to any other party likely to be affected for an order to allocate the charges amongst the various assets comprising the property.

So what I am going to add at the end is, after "the property": (as read)

> Or the costs of these proceedings among any parties who have benefitted

> from these proceedings.

Is that wording clear? I see a nod, thank you.

So that will be a change in the amended and restated initial order.

As I said, I find that I do not have the power to extend the charges to the UFI owners properties, but I am not precluding anyone from arguing at any appropriate point in the future that if those parties have benefitted from these proceedings, an application can be made to share costs with them.

I am also not precluding the possibility that UFI owners may agree at some point to have their interests attached by the charges. Obviously we are at a very early stage of these proceedings potentially. And if they agree to do so, I would have the authority to make that order.

The next matter I will deal with today is adding the two new trusts to these proceedings. The monitor asks that I add the Hills of Windridge trust and the Fossil Creek trust to these proceedings as affiliates of the debtor companies. It was suggested that I have the authority to do that under Section 11, and that it would be just and convenient to extend the scope of the proceedings to these two trusts to prevent the transfer of the Texas lands, quote: (as read)

> Until such time as the monitor is able to definitively determine which entities are the registered owners.

With respect, that reasoning is backwards. A desire for an order granted because it is considered just or convenient does not create jurisdiction in the Court to grant the order.

This request would require me to order that Mr. Foo -- an individual -- should be treated as a debtor company under the CCAA, or an affiliate of a debtor company. I clearly do not have the authority to do that.

The monitor asked that in the alternative, I grant an order enjoining the sale of the Texas lands. It is equally clear that power to do that is well beyond the jurisdiction of this Court.

I note that the interests of the debtor companies and their affiliates in the properties cannot be sold under the current interim order, except by the monitor, and subject to the limitations in paragraph 15(a) of the interim order. But with respect to the request to extend the initial order to cover the two new trusts, that part of the monitor's application is

dismissed.

Next, removing the trustees from all four trusts. The monitor requested that I remove the trustees of the two trusts that are currently part of these proceedings, and the two new trusts. Obviously I will not be doing that with respect to the two new trusts, because I am not adding them. But I also find it is premature for me to do that with respect to the two trusts that are already included in these proceedings, so I adjourn that part of the monitor's application to 10 AM, on December 15th.

Here is a list of miscellaneous items from the monitor's application that I am dealing with at this time:

> So service, I will deem service of the come-back application good and sufficient.
>
> The request to approve the requested protections for representative counsel and the other requested changes in paragraphs 26 to 33 of the amended and restated initial order are granted.
>
> I do authorize the monitor to register the initial order and/or the amended and restated initial order on title to the Angus Manor lands.
>
> And I do declare that the monitor and representative counsel have the necessary standing to apply to add other debtor companies or affiliates to these proceedings.

The rest of the -- other than the extension of stay, which I am going to get into in a bit more detail now -- the rest of the monitor's application is adjourned to December 18th.

Between now and December 18th, I direct the parties to take the following steps: By 4 PM, this Thursday, November 28th, the monitor will provide a second report to the Court and to the other stakeholders. This will be a very limited purpose report, reporting on two things: The expenditures and accruals to date, broken down as between the service providers; and second, a revised cash-flow statement listing all proposed expenditures to get to and complete the December 18th hearing date, again, broken down as between the service providers. I want a description of what each professional will be doing up to and including December 18th, in keeping with the limited scope of the stay extension I am granting.

Next, we have a hearing this Friday, at 9 AM -- although we can discuss that afterwards, because it looks like the rest of my morning was cleared, which I was not anticipating. It

will be a one-hour hearing. The purpose of that hearing will be based on the second report to decide whether the charges and the limit on the interim loan should be increased for the interim stay extension period to December 18th. What I expect from the monitor is to see a very realistic and prudent cash flow.

As I will make clear, the monitors and its counsel's primary task over the next month will be corresponding with the respondents and preparing the comprehensive report I have requested for the December 18th hearing. Other than that, the monitor should only be carrying out the tasks that it is empowered to carry out under the initial order that are necessary.

Same is true for representative counsel. Obviously they will be communicating with their respective groups of investors, and all of the professionals will need to prepare for and attend the November 29th and December 18th hearings. But beyond what I have described, only absolutely necessary steps should be taken.

If I am reading the first report correctly, it appears that the interim lender has advanced $500,000, of which 378,000 has gone to the monitor. The balance are fees and an interest reserve. Professional fees to November 22nd were estimated to be $309,000. Very close scrutiny of the cash flow is necessary at this time, in my view, because I remain unconvinced that a long and comprehensive stay extension is warranted, bringing with it what would be very substantial fees, projected in the first report, that would be borne by all the investors.

My dismissal of the monitor's request to extend the charges to the UFIs will be something that the monitor will have to discuss with the interim lender between now and Thursday. The monitor will also have to do the same with its US counsel, so that it can give me, and so that it has an understanding of what steps will be necessary this a Chapter 15 proceedings, and what possibly could be delayed in those proceedings between now and December 18th.

And as I said, at the end of the decision today, I can answer any questions you have about these details, but I think the parties understand the overall gist of my direction.

I will not be approving a $2 million cash-flow on Friday, and I expect everybody to work together in good faith to help the monitor come up with the most modest and realistic cash-flow possible.

Turning to the respondents, I am specifically directing them to provide to the monitor the information that the monitor will need to prepare the comprehensive report I am expecting for December 18th. It is most efficient to describe the respondents' information

obligations with reference to Appendix C from the first report, which is the November 15th letter that Mr. Oliver sent to the respondents' former counsel, but which all the parties now have notice of, because it was included in the report. I am just going to pull that letter up.

So this information, I will get into a bit more detail, this information has, Mr. Jukes, has to be provided by the respondents by 4 PM on Friday, December 6th, at the latest. First of all, if you look at that Appendix C, that is the November 15th letter, Schedule A is the group to which the information requests relate. I am directing that the two new trusts be added to that list.

The respondents put information in evidence about those trusts. It is obvious from the scant evidence that I have that those trusts are involved at the very least in the holding of title to the Texas lands. So they will be added to this list, and they will be covered by the information requests.

I think the entity in number 9 -- which says Hills of Windridge Trust -- I think that is supposed to be Hills of Windridge A2A Trust, that is one of the two trusts currently in the proceedings. So what the respondents have to provide by the deadline I have stated is all of the corporate records -- that is the first section -- turning now to Schedule B in that letter; the accounting records in the second section.

With respect to current bank accounts, the respondents have to provide a daily update to the monitor so that the monitor can see if balances are changing in those current accounts.

The investor records in the third section have to be provided.

The contracts, all that information in the fourth section.

The contacts in the fifth section.

And then the other records in the final section.

I am adding some specific items to that other section, so take note of this, Mr. Jukes -- and they may be covered, but I am stating them in more detail, because these have to be included in the monitor's report: So all title documents for the properties; all documents related to the marketing of the properties, data rooms, or due diligence materials related to the marketing of the properties; any valuation or appraisal information for the properties in any form; and all information about the investor approval process conducted for any sales, including what I mentioned before -- how investors were notified of sales, what they were told about those sales, what opportunities they were given to approve

sales, how sales were approved, including who provided those approvals and under what authority.

So I want to be clear about what this production process will look like. I was encouraged to see in the monitor's second supplement to its first report that there has been contact, and I think the respondents appear to be that they initiated conversations to hold a meeting tomorrow. I expect this production process to be a dialogue between the respondents and the monitor that should start immediately. It should be a steady flow of information. This will not be silence until 3:59 PM, on December 6th, and then a large data dump. That will not allow the monitor to prepare its report, which will be a sizable undertaking.

The respondents' obligation is not limited to producing documents that exist. If the monitor has questions within these topics or areas I have described, it can ask them, and the respondents must respond in correspondence.

There may be legitimate disputes about the scope of what monitor is entitled to receive. I would expect any such disputes to be resolved on the side of inclusion, not exclusion. There may be legitimate disputes about whether some materials that the monitor wants are confidential. The respondents can identify as confidential any information they provide, but they cannot refuse to send it on that basis. The only basis on which they can refuse to send information is if it is privileged. What I mean is if it is covered by the topics I have outlined, they have to produce it, except for privileged information.

For any information the respondents do describe or identify as confidential, the monitor will keep it confidential, and will only include it in a confidential appendix to its report. And if there is an argument about confidentiality, we can have that on December 18th.

So I expect in this disclosure of information, and then in the subsequent report, a full picture of all the topics I have described.

All stakeholders, including the respondents, are under the express duty of good faith set out in Section 18.6 of the *Act*. And I expect the respondents to comply with this order by cooperating with the monitor fully and completely.

Serious allegations have been raised by the applicant investors and others, and the respondents now have an opportunity to demonstrate that as they have argued, everything is in order. And a failure by them to comply with this order in good faith and to provide the necessary materials would be a factor that I would consider very seriously on December 18th, especially since the stay remedy they have requested, I will note, is an equitable remedy. That will be well known to Mr. Jukes.

And finally, the monitor will provide to the Court and to the other parties what I have been calling its comprehensive report, and any confidential supplement, by 4 PM on Friday, December 13th.

The respondents, if they want to file any additional evidence for December 18th, they can do so by that same deadline -- 4 PM on Friday, December 13th.

And if parties want to file briefs in advance of the December 18th hearing, they can do that by Monday, 4 PM on Monday, December 16th.

Discussion

THE COURT: So that was a lot, and I anticipate that parties may have questions about that. So I will open the floor up to anyone who has questions. Do I see Mr. Oliver? The screen shots I am seeing are very small, but has Mr. Oliver joined us perhaps?

MR. OLIVER: I have, yes. My other hearing finished, thank you, Sir.

THE COURT: Okay. I do not know what you heard of that, or when you came in, Mr. Oliver, but there is fairly, what I hope are fairly clear directions to the monitor on the limited purpose of this extension, and then a fairly sizable undertaking to produce a comprehensive report so I have the necessary evidence.

MR. OLIVER: I think I got it all, Sir. Thank you. And if not, I think my colleagues will have as well.

THE COURT: Okay.

Any questions from anyone else?

MR. JUKES: Sir, this is more of a mundane procedural type question, but in terms of getting a transcript, I guess firstly, we would need some courtroom information to do that; but secondly, is there any way that we could get some kind of note to the transcript management to expedite here? I took as many of these notes as I could, but my hand is maybe not as quick as some on the note-taking.

THE COURT: Sure. First of all, we are in Courtroom 1003, so that is the courtroom you need to specify to order a transcript.

You know, I think what I will do is I read in pretty detailed notes. I think I can probably put together -- do not treat this as definitive, but I think it will probably be the most efficient way for everyone to work together to draft this Court order and to understand what the parties' obligations -- I will put together at least a point-form in an email. I will send it to my assistant, and she will send it out to everyone this afternoon. So you can see what I think are the directions with respect to what is going to happen next.

MR. OLIVER: Thank you, Sir.

One question I had, if I may, was for the hearing on the 18th of December, just in the interest of sort of perfecting materials correctly, would you be looking for, for example, an application for advice and direction from the monitor with this information as well, with the information that you asked for, as well as recommendations with respect to the path forward? Would that be of assistance?

THE COURT: Well, yes, the way I am viewing December 18th is an adjournment of your larger stay extension application -- other than the specific things I dealt with today -- an adjournment of that application and an adjournment of Mr. Jukes' application. If we are going to be a month forward into the future, if you think other relief is required, or you need to amend that existing application, you are certainly free to do that. The deadline for that should probably be -- well, send it out as soon as you can, but no later than that Friday afternoon deadline for your report.

MR. OLIVER: Thank you.

THE COURT: But the more notice the respondents certainly have, if you are seeking different relief or advice and directions on different matters, the earlier the better. You can make that application returnable at that time.

So yes, this Friday, I imposed hearing dates on all of you. That is just a practical reality, because looking at my schedule, there are not many days. Given the real-time nature of this, and given that the commercial list is fully booked until well into January, you are not going to get time in front of other Judges. So I am jamming you with those dates and times.

As I said, I thought I was sitting for the whole morning this coming Friday. It looks like I may not be. So if 9 AM is incredibly onerous or impossible for somebody, we could talk about moving that to later on Friday morning.

Okay, hearing nothing.

Similarly, for December 18th. That is pretty much the only time I would have a half-day open between now and the holiday break. If there is violent opposition to doing that in the morning, we could move that to 2 PM, but I think given the volume of the materials that people will have, and hopefully the amount of dialogue that will occur between now and then, I think a half-day is sufficient to argue that motion, those motions.

Okay. Assuming people have access to their calendars, and no one is screaming about 10 AM, we will do it at 10 AM on December 18th.

And, Madam Clerk, you have both of those dates. We will have a physical courtroom as well as Webex?

THE COURT CLERK: Yes.

THE COURT: Anything else arising that anyone can think of? As I said, the first thing I will do when I go upstairs is put together this email that you will get from my assistant, hopefully helping you with the process of drafting the order and understanding where this is going.

MR. LEE: My Lord, Mr. Jukes has indicated to me that he will have very limited time in December. I want to make sure he will be available on December 18th.

THE COURT: Okay.

MR. JUKES: Yes, I can make that work, yes.

MR. LEE: Great, thank you.

THE COURT: Okay. Speak now or forever hold your peace.

Okay. Thank you, all. As I say, stay tuned for that email a little later this afternoon, and then if you have trouble, obviously, if you have trouble settling the terms of the order between now and Friday, we can do it on Friday. But I think with what I have said today, and with the email I will send shortly, I think that gives everyone enough detail to know what they need to be doing in the short-term.

Thank you, all, for attending. Good afternoon.

PROCEEDINGS ADJOURNED UNTIL 9:00 AM, NOVEMBER 29, 2024

Certificate of Record

I, India Cyr, certify that this recording is the record made of the evidence in the proceedings in the Court of King's Bench, held in Courtroom 1003, at Calgary, Alberta, on the 25th day of November, 2024, and that I was the court official in charge of the sound-recording machine at all times.

Certificate of Transcript

I, J. Aubé, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

690512 NB Inc.
Order Number: TDS-1073424
Dated: December 12, 2024

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act

R.S.C. 1985, c. C-36

Currency

An Act to facilitate compromises and arrangements between companies and their creditors

R.S.C. 1985, c. C-36, as am. R.S.C. 1985, c. 27 (2nd Supp.), ss. 10 (Sched., item 3), 11; S.C. 1990, c. 17, s. 4; 1992, c. 27, s. 90(1)(f); 1993, c. 28, s. 78 (Sched. III, item 20) [Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1993, c. 34, s. 52; 1996, c. 6, s. 167(1)(d), (2); 1997, c. 12, ss. 120-127; 1998, c. 19, s. 260; 1998, c. 30, s. 14(c); 1999, c. 3, s. 22; 1999, c. 28, s. 154; 2000, c. 30, ss. 156-158; 2001, c. 9, ss. 575-577; 2001, c. 34, s. 33; 2002, c. 7, ss. 133-135; 2004, c. 25, ss. 193-195; 2005, c. 3, ss. 15, 16; 2005, c. 47, ss. 124-131 [ss. 124, 126 amended 2007, c. 36, ss. 105, 106.]; 2007, c. 29, ss. 104-109; 2007, c. 36, ss. 61(1), (2), (3) (Fr.), (4), 62 (Fr.), 63-73, 74(1), (2) (Fr.), 75-82, 112(17), (20), (23) [s. 63 repealed 2007, c. 36, s. 112(15).]; 2009, c. 33, ss. 27-29; 2012, c. 16, s. 82; 2012, c. 31, ss. 419-421; 2015, c. 3, s. 37; 2017, c. 26, s. 14; 2018, c. 10, s. 89; 2018, c. 27, s. 269; 2019, c. 29, ss. 136-140; 2023, c. 6, s. 5; 2024, c. 15, s. 274 [To come into force June 20, 2026.].

Currency
Federal English Statutes reflect amendments current to September 25, 2024
Federal English Regulations Current to Gazette Vol. 158:20 (September 25, 2024)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 13

s 13. Leave to appeal

Currency

13.Leave to appeal

Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Amendment History

2002, c. 7, s. 134

Currency

Federal English Statutes reflect amendments current to September 25, 2024
Federal English Regulations Current to Gazette Vol. 158:20 (September 25, 2024)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 14

s 14.

Currency

14.

14(1)Court of appeal

An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

14(2)Practice

All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

Amendment History

2002, c. 7, s. 135

Currency

Federal English Statutes reflect amendments current to September 25, 2024
Federal English Regulations Current to Gazette Vol. 158:20 (September 25, 2024)

End of Document

TAB 2

2022 BCSC 1655
British Columbia Supreme Court

Port Capital Development (EV) Inc. (Re)

2022 CarswellBC 2648, 2022 BCSC 1655, 2022 A.C.W.S. 4343, 5 C.B.R. (7th) 168

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

And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, as amended

And In the Matter of a Plan of Compromise and Arrangement of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

Fitzpatrick J.

Heard: August 29, 2022
Judgment: August 29, 2022
Docket: Vancouver S205095

Counsel: R. Clark, K.C., for 1296371 B.C. Ltd.
P. Bychawski, for Monitor, Ernst & Young Inc.
S. Stephens, for Domain Mortgage Corp.
W. Roberts, S. Hannigan, for Aviva Insurance Company of Canada
K. Jackson, T. Posyniak, for Solterra Acquisitions Corp.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.4 Liquidation or sale of assets
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Parties were involved in proceedings under Companies' Creditors Arrangement Act — Sale of debtor's unfinished development property was approved — Creditor wished to appeal sale — Creditor brought application for extension of time to file appeal — Application dismissed — Creditor formed intention to seek leave to appeal within appeal period and its counsel communicated that to other counsel — Delay was not lengthy and counsel moved expeditiously — Late filing arose from counsel's error — Three-day window between appeal date and time when appeal was perfected did not give rise to any prejudice on part of respondents — No merit to argument that creditor was not accorded procedural fairness regarding notice of Sale Order — Creditor did not show that potentially higher offers existed which should have been taken into account in sale process — Debtor had not previously argued that agreement between certain secured creditor and buyer should be ordered to be produced, and could not introduce argument on appeal.
Table of Authorities
Cases considered by *Fitzpatrick J.*:
Barendregt v. Grebliunas (2021), 2021 BCCA 11, 2021 CarswellBC 46, 50 R.F.L. (8th) 1, 45 B.C.L.R. (6th) 14 (B.C. C.A.) — considered
Barendregt v. Grebliunas (2022), 2022 SCC 22, 2022 CSC 22, 2022 CarswellBC 1292, 2022 CarswellBC 1293, 469 D.L.R. (4th) 1, 71 R.F.L. (8th) 1, [2022] 10 W.W.R. 1, 66 B.C.L.R. (6th) 1 (S.C.C.) — considered
Cage Logistics Inc., Re (2003), 2003 ABCA 36, 2003 CarswellAlta 123, 9 Alta. L.R. (4th) 65, 320 A.R. 281, 288 W.A.C. 281, 40 C.B.R. (4th) 165 (Alta. C.A.) — considered

Davies v. Canadian Imperial Bank of Commerce (1987), 15 B.C.L.R. (2d) 256, 1987 CarswellBC 196 (B.C. C.A.) — referred to

Edgewater Casino Inc., Re (2009), 2009 BCCA 40, 2009 CarswellBC 213, 51 C.B.R. (5th) 1, 265 B.C.A.C. 274, 446 W.A.C. 274, (sub nom. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.)* 308 D.L.R. (4th) 339 (B.C. C.A.) — considered

Forjay Management Ltd. v. 625536 B.C. Ltd. (2019), 2019 BCCA 368, 2019 CarswellBC 3083, 73 C.B.R. (6th) 181, 28 B.C.L.R. (6th) 213 (B.C. C.A.) — considered

Haldorson v. Coquitlam (City) (2000), 2000 BCCA 672, 2000 CarswellBC 2559, 3 C.P.C. (5th) 225, 149 B.C.A.C. 197, 244 W.A.C. 197 (B.C. C.A.) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — considered

Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership (2018), 2018 BCCA 283, 2018 CarswellBC 1788, 61 C.B.R. (6th) 196 (B.C. C.A.) — followed

Institutional Mortgage Capital Canada Inc. v. Plaza 500 Hotels Ltd. (2020), 2020 BCCA 193, 2020 CarswellBC 1669, 21 R.P.R. (6th) 10 (B.C. C.A.) — referred to

Perren v. Lalari (2009), 2009 BCCA 564, 2009 CarswellBC 3315, 99 B.C.L.R. (4th) 80, 78 C.P.C. (6th) 195, 280 B.C.A.C. 197, 474 W.A.C. 197 (B.C. C.A.) — referred to

Port Capital Development (EV) Inc. (Re) (2021), 2021 BCSC 1272, 2021 CarswellBC 2075 (B.C. S.C.) — referred to

Port Capital Development (EV) Inc. (Re) (2022), 2022 BCSC 370, 2022 CarswellBC 577, 96 C.B.R. (6th) 228 (B.C. S.C.) — referred to

Port Capital Development (EV) Inc. (Re) (2022), 2022 BCSC 1464, 2022 CarswellBC 2307, 1 C.B.R. (7th) 270 (B.C. S.C.) — referred to

Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd. (2021), 2021 BCCA 319, 2021 CarswellBC 2650, 92 C.B.R. (6th) 165, 30 R.P.R. (6th) 175, 57 B.C.L.R. (6th) 88 (B.C. C.A.) — referred to

Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd. (2021), 2021 BCCA 382, 2021 CarswellBC 3174, 93 C.B.R. (6th) 3, 462 D.L.R. (4th) 488, 54 B.C.L.R. (6th) 250, 18 C.L.R. (5th) 41 (B.C. C.A.) — referred to

Royal Bank v. Cow Harbour Construction Ltd. (2010), 2010 ABQB 637, 2010 CarswellAlta 2027, 72 C.B.R. (5th) 261, 37 Alta. L.R. (5th) 82, (sub nom. *Cow Harbour Construction Ltd., Re)* 504 A.R. 319 (Alta. Q.B.) — referred to

Salfinger v. Salfinger (2013), 2013 BCCA 217, 2013 CarswellBC 1156, 337 B.C.A.C. 6, 576 W.A.C. 6 (B.C. C.A.) — referred to

Southern Star Developments Ltd. v. Quest University Canada (2020), 2020 BCCA 364, 2020 CarswellBC 3252, 85 C.B.R. (6th) 96 (B.C. C.A.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — referred to

Vanguard Inc. v. Royal Bank (2004), 2004 SKCA 99, 2004 CarswellSask 466, (sub nom. *Peak Manufacturing Inc., Re)* 249 Sask. R. 238, 4 C.B.R. (5th) 300, 325 W.A.C. 238 (Sask. C.A.) — referred to

Westar Mining Ltd., Re (1993), 75 B.C.L.R. (2d) 16, 17 C.B.R. (3d) 202, 22 B.C.A.C. 106, 38 W.A.C. 106, 1993 CarswellBC 529 (B.C. C.A.) — referred to

Westar Mining Ltd., Re (1993), 80 B.C.L.R. (2d) 11, [1993] 2 S.C.R. 448, 155 N.R. 157, 20 C.B.R. (3d) 1, 29 B.C.A.C. 43, 48 W.A.C. 43, 1993 CarswellBC 553, 1993 CarswellBC 2655 (S.C.C.) — referred to

Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd. (2009), 2009 BCCA 370, 2009 CarswellBC 2505, 275 B.C.A.C. 21, 465 W.A.C. 21 (B.C. C.A. [In Chambers]) — referred to

Wiebe v. Weinrich Contracting Ltd. (2020), 2020 ABCA 396, 2020 CarswellAlta 2082, 17 Alta. L.R. (7th) 11 (Alta. C.A.) — considered

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 14 — referred to

s. 14(2) — referred to

Rules considered:

Court of Appeal Rules, B.C. Reg. 297/2001

Generally — referred to

APPLICATION by creditor for extension of time to appeal order for sale of assets in insolvency proceedings.

***Fitzpatrick J.*:**

INTRODUCTION

1 On July 22, 2022, I approved a sale of the petitioners' unfinished development property to Solterra Acquisitions Corp. ("Solterra"): see *Port Capital Development (EV) Inc. (Re)* 2022 BCSC 1464 [*2022 Sale Reasons*].

2 One of the secured creditors, 1296371 B.C. Ltd. ("129"), who was not present with counsel at that hearing, or present at the hearings leading to that decision, later indicated its intention to appeal my decision. However, 129 did not take steps to perfect its appeal/leave to appeal until the eve of the filing deadline, and then did not undertake the necessary procedures in the Court of Appeal to perfect the appeal before the deadline.

3 On August 18, 2022, 129 filed and served its leave to appeal, which is beyond the 21-day appeal period.

4 129 now seeks an order of this Court granting an extension of the time to file an appeal/leave to appeal to August 18, 2022. Major stakeholders in this proceeding, including the first and second secured creditors, Solterra and the Monitor, oppose any extension.

5 On August 29, 2022, I dismissed 129's application for an extension of the time to appeal my order, with written reasons to follow. These are those reasons.

BACKGROUND FACTS

6 Since its inception in May 2020, this proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended [*CCAA*], has had a long and tortious history.

7 The events from May 2020 — early-July 2022 are summarized in the *2022 Sale Reasons* at paras. 8-27 (defined terms are found there). For the sake of completeness in these reasons, I will briefly provide a recap:

a) May 2020-June 2021: the petitioners ran a lengthy and difficult sale and investment solicitation process (SISP) which resulted in competing bids. On June 15, 2021, I approved an offer from Solterra Acquisitions Corp. ("Solterra") and rejected 129's offer: *Port Capital Development (EV) Inc. (Re),*2021 BCSC 1272 [*2021 Sale Reasons*] at paras. 5 — 26;

b) July-September 2021: 129 appealed the *2021 Sale Reasons*. Leave was obtained and a five-justice division was convened: *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.*, 2021 BCCA 319 at para. 3 [*BCCA Leave Reasons*]. On appeal, the court overturned my decision and approved 129's offer, accepting that the petitioners should be given

an opportunity to refinance the debt and continue seeking restructuring options in this proceeding. Macario Reyes acts as the principal and directing mind for both the petitioners and 129. The petitioners were supported throughout by its major secured creditors, including Aviva Insurance Company of Canada ("Aviva"): *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.*,2021 BCCA 382 [*Port Capital BCCA*];

c) October 2021: the petitioners refinanced their debt through new loans from Domain Mortgage Corp. ("Domain") and 129/Aviva (who advanced monies using pre-sale deposit funds);

d) December 2021-February 2022: by December 2021, the petitioners ran out of cash to finance ongoing costs. However, in early 2022, I approved further financing from Domain to fund ongoing expenses: *Port Capital Development (EV) Inc. (Re),*, 2022 BCSC 370; and

e) April-July 2022: the petitioners arranged for a development partner (Enso Holdings Ltd. ("Enso")) and refinancing through a $20 million loan from Mandate. This transaction was approved by the Court. However, Mandate's loan did not close. By early July 2022, Domain's loan had matured and demand was made. In addition, ongoing expenses incurred by the petitioners in this proceeding, including a critical one with respect to the maintenance of the assets, were unpaid and accruing. Professional fees, including those of the Monitor and the petitioners' counsel, were also unpaid. The Administration Charge was exceeded.

8 In early July 2022, the secured creditors — Domain and Aviva — acted. Domain filed applications to terminate the *CCAA* proceedings and appoint a receiver to immediately undertake a further sales process. Aviva filed an application to grant the Monitor enhanced powers to run a "simplified" sales process or "SSISP".

9 On July 13, 2022, I heard Domain's receivership application, which the petitioners did not oppose. However, against the stark choice of a receivership, with its attendant delay and costs in that proceeding before any sale could be arranged, the major stakeholders present — the petitioners, Domain, Aviva and the Monitor — agreed to delay that result and seek another outcome on an urgent basis. This led to later hearings before the Court as all those parties urgently attempted to find another and better solution for the stakeholders. Those later hearings took place on July 18 and 22, 2022. The details of all three hearings are outlined in the *2022 Sale Reasons* at paras. 33-50.

10 On July 22, 2022, I exercised my discretion to consider and approve Solterra's offer of $18.5 million: *2022 Sale Reasons* at paras. 51-61. An order was granted to that effect (the "Sale Order").

11 The closing of the Solterra transaction is currently scheduled for September 20, 2022.

129's APPEAL EFFORTS

12 The deadline for 129 to file its notice of appeal/notice of application for leave to appeal the Sale Order and to serve it on all parties was within 21 days of the Sale Order, or August 12, 2022: *CCAA*, s. 14(2).

13 The only evidence as to the circumstances of 129's appeal efforts are outlined in the Affidavit of Darlene Purdy #1 sworn August 24, 2022. Briefly, the facts are:

a) On August 5, 2022, 129's counsel advised most of the counsel present at the July 2022 hearings (not Aviva) that he had been retained to seek leave to appeal. From those communications, 129's counsel stated that he was aware of the need to file by August 12, 2022. He asked for the other counsels' availability, indicating that the Court of Appeal Rules require a hearing date to be set in the filing materials;

b) On August 8, 2022, after a brief exchange of emails, counsel agreed that any leave application would be heard on September 7, 2022, and the closing of the Solterra sale would not occur prior to that;

c) On August 12, 2022, the last day in the appeal period, 129's counsel prepared its appeal materials, including a notice of application for leave to appeal and an application record. Just before 4:00 p.m., when counsel's legal assistant began

uploading the materials to the Court of Appeal's website, counsel's staff encountered problems in filing the appeal materials and they did not succeed in doing so prior to 4:00 p.m.;

d) At 4:39 p.m. and 4:41 p.m. on August 12, 2022, 129's counsel's staff forwarded unfiled copies of the notice of application for leave to appeal and the application record to other counsel;

e) In the morning of August 15, 2022, 129's counsel and its staff were advised by the Court of Appeal registry that under the Rules, a notice of appeal had to be filed as an initiating document referencing the fact that the party is also seeking leave to appeal. The other parties were advised by email that 129 intended to proceed with the correct documentation. Attempts to file the correct documents were made later throughout the day;

f) Late in the day of August 15, 2022, the Court of Appeal accepted the filing of the notice of appeal, which referenced that leave was required. 129's counsel's filing was "courtesy rejected" as it was not in the correct form. The grounds for leave to appeal were stated to be:

> 1. The Learned Chambers Judge erred in law in granting an order in breach of the rules of natural justice.
>
> 2. The Learned Chambers Judge erred in principle in failing to consider potentially higher offers, failing to direct service on the Appellant who, along with Aviva Insurance Company of Canada had the only financial interest in a higher price and failing to require production of a private agreement between Aviva and Solterra Acquisitions Corp.

g) On August 16, 2022, 129's counsel sent filed copies of the appeal materials to counsel who had appeared on July 22, 2022;

h) On August 18, 2022, 129's counsel forwarded copies of the appeal materials to the entire service list, then perfecting the appeal; and

i) On August 19, 2022, Solterra's counsel, supported by Domain and Aviva, advised 129's counsel that the Court of Appeal had no jurisdiction under the *CCAA* to consider the application for leave to appeal since the appeal had been filed outside of the time limit.

RELEVANT AUTHORITIES RE TEST FOR EXTENSION

14 Given that 129 failed to perfect its appeal within 21 days, it falls to this Court — not the Court of Appeal — to consider whether any extension of time should be granted: *CCAA*, s. 14(2); *Bank of Montreal v. Cage Logistics Inc.* 2003 ABCA 36 [*Cage Logistics*]; *Vanguard Inc. v. Royal Bank of Canada*, 2004 SKCA 99 at para. 3.

15 In *Cage Logistics* at para. 6, Justice Wittman reproduced and emphasized certain portions s. 14 of the *CCAA*, as follows:

> The C.C.A.A. provisions that are relevant to this application are ss. 13 and 14. They state as follows:
>
> 14.(1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.
>
> (2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, **but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from**, or, in the Yukon Territory, a judge of the Supreme Court of Canada, **allows**, the appellant has taken proceedings therein to perfect his appeal, and within that time he has made a deposit or given sufficient security according to the practice of the court appealed to that he will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

[Bold emphasis added in original]

16 In *Cage Logistics*, Wittman J.A. discussed the unique aspects of *CCAA* proceedings that must have informed Parliament in deciding to vest jurisdiction to consider any extension of time to appeal in this Court, and not an appeal court:

> [17] I am, however, persuaded that I must interpret ss. 13 and 14 of the C.C.A.A. together, especially when the express words accord with the philosophy of the C.C.A.A. I agree that the difference in wording between s. 13 and s. 14 in describing the access to and powers of various courts is to avoid creditors or other would-be appellants from applying for leave in an untimely fashion so as to disrupt or derail a plan of arrangement. Parliament has indicated that, with the exception of the Yukon territory, the discretion to extend time is vested solely in the court appealed from. In other words, in the supervising judge who is in a unique and informed position to exercise that discretion according to the particular circumstances and stage of the C.C.A.A. proceedings then before her.
>
> [Emphasis added.]

17 129 refers to various authorities which discuss the considerations where an appellant seeks an extension of time to appeal: *Davies v. Canadian Imperial Bank of Commerce*, [1987] B.C.J. No. 1479 (B.C.C.A.) at para. 20; *Westbank Holdings Ltd., v. Westgate Shopping Centre Ltd.* 2009 BCCA 370 [*Westbank Holdings*] at para. 25; *Salfinger v. Salfinger*, 2013 BCCA 217 at para. 16. 129 relies on these factors or considerations.

18 The above authorities are well taken and are clearly still good law, and I will address the considerations set out in those authorities.

19 However, insolvency proceedings bring before the Court a unique set of circumstances. I do not suggest that different factors apply in insolvency matters where an extension is sought. What I do suggest is that any extension application must be assessed within the context of the circumstances that apply in insolvency matters which gives rise to a unique lens through which the extension factors can be considered.

20 This approach is supported by the approach taken to an application for an extension of time to appeal in *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership,*2018 BCCA 283 at para. 30 *[Wedgemount]* and *Forjay Management Ltd. v. 625536 B.C. Ltd.,*2019 BCCA 368 [*Forjay Management*] at para. 33.

21 Therefore, I will apply the factors cited by 129, while accounting for the additional factors set out in *Wedgemount* which are particularly suitable for extension applications in insolvency proceedings. At para. 30 of *Wedgemount*, Justice Groberman outlined certain factors which serve as a guide to the exercise of the court's discretion on an extension application:

> a) Was there an intention to apply for leave before the expiry of the time for doing so?
>
> b) Did the appellant communicate the intention to the respondents?
>
> c) Was the delay lengthy?
>
> d) Did the applicant act expeditiously to seek an extension of time?
>
> e) Is there an explanation for the delay?
>
> f) Is there prejudice to the respondents consequent on the delay?
>
> g) Is there merit to the application for leave?
>
> h) Is it in the interests of justice that the extension be granted?

22 129 bears the onus of satisfying all of the above factors.

23 Both *Wedgemount* and *Forjay Management* involved court-ordered receiverships granted under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3; they were not *CCAA* proceedings. However, the court's discussion in those cases as to a proper approach to a request for an extension of time in an insolvency matter is very helpful here. Those comments provide confirmation as to the Court's consideration of any extension application in the unique circumstances that pertain in insolvency matters.

DISCUSSION

24 I propose to follow the *Wedgemount* factors in my analysis below. In doing so, I will draw up Groberman J.A.'s approach to some of these factors in insolvency matters.

Intention to Appeal / Communication / Delay / Seeking Extension

25 No stakeholder takes issue with 129 having met its onus in respect of the first four factors. 129 formed the intention to seek leave to appeal within the appeal period and its counsel communicated that to other counsel. In addition, the delay (August 12-18, 2022) was not lengthy. Finally, 129 moved expeditiously to seek an extension of the time to appeal in late August 2022.

26 These four factors favour an extension.

Is there an Explanation for the Delay?

27 It is apparent that the late filing of the appeal took place arising from counsel's error, which typically favours an extension. This is unfortunate; however, that fact does not overwhelm the analysis and obviate the need to consider all of the relevant factors on this extension application. Counsel error is but one of those factors. 129 has not referred to any decision that would elevate the significance of counsel error so as to overwhelm the other factors.

28 Many of the respondents take the position that 129 did not meet its onus to provide a reasonable explanation for the delay, as 129's counsel waited until the 11th hour before filing its materials. The respondents posit that 129's failure to discover its error in identifying the materials that had to be filed before the deadline does not constitute a reasonable explanation.

29 The respondents refer to the urgency of the matter, particularly the scheduled closing of the Solterra transaction on September 20, 2022. The respondents say that 129 failed to move with alacrity in what were undoubtedly urgent circumstances, in that 129 waited two weeks to announce its intention to appeal and then waited until the last minute to (attempt to) file the appeal materials. In essence, 129 took over three weeks to perfect its appeal in the midst of an eight-week scheduled closing period, while significant costs were being incurred by the stakeholders.

30 129 is no stranger to appealing decisions of this Court, including sale approvals in this proceeding. Indeed, in its earlier appeal, 129 had no trouble meeting the required time limits to file its appeal, although the filing was arguably not done with any particular alacrity then as it was only filed the second last day before the deadline (which in any event, allowed the leave application to be heard well in advance of the scheduled sale closing date).

31 Mr. Reyes and his counsel have failed to adduce any evidence to explain why the appeal materials were in the wrong form, and why they did not attempt to file those materials until the eve of the deadline. As such, this Court and the respondents are precluded from undertaking a fulsome analysis of this factor.

32 Rather, 129's counsel only made submissions on the point. He stated that the delay in filing was simply "how long it took". He refers to having to read transcripts of the July 2022 hearings in assessing any appeal, which I accept as reasonable since he was not 129's counsel at the time (although 129's prior counsel was also not present so he would have had to read transcripts too). However, there is no basis upon which to assess whether this assertion is reasonable or not since there no evidence from 129 or counsel on this point, including when the transcripts were received.

33 As a matter of practice, evidence should be before the court in the form of affidavits, not counsel's submissions at the time of the hearing. To proceed in this manner is to put opposing counsel in an unfair position to assess the matter, while also unreasonably requesting that the Court accept counsel's submissions without supporting evidence on what is a point of controversy.

34 This factor causes me some concern, for the reasons expressed by the respondents; specifically, that 129 failed to act with urgency despite the exigent circumstances, and 129's counsel's carelessness in neglecting to inform itself about the Rules. 129's apparent lackadaisical approach to advancing an appeal from the Sale Order is consistent with my earlier assessments of Mr. Reyes' attitude in these proceedings, namely to delay the matter as he now attempts to do in order to buy him more time to find a solution to the petitioners' financial woes: *2021 Sale Reasons* at paras. 90-91; and, *2022 Sale Reasons* at para. 56.

35 Despite the lack of evidence on this issue, the respondents did not press the issue to a large degree. Accordingly, while not ideal, I will accept 129's explanation for the delay, despite the fact that the evidence before the Court does not explicitly explain the delay: *Wedgemount* at para. 34.

36 Accordingly, this factor also favours an extension.

Is there Prejudice to the Respondents from the Delay?

37 129 says that the prejudice enquiry is limited to any prejudice that would have arisen from the extension being sought. 129 says that no prejudice arises on the part of the respondents. Conversely, 129 will be prejudiced in that it will lose its right to seek leave to appeal.

38 In *Wedgemount*, Groberman J.A. stated:

> [38] In assessing the prejudice occasioned by the delay in filing the leave application, it is important to recognize what is being considered is prejudice arising between the end of the appeal period and the date that the leave application was filed: see *Re Braich*, 2007 BCCA 641. While the evidence in this case is equivocal, I am prepared to accept that no great expenditures or prejudice arose between May 28, 2018 the last day for timely filing of the application from the second judgment and June 1, 2018 when the document was filed.
>
> [Emphasis added.]

39 Viewed in this manner, I agree that the three-day window between the appeal date (August 12, 2022) and the time when the appeal was perfected (August 18) did not give rise to any prejudice on the part of the respondents.

40 Having said that, there are elements of prejudice that do arise, which are significant. I will address those issues below when discussing the interests of justice factor.

Is there Merit to the Application for Leave?

41 I will begin this discussion by noting what is obvious — namely that this Court is in an odd position to be analyzing the merits of its own decision as part of this application. This "awkwardness" was noted in *Royal Bank of Canada v. Cow Harbour Construction Ltd.*, 2010 ABQB 637 at paras. 27-28, but the court was nevertheless required to undertake that task, as directed by Parliament in s. 14(2) of the *CCAA*.

42 I agree that the question of merit is confined to considering whether the leave application is bound to fail because it is "vexatious, frivolous or entirely without merit": *Davies* at para. 34; *Westbank Holdings* at para. 36-37; *Salfinger* at paras. 17 and 25. If the matter were to proceed to a leave application, then obviously whether leave would be granted would be in the hands of the Court of Appeal.

43 The parties agree that the decision in the Sale Order was a discretionary one made by me as the supervising judge who has performed that role since the inception of this *CCAA* proceeding. I have heard every application in this Court since that time.

44 It is beyond question that, across Canada, appeal courts approach leave to appeal applications in respect of *CCAA* decisions with caution and will only grant leave "sparingly" with respect to discretionary decisions in this Court.

45 In *Edgewater Casino Inc. (Re)* 2009 BCCA 40 [*Edgewater*], Justice Tysoe stated:

> [17] . . . It is my view that the same test applicable to all other leave applications should be utilized when considering an application for leave to appeal from a *CCAA* order. In British Columbia, the test involves a consideration of the following factors:
>
> (a) whether the point on appeal is of significance to the practice;
>
> (b) whether the point raised is of significance to the action itself;
>
> (c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (d) whether the appeal will unduly hinder the progress of the action.
>
> . . .
>
> [18] This is not to suggest that I disagree with the above comments of Macfarlane J.A. in *Pacific National Lease*. To the contrary, I agree with his comments, but I do not believe that he established a special test for *CCAA* orders. Rather, his comments are a product of the application of the usual standard used on leave applications to orders that are typically made in *CCAA* proceedings and a recognition of the special position of the supervising judge in *CCAA* proceedings. In particular, a consideration of the third and fourth of the above factors will result in leave to appeal from typical *CCAA* orders being given sparingly.
>
> [19] The third of the above factors involves a consideration of the merits of the appeal. . . . Most orders made in *CCAA* proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons alluded to in the comments of Macfarlane J.A.
>
> [20] First, one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests. Secondly, *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. These considerations are reflected in the comment made by Madam Justice Newbury in *New Skeena Forest Products* that "[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in *CCAA* matters and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).
>
> [21] The fourth of the above factors relates to the detrimental effect of an appeal on the underlying action. In most non-*CCAA* cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. *CCAA* proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing — some refer to *CCAA* proceedings as "real-time" litigation.
>
> [22] The fundamental purpose of *CCAA* proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these

> efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.
>
> . . .
>
> [24] As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing CCAA proceeding. . . .
>
> [Emphasis added.]

46 Following *Edgewater* and earlier authorities, the Court of Appeal has consistently applied this test in affording a deferential approach to discretionary decisions in *CCAA* matters by this Court: *Quest University Canada (Re)*, 2020 BCCA 364 at paras. 22-25; *BCCA Leave Reasons* at para. 45-48.

47 This approach was also endorsed in *9354-9186 Québec inc. v. Callidus Capital Corp.* 2020 SCC 10 [*Callidus*] at para. 53-54. In *Callidus* at para. 47, Chief Justice Wagner spoke of the "unique supervisory role for judges" in *CCAA* proceedings. At para. 53, the Court stated that an appeal court owed a "high degree of deference" to discretionary decisions in the court below and should only intervene if the supervising judge erred in principle or exercised his or her discretion unreasonably.

48 The same approach has been taken in insolvency proceedings involving receiverships, where appeal courts will afford a high degree of deference in respect of discretionary decisions made by a supervising judge in managing a proceeding: *Wedgemount* at para 43; *Forjay Management* at para 37.

49 In *Forjay Management* , at paras. 36-39, the court declined to extend the time to appeal, finding that there was no reasonable prospect that the appeal will succeed and that it was not in the interests of justice to grant the extension. The court found no error in the exercise of discretion and no arguable case that the conclusions were based on a palpable and overriding error. In *Wedgemount*, the court reached the same conclusions, as I will discuss in more detail below.

50 Accordingly, consideration of the merits is engaged on an extension application (*Wedgemount*) which is then directed to the merits that would be considered on a leave application (*Edgewater*).

51 129's proposed appeal is centered on three arguments:

> a) it was denied "natural justice" when the Sale Order was made "without any notice to [129] or opportunity [for 129] to afford it being heard";
>
> b) it was an error in principle, when advised of two potential offers for a higher price, for the Court not to structure a process that could allow them to be advanced; and
>
> c) the Court failed to direct Aviva's production of an agreement reached between Aviva and Solterra.

i. Notice Issue

52 Firstly, 129 raises a notice issue. I summarized the course of the three July 2022 hearings in detail in the *2022 Sale Reasons* at paras. 33 — 50. In particular, I addressed the notice issue to parties on the service list, as raised by the petitioners' counsel in the afternoon of July 22, 2022 (Friday), in the *2022 Sale Reasons* at para. 56(g). I have also now had the benefit of refreshing my memory by reading the transcripts of all of these hearings.

53 The July 13, 2022 (Wednesday) hearing began with both Domain and Aviva's application before the Court. At the outset, Aviva's counsel indicated that he hoped to have a binding letter of intent (LOI) for a sale in hand for the afternoon, as a result of which Aviva indicated that it was not proceeding with its application. When asked by the Court whether the petitioners had any proposal in the face of Domain's application to appoint a receiver, counsel indicated "no". He indicated that he only had a conditional financing commitment which he considered was not sufficient to resist the application. The matter was stood

down to 2:00 p.m. and, at that time, Aviva's counsel indicated he had an agreement in principle with Solterra. The Court heard Domain's counsel's submissions on the receivership application.

54 At the end of that hearing, the path confirmed by all parties, and accepted by the Court was this: the Court would not decide Domain's application until possibly July 18, 2022 (Monday). In the meantime, the parties would seek out potential alternatives to a receivership. At that time, the Monitor discussed the potential alternatives available to the stakeholders in what were described as urgent circumstances: (1) grant the receivership; (2) allow Aviva to seek to revive a sale from previous bidders (including Solterra), in which efforts were ongoing; (3) grant Aviva's application to continue the sales process within the *CCAA*; and (4) continue the *CCAA*. Counsel specifically referred to July 22, 2022 as being the "drop dead date" in terms of either the receivership or finding another solution.

55 On July 13, 2022, the petitioners' counsel also indicated that his client (Mr. Reyes) was going to continue his efforts to find binding commitments for refinancing.

56 The underlying difficulty for all concerned — that gave rise to the urgency — was that costs and expenses were mounting quickly, as noted in the Monitor's Thirteenth Report dated July 11, 2022 and as discussed by the Monitor's counsel at the hearing. The petitioners had continued to fail to pay ongoing receivables. Professional fees were unpaid and, to some extent, were not covered by the Administration Charge, leaving those professionals exposed. Finally, the ongoing carrying costs for the stakeholders were said to exceed $500,000 per month, including critical site preservation costs, Domain's interest and taxes. On July 13, 2022, the petitioners' counsel confirmed that his client was not in a position to cover the ongoing expenses and costs.

57 On July 18, 2022, the parties (including the petitioners' counsel) appeared again and discussed the status of matters. Numerous counsel referred to an LOI from Enso for a $20 million sale, as arranged by Mr. Reyes (*2022 Sale Reasons* at para. 40). Stakeholders indicated their support for that option. Again, counsel referred to being back by no later than July 22, 2022 to either approve a sale (at that time, to Enso) or grant the receivership. The petitioners' counsel articulated their support for the approval of the Enso transaction later that week, subject to Mr. Reyes' ongoing efforts to find refinancing (referring to three parties being "at the table" with them).

58 In the *2022 Sale Reasons* at paras. 43-50, I have described the events at the July 22, 2022 hearing in detail. At bottom, the only definitive non-binding transaction that had emerged was Solterra's offer. As before, the petitioners' counsel indicated ongoing efforts to get refinancing and requested a two-week adjournment (but provided no offer to refinance the costs accruing in the meantime).

59 It is correct to say that Aviva's application to approve the Solterra transaction was only specifically raised in its notice of application filed later at the July 22, 2022 hearing. That was the application that the Court directed Aviva to file in order to put the matter properly before the Court. In that application, Aviva specifically sought to abridge the time for service and dispense with formal service on parties on the service list.

60 On July 22, 2022, what was submitted by counsel, and accepted by the Court, was that effective in early July 2022, a sales process had been implemented with a return to the market (concentrated on earlier bidders), under the supervision of the Monitor, with the intention to bring forward a transaction for approval no later than July 22, 2022 (failing which the receivership would proceed).

61 In the *2022 Sale Reasons* at para. 56(g), I noted that the petitioners' counsel raised the matter of service of Aviva's application.

62 129's present argument that it had "no notice" of the application to approve the Solterra offer is disingenuous to say the least. In 129's notice of application, and in its evidence, it refers only to Domain and Aviva's applications filed in early July 2022 and then to the ultimate hearing date of July 22, 2022. No mention is made whatsoever of the events of July 13 and 18, 2022 when the stakeholders were addressing the state of affairs and the options to them. However, neither I nor the other stakeholders have forgotten the events of the two earlier hearings.

63 129 was served with notice of Domain and Aviva's applications. The petitioners, as represented by counsel at all hearings in July 2022, were well aware of the unfolding of events from July 13 — 22, 2022. The petitioners' knowledge is the knowledge of Mr. Reyes, as their directing mind. Further, Mr. Reyes' knowledge is the knowledge of 129, as its controlling shareholder and directing mind: *BCCA Leave Reasons* at para. 11; *Port Capital BCCA* at para. 12.

64 As I stated in the *2022 Sale Reasons* at para. 56, the manner in which the July 2022 hearings unfolded was a classic example of "real time litigation", as was described in *Edgewater* at para. 21. At paras. 56(g) — (i) of the *2022 Sale Reasons*, I made findings of fact and reached conclusions from those facts and the reasonable inferences that arose:

> (g) I reject the Petitioners' complaints about the Solterra Offer being considered on very short notice. Mr. Reyes, as the person instructing counsel for the Petitioners, was well aware of Domain and Aviva's applications and also, Aviva's stated intentions to revive a sale on July 13, 2022. In fact, over the last weeks, Mr. Reyes has been making efforts to generate his own offer, to no effect;
>
> (h) As he has done many times in this proceeding, Mr. Reyes only wishes to avoid a sale at this time to buy himself more time; however, it is crystal clear that any further time will come at a significant cost and risk to other stakeholders. In essence, Mr. Reyes' only remaining "kernel of a plan" is simply delay;
>
> (i) I accept that the Solterra Offer has arisen without any further formal sales process and in a very expedited manner. This is an aspect of the "real time litigation" that these proceedings require. However, there is no evidence to suggest that any further sales process — whether by a receiver or through the SSISP — would produce a superior offer to the Solterra Offer, either in terms of price or closing terms. As such, no unfairness arises;

65 I accept that *CCAA* proceedings do not occupy a special category of litigation where the normal rules of service and notice go by the wayside. Procedural fairness is an important aspect of any *CCAA* proceeding and this one is no exception. In my experience, the importance of notice was not necessarily respected in the early days of *CCAA* litigation, but considerably more rigour has been required in past decades and the Court remains vigilant in requiring notice and service, as appropriate, in order to ensure fairness in the process. However, the fact of the matter is that the exigencies inherent in *CCAA* proceedings do not always allow the parties and the Court to abide by strict and immutable notice periods. Matters happen quickly and organically and often, decisions have to be made in what are urgent and complex circumstances (*Edgewater* at paras. 20 — 21).

66 That is what happened here. This Court was fully aware of the notice and service issues on July 22, 2022, but those issues were attenuated by the fact that Mr. Reyes, who was the directing mind for 129 as well as the person instructing the petitioners' counsel throughout the July 2022 hearings, was fully aware of the sales process; including what was intended and anticipated timelines. Further, Mr. Reyes actively participated in that sales process, and was fully aware that all parties were working toward a transaction that could be presented to the Court for approval so as to avoid a receivership. Mr. Reyes was personally present at the continuation of the July 22, 2022 hearing by video, as was the petitioners' counsel and counsel for the Hynes Group, another party presented by Mr. Reyes as a potential offeror.

67 My earlier findings of fact in that respect are now further supported by evidence introduced by Aviva showing various communications with Mr. Reyes in the period from July 13 — 22, 2022. For example, on July 20, 2022, Aviva's representative emailed Mr. Reyes two separate times stating that he expected a Solterra bid to be awarded on July 22 if no other option materialized.

68 On July 22, 2022, all stakeholders, with the exception of the petitioners and 129 (indirectly), supported an immediate sale, as did the Monitor.

69 I have no doubt that, if the Enso transaction had emerged as the best option, the petitioners and 129 would not have faced any opposition to court approval on July 22, 2022 by reason of objections based on lack of notice or a lack of a formal application. In fact, Enso's LOI dated July 18, 2022 specifically required court approval by July 22, 2022.

70 It is very telling that Mr. Reyes had failed to introduce *any evidence* on this application to support his argument that 129 had "no notice". The simple truth is that he did have actual notice, albeit not specific and formal notice of the terms of the Solterra offer.

71 My discretion to consider and grant the Sale Order on July 22, 2022 was an exercise of discretion pursuant to the *CCAA*. In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, the Court accepted that procedural decisions in *CCAA* matters — including dispensing with or shortening notice — are to be accorded considerable deference:

> [218] Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. . . . In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the judicial discretion of the CCAA judge. . . . Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case. ...
>
> [Emphasis added.]

72 In *Wiebe v Weinrich Contracting Ltd.*, 2020 ABCA 396, the court also considered procedural fairness in *CCAA* proceedings, including where urgent circumstances arise:

> [31] This broad and flexible authority means a high degree of deference is afforded to a supervising judge making a discretionary decision in the *CCAA* context. An appellate court may intervene if there was an error in principle or the discretion was exercised unreasonably: *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 53 [*Callidus*]. It may also intervene if there was a breach of procedural fairness, if the breach had a negative impact on affected parties' rights: *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6, [2013] 1 SCR 271 at paras 73-74 (*per* Deschamps J) and paras 275-276 (*per* LeBel J, dissenting, but not on whether the duty of procedural fairness applies to *CCAA* proceedings).
>
> . . .
>
> [49] It is well known that the content of the duty of procedural fairness is sensitive to context: see *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 21-22, 174 DLR (4th) 193 on this point in relation to administrative bodies. The context and purpose of *CCAA* proceedings can affect the specifics of the duty. Sometimes, emergent matters arise and quick decisions on complex matters are needed, and the content of the duty of procedural fairness necessarily reflects that. Indeed, s 11(1) of the *CCAA* recognizes that applications within *CCAA* proceedings may have to be made *ex parte* in appropriate circumstances, or on the supervising judge's own motion, without application or notice to some or all affected parties.
>
> [Emphasis added.]

73 Is there any merit to 129's argument that it was not accorded procedural fairness in respect of this matter? In my view, No. In the *2022 Sale Reasons* at para. 56, I fully summarized the factors that informed by decision. 129 does not point to any error in the exercise of my discretion or argue that my conclusions were based on a palpable and overriding error. 129's argument rests solely on the technical position that it only received formal notice of Aviva's notice of application in the afternoon of July 22, 2022 just before the hearing. While strictly true, this position ignores, conveniently, the entire context of the hearings in July 2022 which was the basis upon which I exercised my discretion to proceed, after concluding that Mr. Reyes/129 was accorded procedural fairness. I see no prospect that leave to appeal would be granted on the notice issue, in light of the exercise of my discretion in these circumstances.

ii. Alternative Potential Offers

74 129's second argument on appeal is that this Court erred in principle when, advised of two "potentially higher offers", it did not structure a process that could allow them to be advanced.

75 This argument is also without merit. At para. 48 of the *2022 Sale Reasons*, I did consider the potential transactions put forward by Mr. Reyes, before concluding at para. 56(i) that:

> . . . there is no evidence to suggest that any further sales process — whether by a receiver or through the SSISP — would produce a superior offer to the Solterra Offer, either in terms of price or closing terms. As such, no unfairness arises;

76 If 129 is really arguing that I failed put sufficient weight on these "potential" offers, that argument is also without merit. As Wagner C.J. stated in *Callidus* at para. 53, appeal courts are cautioned not to substitute their own discretion in place of the supervising judge.

77 Many decisions made in ongoing restructuring efforts are based not only on past events, but a supervising judge's best assessment as to possible future events. This circumstance happens routinely in restructuring matters when the Court is confronted with a "possibility" versus a "reality". For example, parties may come to the court with a conditional LOI for financing or a conditional sale. The court must assess the viability of that potential transaction in terms of whether it has a reasonable prospect of materializing and when. It can be the case that the court accepts the only confirmed option before it — applying the old adage "a bird in hand is worth two in the bush". Hopes of a better transaction materializing can and often are just that; hopes.

78 The respondents also point to the fact that, despite the petitioners' assertions on July 22, 2022 that they just needed a short period of time to put together a better deal, no further transaction has since emerged that would test the conclusions reached by the Court on July 22, 2022 (albeit obviously with hindsight).

79 129's response to this point is that it decided to proceed on the basis of the record before the Court on July 22, 2022.

80 However, 129 is no stranger to obtaining and presenting evidence in support of its position in appeal hearings as "new evidence". In *Port Capital BCCA*, at paras. 44 — 49, the court admitted, as "new evidence", affidavits of Mr. Reyes stating that he had later secured the financing that he needed to keep the development afloat. In admitting this "new evidence", at para. 48, the court relied on its decision in *Barendregt v. Grebliunas* 2021 BCCA 11 *[Barendregt BCCA]* at paras. 32 — 33

81 In *Barendregt BCCA* at paras. 29-38, Justice Voith declined to apply the *Palmer* test to this "new evidence" (i.e. evidence that only arose after the decision in the lower court). Rather, at para. 34, he concluded that the court had a basis to intervene if the lower court made assumptions about future events but the "new evidence" established the assumptions are incorrect. Further, Voith J.A. stated:

> [43] Accordingly, depending on the circumstances, new evidence may be admitted if it establishes that a premise or underpinning or understanding of the trial judge that was significant or fundamental or pivotal has been undermined or altered.

82 In *Port Capital BCCA* at para. 49, the Court of Appeal specifically relied on the principle that they had a basis to intervene if the premise for this Court's decision had been altered, stating that it was important to work with "accurate information". Mr. Reyes' "new evidence" was admitted on that basis and contributed to the result, whereby the Court of Appeal approved 129's offer, which had since become fully financed and secured.

83 However, in *Barendregt v. Grebliunas* 2022 SCC 22 [*Barendregt SCC*], the court specifically rejected the reasoning in *Barendregt BCCA*. The Court found that the *Palmer* test still applied and was focused on the party's actions at the time of the original hearing in terms of why this evidence was not presented at the hearing and whether the "new evidence" should be admitted:

> [60] The reason why "new" evidence was unavailable for trial may have its roots in the parties' pre-trial conduct. For facts arising after trial, courts should consider whether the party's conduct could have influenced the timing of the fact they seek to prove. Consider this case. If finances are at issue and a party does not take steps to obtain a financing commitment until after trial, the court may ask why the evidence could not have been obtained for trial. Parties cannot benefit from their own inaction when the existence of those facts was partially or entirely within their control. Again, litigants must put their best foot forward at trial. In the end, what matters is that this criterion properly safeguards finality and order in our judicial process.
>
> [61] In sum, the focus of the due diligence criterion is on the litigant's conduct in the particular context of the case. Considering whether the evidence could have been *available* for trial with the exercise of due diligence is tantamount to the requirement that the evidence could not, with the exercise of due diligence, have been *obtained* for trial. Where a party seeks to adduce additional evidence on appeal, yet failed to act with due diligence, the *Palmer* test will generally foreclose admission.
>
> [Emphasis added.]

84 The *Barendregt* proceedings involved a family relocation issue. Obviously, family issues arise in dynamic situations and some flexibility is usually required to properly adjudicate what can be very delicate reissues. In *Barendregt*, the chambers judge had assessed the father's ability to refinance his residence as was relevant to that issue. On appeal, the father presented evidence as to financing he later obtained, seeking to reverse the chamber judge's conclusion that there was no realistic prospect of him refinancing his residence: *Barendregt SCC* at paras. 86-87. The Court stated:

> [88] Allowing the father to resolve these concerns and redraw the factual landscape at the eleventh hour of the appeal occasioned considerable unfairness. In effect, he was allowed to relitigate the same issues on the basis of more favourable facts, displacing the corrective function of the appellate court. Nothing on the record indicates that he was prevented from obtaining the financing commitments before trial. This ran firmly against the interest in finality and order that due diligence is meant to safeguard.

85 In *Barendregt SCC* at para. 1, the Court stated that "[a]n appeal is not a retrial".

86 I would rephrase that comment for these *CCAA* proceedings in relation to Port Capital, in that an appeal is not an opportunity to continue highly dynamic restructuring proceedings by seeking a different decision by an appeal court (*Callidus* at paras. 53 — 54) and in so doing, attempt to remediate deficiencies in that party's evidence before the lower court to provide a basis upon which the appeal court can come to a different decision.

87 Finally, I would add that, in my view, the court's approach in *Port Capital BCCA*, in applying *Barendregt BCCA*, has the very real potential to undermine Parliament's intention in investing court supervision of these matters in the trial courts, not courts of appeal. Parliament's approach has been recognized time and time again in appeal courts across Canada, emphasizing that significant deference is owed to the presider who is very familiar with the proceedings and the dynamics in what is usually a fast paced and ever-changing environment.

88 Mr. Reyes has made no attempt to present any other offers to date; nor has he presented any evidence as to his due diligence efforts that may have explained his inability to present alternate offers prior to July 22, 2022. The lacunae of evidence as to other options that might be available to the stakeholders at this time is also relevant in respect of the interests of justice factor discussed below.

89 Accordingly, 129's argument respecting alternative potential offers has no merit.

iii. Production of Agreement Issue

90 Finally, 129 argues in its notice of appeal that this Court was in error in not compelling Aviva to produce an agreement between it and Solterra.

91 When the parties came before me on July 22, 2022, with the Solterra offer in hand, Aviva's counsel fully disclosed that it had a "back-end revenue sharing piece" with Solterra. Counsel also reported that the Monitor had been advised of the terms of that agreement and had not raised any issues with it.

92 The fact of the matter is that no other stakeholder, including petitioners' counsel and Mr. Reyes, made any mention of this Aviva/Solterra agreement on July 22, 2022, let alone asked the Court to direct that it be produced to them. The first mention of it is found in 129's notice of appeal/leave to appeal. If that issue had been raised on July 13, 2022, I would have asked for counsels' positions and addressed the matter before coming to a decision. Without that scenario having taken place, I see no merit in 129's argument on appeal.

iv. Summary: Merits

93 In summary, I am not persuaded that there is any merit on a leave application, where a Court of Appeal chambers judge would determine that this aspect of the leave test is satisfied. I consider that there is little prospect that a chambers appeal judge would view the alleged grounds as sufficiently meritorious to justify the matter proceeding to an appeal of the Sale Order, as this appeal is frivolous and vexatious.

94 Having said that, the merits (or lack thereof) are only one factor to be considered: *Salfinger* at para. 21.

95 In summary, this factor does not favour an extension.

Is it in the Interests of Justice that the Extension be Granted?

96 Even if I had considered that this appeal was not frivolous and vexatious and not doomed to fail, at best 129's arguments are weak. In any event, I consider the interests of justice factor provides full support for my decision on this extension application.

97 The interests of justice are the overarching consideration in terms of whether an extension should be granted, with the prior factors informing that question: *Davies* at para. 30; *Westbank Holdings* at para. 38; *Perren v. Lalari*, 2009 BCCA 564 at para. 33; *Salfinger* at para. 16.

98 On a leave application, the court in *Quest University* stated:

> [22] The criteria for leave to appeal were stated by Saunders J.A. in, *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326(B.C. C.A. [In Chambers]), at para. 10:
>
> > [10] The criteria for leave to appeal are well known. As stated [in] *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp*. (1988), 19 C.P.C. (3d) 396 (B.C. C.A.) they include:
> >
> > (1) whether the point on appeal is of significance to the practice;
> >
> > (2) whether the point raised is of significance to the action itself;
> >
> > (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
> >
> > (4) whether the appeal will unduly hinder the progress of the action.
>
> See also *Chavez v. Sundance Cruises Corp*. (1993), 77 B.C.L.R. (2d) 328 (B.C. C.A.).
>
> [23] Even where the four criteria have been met, leave may still be denied where granting it would not be in the interests of justice: *Movassaghi v. Aghtai*, 2010 BCCA 175at para. 27 (Smith J.A. in Chambers).
>
> [Emphasis added.]

99 129's appeal does not raise any issue of significance to the practice. While the issue is significant to the proceeding, the result of the *2022 Sale Reasons* was not "sprung" on Mr. Reyes and without warning. Despite the Court of Appeal's comments in *Port Capital BCCA* at paras. 77 — 78, I had not forgotten, nor have I now forgotten, the well-known authorities that discuss the statutory objectives of the *CCAA* (*Port Capital BCCA* at paras. 58-67). Mr. Reyes has had over two years to attempt to find a solution to the petitioners' financial difficulties. I have no hesitation concluding that he has been given ample time, including from the Court of Appeal, to find such a solution. He had failed to do so by summer 2021 and he has failed to do so now.

100 It is well taken that many interests are at play in this proceeding, including 129's and those of the various respondent creditors. In that respect, a consideration of the interests of justice requires that the Court balance those respective interests toward arriving at a just and fair conclusion: *Perren* at para. 33, citing *Haldorson v. Coquitlam (City),*2000 BCCA 672 at para. 9.

101 Under the interests of justice factor, I will consider the fourth factor that would be considered on a leave application, namely whether the appeal would unduly hinder the progress of the action.

102 129 argues in its extension application, in an attempt to avoid the test that leave will only be granted "sparingly", that no further balancing of the stakeholder interests is required that might be hindered by an appeal. 129 states:

> 27. . . . This is the end of the CCAA proceedings. All that is left is to sell the assets at the highest price achievable with the proceeds to be distributed to the creditors. Indeed, the applications properly before the Learned Chambers Judge were simply asking for approval of two different ways to accomplish that end. There is no more balancing of interests to engage the Court's ongoing supervisory function.

103 In support, 129 cites Tysoe J.A.'s comments in *Edgewater* :

> [24] As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing CCAA proceeding. However, not all of the above considerations will be applicable to some orders made in CCAA proceedings. Thus, in *Westar Mining* [*Re Westar Mining Ltd.* (1993), 75 B.C.L.R. (2d) 16], McEachern C.J.B.C., while generally agreeing with the comments made in *Pacific National Lease* [*Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368], believed that the considerations mentioned by Macfarlane J.A. were not applicable in that case because the CCAA proceeding had effectively come to an end with the sale of the principal assets of the debtor company. . . .
>
> [Emphasis added.]

104 However, the facts and considerations that led Tysoe J.A. to not accord deference to the chambers judge in *Edgewater* , as described in para. 25, were distinguishable from those present at this time. That is, in *Edgewater* , the appeals would not have delayed or jeopardized the reorganization process, and the knowledge gained by the chambers judge during the reorganization process were not relevant to his decisions in the decision being appealed.

105 The same cannot be said here. Similarly, the circumstances discussed in *Westar Mining Ltd., Re*, [1993] B.C.J. No. 158 (B.C. C.A.) (B.C.C.A.) [*Westar Mining*] upon which 129 relies (cited in *Edgewater* at paras. 14 and 24) are distinguishable. At para. 58 of *Westar Mining* , MacEachern C.J. agreed with the usual approach to leave applications (upheld on appeal [1993] 2 S.C.R. 448). However, in that case, he noted that the considerations that underpin the "sparingly" test were no longer present in that matter. By then, the assets had been liquidated and what remained was to determine priorities to a fund.

106 This *CCAA* proceeding has not come to an end. The development property is a wasting asset and continues to be so. This Court has approved an unconditional offer, but it has yet to close. There is no fund that has been created for the stakeholders. The secured stakeholders have yet to receive any recovery of the amounts owing to them. Payment of amounts owed to professionals under the Administration Charge has yet to occur, as they are not being paid by the petitioners. As such, I consider that this proceeding is still very much extant in terms of this Court's supervisory jurisdiction to shepherd the process to a conclusion that achieves the best available option for the stakeholders.

107 129 says that, if the extension is granted, any subsequent leave application or appeal would not impact the sale to Solterra.

108 At para. 12 of the Sale Order, the beneficiaries of the Administration Charge — the Monitor and its counsel, and the petitioners' counsel — were granted a Supplemental Administration Charge on the assets, not to exceed $150,000. This provision was intended to protect those professionals from amounts already owed and which was effectively unsecured. However, that charge ranks subordinate to the Administration Charge of $100,000 and Domain's security, and will therefore only be recoverable if a sale generates sufficient monies to repay Domain.

109 Mr. Reyes/129 argues that 129 will be irreparably harmed by a closing of the Solterra sale. He says that any "chance" for a higher price will be lost. 129 seeks to minimize the risk of the Solterra offer not proceeding. 129 suggests that an expedited appeal would allow the Court of Appeal many options, including ordering a stay after the September 7, 2022 leave application and/or convening an appeal before closing.

110 I have no information as to the potential logistics of such a scenario. Assuming a successful leave application on September 7, 2022, that leaves only 13 days before the scheduled closing. The circumstances here are very unlike what 129 faced in the Court of Appeal on the earlier leave application. In that case, leave was granted on August 20, 2021 and the appeal was scheduled to be heard September 21, 2021, about a week ahead of the scheduled closing on September 30, 2021: *BCCA Leave Reasons* at para. 3. In principle, that period within which to prepare the appeal sounds reasonable, given the materials that would need to be filed. If leave was granted and if that timing held here, any appeal would be after the closing, rendering it moot. In that event, 129 would have to rely on obtaining a stay if they obtained leave.

111 Even by September 7, 2022, it is reasonable to infer that the parties and Solterra will be incurring substantial costs in anticipation of the sale closing in 13 days, which include costs of the Monitor (now tentatively secured under the Supplemental Administration Charge in the Sale Order now being challenged).

112 At para. 53, the chambers judge considered the risk of Solterra withdrawing from the transaction to be highly unlikely.

113 The evidence before me suggests that Solterra's second attempt to purchase the development has significant limitations in terms of whether it will extend beyond the scheduled closing date. Solterra's counsel argues:

> . . . In this case, 129's proposed appeal puts Solterra's offer at risk. 129's appeal would likely lead to the loss of Solterra's offer because Solterra has no intention of extending and cannot be expected to extend its closing date beyond September 20, at the cost of a very high increase in the purchase price, only to accommodate 129's appeal, from which Solterra derives absolutely no benefit. Solterra's option to extend for 30 days is only a punitive costly last resort to confirm financing. An appeal would hinder the ability of the parties to realize on a viable sale of the Project and cause more significant and unnecessary costs to accrue.
>
> Solterra has been here once before. It expended significant sums on appeal last time, only to have this *CCAA* end up in the same spot a year later. It is not . . . going through a pointless appeal process.

114 I accept that, at times, positions taken by a purchaser must be taken with a grain of salt. However, in Solterra's circumstance's, I accept this submission and conclude that it is highly unlikely that Solterra will choose to extend the closing of its offer to accommodate any appeal. For these reasons, the situation in 2021 is distinguishable from the case at bar.

115 As all of the respondents forcefully argue, granting the extension so as to allow 129 to proceed to a leave application (and possibly an appeal) has the real potential to threaten the only viable, unconditional offer that is before the Court to address the urgent financial issues that have arisen.

116 In *Wedgemount*, Groberman J.A. stated:

> [44] . . . This is "real-time" litigation, where the ability of the receiver to realize on the assets of Wedgemount will depend on being able to move quickly, and without entitlement issues being clouded by an appeal. The evidence before the court

> convinces me that there is a very real chance that delays and uncertainties inherent in an appeal will drastically reduce the amount that Deloitte can ultimately realize on a sale of the project.
>
> [45] I am therefore of the view that a judge hearing the leave applications would inevitably conclude that leave should not be granted. As I find the leave applications themselves would be doomed to failure, I decline to extend time to bring the application.

117 Similarly, in *Quest University*, the court concluded that granting leave to appeal would unduly hinder the progress of the action. At paras. 35-36, the court concluded that granting leave would likely cause the only viable option (a sale) to collapse "with catastrophic effects" and "disastrous consequences for the myriad stakeholders".

118 Finally, these same considerations were discussed in *Institutional Mortgage Capital Canada Inc. v. Plaza 500 Hotels Ltd.*, 2020 BCCA 193. There, an approved sale by this Court was challenged on appeal. The evidence before the court addressed the length of time the mortgage had been in default, the ongoing accumulation of debt and the risk of losing a sale with the prospect of any future sale being at a lesser price (para. 58). At paras. 92 — 93, Justice Goepel found that these circumstances supported his conclusion that the interests of justice weighed against granting leave.

119 In my view, 129/ Mr. Reyes' attempts to appeal are, as I concluded in the *2022 Sale Reasons* in para. 56, driven solely by his wish to delay this proceeding so that he can keep his "hopes" of completing the development himself alive. However, he only seeks to do so at the expense of the other stakeholders who bear the significant costs and risk of any further delay.

120 There is no money to allow further time to see another sales process fully unfold in either this proceeding or a receivership. Ongoing site expenses are already outstanding in excess of $413,000. Someone has to pay these amounts, failing which site security for the only valuable asset will be compromised. Mr. Reyes makes no offer to fund these ongoing costs. Any delay of the closing, of even a month, will result in Domain's further financing costs continuing to consume the amounts that Aviva hopes to receive from the Solterra sale. The costs of a receivership would also erode or eliminate any recovery to Aviva. In the very near future, Aviva will not be able to recover any money. The longer this matter is delayed, the greater the risk that even Domain will suffer a loss.

121 The professionals secured by the Administration Charge have not been paid for over six months, including the Court's appointed Monitor. This was the case in early-July 2022, when the Monitor was exposed for its fees to the extent of $120,000. That amount has no doubt increased. A monitor can resign but it remains a requirement of the *CCAA* that a monitor be in place and it is not realistic to expect another professional firm to get involved with the immediate prospect of not being paid for its services. In the Sale Order, the parties consented to the Supplemental Administration Charge to secure the Monitor and its counsel (and petitioners' counsel) for most of its shortfall, but that falls behind Domain's priority, so time is money in terms of that charge being a real benefit for the Monitor and its counsel.

122 The factors that supported the Court of Appeal's decision to grant leave to appeal in 2021 are not present here: *BCCA Leave Reasons* at paras. 17 and 52 — 53. Domain and Aviva, whose financial interests are on the line, do not support the extension or leave application. The petitioners, 129, and Mr. Reyes do not have a financing offer in hand to support a continuation of the *CCAA* proceeding. Finally, I conclude that there is significant risk to the Solterra offer arising from any delay from an appeal.

123 Mr. Reyes' verbal offer, communicated through counsel, at the conclusion of this hearing to pay the ongoing Monitor's expenses is too little, too late and too vague, for the reasons stated above. So too would I discount 129's submission that it would be open to this Court or the Court of Appeal to order security as part of any order granting the extension or leave. In *BCCA Leave Reasons* at para. 57, the court ordered $10,000 as security for costs. However, this amount is minimal at best and does not come near to addressing the significant losses that have happened and will happen in the future.

124 At bottom, 129's strategy to delay has the very real potential to cause serious and escalating risk to all stakeholders, including Aviva and Domain, and the Monitor (and parenthetically, 129 itself).

125 As is well known, the Monitor occupies a unique position in *CCAA* proceedings, performing an independent oversight role to assist the Court. A monitor is required to consider the interests of all stakeholders, toward the overall objective in *CCAA* proceedings of treating all stakeholders as "advantageously and fairly as the circumstances permit": *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70; *Callidus* at para. 75.

126 The Monitor performed that role in the course of the July 2022 hearings and ultimately supported both the appropriateness and effectiveness of the sales process undertaken over that time and, also supported approval of the Solterra offer on July 22, 2022 (*2022 Sale Reasons* at para. 56(k)).

127 The Monitor continues in its role on this application. At this hearing, the Monitor asserts that:

a) The stakeholders are in a worse position now than in summer 2021 when the Solterra Backup Offer was approved. The current Solterra offer is approximately $5 million less than the Solterra Backup Offer. Those detrimentally affected include the pre-sale purchasers, who have lost most of their $8 million in deposits (*2022 Sale Reasons* at para. 56(c)); and

b) The Solterra offer is the only offer available, given deteriorating market conditions. Further, the Monitor states that there is risk of the Solterra offer collapsing as a result of any appeal.

128 The Monitor states quite starkly that prolonging this proceeding will likely result in significant and potentially irreparable prejudice to the stakeholders. The Monitor emphasizes that the petitioners, 129 and Mr. Reyes have failed to put forward any plan to mitigate the current outstanding costs or the ongoing and potential risks that arise from delay.

129 There is no doubt that 129's position must be considered in the balancing exercise when assessing what the interests of justice require. As matters stand, 129 will garner a small recovery from the Solterra sale but any delay from an appeal will eliminate that. On the other hand, the costs and risks to the other stakeholders far outweighs whatever hopes Mr. Reyes may still hold for this development. While Mr. Reyes is content to "roll the dice" with other stakeholders' monies in pursing his dreams, I am not.

130 I conclude that the delays and uncertainties inherent in any leave application and possible appeal have the real chance to scupper the Solterra deal and create the likely result that the stakeholders, even possibly Domain, will suffer losses. In that event, I consider it extremely unlikely that a chambers appeal judge would grant leave to appeal as it is manifestly not in the interests of justice to allow any appeal proceeding to go forward.

CONCLUSION

131 129's application for an extension of time to appeal the Sale Order is dismissed.

Application dismissed.

TAB 3

2018 BCCA 283, 2018 CarswellBC 1788, 294 A.C.W.S. (3d) 237, 61 C.B.R. (6th) 196

2018 BCCA 283
British Columbia Court of Appeal

Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership

2018 CarswellBC 1788, 2018 BCCA 283, 294 A.C.W.S. (3d) 237, 61 C.B.R. (6th) 196

Industrial Alliance Insurance and Financial Services Inc. (Respondent / Plaintiff) and Wedgemount Power Limited Partnership, Wedgemount Power (GP) Inc. and Wedgemount Power Inc. (Respondents / Defendants) and British Columbia Hydro and Power Authority (Appellant / Applicant / Respondent)

Groberman J.A., In Chambers

Heard: July 6, 2018
Judgment: July 9, 2018
Docket: Vancouver CA45324, CA45325

Proceedings: affirming *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership* (2018), 60 C.B.R. (6th) 267, 2018 BCSC 970, 2018 CarswellBC 1565, Butler J. (B.C. S.C.); and affirming *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership* (2018), 2018 BCSC 971, 2018 CarswellBC 1566, Butler J. (B.C. S.C.)

Counsel: J.I. Maclean, Q.C., J.D. Bradshaw, A. McCawley (articled student), for Industrial Alliance Insurance
V.L. Tickle, for Deloitte Restructuring Inc.
L.C. Hiebert, S.T.C. Warnett, for B.C. Hydro

Subject: Civil Practice and Procedure; Contracts; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Appeals
XVII.4.a To Court of Appeal
XVII.4.a.ii Time for appeal
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal
One group of respondents were owners and developers of power project — Second group of respondents was company who financed power project — When project met delays, owners experienced financial problems — Company appointed receiver over owners — Owners made agreement with appellant power authority, for authority to purchase electricity from owners — Before deadline, authority indicated they were not committed to agreement — Receiver brought application for declaration that authority could not terminate agreement — Receiver's application was successful, after application by authority to stay application was dismissed — Authority filed notices of appeal regarding both above-noted judgments — Company applied to quash notices of appeal, claiming proper leave was not obtained and notices were out of time — Authority applied for extension of time — Notices of appeal converted to notices of application for leave, by court — Application for extension dismissed — Appeal provisions of Bankruptcy and Insolvency Act were applicable — Most applicable considerations favoured extension of time — There were no significant expenses or prejudice to company — However, leave application would have effect of delaying action — Ability of receiver to realize on assets of owners was dependent on being able to move quickly — Judge hearing leave applications would dismiss these applications — Court had power to do same at this stage of litigation.
Table of Authorities
Cases considered by *Groberman J.A., In Chambers*:

Braich, Re (2007), 2007 BCCA 641, 2007 CarswellBC 3185, (sub nom. *Braich (Bankrupt), Re)* 250 B.C.A.C. 53, (sub nom. *Braich (Bankrupt), Re)* 416 W.A.C. 53 (B.C. C.A. [In Chambers]) — referred to

Edgewater Casino Inc., Re (2009), 2009 BCCA 40, 2009 CarswellBC 213, 51 C.B.R. (5th) 1, 265 B.C.A.C. 274, 446 W.A.C. 274, (sub nom. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.)* 308 D.L.R. (4th) 339 (B.C. C.A.) — followed

Knight v. Thorne, Ernst & Whinney Inc. (1990), 42 C.P.C. (2d) 291, 80 C.B.R. (N.S.) 131, 49 B.C.L.R. (2d) 158, 1990 CarswellBC 427 (B.C. C.A.) — considered

Pope & Talbot Ltd., Re (2009), 2009 BCSC 1014, 2009 CarswellBC 2015, 76 C.C.L.I. (4th) 212, 57 C.B.R. (5th) 94, [2009] I.L.R. I-4871, 98 B.C.L.R. (4th) 169 (B.C. S.C.) — considered

Taylor Ventures Ltd., Re (2002), 2002 BCSC 699, 2002 CarswellBC 1045, 34 C.B.R. (4th) 118, 17 C.L.R. (3d) 42 (B.C. S.C. [In Chambers]) — distinguished

2003945 Alberta Ltd. v. 1951584 Ontario Inc. (2018), 2018 ABCA 48, 2018 CarswellAlta 160, 57 C.B.R. (6th) 272 (Alta. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 183(1)(c) — considered

s. 183(2) — considered

s. 193(a)-193(d) — referred to

s. 193(e) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Court of Appeal Act, R.S.B.C. 1996, c. 77

s. 6 — considered

s. 14(1) — considered

Law and Equity Act, R.S.B.C. 1996, c. 253

Generally — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

Generally — referred to

R. 9(1) — considered

R. 9(4) — considered

R. 31 — considered

APPLICATION by power authority for extension of time to appeal judgments reported at *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership* (2018), 2018 BCSC 970, 2018 CarswellBC 1565, 60 C.B.R. (6th) 267 (B.C. S.C.) and *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership* (2018), 2018 BCSC 971, 2018 CarswellBC 1566 (B.C. S.C.).

***Groberman J.A., In Chambers* (orally):**

1 The Wedgemount respondents ("Wedgemount") are the owners and developers of a five-megawatt run-of-river power project located on Wedgemount Creek, near Whistler, British Columbia. Industrial Alliance Insurance and Financial Services Inc. ("Alliance") has provided substantial financing for the project. Unfortunately, the project experienced significant delays,

and Wedgemount encountered financial problems. In May 2017, Alliance applied under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and under the *Law and Equity Act*, R.S.B.C. 1996, c 253 for the appointment of a receiver. The Supreme Court of British Columbia appointed Deloitte Restructuring Inc. ("Deloitte") as receiver over Wedgemount. Deloitte has made considerable efforts to complete the project and to sell it.

2 The viability of the project is closely tied to an agreement between Wedgemount and the British Columbia Hydro and Power Authority ("BC Hydro") under which BC Hydro has committed to purchasing electricity generated by the project. The agreement (which the parties have referred to as the "Electricity Purchase Agreement" or "EPA") set September 30, 2015 as the target date for commercial operation of the project. It gave BC Hydro a right to terminate the agreement if commercial operations did not commence within two years of that date.

3 Deloitte engaged in considerable communications with BC Hydro in an effort to ensure that BC Hydro would not terminate the agreement. Very shortly before the date on which BC Hydro would have the right to terminate the agreement, however, BC Hydro indicated that it was not committed to maintaining the agreement in place.

4 The parties disagreed as to whether BC Hydro had the right to terminate the agreement. I need not describe all of the communications between the parties, or the procedures taken by them. What is important, for our purposes, is that Deloitte brought an application before the BC Supreme Court for a declaration that BC Hydro did not have the unilateral right to terminate the EPA. BC Hydro sought to stay that application, arguing that all issues concerning the EPA were, under the terms of the agreement, to be decided by arbitration.

5 On May 4, 2018, a judge of the Supreme Court dismissed B.C. Hydro's application to stay Deloitte's application. On May 18, 2018 the same judge acceded to Deloitte's application, finding that an estoppel prevented BC Hydro from terminating the agreement.

6 On June 1, 2018, BC Hydro filed notices of appeal in this Court in respect of both the May 4 and May 18 judgments. Alliance applies to quash the notices of appeal on the grounds that the appellant was required to obtain leave to appeal, and on the basis that appeals have been brought out of time.

7 BC Hydro resists the applications to quash, arguing that the statutory provisions requiring leave to appeal and providing for an abbreviated appeal period are not applicable to these appeals. In the alternative, it seeks orders converting the notices of appeal to applications for leave to appeal, extending the time to apply for leave, and granting leave.

8 The various applications, except the actual leave applications, came on before me on July 6, 2018. At the end of the hearing, I advised that I would be declaring that the provisions of the *Bankruptcy and Insolvency Act* and of the *Bankruptcy and Insolvency General Rules* are applicable to the appeals. I further advised that while I would be converting the notices of appeal to notices of application for leave to appeal, I would be refusing the application for extension of time. I am now making those declarations and orders.

Is The Bankruptcy and Insolvency Act Applicable?

9 Alliance commenced the action for appointment of a receiver under both the *Law and Equity Act* and under the *Bankruptcy and Insolvency Act*. Counsel advised that this is a common practice. It allows flexibility as to the appropriate course of proceeding and remedies in the receivership.

10 Section 183(1) of the *Bankruptcy and Insolvency Act* gives the Supreme Court of British Columbia plenary authority to exercise jurisdiction under the Act:

> 183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act . . . .
>
> . . .

> (c) in the Province . . . of . . . British Columbia, the Supreme Court . . . .

11 Section 183(2) confers jurisdiction on this this Court to hear appeals under the statute:

> (2) . . . [T]he courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

12 Section 193 authorizes appeals and sets out leave requirements:

> 193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> . . .
>
> (e) in any other case by leave of a judge of the Court of Appeal.

13 It is common ground among the parties that ss. 193(a) through (d) are inapplicable to these proceedings, and that, assuming the proceedings are properly characterized as appeals under the *Bankruptcy and Insolvency Act*, leave is required pursuant to s. 193(e).

14 Rule 31 of the *Bankruptcy and Insolvency General Rules* (C.R.C., c. 368) sets out the time limit for appeals and leave applications:

> 31 (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.
>
> (2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

15 Section 6 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77 is the general provision governing appeals to this Court:

> 6 (1) An appeal lies to the court
>
> (a) from an order of the Supreme Court or an order of a judge of that court, and
>
> (b) in any matter where jurisdiction is given to it under an enactment of British Columbia or Canada.
>
> (2) If another enactment of British Columbia or Canada provides that there is no appeal, or a limited right of appeal, from an order referred to in subsection (1), that enactment prevails.

16 Section 14(1) of the *Court of Appeal Act* sets out the general time limit for an appeal:

> 14(1) The time limit for bringing an appeal or an application for leave to appeal is
>
> (a) 30 days, commencing on the day after the order appealed from is pronounced, or
>
> (b) if another enactment specifies a different period, that different period.

17 BC Hydro contends that the appeal provisions of the *Bankruptcy and Insolvency Act* apply only to proceedings filed in the Bankruptcy registry of the Supreme Court, and that those proceedings must comply with Rules 9(1) and (4) of the *Bankruptcy and Insolvency General Rules*:

> 9 (1) All proceedings used in court must be dated and entitled in the name of the court in which they are used, together with the words "in Bankruptcy and Insolvency".
>
> . . .
>
> (4) Every document used in the course of a receivership must be entitled "In the Matter of the Receivership of . . . ".

18 The initiating documents for the action in the Supreme Court did not describe the court as sitting "in Bankruptcy and Insolvency", nor did it include the words "In the Matter of the Receivership of [Wedgemount]". Citing *Taylor Ventures Ltd., Re*, 2002 BCSC 699 (B.C. S.C. [In Chambers]), particularly at paras. 42-46, BC Hydro says that the failure to use language in the forms that conform with the *Bankruptcy and Insolvency General Rules* means that the provisions of the *Act* and *Rules* are inapplicable.

19 In my view, *Taylor Ventures* does not support that conclusion. The question in *Taylor Ventures* was whether Notices of Disallowance were effective, given that they had not been filed in a bankruptcy action, and had not provided the bankruptcy action style of cause. The judge found that the documents were "calculated to mislead" and were, therefore, not proper notices of disallowance.

20 No one suggests, in this case, that any filings were improper or calculated to mislead. The parties knew, at all times, that the proceeding was brought pursuant to the *Bankruptcy and Insolvency Act*, and that remedies were being sought in reliance on that statute. Where a party obtains remedies in reliance on the *Bankruptcy and Insolvency Act*, it is the appeal provisions of that statute that govern: see, for example, *2003945 Alberta Ltd. v. 1951584 Ontario Inc.*, 2018 ABCA 48 (Alta. C.A.) . To require special notations or words on the documents, would, in these circumstances, elevate form over substance.

21 I acknowledge that, in a case such as the present one, where relief is sought under both common law equitable principles and the *Law and Equity Act* as well as under the *Bankruptcy and Insolvency Act*, there can be some question as to whether the appeal provisions of the *Bankruptcy and Insolvency Act* are engaged. In my view, the answer depends on whether the order under appeal is one granted in reliance on jurisdiction under the *Bankruptcy and Insolvency Act*. Where it is, the appeal provisions of that statute are applicable.

22 In the case before us, there are two orders under appeal. The first is the May 4, 2018 order declining to stay Deloitte's application for a declaration against BC Hydro. In making that order, the judge relied on jurisdiction conferred on him by the *Bankruptcy and Insolvency Act*:

> [38] I dismiss BC Hydro's application for a stay of the Receiver's application. I am doing so on the basis that the Receiver has the jurisdiction, in the unusual circumstances of this case, to bring the application for a declaration and directions. It falls within the powers granted to the Receiver under subsections 243(1)(b) and (c) of the [*Bankruptcy and Insolvency Act*] and under the terms of the Order.
>
> [Emphasis added.]

23 In his analysis, the judge also referred at para. 32 to *Pope & Talbot Ltd., Re*, 2009 BCSC 1014 (B.C. S.C.) for the proposition that "the court has considerable jurisdiction to suspend private contractual rights where it is appropriate to do so, . . . *in bankruptcy proceedings.* [Emphasis added.]"

24 It is clear, then, that the judge was purporting to act pursuant to powers conferred on him in the *Bankruptcy and Insolvency Act*. Accordingly, the appeal provisions of that statute govern.

25 The jurisdiction exercised in the May 18 decision is that described in the May 4 reasons. Again, in the May 18 decision, the judge referenced provisions of the *Bankruptcy and Insolvency Act*, as well as provisions in agreements between BC Hydro and Wedgemount referencing bankruptcy. The May 18 decision, then, was also a decision invoking powers conferred by the *Bankruptcy and Insolvency Act*.

26 In the result, I am in no doubt that the appeal provisions of the *Bankruptcy and Insolvency Act* are applicable to these proceedings.

Conversion of the Notices of Appeal to Applications for Leave

27 All of the parties acknowledge that, in the circumstances of this case, it is appropriate to convert the notices of appeal to applications for leave to appeal. I direct that the notices of appeal are, for all purposes, deemed to be applications for leave to appeal.

Should the time to Apply for Leave be Extended?

28 I turn, then, to the question of whether the time to apply for leave ought to be extended.

29 I begin by observing that in a case such as the present, it would have been most efficient for the parties to be prepared to argue the leave applications, themselves, together with the applications for extensions. The considerations on the extension applications include considerations that overlap with those that bear on the granting or withholding of leave.

30 That said, I am able to dispose of this matter on the applications for extension of time. The parties agree on the considerations applicable to the application for an extension. They are the considerations generally applied by this Court in exercising discretions to extend time. As applied to the extension of time to apply for leave in the present case, I would describe the considerations as follows:

a) Was there an intention to apply for leave before the expiry of the time for doing so?

b) Did the appellant communicate the intention to the respondents?

c) Was the delay lengthy?

d) Did the applicant act expeditiously to seek an extension of time?

e) Is there an explanation for the delay?

f) Is there prejudice to the respondents consequent on the delay?

g) Is there merit to the application for leave?

h) Is it in the interests of justice that the extension be granted?

31 It is important to recognize that this is not a checklist. The answers to the various questions are not added together or dealt with in some mathematical or algorithmic approach. Rather, they are simply considerations that guide the exercise of judicial discretion.

32 In this case, most of the considerations favour an extension. The delay was not extensive. In the case of the first appeal, the application for leave ought to have been filed by May 14, and it was filed June 1. The second appeal ought to have been filed by May 28, but was filed June 1.

33 While there is no definitive evidence showing that BC Hydro formed the intention of appealing within the appeal period, there is evidence that it was considering bringing an appeal, and that, at least in respect of the second appeal, it gave some indication to the respondents that an appeal was under active consideration.

34 The material before the Court does not explicitly explain the delay, but does imply that BC Hydro considered that the abbreviated appeal period under the *Bankruptcy and Insolvency Act* was inapplicable.

35 In *Knight v. Thorne, Ernst & Whinney Inc.* (1990), 49 B.C.L.R. (2d) 158 (B.C. C.A.), at 160, Lambert J.A. said:

> Time and again counsel are unaware that under federal legislation special appeal periods may apply of which the short period of 10 days under the *Bankruptcy Act* is one. In my opinion, that constitutes in itself a special circumstance and tends particularly to diminish the significance which should be attached to the first two tests set out by Mr. Justice Craig, namely, that the appellant had a bona fide intention to appeal, formed within the appeal period, and that he notified the respondent of that intention within that period. Those two tests would apply with their usual vigour after 30 days had expired but if the appeal is ready for filing and filed within the period between 10 days and 30 days, then, in my opinion, those two tests have diminished importance or no importance at all.

36 Lambert J.A. was simply recognizing that, as there is widespread unawareness of the abbreviated appeal period under the *Bankruptcy and Insolvency Act*, it would be overly harsh to treat a mistaken belief that the 30-day appeal period applied as culpable. I do not see his statement as obviating the need for a party seeking an extension to provide an explanation.

37 In the case before us, the parties are sophisticated, and their counsel specialize in bankruptcy and insolvency. While I accept that BC Hydro may have considered that it could argue that the *Bankruptcy and Insolvency Act* provisions were inapplicable, I am not prepared to assume that it was unaware of the statutory provisions. Still, in light of the short delay, and the circumstances of this case, it is my view that little weight ought to be attached to the absence of clear evidence of an intention to appeal within the time limited for appeal.

38 In assessing the prejudice occasioned by the delay in filing the leave application, it is important to recognize what is being considered is prejudice arising between the end of the appeal period and the date that the leave application was filed: see *Braich, Re*, 2007 BCCA 641 (B.C. C.A. [In Chambers]). While the evidence in this case is equivocal, I am prepared to accept that no great expenditures or prejudice arose between May 28, 2018 — the last day for timely filing of the application from the second judgment — and June 1, 2018 when the document was filed.

39 Accordingly, apart from a consideration of the merits of the leave application, and general issues of justice, I would have been inclined to grant the extension.

40 I am, on this application, not in a position to assess the substantive merits of the appeals. I am prepared to accept, for the purpose of this application, that arguments can properly be advanced to the effect that the questions ultimately decided by the Court ought, instead, to have been put to an arbitrator. In saying this, I am not suggesting that an appeal would be successful; only that it would be arguable. Indeed I do not see the argument as a particularly strong one.

41 It is less obvious that the judge's May 18 decision, finding that BC Hydro is estopped from terminating the EPA is vulnerable to appeal. On the face of it, the decision involves findings of fact, and I am not, at present, persuaded that any meritorious argument can be advanced to the effect that the judge made a palpable and overriding error in reaching his conclusions. That said, if the appeal from the May 4 decision were successful, it is at least arguable that the May 18 order would fall as a consequence. I am, therefore, prepared to accept, for the purposes of this application, that the appeal would not be doomed to failure.

42 I am, however, of the view that the leave application, itself, does not have any prospect of success. One of the factors to be considered in a leave application is whether the granting of leave will unduly hinder the progress of the action.

43 In *Edgewater Casino Inc., Re*, 2009 BCCA 40 (B.C. C.A.), Tysoe J.A. noted that in cases arising under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, this factor will often be decisive of a leave application:

> [21] The fourth of the above factors [i.e., "whether the appeal will unduly hinder the progress of the action"] relates to the detrimental effect of an appeal on the underlying action. In most non-CCAA cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. CCAA proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing — some refer to CCAA proceedings as "real-time" litigation.

> [22] The fundamental purpose of CCAA proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.
>
> . . .
>
> [24] As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing CCAA proceeding. However, not all of the above considerations will be applicable to some orders made in CCAA proceedings. Thus, in *Westar Mining* [*Re Westar Mining Ltd.* (1993), 75 B.C.L.R. (2d) 16], McEachern C.J.B.C., while generally agreeing with the comments made in *Pacific National Lease* [*Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368], believed that the considerations mentioned by Macfarlane J.A. were not applicable in that case because the CCAA proceeding had effectively come to an end with the sale of the principal assets of the debtor company. Madam Justice Newbury made a similar point in *New Skeena Forest Products* [*Re New Skeena Forest Products Inc.*, 2005 BCCA 192] at para. 25 (which was a hearing of an appeal, not a leave application), although she found it unnecessary to decide the appeal on the point.

44 The current litigation, while not under the *Companies' Creditors Arrangement Act*, is of the nature discussed by Tysoe J.A. in *Edgewater*. This is "real-time" litigation, where the ability of the receiver to realize on the assets of Wedgemount will depend on being able to move quickly, and without entitlement issues being clouded by an appeal. The evidence before the court convinces me that there is a very real chance that delays and uncertainties inherent in an appeal will drastically reduce the amount that Deloitte can ultimately realize on a sale of the project.

45 I am therefore of the view that a judge hearing the leave applications would inevitably conclude that leave should not be granted. As I find the leave applications themselves would be doomed to failure, I decline to extend time to bring the application.

46 The applications to extend time are denied, and the appeals stand dismissed.

Application dismissed.

End of Document

TAB 4

2016 ABCA 401
Alberta Court of Appeal

Mudrick Capital Management LP v. Lightstream Resources Ltd.

2016 CarswellAlta 2416, 2016 ABCA 401, [2017] A.W.L.D. 737, 274 A.C.W.S. (3d) 707, 43 C.B.R. (6th) 175

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

In the matter of a Plan of Compromise or Arrangement of Lightstream Resources Ltd.,
1863359 Alberta Ltd., LTS Resources Partnership, 1863360 Alberta Ltd. and Balken Resources

Mudrick Capital Management LP, FrontFour Capital Corp and FrontFour Capital Group LLC (Applicants)
and Lightstream Resources Ltd., Apollo Management L.P. and GSO Capital Partners (Respondents)

Thomas W. Wakeling J.A.

Heard: December 7, 2016
Judgment: December 16, 2016
Docket: Calgary Appeal 1601-0320-AC

Counsel: J.D.T. Pinos, C.D. Simard, for Applicants
M.E. Barrack, R.D. Bell, K.J. Bourassa, for Respondent, Lightstream Resources Ltd.
B.D. O'Neill, J. Wadden, for Respondents, Apollo Management L.P. and GSO Capital Partners

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Debtor company was granted protection available under Companies' Creditors Arrangement Act (CCAA) — Debtor company was defendant in oppression actions under s. 242 of Business Corporations Act brought by applicants — Applicants alleged that debtor company's failure to include them in debt exchange transaction that respondent company entered into with other respondent companies constituted oppression — Supervising judge found that remedy sought by applicants, exchange of unsecured bonds for secured bonds, was not viable option under CCAA — Applicants sought permission to appeal — Application dismissed — Applicants' position was without merit and bound to fail and this deficiency alone overwhelmed fact that issues it raised were of importance to parties and to insolvency community — Fact that granting applicants permission to appeal would unduly hinder progress of proceedings under CCAA buttressed conclusion that permission to appeal should not be granted — Debt-exchange remedial option was inconsistent with debt-restructuring scheme created by CCAA and it would be contrary to law — CCAA did not contemplate ordering substantial public company to negotiate debt exchange agreement with sophisticated investors that fundamentally altered their creditor status and adversely affects security interests of others who had not wrongfully abridged legitimate interests of party seeking status change — Damages award would make applicants whole — Application was form of jockeying inconsistent with fundamental objective of CCAA — Problems that triggered invocation of CCAA presented significant challenges to debtor company, creditors and supervising judge and altering status of creditors in this critical time frame unnecessarily magnified degree of difficulty initial set of problems represented — Remedy applicants sought was indisputably extraordinary in nature Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 14(2).
Table of Authorities
Cases considered by *Thomas W. Wakeling J.A.*:

that it was not. He expressed his opinion unequivocally: [6] "[T]he Plaintiffs are bound to fail and there is no issue to be tried. To grant the remedy sought would be contrary to law."

7 Mudrick and FrontFour Capital seek permission to present to a panel of this Court [7] two questions for consideration. First, did Justice Macleod fail "to apply the correct test for the appropriate remedy for oppressive conduct?" Second, did Justice Macleod err in "[u]sing the context of the CCAA proceeding to restrict the availability of the oppression remedy in a manner contrary to law and public policy?" [8]

8 On December 7, 2016 I denied this application at the conclusion of the parties' oral submissions, stating that reasons would follow. These are my reasons.

II. Questions Presented

9 Section 14(2) of the *Companies' Creditors Arrangement Act* [9] states that "[a]ll appeals ... shall be regulated as far as possible according to the practice in other cases of the court appealed to."

10 There was no contest as to the applicable appellate practice.

11 If no statute stipulates the standard that a court must apply to grant permission to appeal [10] , this Court asks if there are "serious and arguable grounds that are of real and significant interest to the parties." [11] This is the principal question. It incorporates four relatively abstract concepts — serious grounds, arguable grounds, real interest to the parties and significant interest to the parties. To narrow the focus of the inquiry courts pose four more precise and helpful questions to determine if the proposed appeal warrants the attention of a panel of judges and bringing into question the ultimate disposition. [12] First, is the question a party wishes the Court to answer of sufficient importance to persons who are interested in the proper and efficient administration of the *Companies' Creditors Arrangement Act* [13] or the *Business Corporations Act*, [14] or any other identifiable segment of the public? [15] There is a direct correlation between the likelihood permission to appeal will be granted and the size of the group affected by the resolution of the case and the gravity of the impact on the persons affected. [16] Second, will the answer to the question posed by the potential appellant determine a significant issue within the proceeding or the outcome of the proceeding under the *Companies' Creditors Arrangement Act*? [17] Is it important to the resolution of the proceeding in which the applicant is a party? [18] If the answer to the first two questions is "yes", the appeal raises a sufficiently important issue. [19] Third, is the likelihood that the question presented by the potential appellant will be answered in the manner favourable to the potential appellant high enough [20] to justify a second hearing putting the ultimate disposition into doubt [21] and requiring the attention of a panel of judges and counsel for the disputants? Appeals are expensive and introduce delay. Is the answer to the question that the potential appellant presents for consideration so obvious that it can be said the appeal is frivolous? [22] In answering this question, one must bear in mind that an appeal court will only set aside a decision of the supervising judge, if he or she committed an error of law, clearly misapprehended an important fact or made a decision that is obviously wrong. [23] Parliament intended that "most decisions be made by the supervising judge". [24] It follows that permission to appeal will be "only sparingly granted". [25] Fourth, assuming that permission to appeal is granted and that the appellant prosecutes the appeal with reasonable diligence, will the time absorbed by the appeal unduly hinder the progress of the proceedings under the *Companies' Creditors Arrangement Act*? [26]

12 An applicant may be granted permission to appeal even if it fails to clear all four hurdles. [27] A court may exercise its discretion in favor of the applicant who has satisfied the court that the contested decision is clearly wrong despite the fact that the issue is of no interest to the insolvency community. [28] But an applicant with a hopeless case cannot recover from such a predicament.

13 Justice Macleod concluded that the likelihood a court acting judicially would grant the applicants the debt exchange remedy they sought was so low that it could be said they were "bound to fail." [29]

14 Is the applicants' position that this conclusion constitutes reversible error arguable? Or is the likelihood that a court would grant the applicants the remedy they pursue so low that this is a frivolous point?

15 Should permission to appeal be granted?

III. Brief Answers

16 While I am satisfied that the questions Mudrick and FrontFour Capital present are of sufficient importance to the parties and the segment of the community interested in the proper and efficient administration of the *Companies' Creditors Arrangement Act* [30] and the *Business Corporations Act* [31], the applicants have not persuaded me that the likelihood they would prevail on an appeal if granted permission to appeal is anything but extremely low. I have concluded that their appeal is not arguable. Like Justice Macleod, I agree that the prospects of success are close to zero and that the appeal is bound to fail. In this sense, the appeal is frivolous. It makes no sense to grant permission to appeal if the applicants' position is hopeless.

17 Justice Macleod had compelling reasons to declare that the applicants' assertion that a debt exchange was the appropriate remedy was "bound to fail." Ordering Lightstream to enter into an agreement with Mudrick and FrontFour Capital on the same terms as those negotiated by Apollo and GSO Capital would be manifestly unfair to Apollo and GSO Capital. They had the lion's share of Lightstream's unsecured notes and were in a position to provide Lightstream with much needed capital in return for an upgrade in their security status. That Apollo and GSO Capital were able to extract a provision in the July 2, 2015 securities exchange agreement that prohibited Lightstream from entering into identical agreements with its other smaller creditors, such as Mudrick and FrontFour Capital, is evidence of their strong bargaining position. Mudrick and FrontFour Capital have not alleged in any proceeding that Apollo and GSO Capital, by entering into the securities exchange agreement with Lightstream, breached any obligation they had to Mudrick and FrontFour Capital or Lightstream. [32] An order compelling Lightstream to enter into a debt exchange agreement on the terms the applicants seek would unjustifiably diminish the benefits that Apollo and GSO Capital would derive from their status as secured note holders. Their position would be diluted. In addition, the remedy the applicants seek would harm the interests of the other unsecured note holders. They have not acted in a blameworthy manner that justifies an abridgment of their interests.

18 Justice Macleod also was opposed to a remedy that would "impose debt upon Lightstream unilaterally". [33] Counsel informed me that in the current fact pattern this would not be the consequence if the applicants were ultimately successful and they became secured creditors and participated in the credit-bid process. [34] But I agree with Justice Macleod that, as a rule, a corporation should not be forced to assume debt against its wishes. This is a decision that corporate leaders and not judges should be making. Corporate leaders have access to the relevant data and the skill set needed to make a decision that promotes the corporation's best interests. [35]

19 This determination is reason enough to deny the applicants permission to appeal.

20 But there is another reason that leads me to this conclusion.

21 An appeal would undermine the arrangements that were to be presented on December 8, 2016 to the supervising judge for approval. The transaction contemplated by the arrangement must close by December 31, 2016 or a secured creditor whose support is critical to the transaction will take other steps to protect its position. It is extremely unlikely that any appeal prosecuted by Mudrick and FrontFour Capital, if permission to appeal was granted, would be disposed of before December 31, 2016. And if Mudrick or FrontFour Capital prevailed on appeal, the supervising judge would have to revisit the issue. If the applicants' arguments convinced the supervising judge and they received their preferred remedy, the respondents would appeal. Introducing this level of uncertainty at this stage of the restructuring process would not be a positive development considering the underlying purpose of the *Companies' Creditors Arrangement Act* — the successful restructuring of the debtor company's debt obligations

39 Justice Macleod then considered whether there was sufficient evidence to allow an adjudicator to find that Lightstream had oppressed the applicants, and if there was, to assess the likelihood that an adjudicator would hold that the securities exchange remedy was appropriate. He undertook this assignment on the assumption that the facts on which Mudrick and FrontFour Capital based their claim for relief were true. [68] He also took into account facts that were not in dispute. The supervising judge adopted the same analytical framework used to resolve summary judgment applications under r. 7.3 of the *Alberta Rules of Court*. [69]

40 I will list some of the facts that fall into one or both of these categories to give some indication of the fact pattern that Justice Macleod had before him.

41 First, Mudrick and FrontFour Capital "were aware that a selective exchange transaction was a possibility" and "[i]f ... [they] were nervous about a potential debt exchange, they could have sold their position." [70]

42 Second, there was no evidence that general commercial practice precluded Lightstream from entering into a selective debt exchange with Apollo and GSO Partners. [71]

43 Third, the size of the applicants' position in Lightstream's unsecured debt gave them direct access to members of Lightstream's executive team. This access supports the proposition that Mudrick and FrontFour Capital could reasonably expect that Lightstream would not mislead them on matters that directly relate to the welfare of their investment. [72] Lightstream repeatedly assured the applicants that it would not exchange debt on a selective basis. [73]

44 Fourth, Lightstream believed that the terms of the indenture agreement did not preclude it from entering into selective debt exchange transactions. [74] While the applicants claim in their oppression actions that the indenture agreement precludes selective debt exchanges, they never communicated this opinion to Lightstream before July 2, 2015. [75]

45 Fifth, sometime after July 2, 2015, Lightstream offered Mudrick and FrontFour Capital the opportunity to exchange their unsecured debt for secured debt, on terms less favourable than those granted to Apollo and GSO Capital Partners. [76] The applicants rejected this offer, insisting that they were entitled to the same terms granted to Apollo. [77]

46 Justice Macleod concluded that a trial was necessary to determine whether the applicants' expectation that Lightstream would include them in any debt exchange was reasonable [78] and whether Lightstream had oppressed the applicants. [79] He must have concluded that the position of the parties on these issues was not sufficiently disparate to justify a determination one way or the other.

47 Nonetheless the supervising judge undertook the second inquiry — what is the appropriate remedy — on the assumption that Lightstream had oppressed Mudrick and FrontFour Capital. Justice Macleod asked whether a court acting judicially to achieve the purpose of the *Companies' Creditors Arrangement Act* could select the debt exchange remedy the applicants sought. Justice Macleod concluded that this remedy was not a viable option. He stated that "[t]he Plaintiffs are bound to fail". [80]

VI. Analysis

A. The Court of Appeal's Gatekeeper Plays an Important Role

48 An applicant for permission to appeal must convince the appeal court's gatekeeper that an appeal is appropriate. The rationale for the gatekeeper's role is set out below: [81]

> Not every litigant who wants to appear before an appeal court has a right to such a hearing. ... This screening function is bestowed on appeal courts for several good reasons. First, an appeal may be inconsistent with the purpose of the statute. Expeditious resolution may be more important than other values. Second, legislation may, in effect, declare that other decision makers are in a better position or a good enough position to make decisions so that the risk an unfair or unjust

result will be embodied in their work product is sufficiently low to justify denying appellate review. Third, the amount or the subject matter under dispute may not justify the dedication of more state and private resources to the dispute.

49 The second factor justifying the gatekeeper function is engaged when an applicant seeks leave to appeal a decision made under the *Companies' Creditors Arrangements Act*. Justice Blair highlights this when he stated in *Stelco Inc., Re* [82] that "[l]eave is only sparingly granted in ... [*Companies' Creditors Arrangements Act*] matters because of their 'real time' dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings".

B. The Permission-To-Appeal Standard Contains a Merit-Based Component

50 An effective screening mechanism reduces the likelihood that appeals with very low prospects of success enter the appeal stream. Only appeals that display the merit-based component pass through the screen. [83] This process escalates the reversal rate [84] and validates the devotion of the extra judicial and legal resources to this class of appeals and the attenuation of the principle of finality associated with any court decision. [85]

51 The jurisprudence governing permission-to-appeal applications in civil matters, including those under s.13 of the *Companies' Creditors Arrangement Act*, requires the applicant to convince the gatekeeper that the likelihood the question presented for resolution by the applicant would be answered in the applicant's favor is high enough to justify delaying the ultimate disposition of the issue under review. The prospects of success are high enough if the applicant's position is not frivolous. [86] A position is frivolous if it is not arguable. [87] An appeal is frivolous if the likelihood it will succeed is extremely low. [88] It makes no sense to ask an appeal court to hear appeals that are frivolous. [89]

52 This is not an onerous standard. [90] But it is, nonetheless, a standard that an applicant must meet. [91]

C. The Applicants' Prospect of Success on Appeal Are Too Low To Warrant Granting Them Permission to Appeal

53 To say that Justice Macleod thought the applicants' arguments in support of its debt exchange remedy were not compelling is an understatement. He, in effect, held that Mudrick and FrontFour Capital had a hopeless case. His precise words follow: "[T]he Plaintiffs are bound to fail." [92]

54 Justice Macleod clearly explained why he held such a pessimistic view of the applicant's prospects of success. [93] I agree with his assessment and his reasons.

55 First, he held that the debt-exchange remedial option was inconsistent with the debt-restructuring scheme created by the *Companies' Creditors Arrangement Act* [94] and that it "would be contrary to law". [95] The *Act* does not contemplate ordering a substantial public company to negotiate a debt exchange agreement with sophisticated investors that fundamentally alters their creditor status and adversely affects the security interests of others who have not wrongfully abridged the legitimate interests of the party seeking a status change. It would undermine a central tenet of the security protocol in force in Canada.

56 The debt exchange remedy would adversely affect Apollo and GSO Partners and other holders of unsecured Lightstream notes. [96] It would dilute the secured position of Apollo and GSO Partners. And it would reduce even more the likelihood that the other unsecured creditors would be in the money. None of these cocreditors engaged in any blameworthy conduct that harmed the applicants. There is no valid reason to impair their positions.

57 Second, a damages award would make Mudrick and FrontFour Capital whole [97]. They claimed that they never would have acquired Lightstream's unsecured notes or would have sold their unsecured notes in May 2015 had Lightstream not assured them that it did not intend to enter into a selective debt exchange transaction. A damage award will place them in the position they would have been in had they held no Lightstream bonds as of July 2, 2015, the date of the debt exchange transaction between Lightstream, Apollo and GSO Capital, an event which devalued Mudrick and FrontFour Capital's Lightstream holdings.

TAB 5

2024 ABCA 244
Alberta Court of Appeal

NewGrange Energy Inc v. Invico Diversified Income Limited Partnership

2024 CarswellAlta 1766, 2024 ABCA 244, [2024] A.W.L.D. 3148,
[2024] A.W.L.D. 3222, 13 C.B.R. (7th) 211, 2024 A.C.W.S. 3577

NewGrange Energy Inc. (Applicant) and Invico Diversified Income Limited Partnership, by its general partner, Invico Diversified Income Managing GP Inc. (Respondent)

Alice Woolley J.A.

Heard: June 27, 2024
Judgment: July 5, 2024
Docket: Calgary Appeal 2401-0122AC

Proceedings: allowing leave to appeal *Invico Diversified Income Limited Partnership v. NewGrange Energy Inc* (2024), [2024] 6 W.W.R. 457, 68 Alta. L.R. (7th) 17712 C.B.R. (7th) 2582024 ABKB 2142024 CarswellAlta 850, M.H. Hollins J. (Alta. K.B.)

Counsel: B.W. Nelson, for Applicant
R. Gurofsky, for Respondent

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.6 Appeals
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals
Leave to appeal — Royalty agreement stated overriding royalty was intended to be interest in land in royalty lands and to be covenant running therewith — Applicant's gross overriding royalty (GOR) was registered on title — Royalty agreement was executed prior to execution and closing of associated asset purchase agreement — Chambers judge found applicant's GOR did not constitute interest in land, and was to be removed from title to lands being acquired by respondent — Chambers judge found terms of assignment clause in royalty agreement revealed parties' intention for GOR to exist separate from working interest in land — Chambers judge found royalty agreement could not create interest in land that grantor did not yet possess — Applicant brought application for leave to appeal — Application granted — Issues identified by applicant had sufficient merit to warrant review — Questions had sufficient importance to practice to warrant review because of regular use of GORs in oil and gas industry.
Table of Authorities
Cases considered by *Alice Woolley J.A.*:
BMO Nesbitt Burns Inc. v. Bellatrix Exploration Ltd. (2020), 2020 ABCA 264, 2020 CarswellAlta 1262, 81 C.B.R. (6th) 161 (Alta. C.A.) — referred to
Bank of Montreal v. Dynex Petroleum Ltd. (2002), 2002 SCC 7, 2002 CarswellAlta 54, 2002 CarswellAlta 55, 19 B.L.R. (3d) 159, 208 D.L.R. (4th) 155, *(*sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 281 N.R. 113, 30 C.B.R. (4th) 168, 1 R.P.R. (4th) 1, *(*sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 299 A.R. 1, *(*sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 266 W.A.C. 1, [2002] 1 S.C.R. 146, 2002 CSC 7 (S.C.C.) — considered
Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta. C.A.) — referred to
Manitok Energy Inc (Re) (2018), 2018 ABQB 488, 2018 CarswellAlta 1235, 71 Alta. L.R. (6th) 357, 62 C.B.R. (6th) 109 (Alta. Q.B.) — referred to

Mudrick Capital Management LP v. Lightstream Resources Ltd. (2016), 2016 ABCA 401, 2016 CarswellAlta 2416, 43 C.B.R. (6th) 175 (Alta. C.A.) — considered

Prairiesky Royalty Ltd v. Yangarra Resources Ltd (2023), 2023 ABKB 11, 2023 CarswellAlta 30, 16 P.P.S.A.C. (4th) 17, 59 Alta. L.R. (7th) 386, [2023] 11 W.W.R. 672 (Alta. K.B.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 13 — referred to

APPLICATION for leave to appeal judgment reported at *Invico Diversified Income Limited Partnership v. NewGrange Energy Inc* (2024), 2024 ABKB 214, 2024 CarswellAlta 850, [2024] 6 W.W.R. 457, 68 Alta. L.R. (7th) 177, 12 C.B.R. (7th) 258 (Alta. K.B.), determining gross overriding royalty did not constitute interest in land.

***Alice Woolley J.A.*:**

Reasons for Decision

1 The applicant NewGrange Energy Inc seeks leave to appeal the decision of the chambers judge that its gross overriding royalty (GOR) does not constitute an interest in land, and thus should be removed from title to lands being acquired by the respondent Invico Diversified Income Limited Partnership: *Invico Diversified Income Limited Partnership v NewGrange Energy Inc* 2024 ABKB 214 [*Chambers Decision*].

2 The chambers judge also granted the respondent's application for approval of a reverse vesting order with respect to an insolvent company, Free Rein Resources Ltd, through which it would acquire the lands; subject to the determination regarding its GOR, the applicant does not challenge the approval of the reverse vesting order. It also does not challenge the finding of the chambers judge that a second GOR, the shareholders' GOR, was not an interest in land.

3 To assess whether the NewGrange GOR created an interest in land, the chambers judge applied the test from *Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7 at paras 21-22 [*Dynex*], which says that a GOR can be an interest in land if:

> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

4 The chambers judge found that the GOR did not satisfy either branch of the *Dynex* test. The royalty agreement specifically stated, "The Overriding Royalty is intended to be an interest in land in the Royalty Lands and to be a covenant running therewith", and the GOR was registered on title: *Chambers Decision* at paras 46, 51. However, the chambers judge found that the terms of the assignment clause in the royalty agreement revealed the parties' intention for the GOR to exist "separate and apart from the . . . working interest in the land": *Chambers Decision* at para 82. The assignment clause provided:

> In the absence of an assignment in accordance with the foregoing [the 1993 CAPL Assignment Procedure] or Royalty Owner's written consent, Royalty Payor shall remain liable for the payment of the Overriding Royalty notwithstanding that it may no longer have any interest in the Royalty Lands from which such Petroleum Substances are produced, or that it may not be receiving the production or proceeds of production therefrom: *Chambers Decision* at para 81.

5 The chambers judge said that this protection would not be necessary if the GOR ran with the land, "because the assignee of Free Rein's interest would take title to the lands subject to NewGrange's GOR". She noted that the clause created the potential for double recovery if the GOR ran with the land and bound the assignee, and also bound Free Rein: *Chambers Decision* at para 83.

6 The chambers judge distinguished prior decisions in *Manitok Energy Inc (Re)* 2018 ABQB 488 [*Manitok*] and *Prairiesky Royalty Ltd v Yangarra Resources Ltd* 2023 ABKB 11 [*Prairiesky*] that did not find assignment provisions to be inconsistent with clear granting language. She noted that in *Manitok* the assignment clause required the assignor to provide the royalty holder a "substitute property producing a comparable royalty", and that in *Prairiesky* the assignment clause "expressly contemplated a subsequent obligation to execute an assignment and novation agreement": *Chambers Decision* at paras 85-86. The language of the assignment clause in the NewGrange GOR did neither of those things.

7 The chambers judge further found that the NewGrange GOR did not satisfy the second part of the *Dynex* test. She relied in particular on the fact that the royalty agreement was entered into on October 30, 2018, and the petroleum and natural gas leases were not acquired by Free Rein until November 30, 2018, on the closing of the asset purchase agreement signed on November 1, 2018. While she acknowledged the royalty agreement and asset purchase agreement were part of a single transaction, they were not executed contemporaneously. The royalty agreement could not create an interest in land that the grantor did not yet possess:

> Parties to a transaction that purport to convey an interest in land from one to the other must be careful to treat that disposition as a disposition of an interest in land, not as a mere contractual right. That means care with the language across all aspects of the transaction, including care in the timing of execution.
>
> The granting of a royalty on October [30], 2018 in respect of an underlying interest not acquired until November 30, 2018 cannot be a true interest in land.
>
> *Chambers Decision* at paras 104-105.

8 The applicant seeks leave to appeal the chambers judge's determination that its GOR is not an interest in land.

9 The applicant relies in part on the inconsistency between the chambers judge's view of the assignment clause in its royalty agreement and the following discussion of the assignment clause that was at issue in *Prairiesky*:

> **I do not find the fact that the payment obligation would remain with the previous working interest-holder bears on the parties' intention as to whether the 8% Royalty constitutes an interest in land**. It simply provides the royalty holder with the option to reasonably withhold consent to an assignment that would transfer the payment obligations to the new owner, if, for example, the third party had any concerns about the new owner's ability to pay the 8% Royalty: *Prairiesky* at para 118.
>
> [Emphasis added]

10 The applicant also submits that the chambers judge committed a reviewable error in relying on the execution and closing dates of the royalty agreement and the asset purchase agreement; the applicant submits that this was a single transaction, and the timing of the execution and closing of the two agreements was not material.

11 To obtain leave to appeal pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], the applicant must demonstrate "serious and arguable grounds that are of real and significant interest to the parties" considering:

> (1) Whether the point on appeal is of significance to the practice;
>
> (2) Whether the point raised is of significance to the action itself;
>
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) Whether the appeal will unduly hinder the progress of the action:

BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd, 2020 ABCA 264 at para 7 [*BMO Nesbitt Burns*]; *Liberty Oil & Gas Ltd (Re)*, 2003 ABCA 158 at paras 15-16.

12 The respondent concedes that the applicant satisfies parts two and four of this test (i.e., the points raised are of significance to the action, and the appeal will not unduly hinder the progress of the action) but argues that the points on appeal identified by the applicant do not have significance to the practice and are not sufficiently meritorious to warrant leave being granted. It relies on the unique and specific circumstances of these agreements, submitting that the decision interpreting them has no broader significance, and that the decision turns on questions of fact and of mixed fact and law that warrant deference from this Court. It points out that the chambers judge identified and applied the correct legal test to determine whether the NewGrange GOR was an interest in land, and submits that she made no reviewable error in her application of that test to the facts before her.

13 Generally speaking, an appellate court should be cautious in granting leave to appeal in *CCAA* proceedings and must afford "considerable deference" to decisions of a supervising chambers judge. The applicant must point to an error on a question of law, or a palpable and overriding error in findings of fact or in the exercise of discretion: *BMO Nesbitt Burns* at para 8.

14 The applicant must show that its appeal is sufficiently meritorious "to justify delaying the ultimate disposition of the issue under review": *Mudrick Capital Management LP v Lightstream Resources Ltd*, 2016 ABCA 401 at para 51.

15 In my view the issues identified by the applicant have sufficient merit to warrant review by this Court. In particular, this Court should review the question of whether an assignment clause which requires the assignor to remain liable for payment of a royalty in certain circumstances rebuts an expressly stated intention that the GOR is an interest in land. It should also review whether a single transaction in which a royalty agreement is executed prior to the execution and closing of the associated asset purchase agreement fails to satisfy the second part of the *Dynex* test.

16 Further, because of the regular use of GORs in the oil and gas industry, I am satisfied that these questions have sufficient importance to the practice to warrant review by this Court.

17 The application for leave to appeal is accordingly granted with respect to the question of whether the chambers judge erred in concluding that the NewGrange GOR was not an interest in land. This question encompasses the two substantive issues discussed above.

Application granted.

End of Document

TAB 6

2020 ABCA 264
Alberta Court of Appeal

BMO Nesbitt Burns Inc. v. Bellatrix Exploration Ltd.

2020 CarswellAlta 1262, 2020 ABCA 264, [2020] A.W.L.D. 2721, 320 A.C.W.S. (3d) 540, 81 C.B.R. (6th) 161

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c.C-36, as amended And in the Matter of the Plan of Compromise or Arrangement of Bellatrix Exploration Ltd.

BMO Nesbitt Burns Inc., operating as BMO Capital Markets (Applicant) and Bellatrix Exploration Ltd. (Respondent) and National Bank of Canada, as agent (Respondent) and Borden Ladner Gervais LLP (Interested Party / Monitor)

Jo'Anne Strekaf J.A.

Heard: June 23, 2020
Judgment: July 13, 2020
Docket: Calgary Appeal 2001-0115-AC

Proceedings: Leave to appeal refused *Bellatrix Exploration Ltd (Re)* (2020), 82 C.B.R. (6th) 61, 2020 ABQB 348, 2020 CarswellAlta 1018 (Alta. Q.B.)

Counsel: C.C.J. Feasby, Q.C., E.E. Paplawski, for Applicant
R.J. Chadwick, C. Defcours, for Respondent, Bellatrix Exploration Ltd.
E.W. Halt, Q.C., K.J. Bourassa, J. Reid, J. Jang, for Respondent, National Bank of Canada

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.4 Liquidation or sale of assets
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Company entered protection under Companies' Creditors Arrangement Act — Sale was arranged by sale advisor, however, price ultimately was considerably less than had been initially anticipated and was insufficient to pay out first lien creditors — First lien creditors objected to payment of advisor's fee from cash on hand — Order blocking payment to sale advisor being made in priority to amounts owing to first creditors pursuant to priority scheme in initial order was granted — Security for completion fee for sale was found to rank behind that of first lien lenders — Sale advisor brought application for leave to appeal — Application dismissed — Appeal was not prima facie meritorious — Trial judge properly interpreted terms of initial order — Matter did not raise important legal issue that was of significance to practice generally.
Table of Authorities
Cases considered by *Jo'Anne Strekaf J.A.*:
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Blue Range Resource Corp., Re (1999), 1999 CarswellAlta 809, 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — considered
Canadian Airlines Corp., Re (2000), 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to
Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta. C.A.) — followed
Mudrick Capital Management LP v. Lightstream Resources Ltd. (2016), 2016 ABCA 401, 2016 CarswellAlta 2416, 43 C.B.R. (6th) 175 (Alta. C.A.) — considered

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

APPLICATION by sale advisor for leave to appeal order regarding payment of fees.

***Jo'Anne Strekaf J.A.*:**

Introduction

1 BMO Nesbitt Burns Inc (the Sale Advisor) seeks leave to appeal a decision denying payment to it of a Completion Fee in a proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*).

Background

2 The Sale Advisor was retained by Bellatrix Exploration Ltd (Bellatrix), an oil and gas company, to provide financial advisory services with respect to the sale of Bellatrix's assets pursuant to a written engagement letter and fee schedule dated September 9, 2019 (Engagement Letter). The Engagement Letter identified a "Work Fee" of up to $100,000 to be paid monthly, as well as a "Completion Fee", a lump sum of $2.75 million plus a percentage of the value of the transaction above a specified threshold to be paid if a sales transaction was completed.

3 Bellatrix sought protection under the *CCAA*. The Initial Order, granted in the *CCAA* proceedings on October 2, 2019, did the following:

- approved the Sale Advisor on the terms set out in the Engagement Letter (para 27);
- directed that the Monitor, counsel to the Monitor, counsel to Bellatrix and the Sales Advisor "shall be paid their reasonable fees and disbursements . . . in each case at their standard rates and charges, subject to the terms set forth in their respective engagement letters with (Bellatrix), as applicable, as part of the costs of these proceedings" (para 33);
- provided the Monitor, counsel to the Monitor, counsel to Bellatrix and the Sale Advisor with an "Administration Charge", not exceeding $500,000, "as security for the professional fees and disbursements incurred . . . (other than the Completion Fee (as defined in the Sale Advisor Engagement Letter)) at the standard rates and charges of the Monitor, such counsel and the Sale Advisor, subject to the terms set forth in their respective engagement letters" and provided the Sale Advisor with a "Sale Advisor Transaction Fee Charge" as security for the Completion Fee (para 35);
- directed that the priorities of the various charges would be as follows (para 42):

  (a) First Administration Charge (to the maximum amount of $500,000);

  (b) Second — Interim Lenders' Charge;

  (c) Third — Director's Charge (to the maximum amount of $1.5 million);

  (d) Fourth — Credit Card Charge (to the maximum amount of $250,000);

  (e) Fifth — the Encumbrances existing as of the date hereof in favor of the First Lien Agent securing obligations owing under the First Lien Credit Agreement;

  (f) Sixth — KERP Charge (to the maximum amount of $2.7 million); and

(g) Seventh — Sale Advisor Transaction Fee Charge.

4 The Sale Advisor found a purchaser and a Sale and Vesting Order approving the sale of substantially all of Bellatrix's assets was granted on May 8, 2020 (the Transaction). The price, however, was considerably less than had been initially anticipated and was insufficient to pay out the First Lien Creditors. When the First Lien Creditors became aware that Bellatrix intended to pay the Completion Fee of $2.75 million to the Sale Advisor by paying that amount from cash on hand into escrow five days prior to the closing of the Transaction (as contemplated in the Engagement Letter), they applied for an order blocking the payment being made in priority to the amounts owing to them pursuant to the priority scheme set out in paragraph 42 of the Initial Order.

5 The application judge determined that the security for the Completion Fee ranked behind that of the First Lien Lenders and, accordingly, Bellatrix could not pay the Completion Fee to the Sale Advisor before the First Lien Lenders were fully paid.

6 The application judge rejected the Sale Advisor's argument that the distinction between the "Work Fee" and "Completion Fee" was intended to provide extra protection for payment of the Completion Fee and, because Bellatrix had cash on hand to pay the fee, there was no need to resort to the priority scheme in paragraph 42 of the Initial Order.

Test for Leave to Appeal

7 The test for leave to appeal in *CCAA* proceedings requires "serious and arguable grounds that are of real and significant interest to the parties", which can be assessed by considering the following four factors (*Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.) at paras 15-16):

(1) Whether the point on appeal is of significance to the practice;

(2) Whether the point raised is of significance to the action itself;

(3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) Whether the appeal will unduly hinder the progress of the action.

8 "An appellate court should exercise its power sparingly, when asked to intervene in issues which arise in *CCAA* proceedings": *Blue Range Resource Corp., Re*, 1999 ABCA 255 (Alta. C.A.) at para 3. Decisions of a supervising chambers judge are accorded considerable deference and will be interfered with only if the judge acted unreasonably, erred in principle, or made a manifest error: *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178 (Alta. C.A.) at para 3. The applicant must point to an error on a question of law, or a palpable and overriding error in findings of fact or in the exercise of discretion: *Canadian Airlines Corp., Re*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) at paras 28-29.

Analysis

9 The Sale Advisor seeks leave to appeal on the question of whether the Sale Advisor or the First Lien Lenders (both of whom are key participants in the *CCAA* proceedings) are entitled to the $2.75 million held in trust by the Monitor. That is a question of significance in the ongoing *CCAA* proceedings, and the resolution of that question, should leave be granted, would not unduly delay those proceedings. I am, therefore, satisfied that the second and fourth factors in the test for leave to appeal are met in this case.

10 The key considerations on this application are the first and third factors of the test.

11 The Sale Advisor submits first, that the appeal is meritorious, and second, that it is of significance to the practice generally because the Initial Order is based on the template order that is used for all *CCAA* proceedings in Alberta.

12 With respect to the merit of the appeal, the Sale Advisor argues that the application judge's interpretation of the Initial Order conflated the obligation to make ongoing payments and the charges granted to secure such payment obligations, and that this is an error of law, reviewable on the correctness standard. The Sale Advisor further submits that the decision introduces

uncertainty with respect to the payment of other professional fees protected by the Initial Order, including those of the Monitor. If the payment of other professional fees is subject to the priority scheme in paragraph 42, then they would be subject to the $500,000 cap in Administration Charges set out in paragraph 42. The Sale Advisor points out that the cash flow forecasts in support of the Initial Order projected over $7 million in professional fees in the first 16 weeks of the CCAA process and over $1.5 million was paid by Bellatrix during the week of June 6, 2020 alone. Finally, the Sale Advisor says that a payment made under the Key Employee Retention Plan ("KERP"), which also ranks junior to the First Lien Lenders in the priority scheme in paragraph 42, was allowed to proceed, and this payment is not addressed by the application judge.

13 With respect to the third factor, the Sale Advisor says the proposed appeal involves an important question to *CCAA* practice generally, as it relates to the interpretation of clauses in the Initial Order that are based on the template order and will therefore have precedential significance. As well, the structure of agreements between financial advisors and debtor companies is designed to facilitate the restructuring process by deferring a vast majority of the payments until the end of the process. The application judge's decision could result in the restructuring of how professionals may require their fees to be addressed in future *CCAA* proceedings.

14 To satisfy the first aspect of the test for permission to appeal, the applicant must demonstrate that the appeal is sufficiently meritorious "to justify delaying the ultimate disposition of the issue under review": *Mudrick Capital Management LP v. Lightstream Resources Ltd.*, 2016 ABCA 401 (Alta. C.A.) at para 51.

15 The Sale Advisor submits that the application judge erred in law in her interpretation of the Initial Order. It says the application judge failed to recognize that Bellatrix was permitted by paragraph 6(b), and required by paragraph 33, to pay the Completion Fee from cash on hand, and that she erroneously imported security concepts such as priority into a Court-approved payment arrangement.

16 The question is whether this argument is *prima facie* meritorious. The essence of the application judge's decision was that the Engagement Letter and the Initial Order drew a distinction between the monthly Work Fee and the Completion Fee, which distinction was "made purposefully and clearly, not just by the Court but by the parties who painstakingly negotiated their own agreement to much of the Initial Order." (para 17).

17 The distinction is perhaps most clearly set out in her oral decision (Transcript page 2):

> In deciding between the two competing interpretations of the initial order and how it intended to deal with (the Sale Advisor's) completion or success fee, I am persuaded that the interpretation of the first lien lenders is correct. The completion or success fee was consistently delineated from (the Sale Advisor's) work fee. In my view, the latter was secured to some extent by the $500,000 admin charge but was also payable by Bellatrix from cash as an ongoing expense for the costs of these proceedings. It is this ---it is this work fee and not the completion fee that Bellatrix could pay as it went, subject to available cash.

18 In addition, the application judge made the following statement in her written decision (*Bellatrix Exploration Ltd (Re)*, 2020 ABQB 348 (Alta. Q.B.)) at paras 16 — 17:

> [16] BMO argues that the separation of the Completion Fee/Sale Advisor Transaction Fee from its monthly Work Fee and its priority charge in paragraph 42 of the Initial Order was done only as "extra" protection for payment of the former. Because Bellatrix has sufficient cash, BMO says it simply does not need to resort to this priority scheme in order to be paid.
>
> [17] I cannot accept that argument. To do so would render completely meaningless the separate definitions and treatment of the Work Fee and the Completion Fee, first in the Engagement Letter itself and more obviously in the Initial Order. This was a distinction made purposefully and clearly, not just by the Court but by the parties who painstakingly negotiated their own agreement to much of the Initial Order.

19 The Sale Advisor submits that the application judge erred in law by concluding that the Initial Order distinguished between the Work Fee and the Completion Fee for the purposes of determining which fees were payable by Bellatrix on an

ongoing basis. I am not satisfied that the applicant has met its burden of establishing there is sufficient merit to this argument to justify an appeal.

20 Section 6(b) (which was mentioned by the application judge) provides that Bellatrix "shall be entitled but not required to make the following advances or payments . . . (b) the fees and disbursements of any Assistants (which includes the Sale Advisor) retained or employed by (Bellatrix) *at their standard rates and charges* . . . " (emphasis added).

21 Section 33 was not specifically mentioned by the application judge, but it contains similar language. It states that that the Monitor, counsel to the Monitor, counsel to Bellatrix, and the Sales Advisor "shall be paid their reasonable fees and disbursements . . . in each case *at their standard rates and charges*, subject to the terms set forth in their respective engagement letters with (Bellatrix), as applicable, as part of the costs of these proceedings" (emphasis added).

22 Paragraph 35 of the Initial Order, which was reproduced in its entirety by the application judge in her written reasons, provides:

> The Monitor, counsel to the Monitor, counsel to the Applicant and the Sale Advisor shall be entitled to the benefits of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for the professional fees and disbursements incurred both before and after the granting of this Order *(other than the Completion Fee (as defined in the Sale Advisor Engagement Letter))* at the standard rates and charges of the Monitor, such counsel and the Sale Advisor, subject to the terms set forth in their respective engagement letters, as applicable, and *the Sale Advisor shall be entitled to the benefits of and is hereby granted a charge (the "Sale Advisor Transaction Fee Charge") on the Property, as security for the Completion Fee (as defined in the Sale Advisor Engagement Letter). The Administration Charge and the Sale Advisor Transaction Fee Charge shall each have the priority set out in paragraphs 42 and 44 of this Order.*
>
> [emphasis by the application judge]

23 An examination of these clauses (along with paragraphs 42 and 44 of the Initial Order) supports the application judge's recognition that the Work Fee and the Completion Fee were treated differently throughout the Initial Order.

24 The Initial Order contemplated that Bellatrix was *permitted* to pay certain fees on an ongoing basis, pursuant to para 6(b): "the fees and disbursement of (the Sale Advisor) . . . *at their standard rates and charges* . . . " (emphasis added). Bellatrix was *required* to pay other fees on an ongoing basis, described as the Sale Advisor's "reasonable fees and disbursement . . . *at their standard rates and charges*, subject to the terms set forth in their respective engagements letters . . . " (emphasis added) The Completion Fee ($2.75 million plus a percentage of the price of the Transaction) is different from the Work Fee, in that the former does not qualify as an amount payable at the Sale Advisor's "standard rates and charges". This key distinction between the nature of the Work Fee and the Completion Fee is reflected in the different treatment that these fees received, both as to whether they could be paid on an ongoing basis and as to their ultimate priority.

25 The last sentence of para 33, which authorizes and directs Bellatrix "to pay the accounts of the foregoing parties in accordance with the payment terms agreed between [Bellatrix] and such parties" does not have the effect of overriding the earlier requirements in the paragraph that the fees and disbursements payable pursuant to this paragraph be "reasonable" and at "standard rates and charges".

26 The suggestion made by the Sale Advisor that the decision creates uncertainty with respect to the ability of Bellatrix to pay the fees of the Monitor or counsel in excess of the Administration Fee charge $500,000 is unfounded. So long as such fees of the Monitor and counsel (or the Sale Advisor's Work Fee) meet the requirements in para 33, they can be paid on an ongoing basis. Such payments are not restricted by the amount of the Administration Fee charge.

27 The Sale Advisor noted that the application judge did not address para 27 of the Initial Order, which approved the Engagement Letter "including, without limitation, the payment of the fees and expenses contemplated thereby, and (Bellatrix) is authorized to continue the engagement of the Sale Advisor on the terms set out in the Sale Advisor Engagement Letter".

When this paragraph is read in context, together with all of the other paragraphs in the Initial Order, its approval of the Engagement Letter does not override the more specific provisions that distinguish between when payments of the Work Fee and the Completion Fee can be made.

28 With respect to the Sale Advisor's submission that payments made under the KERP provision support its interpretation of the Initial Order, the First Lien Lenders note that those payments were made without their knowledge and at the time they understood that they would be paid out in full. There is no merit to the suggestion that the application judge's failure to address this submission would constitute a reviewable error.

29 While the Initial Order was based upon the draft template order, the question raised on the proposed appeal, whether the Completion Fee can be paid to the Sale Advisor out of cash on hand, is largely dependent upon the interpretation of modifications that were made to the language in the draft template order. As a result, the point on appeal would be of limited interest to the practice generally.

30 For all of the foregoing reasons, I have concluded that the appeal is not *prima facie* meritorious, nor does it raise an important legal issue that is of significance to the practice generally.

Conclusion

31 Having considered all of the factors collectively, I am not satisfied that it would be appropriate to grant leave to appeal. The application is dismissed.

Application dismissed.

TAB 7

2000 ABCA 238
Alberta Court of Appeal [In Chambers]

Canadian Airlines Corp., Re

2000 CarswellAlta 919, 2000 ABCA 238, [2000] 10 W.W.R. 314, [2000] A.W.L.D. 655, [2000] A.J. No. 1028, 20 C.B.R. (4th) 46, 228 W.A.C. 131, 266 A.R. 131, 84 Alta. L.R. (3d) 52, 99 A.C.W.S. (3d) 533, 9 B.L.R. (3d) 86

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

And In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as amended, Section 185;

And In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.; Resurgence Asset Management LLC (Applicant) and Canadian Airlines Corporation and Canadian Airlines International Ltd. (Respondents)

Wittmann J.A.

Heard: August 3, 2000
Judgment: August 29, 2000
Docket: Calgary Appeal 00-08901

Proceedings: refused leave to appeal *Canadian Airlines Corp., Re* (2000), 2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.); affirmed (2000), 2000 CarswellAlta 1556, 2001 ABCA 9, [2001] 3 W.W.R. 1 (Alta. C.A.)

Counsel: *D.R. Haigh*, *Q.C.*, *D.S. Nishimura*, and *A.Z.A. Campbell*, for Applicant.
H.M. Kay, *Q.C.*, *A.L. Friend*, *Q.C.*, and *L.A. Goldbach*, for Respondents.
S.F. Dunphy, for Air Canada.
F.R. Foran, *Q.C.*, for Monitor, Pricewaterhouse Coopers.

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by court
Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.c Appeal from refusal or granting of leave
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act — Investment corporation brought counter-application for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial to them — Application was granted and counter-application dismissed on basis that all statutory conditions were fulfilled and plan was fair and reasonable — Investment corporation brought application for leave to appeal — Leave to appeal refused — Appeal concerning fairness and reasonableness of plan could not proceed on grounds of mootness — Even if appeal were not moot, leave would be refused on basis that chambers judge made no palpable error in findings of fact, and no error in her exercise of discretion in approving

plan — Trial judge correctly determined that plan was not oppresive to minority shareholders, did not violate s. 167 of Business Corporations Act of Alberta and represented best option for all parties concerned, including Canadian public — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act — Investment corporation brought counter-application for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial to them — Application was granted and counter-application dismissed on basis that all statutory conditions were fulfilled and plan was fair and reasonable — Investment corporation brought application for leave to appeal — Leave to appeal refused — Appeal concerning fairness and reasonableness of plan could not proceed on grounds of mootness — Plan was already partially implemented and certain steps could not be reversed, including issuance of articles of reorganization, changes in share structure and management, and implementation of restructuring plan — Appeal court could not rewrite plan, but only uphold it or set it aside — Since it was no longer possible to set plan aside, court could not grant any effective remedy — Appeal court could not grant declaration that investment corporation was unaffected unsecured creditor, nor could appeal on basis of oppression proceed for same reason — No special circumstances existed to warrant expenditure of judicial resources on appeal despite its mootness — Even if appeal were not moot, leave would be refused on basis that chambers judge made no palpable error in findings of fact, and no error in her exercise of discretion in approving plan — Trial judge correctly determined that plan was not oppresive to minority shareholders, did not violate s. 167 of Business Corporations Act of Alberta and represented best option for all parties concerned, including Canadian public — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

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Borowski v. Canada (Attorney General), [1989] 3 W.W.R. 97, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232 (S.C.C.) — applied

Canadian Airlines Corp., Re, 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — applied

Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd. (1993), 81 B.C.L.R. (2d) 142, 31 B.C.A.C. 161, 50 W.A.C. 161 (B.C. C.A.) — considered

Gibbex Mines Ltd. v. International Video Cassettes Ltd., [1975] 2 W.W.R. 10, 49 D.L.R. (3d) 731 (B.C. S.C.) — considered

Harris v. Universal Explorations Ltd. (1982), 16 B.L.R. 186, *(*sub nom. *Universal Explorations Ltd., Re)* 18 Alta. L.R. (2d) 119, 35 A.R. 71 (Alta. T.D.) — considered

Norcan Oils Ltd. v. Fogler (1964), [1965] S.C.R. 36, 49 W.W.R. 321, 46 D.L.R. (2d) 630 (S.C.C.) — considered

Schmidt v. Air Products of Canada Ltd., 3 C.C.P.B. 1, 20 Alta. L.R. (3d) 225, *(*sub nom. *Stearns Catalytic Pension Plans, Re)* 168 N.R. 81, [1994] 8 W.W.R. 305, 3 E.T.R. (2d) 1, 4 C.C.E.L. (2d) 1, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631, *(*sub nom. *Stearns Catalytic Pension Plans, Re)* 155 A.R. 81, *(*sub nom. *Stearns Catalytic Pension Plans, Re)* 73 W.A.C. 81, C.E.B. & P.G.R. 8173 (S.C.C.) — referred to

Sparling v. Northwest Digital Ltd. (1991), 47 C.P.C. (2d) 124 (B.C. C.A.) — applied

Statutes considered:

Business Corporations Act, S.A. 1981, c. B-15

s. 185 — considered

s. 234 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 13 — considered

APPLICATION by investment corporation for leave to appeal from judgment reported at 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, [2000] 10 W.W.R. 269, 2000 ABQB 442, 20 C.B.R. (4th) 1 (Alta. Q.B.), approving airline's plan of arrangement under *Companies' Creditors Arrangement Act.*

Wittmann J.A. **[In Chambers]:**

INTRODUCTION

1 This is an application by Resurgence Asset Management LLC ("Resurgence") for leave to appeal the order of Paperny, J., dated June 27, 2000, [reported 84 Alta. L.R. (3d) 9, [2000] 10 W.W.R. 269 (Alta. Q.B.)] pursuant to proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, ("*CCAA*"). The order sanctioned a plan of compromise and arrangement ("the Plan") proposed by Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") (together, "Canadian") and dismissed an application by Resurgence for a declaration that Resurgence was an unaffected creditor under the Plan.

BACKGROUND

2 Resurgence was the holder of 58.2 per cent of $100,000,000.00 (U.S.) of the unsecured notes issued by CAC.

3 CAC was a publicly traded Alberta corporation which, prior to the June 27 order of Paperny, J., owned 100 per cent of the common shares of CAIL, the operating company of Canadian Airlines.

4 Air Canada is a publicly traded Canadian corporation. Air Canada owned 10 per cent of the shares of 853350 Alberta Ltd. ("853350"), which prior to the June 27 order of Paperny, J., owned all the preferred shares of CAIL.

5 As described in detail by the learned chambers judge in her reasons, Canadian had been searching for a decade for a solution to its ongoing, significant financial difficulties. By December 1999, it was on the brink of bankruptcy. In a series of transactions including 853350's acquisition of the preferred shares of CAIL, Air Canada infused capital into Canadian and assisted in debt restructuring.

6 Canadian came to the conclusion that it must conclude its debt restructuring to permit the completion of a full merger between Canadian and Air Canada. On February 1, 2000, to secure liquidity to continue operating until debt restructuring was achieved, Canadian announced a moratorium on payments to lessors and lenders. CAIL, Air Canada and lessors of 59 aircraft reached an agreement in principle on a restructuring plan. They also reached agreement with other secured creditors and several major unsecured creditors with respect to restructuring.

7 Canadian still faced threats of proceedings by secured creditors. It commenced proceedings under the *CCAA* on March 24, 2000. Pricewaterhouse Coopers Inc. was appointed as Monitor by court order.

8 Arrangements with various aircraft lessors, lenders and conditional vendors which would benefit Canadian by reducing rates and other terms were approved by court orders dated April 14, 2000 and May 10, 2000.

9 On April 25, 2000, in accordance with the March 24 court order, Canadian filed the Plan which was described as having three principal objectives:

(a) To provide near term liquidity so that Canadian can sustain operations;

(b) To allow for the return of aircraft not required by Canadian; and

(c) To permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset value and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

10 The Plan generally provided for stakeholders by category as follows:

(a) Affected unsecured creditors, which included unsecured noteholders, aircraft claimants, executory contract claimants, tax claimants and various litigation claimants, would receive 12 cents per dollar (later changed to 14 cents per dollar) of approved claims;

(b) Affected secured creditors, the senior secured noteholders, would receive 97 per cent of the principal amount of their claim plus interest and costs in respect of their secured claim, and a deficiency claim as unsecured creditors for the remainder;

(c) Unaffected unsecured creditors, which included Canadian's employees, customers and suppliers of goods and services, would be unaffected by the Plan;

(d) Unaffected secured creditor, the Royal Bank, CAIL's operating lender, would not be affected by the Plan.

11 The Plan also proposed share capital reorganization by having all CAIL common shares held by CAC converted into a single retractable share, which would then be retracted by CAIL for $1.00, and all CAIL preferred shares held by 853350 converted into CAIL common shares. The Plan provided for amendments to CAIL's articles of incorporation to effect the proposed reorganization.

12 On May 26, 2000, in accordance with the orders and directions of the court, two classes of creditors, the senior secured noteholders and the affected unsecured creditors voted on the Plan as amended. Both classes approved the Plan by the majorities required by ss. 4 and 5 of the *CCAA*.

13 On May 29, 2000, by notice of motion, Canadian sought court sanction of the Plan under s. 6 of the *CCAA* and an order for reorganization pursuant to s. 185 of the *Business Corporations Act* (Alberta), S.A. 1981, c. B-15 as amended ("*ABCA*"). Resurgence was among those who opposed the Plan. Its application, along with that of four shareholders of CAC, was ordered to be tried during a hearing to consider the fairness and reasonableness of the Plan ("the fairness hearing").

14 Resurgence sought declarations that the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 were oppressive and unfairly prejudicial to it pursuant to s. 234 of the *ABCA*.

15 The fairness hearing lasted two weeks during which *viva voce* evidence of six witnesses was heard, including testimony of the chief financial officers of Canadian and Air Canada. Submissions by counsel were made on behalf of the federal government, the Calgary and Edmonton airport authorities, unions representing employees of Canadian and various creditors of Canadian. The court also received two special reports from the Monitor.

16 As part of assessing the fairness of the Plan, the learned chambers judge received a liquidation analysis of CAIL, prepared by the Monitor, in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event that CAIL's assets were disposed of by a receiver or trustee. The Monitor concluded that liquidation would result in a shortfall to certain secured creditors, that recovery by unsecured creditors would be between one and three cents on the dollar, and that there would be no recovery by shareholders.

17 The learned chambers judge stated that she agreed with the parties opposing the Plan that it was not perfect, but it was neither illegal, nor oppressive, and therefore, dismissed the requested declarations and relief sought by Resurgence. Further, she held that the Plan was the only alternative to bankruptcy as ten years of struggle and failed creative attempts at restructuring clearly demonstrated. She ruled that the Plan was fair and reasonable and deserving of the sanction of the court. She granted the order sanctioning the Plan, and the application pursuant to s. 185 of the *ABCA* to reorganize the corporation.

LEAVE TO APPEAL UNDER THE *CCAA*

18 The *CCAA* provides for appeals to this Court as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge or the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

19 As set out in *Re Canadian Airlines Corp.*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) ("*Resurgence No. 1*"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

20 The respondents argue that apart from the test for leave, mootness is an additional overriding factor in the present case which is dispositive against the granting of leave to appeal.

MOOTNESS

21 In *Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd.* (1993), 81 B.C.L.R. (2d) 142 (B.C. C.A.), an order authorizing the distribution of substantially all the assets of a limited partnership had been fully performed. The appellants appealed, seeking to have the order vacated. The appellants had unsuccessfully applied for a stay of the order. In deciding whether to allow the appeal to be presented, Gibbs, J.A., for the court, said there was no merit, substance or prospective benefit that could accrue to the appellants, and that the appeal was therefore moot.

22 In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), Sopinka, J. for the court, held that where there is no longer a live controversy or concrete dispute, an appeal is moot.

23 No stay of the June 27 order was obtained or even sought. In reliance on that order, most of the transactions contemplated by the Plan have been completed. According to the Affidavit of Paul Brotto, sworn July 6, 2000, filed July 7, 2000, the following occurred:

> 5. The transactions contemplated by the Plan have been completed in reliance upon the Sanction Order. The completion of the transactions has involved, among other things, the following steps:
>
> (a) Effective July 4, 2000, all of the depreciable property of CAIL was transferred to a wholly-owned subsidiary of CAIL and leased back from such subsidiary by CAIL;
>
> (b) Articles of Reorganization of CAIL, being Schedule "D" to the Plan (which is Exhibit "A" to the Sanction Order), were filed and a Certificate of Amendment and Registration of Restated Articles was issued by the Registrar of Corporations pursuant to the Sanction Order, and in accordance with sections 185 and 255 of the Business Corporations Act (Alberta) (the "Certificate") on July 5, 2000. Pursuant to the Articles of Reorganization, the common shares of CAIL formerly held by CAC were converted to retractable preferred shares and the same were retracted. All preferred shares of CAIL held by 853350 Alberta Ltd. ("853350") were converted into CAIL common shares;

(c) The "Section 80.04 Agreement" referred to in the Plan between CAIL and CAC, pursuant to which certain forgiveness of debt obligations under s.80 of the Income Tax Act were transferred from CAIL to CAC, has been entered into as of July 5, 2000;

(d) Payment of $185,973,411 (US funds) has been made to the Trustee on behalf of all holders of Senior Secured Notes as provided for in the Plan and 853350 has acquired the Amended Secured Intercompany Note; and

(e) Payments have been made to Affected Unsecured Creditors holding Unsecured Proven Claims and further payments will be made upon the resolution of disputed claims by the Claims officer; and

(f) It is expected that payment will be made within several days of the date of this Affidavit to the Trustee, on behalf of the Unsecured Notes, in the amount 14 percent of approximately $160,000,000.

24 In *Norcan Oils Ltd. v. Fogler* (1964), [1965] S.C.R. 36 (S.C.C.), it was held that the Alberta Supreme Court Appellate Division could not set aside or revoke a certificate of amalgamation after the registrar of companies had issued the certificate in accordance with a valid court order and the corporations legislation. A notice appealing the order had been served but no stay had been obtained. Absent express legislative authority to reverse the process once the certificate had been issued, the majority of the Supreme Court of Canada held the amalgamation could not be unwound and therefore, an appellate court ought not to make an order which could have no effect.

25 Courts following *Norcan Oils Ltd.* have recognized that any right to appeal will be lost if a party does not obtain a stay of the filing of an amalgamation approval order: *Harris v. Universal Explorations Ltd.* (1982), 35 A.R. 71 (Alta. T.D.) and *Gibbex Mines Ltd. v. International Video Cassettes Ltd.*, [1975] 2 W.W.R. 10 (B.C. S.C.).

26 *Norcan* applies to bind this Court in the present action where CAIL's articles of reorganization were filed with the Registrar of Corporations on July 5, 2000 and pursuant to the provisions of the *ABCA*, a certificate amending the articles was issued. The certificate cannot now be rescinded. There is no provision in the ***ABCA*** for reversing a reorganization.

27 The respondents point out that there are other irreversible changes which have occurred since the date of the June 27, 2000 order. They include changes in share structure, changes in management personnel, implementation of a restructuring plan that included a repayment agreement with its principal lender and other creditors and payments to third parties. [Affidavit of Paul Brotto, paras. 6, 7, 8, 9, 10, 11, 12.]

28 The applicant relies on *Re Blue Range Resource Corp.* (1999), 244 A.R. 103 (Alta. C.A.), to argue that leave to appeal can be granted after a *CCAA* plan has been implemented. In that case, as noted by Fruman, J.A. at 106, a plan was in place and an appeal of the issues which were before her would not unduly hinder the progress of restructuring.

29 In this case, however, the proposed appeal by Resurgence would interfere with the restructuring since the remedies it seeks requires that the Plan be set aside. One proposed ground of appeal attacks the fairness and reasonableness of the Plan itself when the Plan has been almost fully implemented. It cannot be said that the proposed appeal would not unduly hinder the progress of restructuring.

30 If the proposed appeal were allowed, this Court cannot rewrite the Plan; nor could it remit the matter back to the *CCAA* supervising judge for such purpose. It must either uphold or set aside the approval of the Plan granted by the court below. In effect, if Resurgence succeeded on appeal, the Plan would be vacated. However, that remedy is no longer possible, at minimum, because the certificate issued by the Registrar cannot be revoked. As stated in *Norcan Oils Ltd.*, an appellate court cannot order a remedy which could have no effect. This Court cannot order that the Plan be undone in its entirety.

31 Similarly, the other ground of Resurgence's proposed appeal, oppression under s. 234 of the *ABCA*, cannot be allowed since that remedy must be granted within the context of the *CCAA* proceedings. As recognized by the learned chambers judge, allegations of oppression were considered in the test for fairness when seeking judicial sanction of the Plan. As she discussed at paragraphs 140-145 of her reasons, the starting point in any determination of oppression under the *ABCA* requires

an understanding of the rights, interests and reasonable expectations which must be objectively assessed. In this action, the rights, interests and reasonable expectations of both shareholders and creditors must be considered through the lens of *CCAA* insolvency legislation. The complaints of Resurgence, that its rights under its trust indenture have been ignored or eliminated, are to be seen as the function of the insolvency, and not of oppressive conduct. As a consequence, even if Resurgence were to successfully appeal on the ground of oppression, the remedy would not be to give effect to the terms of the trust indenture. This Court could only hold that the fairness test for the court's sanction was not met and therefore, the approval of the Plan should be set aside. Again, as explained above, reversing the Plan is no longer possible.

32 The applicant was unable to point to any issue where this Court could grant a remedy and yet leave the Plan unaffected. It proposed on appeal to seek a declaration that it be declared an unaffected unsecured creditor. That is not a ground of appeal but is rather a remedy. As the respondents argued, the designation of Resurgence as an affected unsecured creditor was part of the Plan. To declare it an unaffected unsecured creditor requires vacating the Plan. On every ground proposed by the applicant, it appears that the response of this Court can only be to either uphold or set aside the approval of the court below. Setting aside the approval is no longer possible since essential elements of the Plan have been implemented and are now irreversible. Thus, the applicant cannot be granted the remedy it seeks. No prospective benefit can accrue to the applicant even if it succeeded on appeal. The appeal, therefore, is moot.

DISCRETION TO HEAR MOOT APPEALS

33 Even if an appeal could provide no benefit to the applicants, should leave be granted?

34 In *Borowski*, *supra*, Sopinka, J. described the doctrine of mootness at 353. He said that, as an aspect of a general policy or practice, a court may decline to decide a case which raises merely a hypothetical or abstract questions and will apply the doctrine when the decision of the court will have no practical effect of resolving some controversy affecting the rights of parties.

35 After discussing the principles involved in deciding whether an issue was moot, Sopinka, J. continued at 358 to describe the second stage of the analysis by examining the basis upon which a court should exercise its discretion either to hear or decline to hear a moot appeal. He examined three underlying factors in the rationale for the exercise of discretion in departing from the usual practice. The first is the requirement of an adversarial context which helps guarantee that issues are well and fully argued when resolving legal disputes. He suggested the presence of collateral consequences may provide the necessary adversarial context. Second is the concern for judicial economy which requires that special circumstances exist in a case to make it worthwhile to apply scare judicial resources to resolve it. Third is the need for the court to demonstrate a measure of awareness of its proper law-making function as the adjudicative branch in the political framework. Judgments in the absence of a dispute may be viewed as intruding into the role of the legislative branch. He concluded at 363:

> In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third and vice versa.

36 The third factor underlying the rationale does not apply in this case. As for the first criterion, the circumstances of this case do not reveal any collateral consequences, although, it may be assumed that the necessary adversarial context could be present. However, there are no special circumstances making it worthwhile for this Court to ration scarce judicial resources to the resolution of this dispute. This outweighs the other two factors in concluding that the mootness doctrine should be enforced.

37 On the ground of mootness, leave to appeal should not be granted.

38 I am supported in this conclusion by similar cases before the British Columbia Court of Appeal, *Sparling v. Northwest Digital Ltd.* (1991), 47 C.P.C. (2d) 124 (B.C. C.A.) and *Galcor*, *supra*.

39 In *Sparling*, a company sought to restructure its financial basis and called a special meeting of shareholders. A court order permitted the voting of certain shares at the shareholders' meeting. A director sought to appeal that order. On the basis

of the initial order, the meeting was held, the shares were voted and some significant changes to the company occurred as a result. Hollinrake, J.A. for the court described these as substantial changes which are irreversible. He found that the appeal was moot because there was no longer a live controversy. After considering *Borowski*, he also concluded that the court should not exercise its discretion to depart from the usual practice of declining to hear moot appeals.

40 In *Galcor*, as stated earlier, an order authorizing the distribution of certain monies to limited partners was appealed. A stay was sought but the application was dismissed. An injunction to restrain the distribution of monies was also sought and refused. The monies were distributed. The B.C. Court of Appeal held there was no merit, no substance and no prospective benefit to the appellants nor could they find any merit in the argument that there would be a collateral advantage if the appeal were heard and allowed. None of the criteria in *Borowski* were of assistance as there was no issue of public importance and no precedent value to other cases. Gibbs, J.A. was of the opinion it would not be prudent to use judicial time to hear a moot case as the rationing of scarce judicial resources was of importance and concern to the court.

APPLICATION OF THE CRITERIA FOR LEAVE

41 In any event, consideration of the usual factors in granting leave to appeal does not result in the granting of leave.

42 In particular, the applicant has not established *prima facie* meritorious grounds. The issue in the proposed appeal must be whether the learned chambers judge erred in determining that the Plan was fair and reasonable. As discussed in *Resurgence No. 1*, regard must be given to the standard of review this Court would apply on appeal when considering a leave application. The applicant has been unable to point to an error on a question of law, or an overriding and palpable error in the findings of fact, or an error in the learned chambers judge's exercise of discretion.

43 Resurgence submits that serious and arguable grounds surround the following issues: (a) Should Resurgence be treated as an unaffected creditor under the Plan? and (b) Should the Plan have been sanctioned under s. 6 of the *CCAA*? The applicant cannot show that either issue is based on an appealable error.

44 On the second issue, the main argument of the applicant is that the learned chambers judge failed to appreciate that the vote in favour of the Plan was not fair. At bottom, most of the submissions Resurgence made on this issue are directed at the learned chambers judge's conclusion that shareholders and creditors of Canadian would not be better off in bankruptcy than under the Plan. To appeal this conclusion, based on the findings of fact and exercise of discretion, Resurgence must establish that it has a *prima facie* meritorious argument that the learned chambers judge's error was overriding and palpable, or created an unreasonable result. This, it has not done.

45 Resurgence also argues that the acceptance of the valuations given by the Monitor to certain assets, in particular, Canadian Regional Airlines Limited ("CRAL"), the pension surplus and the international routes was in error. The Monitor did not attribute value to these assets when it prepared the liquidation analysis. Resurgence argued that the learned chambers judge erred when she held that the Monitor was justified in making these omissions.

46 Resurgence argued that CRAL was worth as much as $260 million to Air Canada. The Monitor valued CRAL on a distressed sale basis. It assumed that without CAIL's national and international network to feed traffic and considering the negative publicity which the failure of CAIL would cause, CRAL would immediately stop operations.

47 The learned chambers judge found that there was no evidence of a potential purchaser for CRAL. She held that CRAL had a value to CAIL and could provide value of Air Canada, but this was attributable to CRAL's ability to feed traffic to and take traffic from the national and international service of CAIL. She held that the Monitor properly considered these factors. The $260 million dollar value was based on CRAL as a going concern which was a completely different scenario than a liquidation analysis. She accepted the liquidation analysis on the basis that if CAIL were to cease operations, CRAL would be obliged to do so as well and that would leave no going concern for Air Canada to acquire.

48 CRAL may have some value, but even assuming that, Resurgence has not shown that it has a *prima facie* meritorious argument that the learned chambers judge committed an overriding and palpable error in finding that the Monitor was justified

in concluding CRAL would not have any value assuming a windup of CAIL. She found that there was no evidence of a market for CRAL as a going concern. Her preference for the liquidation analysis was a proper exercise of her discretion and cannot be said to have been unreasonable.

49 Resurgence also argued that the pension plan surplus must be given value and included in the liquidation analysis because the surplus may revert to the company depending upon the terms of the plan. There was some evidence that in the two pension plans, with assets over $2 billion, there may be a surplus of $40 million. The Monitor attributed no value because of concerns about contingent liabilities which made the true amount of any available surplus indefinite and also because of the uncertainty of the entitlement of Canadian to any such amount.

50 The learned chambers judge found that no basis had been established for any surplus being available to be withdrawn from an ongoing pension plan. She also found that the evidence showed the potential for significant contingencies. Upon termination of the plan, further reductions for contingent benefits payable in accordance with the plans, any wind up costs, contribution holidays and litigation costs would affect a determination of whether there was a true surplus. The evidence before the learned chambers judge included that of the unionized employees who expected to dispute all the calculations of the pension plan surplus and the entitlement to the surplus. The learned chambers judge observed also that the surplus could quickly disappear with relatively minor changes in the market value of the securities held or in the calculation of liabilities. She concluded that given all variables, the existence of any surplus was doubtful at best and held that ascribing a zero value was reasonable in the circumstances.

51 In addition to the evidence upon which the learned chambers judge based her conclusion, she is also supported by the case law which demonstrates that even if a pension surplus existed and was accessible, entitlement is a complex question: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.).

52 Resurgence argued that the international routes of Canadian should have been treated as valuable assets. The Monitor took the position that the international routes were unassignable licences in control of the Government of Canada and not property rights to be treated as assets by the airlines. Resurgence argues that the Monitor's conclusion was wrong because there was evidence that the international routes had value. In December 1999, CAIL sold its Toronto - Tokyo route to Air Canada for $25 million. Resurgence also pointed to statements made by Canadian's former president and CEO in mid-1999 that the value of its international routes was $2 billion. It further noted that in the United States, where the government similarly grants licences to airlines for international routes, many are bought and sold.

53 The learned chambers judge found the evidence indicated that the $25 million paid for the Toronto-Tokyo route was not an amount derived from a valuation but was the amount CAIL needed for its cash flow requirements at the time of the transaction in order to survive. She found that the statements that CAIL's international routes were worth $2 billion reflected the amount CAIL needed to sustain liquidity without its international routes and was not the market value of what could realistically be obtained from an arm's length purchaser. She found there was no evidence of the existence of an arm's length purchaser. As the respondents pointed out, the Canadian market cannot be compared to the United States. Here in Canada, there is no other airline which would purchase international routes, except Air Canada. Air Canada argued that it is pure speculation to suggest it would have paid for the routes when it could have obtained the routes in any event if Canadian went into liquidation.

54 Even accepting Resurgence's argument that those assets should have been given some value, the applicant has not established a *prima facie* meritorious argument that the learned chambers judge was unreasonable to have accepted the valuations based on a liquidation analysis rather than a market value or going concern analysis nor that she lacked any evidence upon which to base her conclusions. She found that the evidence was overwhelming that all other options had been exhausted and have resulted in failure. As described above, she had evidence upon which to accept the Monitor's valuations of the disputed assets. It is not the role of this Court to review the evidence and substitute its opinion for that of the learned chambers judge. She properly exercised her discretion and she had evidence upon which to support her conclusions. The applicant, therefore, has not established that its appeal is *prima facie* meritorious.

55 On the first issue, Resurgence argues that it should be an unaffected creditor to pursue its oppression remedy. As discussed above, the oppression remedy cannot be considered outside the context of the *CCAA* proceedings. The learned chambers judge concluded that the complaints of Resurgence were the result of the insolvency of Canadian and not from any oppressive conduct. The applicant has not established any *prima facie* error committed by the learned chambers judge in reaching that conclusion.

56 Thus, were this appeal not moot, leave would not be granted as the applicant has not met the threshold for leave to appeal.

CONCLUSION

57 The application for leave to appeal is dismissed because it is moot, and in any event, no serious and arguable grounds have been established upon which to found the basis for granting leave.

Application dismissed.

TAB 8

2008 ABCA 1
Alberta Court of Appeal

Minister of National Revenue v. Temple City Housing Inc.

2008 CarswellAlta 2, 2008 ABCA 1, [2008] 2 C.T.C. 67, [2008] G.S.T.C. 2, [2008] A.W.L.D. 582, [2008] A.W.L.D. 690, [2008] A.W.L.D. 691, 163 A.C.W.S. (3d) 508, 2008 G.T.C. 1128 (Eng.), 415 W.A.C. 4, 422 A.R. 4, 43 C.B.R. (5th) 35

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

And In the Matter of Temple City Housing Inc.

The Deputy Attorney General on Behalf of Her Majesty the Queen in Right of Canada as Represented by the Minister of National Revenue (Appellant / Respondent) and Temple City Housing Inc. (Respondent / Appellant)

Rowbotham J.A.

Heard: December 20, 2007
Judgment: January 3, 2008
Docket: Calgary Appeal 0701-0335-AC

Proceedings: refused leave to appeal *Temple City Housing Inc., Re* (2007), 2007 CarswellAlta 1806, 2007 ABQB 7, 42 C.B.R. (5th) 274, [2008] 2 C.T.C. 61, [2007] G.S.T.C. 188, [2008] A.W.L.D. 466, [2008] A.W.L.D. 575, [2008] A.W.L.D. 576, [2008] A.W.L.D. 577, 162 A.C.W.S. (3d) 879 ((Alta. Q.B.))

Counsel: Jill Medhurst-Tivadar for Appellant
Chris D. Simard for Respondent
Howard A. Gorman for Proposed Debtor in Possession Lender, Echo Merchant Fund
G. Scott Watson for Monitor, Hardie & Kelly Inc.

Subject: Estates and Trusts; Goods and Services Tax (GST); Insolvency; Income Tax (Federal)

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Interim financing
Tax
II Income tax
II.23 Administration and enforcement
II.23.a Withholding of tax
II.23.a.i Trust for monies withheld
Tax
II Income tax
II.23 Administration and enforcement
II.23.i Collection of tax
II.23.i.x Priorities and superpriorities of Minister

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Leave to appeal from debtor-in-possession order — Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST — Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") — Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 — CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over

DIP order — CRA brought application for leave to appeal — Application dismissed — CRA did not meet three of four factors for leave to appeal under CCAA — Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA — Amendments included provision granting super-priority to DIP financing — Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings — Moreover, point might not be of significance to action itself — DIP lender had advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order — Further, appeal would hinder proceedings in case at bar — Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Leave to appeal from debtor-in-possession order — Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST — Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") — Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 — CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order — CRA brought application for leave to appeal — Application dismissed — CRA did not meet three of four factors for leave to appeal under CCAA — Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA — Amendments included provision granting super-priority to DIP financing — Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings — Moreover, point might not be of significance to action itself — DIP lender had advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order — Further, appeal would hinder proceedings in case at bar — Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA.

Tax --- Income tax — Administration and enforcement — Collection of tax — Priorities and superpriorities of Minister

Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST — Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") — Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 — CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order — CRA brought application for leave to appeal — Application dismissed — CRA did not meet three of four factors for leave to appeal under CCAA — Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA — Amendments included provision granting super-priority to DIP financing — Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings — Moreover, point might not be of significance to action itself — DIP lender had advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order — Further, appeal would hinder proceedings in case at bar — Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA.

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Generally — referred to

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s. 224(1.2) — referred to

s. 224(1.3)"security interest" — considered

s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47

Generally — referred to

APPLICATION by Canada Revenue Agency for leave to appeal from order under *Companies' Creditors Arrangement Act*, granting debtor-in-possession charge to corporate taxpayer.

***Rowbotham J.A.*:**

Introduction

1 Canada Revenue Agency (CRA) seeks leave to appeal a provision in an order made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), granting the Debtor in Possession Lender, Echo Merchant Fund (DIP Lender), a charge in priority over the claim of the applicant. Should leave be granted, the applicant also seeks a stay pending appeal.

Background Facts

2 The respondent, Temple City Housing Inc. (Temple) is a small private company that manufactures homes and truss beams for homes in Cardston, Alberta. Temple has almost 200 employees but has suffered from a shortage of skilled trade workers which has slowed its production and lowered its revenues. In September 2007, entire sections of production had to be shut down because of the lack of workers.

3 Temple has debts in excess of $5 million and is unable to meet its current obligations. In November 2007, the respondent sought protection under the CCAA in order to carry on business and restructure as a going concern, rather than liquidating its assets.

4 Temple's largest creditor is the applicant, who has claims for unpaid or unremitted employee source deductions for income tax, Canada Pension Plan and Employment Insurance, as well as GST for 2007, which total approximately $973,000.

5 In order to pay its employees and continue carrying on business, Temple requires additional financing. The DIP Lender made loans of $185,000 and $91,500 on the condition that it obtains a security interest in the property of Temple in first priority or super-priority over all other claims, specifically the claim by CRA.

Decision of the CCAA Judge

6 The CCAA judge considered the sections of the *Income Tax Act*, R.S.C. 1985, c. 1, and the *Excise Tax Act*, R.S.C. 1985, c. E-15, that require employers to deduct and withhold amounts from their employees' wages (source deductions) and remit them to the Receiver General. The source deductions are deemed to be separate and apart from the property of the employer in trust for Her Majesty. A deemed trust attaches to the property of the employer both when source deductions are made and if source deductions are not remitted to the Receiver General by their due date.

7 The applicant submitted to the CCAA judge and again in this application, that the deemed trust overrides all competing security interests.

8 The CCAA judge held that the Supreme Court of Canada's decision in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720, [2002] G.S.T.C. 23 (S.C.C.), was authority that the deemed trust is similar in principle to a floating charge. Thus, although the property of the employer is subject to the deemed trust, Her Majesty's interest in the property did not continue, for example, once property was sold to a third party. She also found that her interpretation was further supported by the definition in the *Income Tax Act*, which states that a "security interest" means "any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a ... deemed or actual trust...". Therefore, she held that Her Majesty's security interest could be treated the same way as any other security interest under the CCAA.

9 Exercising the inherent jurisdiction of a CCAA court, the CCAA judge held that in the circumstances, particularly, given the number of employees affected and the spirit of the CCAA, which is to promote the continuation of the corporation so that it can emerge from insolvency protection, she granted the DIP Lender first priority to the extent of $300,000 over any claims by the applicant.

10 The order under which leave is sought is dated November 23, 2007 at para. 41 provides:

> In particular, the DIP Charge to the extent of $300,000.00 shall have priority over any claims by CRA [Canada Revenue Agency] in relation to unpaid or unremitted employee source deductions and GST as defined pursuant to the *Income Tax Act* and the *Excise Tax Act*.

Proposed Grounds for Appeal

11 The applicant seeks leave to appeal para. 41 of the November 23, 2007 order on the basis that the CCAA judge erred in granting the DIP Lender priority over Her Majesty's deemed trust claims arising under sections 224(1.2), 227(4) and 227(4.1) of the *Income Tax Act*.

Test for Leave

12 The test for leave is well known. In *Smoky River Coal Ltd., Re*, 1999 ABCA 62 (Alta. C.A.) at para. 22, this Court stated that to obtain leave to appeal an order under the CCAA, there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:

> (1) Whether the point on appeal is of significance to the practice;
>
> (2) Whether the point raised is of significance to the action itself;
>
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) Whether the appeal will unduly hinder the progress of the action.

Application

13 The applicant is unable to meet the test for leave. The point which the applicant seeks to appeal will not be of significance to CCAA practice because the legislation has been amended. Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 39th Parliament, 2nd Session, 2007, received Royal Assent on December 14, 2007. The amendments to the CCAA include specific authority to grant super-priority to DIP financing such as the loan in this case. This provision has not yet been proclaimed in force. However, once it has been proclaimed in force, the issue of the CCAA judge's inherent jurisdiction to order such priorities will not be an issue in future CCAA proceedings. Counsel for the CRA forcefully submitted that despite the amendments, this case is of significance to the practice because, to her knowledge, it is the first time that a court has given priority to the DIP Lender over the CRA's deemed trust. She made several arguments as to why the decision of the CCAA judge was incorrect, assuming that the standard of review is correctness. It seems to me, however, that these arguments, particularly the application of Iacobucci J.'s decision in the *First Vancouver* case, will still have force in future cases where the matter will be largely one of statutory interpretation. I conclude therefore that this particular appeal would not be of significance to the practice.

14 Moreover, the point may not be of significance to the action itself. As counsel for Temple submitted, this is real time litigation. The CCAA judge makes discretionary decisions in a constantly changing situation. Her decision is owed a high degree of deference. The DIP Lender has advanced $300,000 to Temple in reliance on the November 23 order and, in particular, on the lack of a stay of that order. The proceeds have been paid to Temple's employees and suppliers. It is now virtually impossible to "unscramble the egg", as counsel for Temple submitted; in other words to reverse the effect of para. 41 of the November 23 order and to grant the remedy that the applicant now seeks. As was the case in *Canadian Airlines Corp., Re*, 2000 ABCA 238, 266 A.R. 131 (Alta. C.A. [In Chambers]) at para. 32, this appeal may well be moot.

15 Further, an appeal would hinder the CCAA proceedings because without an order giving the DIP Lender first priority over the applicant's claim, the DIP Lender would not advance funds and without the current and future loans, Temple would be unable to restructure under the CCAA and would be forced to close its business.

16 Given that three of the four factors cannot be met, even if the point on appeal is *prima facie* meritorious, the applicant cannot show that there are serious and arguable grounds of real and significant interest to the parties.

Conclusion

17 As the applicant is unable to meet the test for leave, the application is dismissed and therefore, the application for a stay need not be considered.

Application dismissed.

End of Document

TAB 9

Rescue!

The Companies' Creditors Arrangement Act

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in the initial *CCAA* order, which specifies that parties can come before the court in an application to vary or amend the order. The Model Initial Order in Ontario provides an example of a come-back clause in an initial *CCAA* order:

> ¶9 THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order or seek other relief on not less than seven (7) days notice to the Debtors and the Foreign Representative and their respective counsel, and to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.[37]

The Ontario Superior Court has held that such persons should not feel constrained about relying on the come-back clause in the *CCAA* order to seek a variance of the initial stay order. Mr. Justice Farley in *Re MuscleTech Research & Development Inc.* particularly stressed the parties' ability under the come-back provisions:

> ¶5 As this order today is being requested without notice to persons who may be affected, I would stress that these persons are completely at liberty and encouraged to use the comeback clause found at paragraph 59 of the Initial Order. In that respect, notwithstanding any order having previously been given, the onus rests with the applicants (and the applicants alone) to justify *ab initio* the relief requested and previously granted. Comeback relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question. This endorsement is to be provided to the creditors and others receiving notice.[38]

Hence, the court has held that the *CCAA* debtor or other applicant for the initial *CCAA* order has the onus on a come-back motion to satisfy the court that the existing terms of the *CCAA* order should be upheld.[39] Placing the onus here helps to discourage debtors from trying to unduly gain an advantage in the workout negotiations through the terms of the stay order. It allows creditors or other stakeholders that did not receive notice, or received notice only on very short notice, the opportunity to come before the court to make submissions on the order that has been issued.

However, as one counsel observed, first day motions are all about jockeying for position and advantage. As discussed in chapter 1, it is important that applicants seeking first day orders on short notice or no notice do so on the basis of full disclosure, including advising the court of issues that are likely to be contested. Where the court is not advised of issues or positions likely to be taken by creditors who were not given notice, the court may rescind the order, particularly where the debtor or

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[37] Ontario Model Order, at para. 44. See Appendices 4 to 12 for full text of model orders.

[38] *Re MuscleTech Research & Development Inc.*, 2006 CarswellOnt 264, [2006] O.J. No. 167 (Ont. S.C.J. [Commercial List]).

[39] *Re Warehouse Drug Store Ltd.*, 2005 CarswellOnt 1724 (Ont. S.C.J. [Commercial List]).