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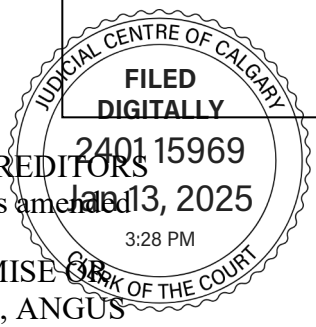

COURT FILE NUMBER	2401-15969
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK 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	**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	**Fasken Martineau DuMoulin LLP** Barristers and Solicitors 3400 First Canadian centre 350 – 7th Avenue SW Calgary, AB, T2P 3N9 **Attention: Robyn Gurofsky / Kaitlyn Wong** Telephone: (403)261-9469 / (403)261-7388 Email: rgurofsky@fasken.com / kwong@fasken.com File No.: 340252.00001

BRIEF OF CANADIAN REP COUNSEL

Friday, January 17, 2024, at 10:00 a.m.

Before the Honourable Justice C. Feasby

CONTENTS

I. INTRODUCTION

1. This Brief is submitted by Canadian Rep Counsel on behalf of Canadian Investors to outline:

   (a) its opposition to the Application of the Debtor Companies for an order setting aside or otherwise varying the Initial Order, or, in the alternative, a stay of the Initial Order (the "**Debtor Companies' Application**"); and

   (b) its support for the Application of the Monitor to, among other things, extend the stay of proceedings (the "**Stay Extension Application**").

2. All capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the ARIO or the Third Report of the Monitor, filed December 13, 2024 (the "**Third Report**").

3. The Initial Order was granted in these proceedings with due process, the Canadian Investors had standing to bring the Initial Application, and this Court had jurisdiction to grant such relief. Despite bald assertions of solvency, the Debtor Companies have failed to lead any evidence in support of this position. The evidence before this Court amply establishes that the Debtor Companies are debtor companies for the purposes of the *Companies' Creditors Arrangement Act*[1] as they are insolvent.

4. The continuation of the within proceedings is necessary to protect the only remaining opportunity for Investors to recoup their investments and to ensure that any proceeds from sales of the subject lands are preserved for orderly and equitable distribution to Investors. The significant history of mismanagement of the Debtor Companies indicates that they are simply not equipped to address their own insolvency or effectively administer sales in a manner that takes into account the interests of the Investors.

5. While the Applicant Investors may not be the typical applicant, they qualify within the statutory requirements of the CCAA. Further, the treatment of the Applicant Investors by

[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] [**TAB 1**].

management, which experiences have now been confirmed and supported by numerous other Canadian and Offshore Investors, and the treatment of the Investor group at large, has been anything but the norm. Handing control of the Debtor Companies back to management in the present circumstances would be wholly inequitable and unjust.

II. BACKGROUND

6. On November 14, 2024, this Court granted the Initial Order on application by the Applicant Investors, which provided for, among other things, i) a stay of proceedings, ii) the appointment of the Monitor with certain enhanced powers, iii) the appointment of Canadian Rep Counsel and Offshore Rep Counsel, iv) authorization for the Debtor Companies to enter into an interim financing agreement with Pillar Capital Corp., and v) approval of the Interim Lender's Charge and Administration Charge.

7. The Court subsequently granted the ARIO which, among other things, extended the stay of proceedings up to and including December 18, 2024. At such time, Simard J adjourned the Debtor Companies' Application directing the Debtor Companies to provide the Requested Information to the Monitor by no later than December 6, 2024. The Monitor was to use the Requested Information to prepare the Third Report to provide the Court with a proper evidentiary record to decide the Debtor Companies' Application and whether these CCAA proceedings should continue.

8. The hearing for the Debtor Companies' Application and to determine whether these proceedings should continue was further adjourned to January 17, 2024, to allow the parties to cross-examine on certain affidavit evidence.

9. Since the ARIO, this Court has further granted several limited scope orders to increase the Interim Lender's Charge, increase the Administration Charge, and to extend the stay of proceedings which stay is currently set to expire on January 17, 2024.

III. ISSUES

10. The issues to be considered by this Court on the various Applications before it are, among other things:

(a) *Is it appropriate to set aside or otherwise vary the Initial Order?*

(b) *In the alternative, is it appropriate to stay the Initial Order?*

(c) *Should the extension of the stay of proceedings be granted?*

(d) *In the alternative, should a receiver be appointed over the Debtor Companies?*

IV. LAW & ARGUMENT

A. Setting Aside or Varying the Initial Order is Not Appropriate

11. This Court has held that where a party seeks to vary an order in a comeback situation in CCAA proceedings, the onus may vary as follows:

(a) the initial applicant will bear the onus of satisfying the Court that the terms of the initial order are appropriate where the initial application was made without notice or with insufficient notice; or

(b) the party seeking the variation will bear the onus of showing why such relief is appropriate and that the relief being sought does not prejudice others who relied on the initial order in good faith where the initial application was made with notice.[2]

12. Regardless of who bears the onus, Farley J has stated that in CCAA proceedings the relief sought at a comeback hearing "cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question."[3]

i. The Initial Order was Granted with Due Process

13. This Court abridged the time for notice of the Initial Application and deemed service of the same to be good and sufficient such that the Initial Application was properly returnable before the Court on November 14, 2024.[4]

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[2] *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 at para 77 [*Canada North*] [**TAB 2**].

[3] *Muscletech Research & Development Inc, Re*, 19 CBR (5th) 54, 2006 CarswellOnt 264 at para 5 (Ont Sup Ct J) [**TAB 3**]; *Canada North*, *supra* at para 68 [**TAB 2**].

[4] Order of the Honourable Justice C Feasby, granted November 14, 2024, *In the Matter of the Compromise or Arrangement of Angus A2A GP Inc et al*, Court of King's Bench of Alberta Court File No 2401-15969 at para 1.

14. While Simard J recognized that the Initial Order was granted on very short notice, when granting the ARIO, Simard J also noted that the present case "is a genuine case of real-time litigation" whereby the Applicant Investors brought the Initial Application in the manner that they did after receiving information indicating that the Angus Manor lands were to be imminently sold in the absence of prior notice.[5] Justice Simard further stated that while service of the Initial Application was imperfect and short, there was a "legitimate urgency to the application" and all of the Debtor Companies were represented by legal counsel and had substantive notice of the hearing on November 21, 2024.[6]

15. On this basis, this Court has already decided the issue of due process in respect of the Initial Order, as raised by the Debtor Companies. However, if the Debtor Companies' Application also varies or sets asides the ARIO (and therefore Simard J's findings noted above), the Initial Application was still brought with due process.

16. As noted by Fitzpatrick J, the normal rules of service and notice remain applicable to CCAA proceedings to ensure procedural fairness. However, she further states that:

> 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.[7]

17. This Court has further stated that "Short notice in insolvency proceedings is not a new concept",[8] and that it is trite law "that the point of service is that a party must get notice of the proceedings".[9] The Alberta Court of Appeal has further held that service is to be a practical consideration and "not some sort of magical or formalistic ritual that has to be followed."[10]

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[5] Transcript of Proceedings taken in the Court of King's Bench of Alberta, Courthouse, Calgary, Alberta, November 25, 2024, before the Honourable Justice C Simard, at 6-25-28 [November 25 Transcript].

[6] November 25 Transcript, at 8-3-9.

[7] *Port Capital Development (EV) Inc (Re)*, 2022 BCSC 1655 at para 65 [**TAB 4**].

[8] *Canada North*, *supra* at para 65 [**TAB 2**].

[9] *Canada North*, *supra* at para 58 [**TAB 2**] citing to *Concrete Equities Inc, Re*, 2012 ABCA 266 at para 19 [*Concrete Equities*] [**TAB 5**].

[10] *Concrete Equities*, *supra* at para 19 [**TAB 5**].

18. The Debtor Companies had notice of the Initial Application and legal counsel appeared for them at the hearing on November 14, 2024. Since the date of the Initial Order, the Debtor Companies have collectively retained a further three law firms to represent them in these proceedings and provided nine responding affidavits. Canadian Rep Counsel therefore submits that the Initial Order was granted with due process and the Debtor Companies have since filed a full response in these proceedings.

19. In any event, any short service with respect to the Initial Order was cured through the rehearing of the same issues before Simard J at the ARIO hearing.

ii. The Issues of Insolvency, Eligibility Under the CCAA, and Standing Have No Merit

20. The Debtor Companies further argue that the Initial Order should be set aside or varied as i) the Debtor Companies are not insolvent, ii) the Debtor Companies are not eligible for an order made pursuant to the CCAA, and iii) the Canadian Investors lacked standing to bring the Initial Application.

21. Justice Simard heard and decided each of these issues in his November 25 reasons. In particular:

    (a) the Court found there to be ample evidence that all of the Debtor Companies were affiliated, and their businesses inextricably intertwined in relation to the subject projects;[11]

    (b) the Court was satisfied that the Debtor Companies are insolvent as, among other things, the current negotiated purchase price for the Angus Manor lands would not be sufficient to repay Canadian investors who purchased bonds in full and the final judgment granted by the District Court of Tarrant County, Texas against, among others, Windridge USA and Fossil USA exceeded $5 million Canadian and remains unpaid;[12] and

[11] November 25 Transcript, at 9-21-23.
[12] November 25 Transcript, at 10-6-22.

(c) sections 11 and 11.02(1) of the CCAA are silent on who may bring an application under the Act. There is no statutory "prohibition" on an investor bringing an application for an initial order and the Canadian Investors qualified as persons interested for the purposes of the CCAA to have standing to bring the Initial Application.[13]

As such, Simard J's decision on these issues stands until the Alberta Court of Appeal determines otherwise. Even if the Debtor Companies also seek to vary or set aside the ARIO, their arguments in regard to standing, insolvency, and eligibility remain without merit.

The Canadian Investors Had Standing to Bring the Initial Application

22. As noted by Simard J in his November 25 reasons, sections 11 and 11.02 of the CCAA which pertain to applications and initial applications, respectively, simply state that such applications must be brought "in respect of a debtor company", and otherwise do not specify who can or cannot bring such applications.[14]

23. Albeit unconventional, there is no prohibition against the Canadian Investors from bringing an Initial Application in respect of the Debtor Companies. As previously noted, the treatment of the Canadian and Offshore Investors by management of the Debtor Companies has been anything but conventional.

The Debtor Companies are Insolvent

24. Despite the above noted findings by this Court, the Debtor Companies continue to assert that they are not insolvent and, therefore, do not qualify as debtor companies for the purposes of the CCAA, yet they have failed to lead any evidence that demonstrates their solvency.

25. The approach to determining whether a party is insolvent for the purposes of qualifying as a debtor company under the CCAA is set out at paragraphs 47 to 51 of Canadian Rep

[13] November 25 Transcript, at 8-20-34, 9-4-6.
[14] CCAA, *supra* at ss 11, 11.02 [**TAB 1**].

Counsel's first brief filed in these CCAA proceedings on November 12, 2024, and is adopted and relied upon herein.

26. The current evidence before the Court is as follows:

(a) while the final judgment granted by the District Court of Tarrant County, Texas was vacated against Fossil Creek Trust,[15] it remains unpaid[16] and is therefore outstanding against both Fossil USA and Windridge USA;[17]

(b) the only title documents put before the Court show the final judgment to be registered against the lands held by Windridge USA;[18]

(c) the bonds held by certain Canadian Investors with respect to Angus Manor will not be paid in full, or at all, by their maturity date of September 30, 2026,[19] under the current proposed sale for the Angus Manor lands;[20]

(d) the Debtor Companies do not have up to date financial statements or records, if any such documents exist at all for certain of the Debtor Companies. Of the Angus Manor entities, the Debtor Companies only provided financial records for Angus Manor Developments up to December 10, 2018.[21] The Debtor Companies provided audited financial statements for Windridge LP and Hills of Windridge A2A Trust for 2014 to 2016, and financial records for Hills of Windridge A2A Trust up to December 31, 2017.[22] At the time of filing the Third Report, the Debtor Companies had not provided any financial statements or records for the Fossil Creek entities or A2A CSC,[23] and provided limited bank and credit card statements, but no financial

[15] Affidavit of Allan Lind, sworn December 13, 2024, at para 21, Exhibit "K" [Second Lind Affidavit].

[16] Transcript of the Questioning of Allan Lind, January 7, 2025, at 31-11-18 [Lind Transcript].

[17] Affidavit of Michael Edwards, sworn November 12, 2024, at Exhibit "36" [Edwards Affidavit].

[18] Edwards Affidavit, at Exhibit "33".

[19] Edwards Affidavit, at para 45.

[20] Affidavit of George Woodland Chambers, sworn November 20, 2024, at Exhibit "4"; Third Report of the Monitor, filed December 13, 2024, at para 73 [Third Report].

[21] Third Report, at para 44.

[22] Third Report, at para 119.

[23] Third Report, at paras 77, 169-170.

records, for A2A Developments.[24] Canadian Rep Counsel understands that the Debtor Companies have since provided audited financial statements for Fossil LP and Fossil Creek A2A Trust for 2014 to 2016 to the Monitor;

(e) as at December 2018, Serene was owed approximately $2.5 million by related A2A entities, including $1,807,209 from A2A CSC, a total of $500,485 from various Windridge entities, $2,565 from A2A Developments, and $2,000 from Fossil Creek A2A Trust. Further, Serene itself owed approximately $6.6 million to other A2A entities.[25] The Debtor Companies did not provide more up to date accounts information;

(f) the limited bank statements provided by the Debtor Companies to the Monitor indicate the following:

(i) the Debtor Companies provided the Monitor with bank statements for three of the six Angus Manor entities.[26] As at October 31, 2024, Angus Manor Developments held $15,800.81 in its bank account, with nominal amounts in the accounts held by Angus Manor Capital and Angus LP as at November 29, 2024, and October 31, 2024, respectively;[27]

(ii) as at October 31,2024, Fossil LP held $749 in its bank account, and, as at October 31, 2022, Fossil Creek A2A Trust had $0.00 in its bank account.[28] The Debtor Companies did not provide a more recent bank statement for Fossil Creek A2A Trust, nor did they provide bank statements for the other three Fossil Creek entities;[29] and

[24] Third Report, at paras 166-167.

[25] Third Report, at para 155.

[26] Third Report, at para 44.

[27] Affidavit of Grayson Ambrose, sworn December 13, 2024, at Exhibit "G" [Second Ambrose Affidavit]; Third Report, at para 44.

[28] Third Report, at para 90.

[29] Third Report, at para 81.

(iii) as at April 30, 2024, Windridge LP held $80.68 in its bank account, and Hills of Windridge Trust A2A Trust had $0.00 in its respective account as at March 31, 2022.[30] The Debtor Companies did not provide any further bank statements;[31]

(g) Serene Sendera Ranch LP, an entity associated with the A2A project Sendera Ranch, advanced $40,893 to A2A Developments on November 13, 2024, which funds were used to pay the outstanding property taxes for Angus Manor on the eve of the Initial Application hearing, and what is assumed to be a portion of legal fees of Carscallen LLP and Miles Davison LLP;[32]

(h) as a result of self-described financial challenges facing the subject projects, the Debtor Companies did not have sufficient funds to pay accountants, maintain offices, or continue software subscriptions to maintain corporate records. Mr. Lind reiterates that certain financial statements were not prepared at all due to limited funds, and notes that when the A2A Group's office in Fort Worth, Texas closed, "office owners would not allow any company records to be recovered".[33] Mr. Ambrose further states that he has been working with a "skeleton crew with limited resources";[34]

(i) due to a lack of funding the A2A Group's Canadian office formerly located in Toronto, Ontario closed;[35]

(j) Mr. Ambrose states that "It was a lack of funds that made that decision" when referring to the decision made by Angus GP to not incur expenses to provide audited financial statements to Investors;[36] and

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[30] Third Report, at para 133.

[31] Third Report, at para 119.

[32] Third Report, at para 174.

[33] Affidavit of Allan Lind, sworn December 31, 2024 (Miles Davison LLP), at paras 7-9 [Third Lind Affidavit]; Lind Transcript, at 55-8-18.

[34] Transcript of Questioning of Grayson Ambrose, January 7, 2025, at 74-5-8 [Ambrose Transcript].

[35] Ambrose Transcript, at 14-19-24.

[36] Ambrose Transcript, at 29-2-7.

(k) the Concept Planning Funds for each of Angus Manor, Fossil Creek, and Windridge have been depleted.[37] As a result of the depletion of the Concept Planning Fund for Angus Manor, Mr. Ambrose states that Angus Manor has insufficient funds to cover its own expenses and funding to pay such expenses is coming from outside the Concept Planning Fund. [38] While Mr. Ambrose indicates that this outside source may be A2A Developments, he is not fully aware of where the funds came from as he is "not in control of the funding and where the funds come from".[39]

27. No better or other information has been tendered by the Debtor Companies. In fact, the affiants, Messrs. Lind and Ambrose, who swore the affidavits in support of the Debtor Companies' Application, each indicated that they had no real or substantial insight or involvement in the financial affairs of the Debtor Companies.[40]

28. The operations of the Debtor Companies are significantly intertwined with one another with each entity holding a distinct role within the investment scheme of each project.[41] Further, it is clear from the Third Report and the evidence of the Debtor Companies that the financial affairs of the Debtor Companies are similarly intertwined, with funds routinely co-mingled.[42]

29. Several of the Debtor Companies are also "affiliated companies" for the purposes of the CCAA. The CCAA states "companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person".[43] The definition for "affiliated companies" goes on to state that "two companies affiliated with the same company at the same time are deemed to be affiliated with each other."[44]

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[37] Second Ambrose Affidavit, at para 59; Ambrose Transcript, at 41-19-24; Lind Transcript, at 63-18-20, 64-3-6.

[38] Ambrose Transcript, at 59-15-25 – 60-1-2; Second Ambrose Affidavit, at para 60.

[39] Ambrose Transcript, at 59-15-20; Second Ambrose Affidavit, at para 60.

[40] Ambrose Transcript, at 37-19-21, 38-1-3, 51-7-9, 56-19-23, 57-2-7, 59-18-20, 61-9-11, 63-16-23; Lind Transcript, at 52-1-6.

[41] Edwards Affidavit, Exhibits "23"-"24"; Affidavit of Allan Lind, sworn November 21, 2024, at Exhibits "A"-"B" [First Lind Affidavit].

[42] Ambrose Transcript, at 37-2-12, 37-21-24, 83-10-13; Third Report, at para 155.

[43] CCAA, *supra* at s 3(2)(a) [**TAB 1**].

[44] CCAA, *supra* at s 3(2)(b) [**TAB 1**].

30. For the purposes of the CCAA, a company is a subsidiary of another if i) it is controlled by the other company, ii) that other company and one or more companies each of which is controlled by that other company, iii) two or more companies each of which is controlled by that other company, or iv) is a subsidiary of a company that is a subsidiary of that other company.[45]

31. The ownership structure of the Debtor Companies indicates the following:

(a) A2A Developments is the sole owner of Angus GP and Angus Developments;

(b) Serene is the sole owner of Angus Manor GP and holds a 60% ownership interest in Angus Manor Capital;[46]

(c) A2A Developments is the sole owner of Fossil GP and Windridge GP;[47]

(d) Serene Country Homes Holdings PTE Ltd. is the sole owner of Serene[48] and Serene Country Homes, LLC, the latter of which is the sole owner of Fossil USA and Windridge USA;[49] and

(e) with the exception of A2A CSC, Mr. Dirk Foo is the sole or majority owner, either directly or indirectly, of all of the Debtor Companies.[50]

32. The Debtor Companies are insolvent, cumulatively holding debts in excess of $5 million, and qualify as debtor companies for the purposes of the CCAA.

iii. The Issue of Jurisdiction Has Been Decided

33. This Court has already decided the issue of whether it has jurisdiction over Windridge USA and Fossil USA in the absence of a service *ex juris* order. Justice Simard found both Windridge USA and Fossil USA to be proper respondents in these proceedings given "they

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[45] CCAA, *supra* at s 3(4) [**TAB 1**].
[46] Third Report, at para 35.
[47] Third Report, at paras 80, 118.
[48] Third Report, at para 152.
[49] Third Report, at paras 80, 118.
[50] Third Report, at paras 35, 80, 118, 152.

are inextricably intertwined in the corporate and investment structure of the Windridge and Fossil Creek projects that were marketed to Canadian investors".[51] Despite imperfect service of the Initial Application, the Court still had jurisdiction over all of the Debtor Companies.[52]

34. The relevant rules pertaining to service of documents on parties outside of Canada operate to ensure there is a "real and substantial connection" between the parties and Alberta for the Alberta Courts to impose its jurisdiction.[53] Service *ex juris* is a means by which the Courts decide if they should exercise their jurisdiction[54] and is further used to bring Canadian courts into compliance with their obligations under the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (the "**Hague Convention**").[55]

35. The Hague Convention has a dual purpose: i) to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad are brought to the notice of the addressee in sufficient time, and ii) to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure.[56]

36. A real and substantial connection exists between the Debtor Companies and Alberta to warrant the exercise of this Court's discretion over Windridge USA and Fossil USA. The basis for this connection is set out in Canadian Rep Counsel's first brief, filed November 12, 2024, at paragraph 56, and is adopted and relied upon herein.

37. Further, the Initial Application and its supporting materials were brought to the attention of Windridge USA and Fossil USA as evidenced by the fact that counsel for both entities appeared at the hearing of the Initial Application, therefore meeting the purpose of the Hague Convention. While notice was short, the circumstances at the time required the

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[51] November 25 Transcript, at 8-9-12.

[52] November 25 Transcript, at 8-14-15.

[53] *Acciona Infrastructure Canada Inc v Posco Daewoo Corporation*, 2019 ABCA 241 at para 14 [*Acciona*] [**TAB 6**].

[54] *Acciona*, *supra* at para 14 [**TAB 6**].

[55] *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 15 November 1965, 658 UNTS 163 (entered into force 10 November 1969) [Hague Convention] [**TAB 7**].

[56] Hague Convention, *supra* [**TAB 7**].

Initial Application to be brought on an urgent basis in light of the real-time litigation that was occurring.

iv. The Nature of the Relief Granted is Necessary and Appropriate in the Given Circumstances

38. The Initial Application was brought by five Canadian Investors. Pursuant to the ARIO, Canadian Rep Counsel commenced a process to solicit feedback from Canadian Investors on their investments in the subject projects and their views on the A2A Group and these proceedings. As at January 8, 2025, Canadian Rep Counsel had received feedback from 120 Canadian Investors in response to its correspondence or that of Pinnacle Wealth Brokers Ltd. ("**Pinnacle**") broken down by the subject projects as follows:

    (a) of the respondents, 42 reportedly invested in Angus Manor with a total investment amount of $1,030,500;

    (b) 36 respondents reportedly invested in Fossil Creek with a total investment amount of $809,300; and

    (c) 46 respondents reportedly invested in Windridge with a total investment amount of $1,006,233.[57]

39. Only one of the 120 responding Canadian Investors indicated they were supportive of the A2A Group's handling of their investments to date, and that individual was also supportive of the ongoing appointment of the Monitor.[58] All but six of these respondents supported the ongoing appointment of the Monitor, and those six investors either did not answer the question or required additional information.[59]

40. As stated by Simard J in his reasons of November 25, 2024, the "almost total lack of communication from the A2A Group, and extremely derelict governance" was "amply established on the evidence".[60]

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[57] Secretarial Affidavit No 3 of Kim Picard, sworn January 8, 2025, at para 6 [Third Picard Affidavit].

[58] Third Picard Affidavit, at para 7(f).

[59] Third Picard Affidavit, at para 7(g)-(h).

[60] November 25 Transcript, at 4-34-36.

41. Since the granting of the Initial Order, further evidence of the mismanagement of the Debtor Companies and the handling of Investors' contributions has come to light, including, among other things:

(a) no Canadian Investors who have been in contact with Canadian Rep Counsel have received any financial reporting from the A2A Group in respect of their investments in the last six years;[61]

(b) no Canadian Investors in Fossil Creek or Windridge have received notice of a General or Special meeting of the trust unitholders of Fossil Creek A2A Trust or Hills of Windridge A2A Trust, respectively;[62]

(c) while Canadian Investors may have limited rights in relation to the subject projects, management of the Debtor Companies has failed to meet the rights that have been afforded to Canadian Investors under the relevant limited partnership agreements,[63] subscription agreements,[64] and trust declarations,[65] as the case may be, in relation to maintaining adequate accounting records, preparing and providing financial reporting to Canadian Investors, and holding general meetings when required;

(d) despite recognizing that Angus LP owed reporting duties to Canadian Investors in Angus Manor, Mr. Ambrose states that "There was also nothing to report on the part of the LP, as the GP made the decision not to incur expenses to provide the audited financial statements";[66]

(e) some Canadian Investors in Fossil Creek and Windridge have received small repayments on their investments, while other Canadian Investors with the same investment instruments in the same project have received no distributions.[67] The

[61] Third Picard Affidavit, at para 7(a).
[62] Third Picard Affidavit, at para 7(b).
[63] Third Report, at para 61, Appendix H.
[64] Third Report, at para 62; Edwards Affidavit, at Exhibit "22".
[65] Third Report, at paras 93-94, 137, Appendices N, W.
[66] Second Ambrose Affidavit, at paras 18, 24.
[67] Secretarial Affidavit No 2 of Kim Picard, sworn December 13, 2024, at para 9(d)-(e) [Second Picard Affidavit].

payments that were made to certain Canadian Investors in Windridge were not consistently proportional to the amounts invested. These inconsistencies in distributions to Canadian Investors are not reflected in the Canadian Investor Records provided by the Debtor Companies to the Monitor which indicate that all Canadian Investors should have received distributions[68], nor is there any legal justification for such inconsistencies;

(f) Mr. Lind describes a lack of document retention by the Debtor Companies due to financial difficulties and because the Debtor Companies' records are held by different accounting and law firms with whom management has not maintained contact;[69]

(g) Messrs. Ambrose and Lind, who are directors of Fossil GP,[70] were not aware that the corporation had previously been struck from the Alberta Corporate Registry;[71] and

(h) management has received requests from various entities, including Pinnacle and Olympia Trust Company, asking for updates on the investments but chose not to respond to such inquiries.[72]

42. As stated by the Supreme Court of Canada in *9354-9186 Québec inc v Callidus Capital Corp*, the underlying objectives of the CCAA are as follows:

(a) to provide for timely, efficient, and impartial resolution of a debtor's insolvency;

(b) to preserve and maximize the value of the debtor's assets;

(c) to ensure fair and equitable treatment of the claims against the debtor;

(d) to protect the public interest; and

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[68] Third Report, at paras 86, 126.

[69] Third Lind Affidavit, at paras 7-9.

[70] Edwards Affidavit, at Exhibit "13".

[71] Ambrose Transcript, at 27-4-6, 27-15-16; Lind Transcript, at 23-16-20.

[72] Ambrose Transcript, at 79-11-21.

(e) in the context of commercial insolvency, to balance the costs and benefits of restructuring or liquidating the company.[73]

43. The underlying objectives of the CCAA are being furthered in the within proceedings as, among other things:

(a) the Monitor is well-positioned to provide for a timely, efficient, and impartial resolution to the Debtor Companies' insolvency;

(b) the Monitor is necessary to preserve and maximize any value that remains in the Debtor Companies' assets, being the lands of the subject projects;

(c) the Monitor can promote the fair and equitable treatment of investors by ensuring that investors in the same projects, holding the same investment instrument *all* receive distributions from any sale proceeds. Further, it is clear from management's derelict record keeping that a claims process may be required, which is routinely done in the context of CCAA proceedings;

(d) through the Chapter 15 Proceedings, the U.S. Bankruptcy Court can and in fact has recognized these CCAA proceedings as foreign main proceedings to establish a clear and efficient process to deal with cross-border matters, particularly those relating to the Fossil Creek and Windridge lands;[74]

(e) the process will protect the public interest by protecting investors. These CCAA proceedings create transparency and accountability in terms of how sale proceeds are handled, and will protect the limited rights that have been afforded to Canadian Investors; and

(f) these proceedings allow for the costs and benefits of the same to be balanced across Investors. While these proceedings carry their own costs, the Investors will have the benefit of avoiding the high fees and commissions typically charged by

[73] *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 40 [**TAB 8**].
[74] Third Report, at para 20.

management of the Debtor Companies in relation to the projects, if any such distributions are to be made.

44. While conduct of an investigation is not the driving force behind initiating CCAA proceedings, the ability of a Monitor to investigate a debtor company's affairs has played an important role in several proceedings under the CCAA.[75] Further, the conduct of necessary investigations to determine the state of a debtor company's business and financial affairs is a recognized duty and function of the Monitor under the CCAA.[76]

45. Further, it would be manifestly unfair to the Interim Lender to set aside or otherwise vary the Initial Order when they advanced funds in reliance on the Initial Order, and those subsequently granted. Such funds have been paid out to the relevant parties, under the assurances and protections afforded by the Initial Order. When such funds have been paid out, it can be "virtually impossible to 'unscramble the egg'".[77]

46. For all of the aforementioned reasons, Canadian Rep Counsel respectfully submits that it is not appropriate in the given circumstances to set aside or otherwise vary the Initial Order.

B. Staying the Initial Order is Not Appropriate

i. The Tripartite Test

47. The well-established tripartite test as set out by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)* is applicable where a party seeks to stay an order.[78] The tripartite test has been applied in the context of insolvency proceedings, including those under the CCAA, on various occasions[79] and where a stay is being sought pursuant to Rule 1.4(2)(h) of the *Alberta Rules of Court*.[80]

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[75] *Aquino v Aquino*, 2021 ONSC 7797 at paras 17-18 [**TAB 9**]; *Aquino v Bondfield Construction Co*, 2024 SCC 31 at paras 11-12 [**TAB 10**]; *Arrangement relatif à Bloom Lake General*, 2021 QCCS 2946 at paras 76-85 [**TAB 11**].

[76] CCAA, *supra* at s 23(1)(c) [**TAB 1**].

[77] *Minister of National Revenue v Temple City Housing Inc*, 2008 ABCA 1 at para 14 [**TAB 12**].

[78] *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CarswellQue 120 [*RJR*] [**TAB 13**].

[79] See *Royal Bank v Cow Harbour Construction Ltd*, 2010 ABQB 637 at para 55 [*Cow Harbour*] [**TAB 14**]; *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 304 at para 16 [*Third Eye*] [**TAB 15**]; *British Columbia v Peakhill Capital Inc*, 2023 BCCA 368 at para 8 [**TAB 16**].

[80] *HML Contracting Ltd v Pinder*, 2022 ABCA 185 at para 18 [**TAB 17**].

48. The party seeking the stay bears the onus of demonstrating the following three factors under the tripartite test:

(a) there is a serious question to be tried, or an arguable issue which is not frivolous or vexatious;

(b) there will be irreparable harm if the stay is not granted; and

(c) the balance of convenience favours granting the stay.[81]

49. All three elements of the test must be satisfied in order for a stay to be granted. A failure to establish one of the elements will preclude the granting of a stay.[82]

ii. There is No Serious nor Arguable Question to be Tried

50. The first branch of the tripartite test asks whether there is a serious question to be tried or an arguable issue to be tried. While this step imposes a low threshold to be met, the moving party must still demonstrate that the issues it has raised are not frivolous or vexatious, and that such issues have some merit based on a preliminary assessment.[83]

51. A more extensive review of the merits is required where the result of the interlocutory motion will effectively amount to a final determination of, or end, the action.[84] In such cases, the party seeking the stay must meet the higher test of establishing a strong *prima facie* case.[85]

52. The Debtor Companies' Application seeks to stay the Initial Order pending a more complete hearing of the applicable issues. A full hearing has been scheduled before this Court negating the need for the requested stay.

53. If the Debtor Companies still seek a stay of the Initial Order for other reasons, they still would not meet this stage of the tripartite test. A stay of the Initial Order would effectively

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[81] *RJR*, *supra* at para 48 [**TAB 13**].
[82] *Cow Harbour*, *supra* at para 56 [**TAB 14**].
[83] *RJR*, *supra* at paras 54-55 [**TAB 13**].
[84] *RJR*, *supra* at para 56 [**TAB 13**]; *Ghana Gold Corp, Re*, 2013 ONSC 3284 at para 40 [*Ghana Gold*] [**TAB 18**].
[85] *Ghana Gold*, *supra* at para 40 [**TAB 18**].

end these proceedings as i) the Monitor, the Monitor's legal counsel, Canadian Rep Counsel, and Offshore Rep Counsel would lose the protections afforded by the Administration Charge, ii) the Debtor Companies would lose the authorization to borrow from the Interim Lender to fund these proceedings, iii) the Interim Lender would lose the protections afforded by the Interim Lender's Charge, iv) the Monitor would be unable to continue to perform its functions and duties, and v) the power to negotiate and close sales for the subject properties would return exclusively to the hands of management to the extreme prejudice of the Canadian and Offshore Investors.

54. For these reasons, the higher burden of a strong *prima facie* case is applicable at this stage of the tripartite test.

55. The Debtor Companies do not have a strong *prima facie* case in respect of the issues that they have raised in support of a stay of the Initial Order, including a lack of due process, lack of jurisdiction, lack of standing, and that the Debtor Companies are solvent. As discussed previously, the Debtor Companies have failed to tender any credible evidence to support their assertions, and these issues have already been decided by this Court and are therefore moot, or otherwise lack merit.

iii. The Debtor Companies Will Not Suffer Irreparable Harm if a Stay is Not Granted

56. While management may suffer harm if a stay is not granted as they will be unable to pay themselves the significant fees and commissions routinely taken by the A2A Group in the course of conducting its business, the Debtor Companies will not suffer irreparable harm should the stay not be granted. Respectfully, the interests of management, who have failed entirely in the exercise of their duties to the Debtor Companies and the Investors, are not relevant here.

57. The second step of the tripartite test asks whether there will be irreparable harm in the absence of a stay to the party seeking the stay.[86] The relevant consideration at this stage is the nature of the harm, rather than the magnitude of harm.[87] As stated by the Alberta Court

[86] *RJR*, *supra* at para 63 [**TAB 13**].
[87] *RJR*, *supra* at para 64 [**TAB 13**].

of Appeal in *Third Eye*, "Irreparable harm is limited to harm that cannot be compensated by an award of costs or damages or otherwise satisfactorily redressed, rectified, or made right at some later point in time".[88]

58. As previously stated, a full hearing of the issues raised by the Debtor Companies is before the Court. A stay of the Initial Order is therefore not required to address any harms that could come to the Debtor Companies as they await a full hearing.

59. The Debtor Companies argue that the continuation of these proceedings will harm the current offer in place for the Angus Manor lands or otherwise diminish the value of such lands for the purposes of future sales. They further argue that any encumbrances over the lands through the CCAA proceedings will prevent any sales from closing. These arguments do not support a stay of the Initial Order (or it being set aside or varied) as:

(a) if deemed to be an appropriate transaction by this Court, the offer from X-Energy Inc. for the Angus Manor lands could proceed in the within CCAA proceedings under the supervision of the Monitor and the Court;

(b) the Monitor is well equipped to determine whether other more attractive offers may be available to Investors;

(c) any transaction will be subject to a sale approval and vesting order that will result in the discharge of all applicable charges registered on the subject lands;

(d) at this time, the Debtor Companies have not provided any indication that they are capable of making distributions of the proceeds of sale of the Angus Manor lands (or any other lands) or that such distribution would be handled appropriately by management given the sale of the Fossil Creek lands and portions of the Windridge lands occurred without notice to multiple investors and the quantum of the proceeds remaining from those sales remains unknown.[89] Further, and notwithstanding that the listing agreement between Angus Manor Developments and Royal LePage

[88] *Third Eye*, *supra* at para 22 [**TAB 15**].

[89] Third Report, at paras 105, 109-110, 144, 146.

already provided for a gross commission rate of 4%, Mr. Ambrose advised the Monitor that the A2A Group was looking into the feasibility of an internal 1% commission on the sale;[90]

(e) the Monitor does not believe that the Investors will receive the benefit of interest payments during the course of the VTB structure in place for the sale of Angus Manor and has serious concerns about the trustworthiness of the VTB structure;[91] and

(f) management of the Debtor Companies themselves had concerns with using a VTB structure for the Angus Manor sale given they are aware of the substantial complications that occurred with the VTB structure used in the sale of a real estate project known as Bridle Park.[92]

60. Certain portions of the Windridge lands were sold to the Tarrant Regional Water District through statutory mechanisms (ie. expropriation).[93] While a marketing process for the remainder of the Windridge lands remains ongoing, only one offer has been made for the lands by Bloomfield Homes LP prior to the commencement of these proceedings; however, that deal did not pass the due diligence phase.[94]

61. With the exception of Mr. Foo, management has had little to no insight into what discussions have occurred with prospective purchasers for the Windridge lands and cannot comment on what bid and asking prices have been put forward for the land.[95] Further, management does not know if Mr. Foo obtained the required approval from Offshore Investors prior to approving the Fossil Creek sale, was not previously aware that Offshore Investors had a vote in such matters, and is not aware of the purchase price for the lands or whether a profit or loss occurred.[96]

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[90] Third Report, at para 68.
[91] Third Report, at paras 73, 75.
[92] Ambrose Transcript, at 111-15-20, 113-8-15, 114-10-13.
[93] Lind Transcript, at 40-12-16.
[94] Lind Transcript, at 89-1-6.
[95] Lind Transcript, at 79-23-25 – 80-1-11.
[96] Lind Transcript, at 74-11-24, 83-7-19, 84-3-11.

iv. The Balance of Convenience Does Not Favour Granting the Stay

62. On the final step of the tripartite test, the balance of convenience, the Court must consider whether the interests of the party seeking the stay outweigh the interests of other stakeholders and the estate as a whole.[97]

63. The investments made by Canadian Investors in the subject projects represent significant amounts to these Investors. For several Canadian Investors, their investments in Angus Manor, Windridge, or Fossil Creek formed part of their RRSP or otherwise was a part of their retirement plans.[98] As stated by one couple who invested in Angus Manor, their investment represented a significant amount for them "as seniors on a fix[ed] income."[99] Another Canadian Investor in Fossil Creek describes their investment of $21,000 in the project to be a "huge loss".[100]

64. These CCAA proceedings provide transparency for Canadian Investors, as well as Offshore Investors, into the A2A Group's handling of their investments given the Debtor Companies have previously been silent when faced with inquiries. The continuing appointment of the Monitor allows for the significant deficiencies in management that have occurred to date to be addressed to facilitate, where appropriate, restructurings or liquidations of the subject projects, which includes ensuring that lands are sold for the best value possible. For all of the aforementioned reasons, there is little indication that management is capable of maximizing value for the lands or of properly conducting sales in the ordinary course of business.

65. Further, there are serious concerns about the ability of the Debtor Companies to distribute any proceeds realized from sales of the subject properties themselves to Investors as both Messrs. Lind and Ambrose have raised uncertainties about whether the UFI interests acquired by the Investors were properly recorded. In particular:

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[97] *Third Eye*, *supra* at para 26 [**TAB 15**].

[98] Second Picard Affidavit, at para 9(f).

[99] Second Picard Affidavit, at Exhibit "C".

[100] Second Picard Affidavit, at Exhibit "C".

(a) Mr. Ambrose has attempted to reconcile inconsistencies in the number of UFIs registered on the Angus Manor lands. His evidence is that a possible explanation for the inconsistencies is that $230,000 worth of UFIs (23 UFIs at $10,000 per UFI) were not properly recorded on title for the Angus Manor lands due to an administrative error on the part of the Debtor Companies and title needs to be adjusted accordingly.[101] This error reflects i) a miscalculation of the UFI purchase price under the Second OM for Angus Manor with the proper price being $5,355 per UFI and not $10,000, and ii) the failure to register a batch of UFIs on title;[102]

(b) in the Third Lind Affidavit, Mr. Lind corrects an error in the number of UFIs held by Fossil LP that occurred in his previous evidence, noting that the correct number should be 269 UFIs and not 295.5 UFIs, as previously stated.[103] Mr. Lind's understanding of the number of UFIs held by Fossil LP and Windridge LP is based on what he was told by A2A client services in Singapore, and Mr. Lind has not conducted an independent review of relevant records to confirm the accuracy of these figures.[104] Further, Mr. Lind could not confirm what records client services reviewed or if those records were up to date;[105]

(c) management of the Debtor Companies indicates that it would be "good practice" to reconcile client information, UFI numbers, and Investor contact information in anticipation of distributions of information or funds to Investors, but such reconciliation has not yet occurred;[106] and

(d) certain management was not aware that some Investors had not been receiving distributions from the Fossil Creek and Windridge projects. Management has not made internal inquiries to understand why these discrepancies occurred.[107]

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[101] Affidavit of Grayson Ambrose, sworn January 3, 2025, at para 6, Exhibit "A" [Third Ambrose Affidavit]; Ambrose Transcript, at 69-4-23, 70-11-14, 70-20-24.

[102] Ambrose Transcript, at 71-16-22.

[103] Third Lind Affidavit, at para 11.

[104] Lind Transcript, at 67-20-25, 68-20-25, 69-1-7.

[105] Lind Transcript, at 68-9-19, 69-8-14.

[106] Ambrose Transcript, at 72-4-22.

[107] Lind Transcript, at 59-2-14, 60-1-9.

66. The above noted factors strongly weigh in favour of an independent party conducting a claims process directly with investors to handle distributions. The Monitor has the expertise and resources available to conduct such a process.

C. In the Alternative, An Equitable Receivership is Just and Convenient

67. For the reasons outlined above, the Debtor Companies Application must clearly fail.

68. However, should this Court exercise its discretion and decide that the continuation of these CCAA proceedings is not appropriate, then the Court has the authority to appoint a receiver over the Debtor Companies pursuant to section 13(2) of the *Judicature Act*.[108] This relief was pled at the Initial Application and was not denied and therefore remains open for consideration as alternative relief. Such alternative relief is just and convenient in the given circumstances to ensure that the degree of visibility that has been obtained into the Debtor Companies' operations is not lost to the detriment of all Investors, to preserve the efforts of the parties to date, and to facilitate a claims process for any proceeds realized from sales of the subject properties run by an independent entity to ensure distributions are made to Investors. In this regard, Canadian Rep Counsel adopts and relies upon the law and argument detailed in its first brief filed in the within proceedings on November 12, 2024.

V. CONCLUSION

69. Canadian Rep Counsel respectfully submits that this Court should dismiss the Debtor Companies' Application to set aside, vary, or stay the Initial Order as the issues raised by the Debtor Companies are either moot or lack merit. The continued appointment of the Monitor is necessary to account for the gross mismanagement of the Debtor Companies and to protect the ability of Investors to receive any distributions from sales of the subject lands. If this Court should decide not to continue these CCAA proceedings, then the appointment of an equitable receiver is not only just and reasonable but necessary in the given circumstances.

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[108] *Judicature Act*, RSA 2000, c J-2, at s 13(2) [**TAB 19**].

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF JANUARY, 2025.

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.	*Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550.
3.	*Muscletech Research & Development Inc, Re*, 19 CBR (5th) 54, 2006 CarswellOnt 264 (Ont Sup Ct J).
4.	*Port Capital Development (EV) Inc (Re)*, 2022 BCSC 1655.
5.	*Concrete Equities Inc, Re*, 2012 ABCA 266.
6.	*Acciona Infrastructure Canada Inc v Posco Daewoo Corporation*, 2019 ABCA 241.
7.	*Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 15 November 1965, 658 UNTS 163 (entered into force 10 November 1969).
8.	*9354-9186 Québec inc v Callidus Capital Corp,* 2020 SCC 10.
9.	*Aquino v Aquino,* 2021 ONSC 7797.
10.	*Aquino v Bondfield Construction Co*, 2024 SCC 31.
11.	*Arrangement relatif à Bloom Lake General*, 2021 QCCS 2946.
12.	*Minister of National Revenue v Temple City Housing Inc*, 2008 ABCA 1.
13.	*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CarswellQue 120.
14.	*Royal Bank v Cow Harbour Construction Ltd*, 2010 ABQB 637.
15.	*DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 304.
16.	*British Columbia v Peakhill Capital Inc*, 2023 BCCA 368.
17.	*HML Contracting Ltd v Pinder*, 2022 ABCA 185.
18.	*Ghana Gold Corp, Re,* 2013 ONSC 3284.
19.	*Judicature Act*, RSA 2000, c J-2.

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.]; 2024, c. 31, s. 3.

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
Interpretation

R.S.C. 1985, c. C-36, s. 3

s 3.

Currency

3.

3(1)Application

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.

3(2)Affiliated companies

For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

3(3)Company controlled

For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

3(4)Subsidiary

For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one ore more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

Amendment History

1997, c. 12, s. 121; 2005, c. 47, s. 125

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. 11

s 11. General power of court

Currency

11.General power of court

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, 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.

Amendment History

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

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. 11.02

s 11.02

Currency

11.02

11.02(1)Stays, etc. — initial application

A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(2)Stays, etc. — other than initial application

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(3)Burden of proof on application

The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.02(4)Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Amendment History

2005, c. 47, s. 128; 2019, c. 29, s. 137

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 III — General (ss. 18.6-43) [Heading added 2005, c. 47, s. 131.]
Monitors [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 23

s 23.

Currency

23.

23(1)Duties and functions

The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(iv) [Repealed 2007, c. 36, s. 72(2)]

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

23(2)Monitor not liable

If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Amendment History

2005, c. 47, s. 131; 2007, c. 36, s. 72

Currency

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

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TAB 2

2017 ABQB 550
Alberta Court of Queen's Bench

Canada North Group Inc (Companies' Creditors Arrangement Act)

2017 CarswellAlta 1631, 2017 ABQB 550, [2017] A.W.L.D. 4936, [2017] A.W.L.D. 5003,
[2018] 2 W.W.R. 731, 283 A.C.W.S. (3d) 214, 52 C.B.R. (6th) 308, 60 Alta. L.R. (6th) 103

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

AND In the Matter of a Plan of Arrangement of Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd (Applicants)

J.E. Topolniski J.

Heard: August 11, 2017
Judgment: September 11, 2017
Docket: Edmonton 1703-12327

Counsel: Darren R Bieganek, Q.C., for Monitor, Ernst & Young
George F Body, for Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue
Jeffrey Oliver, for Business Development Bank of Canada
Stephanie A Wanke, for Applicants, Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

Subject: Income Tax (Federal); Insolvency; Tax — Miscellaneous

Headnote

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts Income Tax Act, s 227(4.1).

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Miscellaneous

Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with

> 58 Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice 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.

47 The answer to whether I have jurisdiction to entertain CRA's motion or whether it is properly a subject of appeal to the Court of Appeal rests on the answers to: for whom and when is the Comeback Provision is available.

Who can rely on the Comeback Provision?

48 The Comeback Provision is available to any interested party. It is only logical that an interested party that was not given notice of a *CCAA* initial hearing can rely on the comeback clause. [22] Similarly, and depending upon the circumstances, an interested party given notice may also access the comeback clause.

49 CRA is an interested party that received notice of the motion for the Initial Order. While the Initial Order deemed that service to be good and sufficient, CRA's actual knowledge came the day after it occurred.

When can the Comeback Provision be used?

50 Recourse through the comeback clause is available when circumstances change. As explained in *Pacific National Lease Holding Corp., Re*:

> [I]n supervising a proceeding under the C.C.A.A. **orders are made, and orders are varied as changing circumstances require**. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. [23] [emphasis added]

51 Likewise, in *Re Royal Oak Mines Inc*, Blair J (as he then was) observed that the comeback clause is a means of sorting out issues as they arise during the course of the restructuring. [24]

52 Logically, non-disclosure of material information in an *ex parte* initial application also supports recourse via the comeback clause. [25]

53 An analogous form of statutory recourse is found in *BIA* s 187(5). A sparingly used tool, variance under this provision is a practical means of determining if an order should continue in the face of changed circumstances or fresh evidence. [26]

54 Equally, under r 9.15(1) of the Alberta *Rules of Court* the Court can set aside, vary, or discharge an entered judgment or order (interlocutory or final) if it was made without notice to an affected person, or to correct an accident or mistake if the person did not have adequate notice of the trial. In a similar vein, r 9.15(4) allows the Court to set aside, vary, or discharge an interlocutory order by agreement of the parties, or because of fresh evidence, or other grounds that the Court considers just.

55 Likely because many, if not most, *CCAA* authorities deal with variance of *ex parte* initial orders, little is written about recourse by appeal versus comeback. One example is the rather unusual case of *Re Algoma Steel Inc*, [27] where creditors filed a simultaneous comeback motion and appeal of the initial *ex parte* order. The appeal was heard first. The Court of Appeal found that the appeal was premature (because the order was a "lights on" order) and said that variance should have been pursued.

56 Comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself - which Rowbothom JA described as the virtual impossibility of unscrambling the egg in *Temple City*. [28]

57 Next, I will discuss service and timing concerns.

Service

58 It is trite that the point of service is that a party must get notice of the proceeding and that a party serving documents on a proper address for service must be able to do so with confidence. [29]

59 As previously noted, CRA was served on June 28 at the CRA Office by courier delivery.

60 Rule 11.14(1)(b) provides that service is effected on statutory entities and other entities by "being sent by recorded mail, addressed to the entity, to the entity's principal place of business or activity in Alberta." Recorded mail includes mail by courier and the date of effective service is "on the date acknowledgement of receipt is signed": r 11.14(2)(b).

61 Rule 3.9 requires that an originating application and supporting affidavits be served at least 10 days before the return date. To comply, the Debtors had to serve by June 25, but because this date fell on a weekend, technically compliant service mandated delivery of the service package on June 23.

62 CRA points to the Office of the Superintendent of Bankruptcy's (OSB) website in defence of the position that service was lacking. In part, it reads:

> To make sure insolvency documents are processed quickly and effectively, you should send them to the appropriate area of the CRA.

The webpage also identifies "key processing areas for insolvency documents", which in this case is the office where the CRA Representative is located in Surrey, British Columbia.

63 The OSB website does not assist CRA. While companies seeking relief under the *CCAA* may retain insolvency professionals in advance of their filing, imposing an expectation that debtors heed the OSB's 'unofficial advice' is simply asking too much. More importantly, to require compliance is contrary to the Alberta *Rules of Court*.

64 Properly, CRA does not cast blame on the Debtors for the fact that its own challenges routing mail caused the delay in getting the service package into the right hands. What CRA does say is that despite this, it should have the opportunity to address its significant challenge to the Priority Charges because if the service package was delivered to the regional office responsible for *CCAA* matters by June 25, it was "very likely that CRA would have been represented at the July 5th application."

65 The Debtors effected service, albeit short notice service, on CRA, which the Court deemed to be good and sufficient. Short notice in insolvency proceedings is not a new concept and CRA is not new to insolvency proceedings. Indeed, it is a seasoned and sophisticated player in the *CCAA* arena with access to the might of the federal government's resources.

66 These observations aside, the *CCAA* is not all about technicalities and technical compliance. It is about ensuring maintenance of the *status quo* in the sorting-out period, balancing interests, and, in that vein, hearing from all affected voices whenever it is practicable to do so.

67 In the result, despite the glaring failure of CRA's mail management system and although CRA was effectively and technically served on June 28, the purpose of service was not fulfilled until July 6 when CRA became aware of the Initial Order. On this basis, I am satisfied that I have jurisdiction to hear the variance motion. In finding as I do, I am mindful that CRA is asking whether the Priority Charges ought to have been granted in the first instance, which could well be the subject of appeal. However, *Algoma Steel* supports the notion that variance may be the preferred route where a party did not have actual notice of an order made early in the proceeding.

Timing

68 While comeback relief may be appropriate, it "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question." [30]

69 Armed with knowledge of the Initial Order the day after it was made and well-knowing that the beneficiaries of the Priority Charges would rely upon them, CRA waited twenty days to informally announce its intentions. Then, CRA chose to attend and take no position at the Extension and Enhanced Financing Motions. It also chose to defer advising the Court of this intended motion until after the Court delivered its decision on those motions.

70 CRA's dawdling put BDC, the Monitor, and perhaps the directors at risk of significant prejudice, and it is unfair for it to now ask that the priority be reversed before it gave meaningful notice to all affected parties.

71 The options for fixing the appropriate date of meaningful notice are the date of informal notice, the hearing date, and the release of these Reasons. In my view, the most appropriate date is the hearing of this motion because experience shows that not all informally announced motions actually proceed.

72 Accordingly, irrespective of whether CRA prevails at the end of the day, all of the Priority Charges should be unaffected until August 11, 2017.

73 I turn next to who bears the onus.

The Onus

74 The authorities disagree on who bears the onus where the party seeking to vary under a comeback clause was served. Indeed, Blair J (as he then was) observed that there may be no formal onus, but there "may well be a practical one if the relief sought goes against the established momentum of the proceeding." [31]

75 In *General Chemical Canada Ltd., Re*, [32] Farley J stated that "[I]n any comeback situation, the onus rests solely and squarely with the [initial] applicant to demonstrate why the original or initial order should stand."

76 In contrast, in *Re Target Canada Co*, Morowetz J directed a comeback hearing that was to be a "true" comeback hearing in which the applying party did "not have to overcome any onus of demonstrating that the order should be set aside or varied." [33] There, the initial order went beyond a usual "first day" order. While service was not addressed, it is evident that many, if not most, of the stakeholders were not represented at the hearing.

77 Considering the practicalities of *CCAA* matters, my view is that barring unforeseen circumstances, the onus on a variation application should be this:

- When the initial application is made *without notice* or with insufficient notice, the initial applicant bears the onus of satisfying the court that the terms of the initial order are appropriate.

- When the initial application is made *with notice*, the onus is on the party seeking the variation to show why it is appropriate and that the relief sought does not prejudice others who relied on the order in good faith.

78 I now turn to the substantive priority issue.

Who has priority?

79 It is beyond debate that *ITA* s227 (4) and the mirrored provisions in *EI Act* (s 86(2) and *CPP Act* (s 23(3)) create deemed trusts, and that *CCAA* s 37(2) explicitly preserves their operation. The debate is simply about whether CRA's interest arising from the deemed trusts can be subordinated by the Priority Charges.

80 Two principal questions arise:

i. What is the nature of CRA's interest?

ii. Does CRA's statutorily secured status elevate it above a Priority Charge?

What is the nature of CRA's interest?

81 CRA relies on the extension of trust provisions in the Fiscal Statutes to support the notion that it holds a proprietary rather than secured interest in the Debtors' property. Key to its position is the effect of the concluding phrase in s 227(4.1):

> Notwithstanding any other provision of this Act . . . property held by any secured creditor... is deemed...and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [emphasis added]

82 CRA asserts that these words take it beyond a mere secured creditor because they do not just *deem* the Crown to be the owner of the interest, but rather, says that it *is* the owner.

83 This is the same position CRA advocated in *Temple City*, where Romaine J distilled these features of tax deemed trusts from *First Vancouver* :

- The "deemed trust" is not in "truth a real one as the subject matter of the trust cannot be identified from the date of creation of the trust;" and

- In principle, the deemed trust is similar to a floating charge over all the assets of the tax debtor in that the tax debtor is free to alienate its property, and when it does, the trust releases the disposed-of property and attaches to the proceeds of sale. To find otherwise would freeze the tax debtor's assets and prevent it from carrying on business, which was clearly not a result intended by Parliament.

84 Justice Romaine determined that despite the concluding words of s 227(4.1) these features were inconsistent with a property interest, noting that the definition of a "security interest" in the *ITA* included a "deemed or actual trust", which supports the interest being capable of having the same treatment as a security interest under the *CCAA*. [34]

85 Moir J in *Rosedale Farms* disagreed finding instead that:

- The analogy of the deemed trust to a floating charge in *First Vancouver* was not about creating security, but rather, sales made in the ordinary course of business. Iacobucci J's statement that the question of priority of secured creditors did not arise is noted. [35]

- The "notwithstanding" language of *ITA* s 227(4.1) expressly overrides the *BIA* and all other enactments thereby giving priority to the deemed trust. [36]

- Reliance on the *ITA* definition of "secured interest" is misguided. [37]

86 Moir J correctly notes Justice Iacobucci's observation that the creation of secured creditor priority did not arise in *First Vancouver* . However, as I read *Temple City*, the analysis did not rest on the floating charge analogy. Rather, like the *ITA* definition of "secured creditor," it was but one of several features supporting the result. That said the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings.

87 *Rosedale Farms* is distinguishable in that it concerned a *BIA* scenario. Nevertheless, even if it were otherwise, like Romaine J, I accept that the definitions of secured creditor and security interest in the *CCAA* and Fiscal Statutes support finding that the interests arising from the deemed trusts are security interests, not property interests. In particular, I note that s 224(1.3) defines a security interest as "any interest in property that secures payment . . . and includes a ... deemed or actual trust ... ."

88 Indeed, it would seem inconsistent to interpret the interest they create in a way contrary to their enabling statutes.

TAB 3

2006 CarswellOnt 264
Ontario Superior Court of Justice [Commercial List]

Muscletech Research & Development Inc., Re

2006 CarswellOnt 264, [2006] O.J. No. 167, 19 C.B.R. (5th) 54

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

AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO

Farley J.

Heard: January 18, 2006
Judgment: January 18, 2006
Docket: 06-CL-6241

Counsel: Jay Carfagnini for Muscletech Research and Development Inc. et al.
Derrick Tay for Paul Gardiner, Iovate Health Sciences Inc.
Natasha MacParland for RSM Richter Inc., Proposed Monitor

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Group of companies applied for initial order under Act — Application granted — Companies were insolvent given imbalance of assets to debt — Debt was over $5,000,000 threshold of Act — Stay of products liability actions against companies would facilitate bona fide resolution discussions forming basis of plan of compromise — It was practical to have actions involving applicants and non-applicants dealt with together as latter were derivative — Companies were all registered in Ontario and had substantial connection to it.

Table of Authorities

Cases considered by *Farley J.*:

Babcock & Wilcox Canada Ltd., Re (2000), 2000 CarswellOnt 704, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) — considered

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 — referred to

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

Generally — referred to

APPLICATION by group of companies for initial order pursuant to Companies' Creditors Arrangement Act.

***Farley J.*:**

1 This is a short endorsement which may be elaborated upon.

2 I am satisfied that the applicants are insolvent given their imbalance of assets to debt (both determined and contingent liability as to product liability suits) and that the debt of the applicant group is over the $5 million threshold as to the CCAA test.

3 The product liability situation vis-à-vis the non-applicants appears to be in essence derivative of claims against the applicants and it would neither be logical nor practical/functional to have that product liability litigation not be dealt with on an all encompassing basis: see *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.); *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.). It is understood that this stay will likely facilitate the entering into of overall *bona fide* resolution meetings/discussions which would form the foundation of a plan of reorganization and compromise.

4 I further understand that the applicants, all of which are Canadian companies registered in Ontario and with the substantial connections to this jurisdiction as set out a paragraph 67 of the applicants' factum:

> 67. In addition to the location of each Applicant's registered office, it is respectfully submitted that the following factors further support a finding that each Applicant's COMI is Ontario, Canada:
>
> (a) each of the Applicants was incorporated in Ontario;
>
> (b) each Applicant's mailing address is an Ontario address;
>
> (c) the principals, directors and officers of the Applicants are residents of Ontario;
>
> (d) all decision-making and control in respect of the Applicants, including product development, takes place at the Applicants' premises located in Ontario;
>
> (e) the Applicants' principal banking arrangements have been conducted in Ontario through the Canadian Imperial Bank of Commerce; and
>
> (f) all administrative functions associated with the Applicants and all of the employees that perform such functions, including general accounting, financial reporting, budgeting and cash management, are conducted and situated in Ontario.

will be making an application later today in the Southern District of New York U.S. Bankruptcy Court for recognition, pursuant to Chapter 15 of the US Bankruptcy Code, of the Initial Order which I am granting. In that respect, I would observe that as I discussed in *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), the courts of Canada and of the US have long enjoyed a firm and ongoing relationship based on comity and commonalities of principles as to, *inter alia*, bankruptcy and insolvency.

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.

6 Order to issue as per my fiat.

Application granted.

End of Document

TAB 4

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

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

TAB 5

2012 ABCA 266
Alberta Court of Appeal

Concrete Equities Inc., Re

2012 CarswellAlta 1572, 2012 ABCA 266, [2012] A.W.L.D. 4627, [2012] A.W.L.D. 4631, [2012] A.W.L.D. 4632, 220 A.C.W.S. (3d) 268, 354 D.L.R. (4th) 683, 542 A.R. 12, 566 W.A.C. 12, 96 C.B.R. (5th) 139

Darcy Sandhu, 934608 Alberta Ltd. and 587901 Alberta Ltd., Appellants (Plaintiffs) and MEG Place LP Investment Corporation, Safeguard Real Estate Investment Fund V Limited Partnership, Respondents (Defendants) Concrete Associates IV Investment Corporation, Not a Party to the Appeal (Defendant)

Peter Martin, Jack Watson, Frans Slatter JJ.A.

Heard: September 10, 2012
Judgment: September 21, 2012
Docket: Calgary Appeal 1201-0022-AC

Proceedings: reversing *Concrete Equities Inc., Re* (2012), 2012 CarswellAlta 42, 2012 ABQB 19, 85 C.B.R. (5th) 156 (Alta. Q.B.)

Counsel: M.A. Marion, M. Lemmens, for Appellants
A. Teasdale, for Respondents
R. Zahara, for Hardie & Kelly Inc. (not a party to appeal)

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Disallowance of claims — Notice of disallowance
When group of companies became insolvent, monitor was appointed under Companies' Creditors Arrangement Act (CCAA) and steering committee formed new corporation M Corp. to eventually take over from monitor — Trustee in bankruptcy for two principals of group filed proofs of claim against company that was member of group, and appeals were filed when those claims were disallowed by monitor — Monitor filed claims on behalf of company against principals' estates, and when trustee disallowed those claims, disallowance were served on monitor's counsel in accordance with address given in proofs of claim — As M Corp. had taken over from monitor, counsel forwarded disallowance to M Corp.'s counsel which also served as M Corp.'s registered office and no appeals were brought from disallowance — Appellants subsequently came to control claims of principals against company, and brought action against company, now controlled by M Corp., to enforce those claims — M Corp. proposed to defend claims, in part, by asserting setoff claims that had been disallowed by trustee, and its application for declaration that disallowance had not been properly served was granted — Appellants appealed — Appeal allowed — Chambers judge erred in relying on difference between direct service of disallowance as opposed to indirect service, as this had no legal significance and only point of service was to ensure M Corp. received notice of disallowance — Trustee was entitled to rely on address for service that was given in proof of claim, and suggestion that trustee with constructive knowledge of de facto change of address must serve twice or verify proper location was impractical — Other issues might have arisen if documents had not made their way to M Corp., but it was clear that they were brought to attention of B and that he understood their legal effect — There was effective service of disallowance in several ways, by service on address for service in proofs, by service in fact by disallowance being brought to M Corp.'s attention, and by service on M Corp.'s registered office.

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Disallowance of claims — Miscellaneous
When group of companies became insolvent, monitor was appointed under Companies' Creditors Arrangement Act (CCAA) and steering committee formed new corporation M Corp. to eventually take over from monitor — Trustee in bankruptcy for two principals of group filed proofs of claim against company that was member of group, and appeals were filed when those

claims were disallowed by monitor — Monitor filed claims on behalf of company against principals' estates, and when trustee disallowed those claims, disallowance were served on monitor's counsel in accordance with address given in proofs of claim — As M Corp. had taken over from monitor, counsel forwarded disallowance to M Corp.'s counsel which also served as M Corp.'s registered office and no appeals were brought from disallowance — Appellants subsequently came to control claims of principals against company, and brought action against company, now controlled by M Corp., to enforce those claims — M Corp. proposed to defend claims, in part, by asserting setoff claims that had been disallowed by trustee, and its application for declaration that disallowance had not been properly served was granted — Appellants appealed — Appeal allowed — Chambers judge erred in relying on difference between direct service of disallowance as opposed to indirect service, as this had no legal significance and only point of service was to ensure M Corp. received notice of disallowance — Trustee was entitled to rely on address for service that was given in proof of claim, and suggestion that trustee with constructive knowledge of de facto change of address must serve twice or verify proper location was impractical — Other issues might have arisen if documents had not made their way to M Corp., but it was clear that they were brought to attention of B and that he understood their legal effect — There was effective service of disallowance in several ways, by service on address for service in proofs, by service in fact by disallowance being brought to M Corp.'s attention, and by service on M Corp.'s registered office.

Table of Authorities

Cases considered:

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Concrete Equities Inc., Re (2012), 2012 ABCA 91, 2012 CarswellAlta 417 (Alta. C.A.) — referred to

Dixon's Boatbuilders Ltd., Re (2000), 2000 CarswellNS 330, *(*sub nom. *Dixon's Boatbuilders Ltd. (Bankrupt), Re)* 194 N.S.R. (2d) 194, *(*sub nom. *Dixon's Boatbuilders Ltd. (Bankrupt), Re)* 606 A.P.R. 194, 20 C.B.R. (4th) 67 (N.S. S.C.) — referred to

Gully (Trustee of) v. TD Canada Trust (2002), 36 C.B.R. (4th) 58, 2002 BCSC 1170, 2002 CarswellBC 1873 (B.C. S.C. [In Chambers]) — referred to

Hughes Estate v. Hughes (2006), 68 Alta. L.R. (4th) 231, 384 W.A.C. 310, 397 A.R. 310, 37 C.P.C. (6th) 234, 2006 CarswellAlta 1456, 2006 ABCA 332 (Alta. C.A.) — referred to

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Zahmol Properties Ltd. v. Calgary (City) (2012), 62 Alta. L.R. (5th) 253, 522 A.R. 32, 544 W.A.C. 32, 2012 ABCA 89, 2012 CarswellAlta 389, 106 L.C.R. 1, 347 D.L.R. (4th) 322, [2012] 10 W.W.R. 69 (Alta. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 69.3 [en. 1992, c. 27, s. 36(1)] — referred to

s. 124(2) — considered

s. 135(1) — considered

s. 135(2) — considered

s. 135(3) — considered

s. 135(4) — considered

s. 187(9) — considered

Business Corporations Act, R.S.A. 2000, c. B-9

s. 256 — referred to

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

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 11.15 — referred to

R. 11.17 — referred to

R. 11.22 — referred to

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

Generally — referred to

R. 2 — considered

R. 3 — considered

Forms considered:

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

Sched. III, Form 31 — referred to

APPEAL by appellants from judgment reported at *Concrete Equities Inc., Re* (2012), 2012 CarswellAlta 42, 2012 ABQB 19, 85 C.B.R. (5th) 156 (Alta. Q.B.), granting M Corp.'s application for declaration that notices of disallowances of claims were not effectively served by trustee in bankruptcy.

***Per curiam*:**

1 The issue on this appeal is whether service of disallowances of claims by a trustee in bankruptcy on the address provided in the proofs of claim was effective service.

Facts

2 The facts are complex, and are outlined in the reasons of the chambers judge: *Concrete Equities Inc., Re*, 2012 ABQB 19, 85 C.B.R. (5th) 156 (Alta. Q.B.).

3 The narrative starts with the insolvency of a group of companies known as the Concrete Equities Group. One member of the group was known as "LP V". When the group became insolvent, Ernst & Young was appointed as the Monitor under the *CCAA*, and also as a receiver.

4 Two of the principals of the Concrete Equities Group were Aurora and Humeniuk. They were also bankrupt, and their trustee in bankruptcy was Hardie & Kelly Inc. The claims and crossclaims between Aurora and Humeniuk on the one hand, and LP V on the other hand, form the foundation of the present dispute and appeal.

5 Hardie & Kelly Inc., in its capacity as trustee in bankruptcy for Aurora and Humeniuk, filed proofs of claim against LP V in the *CCAA* proceedings. In February of 2010, Ernst & Young, the Monitor, disallowed those claims, but reserved any right of counterclaim or set off that LP V had against Aurora and Humeniuk. Hardie & Kelly Inc. appealed those disallowances, but the appeal has not yet been prosecuted.

6 In June 2010 a plan was formed in the *CCAA* proceedings respecting LP V. A new corporation called MEG Place Limited Partnership Investment Corp. was created to become the new general partner of LP V, and to take over from the Monitor, Ernst & Young. In July 2010, as anticipated by the *CCAA* plan, Ernst & Young filed claims on behalf of LP V against the estates of Aurora and Humeniuk. This was the right of set off or counterclaim that had been reserved by Ernst & Young when it disallowed the claims by Aurora and Humeniuk against LP V. Ernst & Young gave as its address for service in the proofs of claim the address of its counsel, McCarthy Tetrault.

7 Shortly thereafter MEG Place took over as the general partner of LP V, and Ernst & Young's role as Monitor ended. Hardie & Kelly Inc., as trustee of the estates of Aurora and Humeniuk, subsequently disallowed the claims filed by LP V against those estates, and served the disallowances on McCarthy Tetrault, Ernst & Young's counsel, in accordance with the address given in the proofs of claim. McCarthy Tetrault forwarded the disallowances to Bennett Jones, which was the registered office of MEG

Place. Bennett Jones recalls sending the disallowances to Mr. Butt, the principal of MEG Place, but he does not recall receiving them. At para. 45 the chambers judge made a finding of fact:

> 45 In this case, Mr. Butt, the principal of MEG, had actual knowledge of the Notices of Disallowance through membership on the Steering Committee and through receipt of copies of the disallowances from Bennett Jones as counsel to the Steering Committee. It may be that Mr. Butt did not recognize the implications of the Notices of Disallowance, but he cannot be said to have lacked knowledge. ...

In the end, no one appealed the disallowances by Hardie & Kelly Inc. of the LP V claims against the estates of Aurora and Humeniuk.

8 The Sandhu group, the present appellants, subsequently came to control the claims of Aurora and Humeniuk against LP V. They commenced an action against LP V, now controlled by MEG Place, to enforce those claims, as well as their personal claims. MEG Place proposed to defend the Sandhu claims, in part, by asserting the counterclaims and set offs that had been previously reserved. It subsequently became apparent that those set off claims had been disallowed, and no appeal had been filed in a timely manner. The situation therefore was that the Aurora and Humeniuk claims against LP V were still alive (because they had appealed the disallowance of their claims by LP V), but the corresponding counterclaims and set offs were not alive (because no one had appealed the disallowance of them).

9 MEG Place brought an application for a declaration that the disallowance of LP V's claims had not been properly served, and therefore the appeal period from the disallowances had not yet run. While it acknowledged that the disallowances had been served on the address for service in the proofs of claim, it alleged that Hardie & Kelly Inc., as trustee in bankruptcy for Aurora and Humeniuk, knew or ought to have known that Ernst & Young was no longer the Monitor of LP V, and that the disallowances should have been served directly on MEG Place.

10 The chambers judge inferred that because Hardie & Kelly Inc. (as well as all other parties on the *CCAA* service list) had been served with the order which had the effect of substituting MEG Place for Ernst & Young, Hardie & Kelly Inc. had knowledge that MEG Place had replaced Ernst & Young. She stated at para. 34:

> 34 The issue in this application is ... whether the Trustee can rely on an address for service set out in a proof of claim despite having subsequently received information that alerted him or should have alerted him to the possibility of a change in the identity of the claimant's agent. I find that he cannot do so. Once the Trustee is aware of the appointment of a new agent, service on that new agent must be effected in accordance with Section 135(3) and Rule 113. Service of the Notices of Disallowance on the Monitor and Receiver as the former agent of LP V is not sufficient for the purposes of the Act and the Rule.

She concluded that since there had never been effective service of the disallowances, the time to appeal them had not yet run. She went on to conclude at para. 49 that the notices of disallowance were, in effect, nullities — a conclusion which the trustee submits left uncertainty over the status of those claims.

11 The appellants had also argued that there was effective service in fact, because McCarthy Tetrault forwarded the disallowances to Bennett Jones, which was counsel for MEG Place. The chambers judge concluded at para. 36 that there was not effective service, because "the Trustee did not *directly serve* Bennett Jones as agent for MEG" (emphasis added). She held further at para. 37 that she did not have to resolve whether Bennett Jones had a retainer that covered this particular issue, because "Bennett Jones was not *directly served*"(emphasis added). While the chambers judge recognized she had jurisdiction under s. 187(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "*BIA*") to cure this irregularity, she declined to do so on the basis that it would be unfair to allow the prosecution of the claims, without allowing the assertion of the off-setting set offs and counterclaims.

12 In *Concrete Equities Inc., Re*, 2012 ABCA 91 (Alta. C.A.) the appellants were subsequently granted leave to appeal on five issues:

a. Did the chambers judge err in her interpretation of s. 135(3) of the *BIA* and Rule 113 of the General Rules, by finding that service of notices of disallowance to the address listed in the prescribed Form 31 proof of claim is not always sufficient?

b. Did the chambers judge err in her application of s. 135(3) of the *BIA* to the facts of this case?

c. Did the chambers judge err in her interpretation of s. 187(9) of the *BIA*, its appropriate criteria, and the meaning of "substantial injustice" pursuant thereto?

d. Did the chambers judge err in the exercise of her discretion under s. 187(9) of the *BIA* in her refusal to cure the irregularity in service of the disallowances?

e. Did the chambers judge err in her conclusion that the unserved notices of disallowance have "no further effect"?

Standard of Review

13 The findings of fact of the chambers judge are entitled to deference, although in this case the facts are largely undisputed. The interpretation of the *BIA* and the *Bankruptcy and Insolvency General Rules*, CRC, c. 368 raise issues of law that are reviewed for correctness. Defining what in law amounts to "service" is also a question of law reviewed for correctness. Absent an error on an extricable point of law, the exercise of the chambers judge's discretion under s. 187(9) is reviewed for reasonableness.

The Bankruptcy and Insolvency Legislation

14 The *BIA* stays all claims against the bankrupt: s. 69.3. Instead, it provides a mechanism whereby any person who has a claim against a bankrupt estate can file proof of that claim with the trustee. The proof of claim process is set out in s. 124 of the *BIA*:

124(2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.

The prescribed form, Form 31, states at the top: "All notices or correspondence regarding this claim must be forwarded to the following address:", followed by a blank space for inserting the address. Bankruptcy R. 2 provides that the prescribed forms "must be used".

15 Section 135(1) directs that "the trustee shall examine every proof of claim". Section 135(2) provides that the trustee can disallow, in whole or in part, any claim. Sections 135(3) and (4) set out the procedure to be followed when a claim is disallowed:

(3) Where the trustee ... disallows, in whole or in part, any claim, ... the trustee shall forthwith provide, in the prescribed manner, to the person whose claim ... was disallowed ... a notice in the prescribed form setting out the reasons for the determination or disallowance.

(4) A ... disallowance ... is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

It is noteworthy that the court may extend the time to appeal in s. 135(4), but only "within that [30 day] period".

16 The *Bankruptcy Rules* set out the procedures to be followed in bankruptcies, but in the absence of a specific rule, the general civil rules apply:

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

The *Bankruptcy Rules* specifically provide for service of a disallowance of a claim:

> 113. The notice of disallowance or notice of valuation provided by a trustee under sub-section 135(3) of the Act to a person whose claim ... has been disallowed ... must be served, or sent by registered mail or courier.

Since the *Bankruptcy Rules* do not contain any general provisions as to what would constitute "service", the general civil procedure applies.

The Requirement of Service

17 This appeal turns on whether the disallowances of the respondents' claims were properly served under the *BIA* and the *Bankruptcy Rules*. To summarize, the disallowances were sent to the address given in the Form 31, which was the address of McCarthy Tetrault (solicitors for Ernst & Young), who forwarded them on to Bennett Jones, who drew them to the attention of the principal of MEG Place.

18 The legal concept of service was discussed in *Zahmol Properties Ltd. v. Calgary (City)*, 2012 ABCA 89 (Alta. C.A.) at paras. 14-6, (2012), 522 A.R. 32 (Alta. C.A.):

> 14 Service is a specialized form of notice. While "notice" is sometimes used as a synonym for "knowledge", in this context notice encompasses the conveying of knowledge or information with intention to affect legal rights. For example, the exercise of an option in a contract conveys the information that the contractual right is being exercised, and that the legal rights of the optionor and the optionee will be affected. A casual statement of an intention to exercise the option at a future time may convey "knowledge", but not in a way that fixes legal rights.
>
> 15 The concept is illustrated by the decision in *St. Peter's Evangelical Lutheran Church v. Ottawa*, [1982] 2 S.C.R. 616. By statute a municipality could prevent the demolition of a historic building, provided that notice that the municipality did not consent to the demolition was given within 90 days. The council of the municipality adopted a resolution within the 90 days, denying permission to demolish the building. The owners of the building were aware of the resolution, because two of its representatives were present when the resolution was passed, and it was reported in the newspapers, but no formal notice of the resolution was ever given. While conceding that no formal notice had been given, the municipality argued that the actual knowledge of the resolution was "notice in fact". The Supreme Court of Canada ruled at p. 629 that it was an error to equate "knowledge on the part of the appellants with notice given by the respondent City". The Court held that some type of "notice" to fix the legal rights of the parties was needed in addition to mere knowledge of the resolution.
>
> 16 Service of legal process conveys the information that an action or proceeding has been commenced that may affect the rights of the person being served, with an intention to affect or engage legal rights. The party served is put on notice that it must take steps to protect its rights, or the court or tribunal might adjudicate in its absence. Sometimes legal processes are commenced in order to crystallize rights, without a final decision having been made as to whether the action will be triggered by service and prosecuted. Sometimes knowledge of an action or proceeding is conveyed without intending to affect legal rights, as when a "courtesy copy" of legal process is provided. Where the knowledge of the legal process is conveyed without an intention to affect legal rights, there is generally no "service": *Hansraj v. Ao*, 2004 ABCA 223at paras. 103-7, 34 Alta LR (4th) 199; *Bennett v. Cultural Tours* (1991), 58 BCLR (2d) 225.

In order to demonstrate proper service of the disallowances of the claims, it must be shown that the respondents received notice of the disallowances of their claims, in a context that made it clear that their rights were being engaged.

19 Service is a quintessentially practical consideration. The only point of service is that the defendant must get notice of the claim against it. Service is not some sort of magical or formalistic ritual that has to be followed. While civil procedure recognizes certain forms of service, unconventional forms of service that actually bring the legal process to the attention of the person being served are still effective. For example, assume that personal service is required, but when the process server arrives the defendant is not there. His wife agrees, however, to provide the documents to her husband when he returns. The next day the husband sends an e-mail, the contents of which make it clear that his wife did follow through, and that he is aware that he has been sued and served. This is effective service, even though it is unconventional.

20 In this case the chambers judge observed on several occasions that there was "no direct service" of the disallowances on the respondents. This was a reference to the fact that while the disallowances made their way to Mr. Butt, it was via McCarthy Tetrault and Bennett Jones, and not directly from Hardie & Kelly Inc. to MEG Place. Any differences between the concepts of direct service and indirect service have no legal significance. So long as the documents came to the attention of the respondents in a context that made it clear that rights were being engaged, the service was effective.

21 Procedural rules almost invariably require and recognize an "address for service". After the commencement document is served, every party is required to signify an address at which it may be served with subsequent documents. The procedural rules provide or imply that the address for service can be changed from time to time as required. Significantly, service of process on the address for service is recognized as good service: Rules 11.15, 11.17, 11.22; *Bishop v. Bishop* (1990), 113 A.R. 280 (Alta. C.A.) at para. 10; *Hughes Estate v. Hughes*, 2006 ABCA 332 (Alta. C.A.) at para. 9, (2006), 68 Alta. L.R. (4th) 231, 397 A.R. 310 (Alta. C.A.); *Kelly v. Calgary Soccer Federation*, 2008 ABCA 85 (Alta. C.A.) at para. 2; *Dixon's Boatbuilders Ltd., Re* (2000), 194 N.S.R. (2d) 194 (N.S. S.C.) at paras. 19-20, (2000), 20 C.B.R. (4th) 67 (N.S. S.C.); *Gully (Trustee of) v. TD Canada Trust*, 2002 BCSC 1170 (B.C. S.C. [In Chambers]) at paras. 18-9, (2002), 36 C.B.R. (4th) 58 (B.C. S.C. [In Chambers]). The ruling of the chambers judge, that the address for service is not always effective, would create great uncertainty in all civil litigation. No litigant could be sure in any particular case whether the address provided was adequate or not. If, in this case, Hardie & Kelly Inc. had "directly" served MEG Place, could MEG Place now argue that the service was ineffective, because it did not respect the address shown on the Form 31?

22 While a party to litigation is entitled to rely on the address for service provided, that does not preclude service by other means. For example, a litigant can still personally serve documents subsequent to the commencement document, even though the rules do not require that. Personal service of a corporation like MEG Place can be effected at its registered office, which was at the offices of Bennett Jones: *Business Corporations Act*, RSA 2000, c. B-9, s. 256.

23 To achieve service, the documents must be conveyed in a context that makes it clear rights are being engaged: *Zahmol Properties* at para. 16. That is an objective test; a party cannot argue that it subjectively did not realize what the documents were. On their own terms, the disallowances warned of the right to appeal and its time limitation. Moreover, a party who is served with a document in a context indicating that it has some legal effect cannot be heard to later say that he did not read the document and therefore did not appreciate its legal effect. In any event, Mr. Butt did not suggest he did not understand that the disallowances had legal effect. He explained MEG Place's inaction as arising because there were a number of issues and "this one wasn't at the top of our list", that he believed his solicitors were handling it, or that he believed that the Sandhu claims were "done". None of these reasons suggests that he did not realize the notices were of legal significance.

24 It is important that the parties to litigation be able to rely on the address for service that is given. Parties should not have to guess, or engage in mind reading, to determine where service should be effected. Litigation is not a game of hide and seek. This is a matter of particular significance under the *BIA* or *CCAA*, for which notice requirements and time lines are important. A rule such as proposed here, namely that a trustee who has constructive knowledge of a *de facto* change of address must either serve twice or verify the proper location, would be impractical in smaller cases and virtually impossible to manage in major cases. In this case, the trustee had been given the address of McCarthy Tetrault, and it was allowed to rely on that address for service. If it had been demonstrated that the documents had never in fact made their way to MEG Place, other interesting issues may have arisen. But in this case it was clear that the documents were brought to the attention of Mr. Butt.

25 Further, where there is a recognized address for service, the serving party need not worry about the authority of the recipient: *Dixon's Boatbuilders* at paras. 17-9. It would not be open to Bennett Jones to argue that it was not specifically retained on this issue, if it was served as the registered office. Likewise, if Bennett Jones had a general retainer from MEG Place, the indoor management rule allows the serving party to rely on that. If a served party with some ostensible authority wishes to disclaim authority, the serving party is entitled to expect direct notice of that. Here, when McCarthy Tetrault sent the documents to Bennett Jones, the trustee and McCarthy Tetrault were entitled to assume that Bennett Jones had sufficient authority to accept them. This is particularly so when Bennett Jones did not return the documents, or advise that it had no authority to accept them, but rather sent them on to its client, MEG Place.

26 The appellants challenge the finding that all of the parties to this dispute, including Hardie & Kelly Inc., had actual or constructive notice that MEG Place had effectively replaced Ernst & Young in managing LP V. That knowledge was said to result from service of the *CCAA* order. It is ironic that service of the order is said to create constructive knowledge, even though it was not served "directly" on Hardie & Kelly Inc., but rather was served on its solicitors, whose address had been given as the address for service in the *CCAA* proceedings.

27 The address for service on the proofs of claim should probably have been changed, but luckily no one was prejudiced by the failure to do so. When McCarthy Tetrault was served with the disallowances, it realized that it should pass them on to the new interested party, MEG Place. It did so by sending the disallowances to Bennett Jones, who sent them on to MEG Place. The disallowances effectively came to the attention of MEG Place, despite the out of date address being used. That was effective service.

Conclusion

28 In conclusion, there was effective service of the disallowances of the claims in several ways:

(a) service on the address for service in Form 31 was effectively achieved;

(b) when McCarthy Tetrault sent the documents to Bennett Jones, who sent them on to MEG Place and Mr. Butt, the disallowances were effectively brought to the attention of MEG Place and served in fact; and

(c) service on Bennett Jones as the registered office of MEG Place was effective service.

The first question on which leave was granted must be answered affirmatively: the chambers judge was in error in concluding that there had been no effective service of the disallowances. It is not necessary to discuss whether a party who gets actual notice by unconventional service can show prejudice, nor to answer the other four questions on which leave was granted, although we would observe that the conundrum faced by the trustee as mentioned in para. 10 *supra* necessarily disappears. The appeal is allowed.

Appeal allowed.

End of Document

TAB 6

2019 ABCA 241
Alberta Court of Appeal

Acciona Infrastructure Canada Inc. v. Posco Daewoo Corporation

2019 CarswellAlta 1169, 2019 ABCA 241, [2019] A.W.L.D. 3245, [2019] A.W.L.D. 3250, 308 A.C.W.S. (3d) 688, 91 Alta. L.R. (6th) 59

Acciona Infrastructure Canada Inc. and Mastec Canada Inc., operating as Acciona/Pacer Joint Venture (Respondents / Plaintiffs / Respondents) and Posco Daewoo Corporation (Appellant / Defendant / Applicant)

Frans Slatter, Myra Bielby, Thomas W. Wakeling JJ.A.

Heard: May 7, 2019
Judgment: June 12, 2019
Docket: Calgary Appeal 1701-0354-AC

Proceedings: reversing *Acciona Infrastructure Canada Inc v. Posco Daewoo Corporation (Daewoo)* (2017), 2017 CarswellAlta 2595, 2017 ABQB 707, A.D. Macleod J. (Alta. Q.B.)

Counsel: W.P. Foley, N. Tams, for Respondents
P.J. Scheibel, J.D. Fraese, for Appellant

Subject: Civil Practice and Procedure

Headnote

Alternative dispute resolution --- Submission or agreement to arbitrate — Interpretation and construction

Defendant subcontractor, based in Republic of Korea, was to supply structural steel for plaintiff joint venture's contract to replace bridge — Dispute resolution was to be conducted under Arbitration Act — Joint venture served notice to submit disputes to arbitration — Subcontractor stated notice was invalid as it purported to commence domestic arbitration whereas, under s. 2(1) of Arbitration Act, arbitration should be held under International Commercial Arbitration Act — Subcontractor issued its own notice to arbitrate — Joint venture nominated its arbitrator and invited subcontractor to do same — Subcontractor took position that there was no "valid" arbitration process underway — Joint venture issued originating application and obtained orders for appointment of arbitrators, order validating service, and consolidation of two arbitrations — Subcontractor's application to set aside orders was dismissed — Subcontractor appealed — Appeal allowed; orders set aside — Deficiencies in service were substantive and would preclude exercise of any discretion to cure irregularities in service ex juris — No satisfactory explanation was given for why joint venture did not apply for order for service ex juris — Order validating service should not have been granted without proof that service under Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965 (Hague Convention) had either been accomplished, or frustrated within meaning of Art. 15 of Hague Convention — Order validating service had to be set aside, and absent service, orders appointing arbitrators and consolidating two arbitrations could not stand Arbitration Act, R.S.A. 2000, c. A-43, s 2(1).

Civil practice and procedure --- Costs — Effect of success of proceedings — Successful party deprived of costs — Grounds — Miscellaneous

Defendant subcontractor, based in Republic of Korea, was to supply structural steel for plaintiff joint venture's contract to replace bridge — Dispute resolution was to be conducted under Arbitration Act — Joint venture served notice to submit disputes to arbitration — Subcontractor stated notice was invalid as it purported to commence domestic arbitration whereas, under s. 2(1) of Arbitration Act, arbitration should be held under International Commercial Arbitration Act — Subcontractor issued its own notice to arbitrate — Joint venture nominated its arbitrator and invited subcontractor to do same — Subcontractor took position that there was no "valid" arbitration process underway — Joint venture issued originating application and obtained orders for appointment of arbitrators, order validating service, and consolidation of two arbitrations — Subcontractor's application to set

The Joint Venture identified Gowling WLG (Canada LLP) as its counsel for the arbitration. Bae, Kim & Lee LLC, a Korean firm, subsequently indicated that it was Daewoo's legal representative, and later advised that Rose LLP of Calgary had been retained.

5 The Joint Venture nominated a possible candidate as a single arbitrator, but Daewoo took the position that the Joint Venture's arbitration notice was invalid because it purported to commence a domestic arbitration under the *Arbitration Act*, RSA 2000, c. A-43 whereas under s. 2(1) of that *Act* the arbitration should be held under the *International Commercial Arbitration Act*, RSA 2000, c. I-5.

6 On June 6, 2017 (about seven months after the Joint Venture served notice to arbitrate), Daewoo issued its own notice to arbitrate. The Daewoo notice to arbitrate specifically recited that even though the subcontract refers to the Alberta *Arbitration Act*, by operation of law the arbitration would actually be conducted under the *International Commercial Arbitration Act*.

7 The Joint Venture was prepared to acquiesce in using the international arbitration procedure, and so nominated its arbitrator. It invited Daewoo to do the same, with a view to those two nominees selecting the third arbitrator, in accordance with international arbitration procedure. Daewoo refused to participate in what it called a defective arbitration. Daewoo took the position that the Joint Venture had only commenced a "domestic arbitration", and had never commenced an "international arbitration", so there was no "valid" arbitration process underway.

8 Faced with an apparent stalemate, the Joint Venture issued an Originating Application seeking the appointment of arbitrators. It subsequently obtained orders validating service of the Originating Application, and consolidating the two arbitrations. Those are the orders presently under appeal.

Service of the Originating Application

9 In light of Daewoo's position that it would not participate in the arbitration, on May 30, 2017 the Joint Venture issued the Originating Application seeking the appointment of arbitrators under the *International Commercial Arbitration Act*. Copies were sent to Bae, Kim & Lee LLC and Rose LLP, but those firms took the position that they were not authorized to accept service. The Joint Venture commenced the process for serving the Originating Application on Daewoo under the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, but did not obtain an order for service *ex juris* under R. 11.25(2)(b).

10 The Joint Venture received notice that on June 9, 2017 the Originating Application had been received by the Central Authority of Korea under the *Hague Convention*. However, prior to receiving confirmation of actual service on Daewoo in Korea, the Joint Venture applied for an order validating service, and an order appointing arbitrators.

11 The first two applications were heard in chambers on July 5, 2017. Daewoo, Bae, Kim & Lee LLC and Rose LLP were all given notice of the application (EKE R279). However, given the position taken by Daewoo, no one appeared on its behalf, and the applications proceeded *ex parte*. The chambers judge granted an order validating service of the Originating Application and appointing three arbitrators. On July 20, 2017 another chambers judge granted an order consolidating the two arbitrations that had been commenced by the parties.

12 On August 2, 2017 the Originating Application was served on Daewoo in Korea under the *Hague Convention*. On August 3, 2017, Daewoo applied to set aside the three orders previously granted: the order validating service, the order appointing arbitrators, and the order consolidating the two arbitrations. Daewoo points out that there are irregularities in the service of the Originating Application:

> (a) the chambers judge was not advised of the status of service under the *Hague Convention*, and the order validating service was granted about one month before actual service of the Originating Application under the *Hague Convention*.
>
> (b) an order for service *ex juris* had not been obtained.

13 Service of commencement documents outside Alberta *and* outside Canada is governed by R. 11.25(2) and 11.26:

11.25(2) A commencement document may be served outside Canada only if

(a) a real and substantial connection exists between Alberta and the facts on which a claim in an action is based and the commencement document is accompanied with a document or affidavit that sets out the grounds for service of the document outside Canada,

(b) the Court, on application supported by an affidavit satisfactory to the Court, permits service outside Canada, and

(c) the person served with the commencement document is also served with a copy of the order permitting service outside Canada.

11.26(1) Unless the Court otherwise orders, if a document may be served outside Alberta under these rules, the document must be served

(a) by a method provided by these rules for service of the document in Alberta,

(b) in accordance with a method of service of documents under the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* that is allowed by the jurisdiction in which the document is to be served, if the Convention applies, or

(c) in accordance with the law of the jurisdiction in which the person to be served is located.

Rule 11.25(3) provides further detail about what constitutes a "real and substantial connection" with Alberta. Rule 11.27 empowers the Court to validate irregular methods of service.

14 As Daewoo points out, there is a jurisdictional component to R. 11.25(2), as it governs when an Alberta court will impose its jurisdiction over persons who are not served within the jurisdiction. The key requirement is that there must be a "real and substantial connection" to Alberta under R. 11.25(2)(a). Further, the applicant is generally expected to show a "good arguable case": *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm LP*, 2011 ABQB 630, 520 A.R. 190, 61 Alta. L.R. (5th) 357 (Alta. Q.B.). There remains, however, an important distinction between jurisdiction and service. Any defendant may voluntarily attorn to the jurisdiction of the Alberta courts, regardless of the regularity of the service of process on it. However, when the defendant resists the jurisdiction of the Alberta courts, then proper service *ex juris* is the platform on which the court decides if it has and should exercise jurisdiction over the parties and the dispute.

15 The chambers judge concluded at para. 14 that R. 11.25(2) does not apply when the court already has jurisdiction over the defendant, in which case an order for service *ex juris* is not required. While the question of "jurisdiction" might properly arise on an application to set aside service *ex juris*, attornment or consent to jurisdiction does not override R. 11.25(2). Obtaining an order for service *ex juris* is an *ex parte* process. The party issuing the commencement document is required to establish a threshold argument for "jurisdiction" (a "real and substantial connection" to Alberta) as a preliminary step. Once the plaintiff has obtained the order for service *ex juris*, it can then proceed to serve the defendant, who might then bring an application to set aside that service on the basis that the Alberta court does not have, or should not assume jurisdiction over the dispute. It is at this later stage that the court is best positioned to ensure that it does not "sanction service outside the jurisdiction without careful consideration": *Dreco Energy Services Ltd. v. Wenzel Downhole Tools Ltd.*, 2008 ABCA 395 (Alta. C.A.) at para. 6, (2008), 440 A.R. 351, 2 Alta. L.R. (5th) 120 (Alta. C.A.).

16 On the application to set aside service the issue of whether the defendant had attorned to the jurisdiction of the court might arise. Allegations that the defendant has attorned, by contract or conduct, can be used as a response to any application to set aside service *ex juris*, or any application for a ruling that it is inconvenient for the Alberta court to assume jurisdiction. However, the plaintiff's mere assertion that the court has jurisdiction over the defendant does not justify non-compliance with the threshold requirements in the *Rules* on service *ex juris*. In that respect, attornment is a shield not a sword.

Retroactive Validation

17 The respondent Joint Venture argues that the failure to get an order for service *ex juris* is a mere irregularity that should be overlooked. It argues that Daewoo is raising procedural irregularities in order to delay the arbitration, and that at the end of the day nothing will be accomplished by setting aside the three orders. There is no doubt that Daewoo, Bae, Kim & Lee LLC and Rose LLP had actual notice of all the proceedings.

18 The Joint Venture argues that this Court should retroactively grant an order for service *ex juris*. It says that one could easily have been obtained. There is clearly a real and substantial connection between the arbitration and Alberta, it has a strong case that arbitration has been commenced and Daewoo has refused to participate, and there is no prejudice to Daewoo. Daewoo argues that the *Rules* do not permit retroactive validation of service without an order for service *ex juris*, because R. 11.25(2)(c) requires service of the order with the commencement document.

19 The applicant has a "good arguable case" to support service *ex juris*. As previously noted, Daewoo takes the position that the Joint Venture's notice to arbitrate is fatally flawed because it only commences a "domestic arbitration", whereas in law the Joint Venture should have commenced an "international arbitration". As a result, Daewoo takes the position that it does not have to participate in the Joint Venture's arbitration at all, because there is no valid arbitration process underway.

20 The Joint Venture argues that the premise of Daewoo's argument is faulty. The Joint Venture only had to commence an "arbitration under the subcontract", which it did. It does not have to overtly commence either a "domestic arbitration" or an "international arbitration". Clause 34 of the Joint Venture's notice to arbitrate clearly put Daewoo on notice that a dispute under the subcontract was being put to arbitration. The law and procedure that applies is implicit in the process, and any dispute about it could have been resolved by the arbitrators. There is nothing in the Subcontract, the *Arbitration Act*, or the *International Commercial Arbitration Act* that requires a party to specify what "type" of arbitration is being triggered.

21 In any event, the Joint Venture points out there is no authority presented for the proposition that a notice to arbitrate that recites the exact provisions of the Subcontract, including the reference to the *Arbitration Act*, can possibly be invalid for that reason.

22 The parties debated whether the Court has jurisdiction to cure irregularities in service *ex juris*. In this case, however, the deficiencies in the service are substantive, and would preclude the exercise of any such discretion. No satisfactory explanation has been given for why the Joint Venture did not apply for an order for service *ex juris*. Another problem is that the order validating service should not have been granted without proof that service under the *Hague Convention* had either been accomplished, or frustrated within the meaning of article 15 of the *Convention*. Given all of the deficiencies in service, this is not an appropriate situation in which the Court might validate service despite the irregularities. The order validating service must be set aside. Absent service, the orders appointing arbitrators and consolidating the two arbitrations cannot stand.

23 The Joint Venture's arguments have practical merit. It is unclear what will be accomplished by these proceedings other than further delay. Nevertheless, the importance of compliance with the *Hague Convention* and the significance of the deficiencies in service preclude retroactive correction in this case, even if that is possible.

24 In the absence of proper service, it is not open to this Court to express opinions on other issues such as the appointment of arbitrators, or consolidation of the arbitrations.

Conclusion

25 In conclusion, the appeal is allowed, and the orders validating service, appointing arbitrators, and consolidating the two arbitrations are set aside. If Daewoo persists in refusing to respond to the notice to arbitrate issued by the Joint Venture, the Joint Venture will have to re-serve the Originating Application in accordance with the *Rules of Court* and the *Hague Convention*.

26 The presumption is that the successful party is entitled to costs of the appeal: R. 14.88(1). There are, however, special circumstances at play.

TAB 7

14. CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 15 November 1965)

The States signatory to the present Convention,
Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,
Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.
This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.
Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.
The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Service Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Dixième session (1964)*, Tome III, *Notification* (391 pp.).

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph *(b)* of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with –

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by –

a) the employment of a judicial officer or of a person competent under the law of the State of destination,

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security. It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –

a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –

a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,

b) the language requirements of the third paragraph of Article 5 and Article 7,

c) the provisions of the fourth paragraph of Article 5,

d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –

a) the designation of authorities, pursuant to Articles 2 and 18,

b) the designation of the authority competent to complete the certificate pursuant to Article 6,

c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of –

a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,

b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,

c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –

a) the signatures and ratifications referred to in Article 26;

b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;

c) the accessions referred to in Article 28 and the dates on which they take effect;

d) the extensions referred to in Article 29 and the dates on which they take effect;

e) the designations, oppositions and declarations referred to in Article 21;

f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

TAB 8

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, [2020] 1 S.C.R. 521, 1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.
Neil A. Peden, for Appellants / Interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Geneviève Cloutier, Clifton P. Prophet, for Respondent, Callidus Capital Corporation
Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing

it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

31 Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. Quebec Court of Appeal (2019 QCCA 171 (C.A. Que.)) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))

32 The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

33 First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Blackburn Developments Ltd., Re*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199 (B.C. S.C.), at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

34 Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

35 In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

36 Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

37 These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. Preliminary Considerations

38 Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of CCAA Proceedings

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

41 Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1 (Ont. C.A.), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 (Ont. C.A.), at para. 70).

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), at paras.

15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business. [3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in CCAA Proceedings

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

TAB 9

2021 ONSC 7797
Ontario Superior Court of Justice

Aquino v. Aquino

2021 CarswellOnt 17491, 2021 ONSC 7797, 340 A.C.W.S. (3d) 164, 96 C.B.R. (6th) 138

JOHN AQUINO (Applicant) and RALPH AQUINO and 2241036 ONTARIO INC. (Respondents)

Cavanagh J.

Heard: May 13, 2021
Judgment: November 25, 2021
Docket: CV-19-00613382-00CL

Counsel: Andrew W. MacDonald, for Moving Party, The Globe and Mail Inc.
David Ullman, Stephen Gaudreau, Alan D. Gold, for Responding Party, John Aquino
Sharon Kour, for Ralph Aquino and Steven Aquino
Evan Cobb, for Ernst & Young Inc., Monitor for Bondfield Construction Company Ltd.
Domenic Magisano, for Crowe Soberman Inc., Receiver of 2241036 Ontario Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Civil practice and procedure --- Judgments and orders — Setting aside — Practice on application to set aside — Evidence on application

Construction group was owned and operated by applicant, his brother and father — Allegations were made that applicant and others had perpetrated false invoicing scheme involving transactions that constituted transfers at undervalue — Applicant swore supplementary affidavit containing invoices relating to construction group — Affidavit made reference to certain surreptitiously recorded recordings and transcripts — Applicant obtained order sealing affidavit and excerpts of transcript recordings — Media company brought motion to set aside order — Motion granted — Fact that excerpts might not constitute admissible evidence in judicial proceeding did not lead to conclusion that they should not have been accepted for filing or that they were not properly part of court file — Assertion that unsealing excerpts might lead to disclosure of information that was disadvantageous to applicant, or that such disclosure might cast his character in unfair light and harm his reputation, was insufficient to establish risk to narrow interest in privacy concerned with protection of human dignity that qualified as public interest — Applicant had not provided sufficient evidence to establish that there were interests of third parties that might be affected if order was set aside, such that strong presumption of open courts was rebutted.

MOTION by media company to set aside order sealing certain materials.

***Cavanagh J.*:**

Introduction

1 The moving party, The Globe and Mail, moves for an order setting aside the Order of Conway J. dated May 24, 2019 which sealed certain materials so that they are added to the public court file and are made accessible to the public.

2 John Aquino opposes the motion and submits that the sealing order was properly made and should not be set aside or varied.

3 For the following reasons, I conclude that the Order of Conway J. sealing certain materials should be set aside.

Factual Background

The Underlying Proceeding

4 The underlying proceeding was commenced on or about January 28, 2019 by John Aquino as an application to wind up and liquidate 2241036 Ontario Inc. ("224 Ontario"), a single-purpose real estate holding entity of which he is a 50% shareholder. John's application was commenced after he was removed as President of Bondfield in October 2018 and replaced by his brother, Steven Aquino.

5 On or about March 2, 2019, Ralph Aquino, a respondent and John's father, brought a cross-application for, among other things, an order removing John as a shareholder and director of 224 Ontario.

6 I refer to John Aquino, Steven Aquino and Ralph Aquino as "John", "Steven", and "Ralph" to avoid confusion and for convenience.

7 On March 18, 2019, Steven swore a supplementary affidavit (the "Supplementary Affidavit") containing invoices relating to Bondfield Construction Company Limited, including its affiliates and subsidiaries (the "Bondfield Group"), and its vendors and contractors. The Bondfield Group is a business owned and operated by the Aquino family, and was a leading design-build and general construction company providing services to both public and private sector clients, including many public-private partnerships.

8 In addition to the invoices and information relating to the Bondfield Group, the Supplementary Affidavit also makes reference to certain surreptitiously recorded recordings and transcripts. The Supplementary Affidavit states that the audio files "are currently being transcribed by a certified reporting service". The Supplementary Affidavit states: "our lawyers are requesting a sealing order in this proceeding because the dissemination of the issues herein may have an impact on the Bondfield Group."

9 The Supplementary Affidavit was served on John's counsel based on the parties' agreement that it would be confidential pending a sealing order.

10 The Globe and Mail has reported on the activities of and events surrounding Bondfield and related companies over the last several years.

11 This reporting began after Bondfield underwent a period of rapid expansion in 2014 and 2015, when it was awarded five public infrastructure contracts by the Crown agency Infrastructure Ontario with a total value of $844.3 million, including a redevelopment project at Toronto's Saint Michael's Hospital ("SMH").

12 John was Bondfield's President and CEO during its period of expansion.

13 In 2015 and 2016, The Globe and Mail published a series of articles about the procurement process that led to Bondfield being awarded the SMH project, including regarding a potential conflict of interest related to certain business ties between John Aquino and a senior executive at SMH.

14 Over time, Bondfield ran into difficulties on numerous projects and, by September 2018, construction was delayed on at least nine of its public infrastructure projects, and at least three other Bondfield contracts had been terminated.

15 In March 2019, Bondfield and certain related companies (the "Bondfield Group") commenced an application under the *Companies' Creditors Arrangement Act* ("*CCAA*").

16 On April 3, 2019, Ernst & Young Inc. was appointed Monitor of the Bondfield Group.

17 In the Bondfield *CCAA* proceeding, forensic investigations of the books and records of the Bondfield Group have been judicially authorized and undertaken.

18 The Bondfield Group's financial difficulties and the forensic investigations into its books and records have led to numerous court proceedings, including transfer at undervalue applications decided by Dietrich J. relating to false invoicing schemes. As reported in The Globe and Mail lawsuits have also been commenced against two of Bondfield's auditors in connection with alleged fraud at Bondfield.

19 In addition, Zurich Insurance Co. Ltd. ("Zurich") has commenced an action seeking rescission of surety bonds worth hundreds of millions of dollars that it issued in connection with the SMH project, alleging that during the procurement process, John Aquino and the senior SMH executive "were colluding to ensure that [Bondfield] would submit an artificially low bid."

The May 24, 2019 Sealing Order of Conway J.

20 On April 2, 2019, Conway J. made an endorsement in respect of a case conference to be held that states:

> CC scheduled before me on April 15/19 2 HRS — 10 am - confirmed.
>
> Directions provided to counsel Re delivery of certain materials directly to me (OH — Judges Admin) on April 12/19 for consideration at the CC.

21 John filed a Notice of Motion dated April 29, 2019 for a motion for an order sealing the Materials. The Notice of Motion requests an Order sealing the Supplementary Affidavit, "the audio files and/or recordings, and the transcripts of the audio files referred to in the Supplementary Affidavit" pending the determination of the Application or further order of the Court.

22 On April 30, 2019, Conway J. made a further endorsement: "Motion for sealing order to be heard by me on May 17 — 1 HR confirmed".

23 By letter dated May 21, 2019, counsel for John Aquino wrote to Justice Conway and provided a form of order for execution and he offered to attend before her on May 24, 2019 to speak to the matter.

24 On May 24, 2019, counsel for John appeared before Conway J. No other counsel attended. A factum had been filed stating that the respondents filed the supplementary affidavit of Steven Aquino and various recordings and transcripts, which the applicant seeks to have sealed.

25 No notice was given to *The Globe and Mail* or other media of the application for the Sealing Order prior to its issuance.

26 On May 24, 2019 when the Sealing Order was made, counsel for John Aquino appeared before Conway J. On that day, Conway J. issued an endorsement that reads:

> All parties have agreed that the Supp Aff of S. Aquino sworn March 18/19 & Recordings and Transcripts be sealed pending further court order. The Monitor of Bondfield has reviewed the form of order & does not oppose. I am satisfied that the parties have agreed that these materials were to be treated as confidential and that it includes TP information that they identify as confidential. I am satisfied that the Sierra Club test is met & that only a specific restricted part of the court file is subject to this sealing order on the basis of the parties' agt re confidentiality. OTG as signed by me. This is all subject to further order as provided in para 3 of the order.

27 The Sealing Order reads:

> **THIS MOTION** made by the Applicant for an Order sealing the Supplementary Affidavit of Steven Aquino, sworn March 18, 2019 ("**Supplementary Affidavit**") and certain recordings and transcripts referred to therein ("**Recordings and Transcripts**"), was heard this day at 330 University Avenue, Toronto, Ontario.
>
> **ON READING** the Affidavit of John Aquino, sworn January 29, 2019, the Supplementary Affidavit, the Reply Affidavit of John Aquino, sworn April 29, 2019, and the affidavit of Alexandra Teodorescu , sworn May 13, 2019, and on being advised that this form of Order has been reviewed by the Monitor in the Bondfield CCAA Proceedings (**Court File No.**

CV-19-615560-00CL) (the "**Monitor**") and on hearing the submissions of counsel for the Applicant, and all other counsel present as set out on the counsel slip, and no one appearing for any other person although duly served as appears from the affidavit of service of Ariyana Botejue, filed,

SEALING OF MATERIALS

1. *THIS COURT ORDERS* that the Supplementary Affidavit and the Recordings and Transcripts (collectively, the "Materials") be sealed, kept confidential and not form part of the public record, but rather be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice which sets out the title of these proceedings and a statement that the contents are subject to a sealing order.

2. *THIS COURT ORDERS* the nothing in this Order shall prevent the Monitor or any person currently in possession of the Materials from reviewing and investigating the Materials and the matters set out therein, from providing the Materials to any governmental authority or from filing the Materials in the Bondfield CCAA Proceeding or any other proceeding on a confidential basis pending an Order of the Court in the Bondfield CCAA Proceeding, or other proceeding, as to the sealing of the Materials in such proceeding.

3. *THIS COURT ORDERS* that, this Order may be varied and the sealing of the Materials lifted in whole or in part, on reasonable notice to the parties, by and Order of a Judge of the Commercial List.

28 According to the Sealing Order, Conway J. reviewed three publicly-filed affidavits before ordering that the materials be sealed:

a) the Affidavit of John Aquino sworn January 29, 2019;

b) the Reply Affidavit of John Aquino sworn April 29, 2019; and

c) the Affidavit of Alexandra Teodorescu sworn May 13, 2019.

29 In his Reply Affidavit, John states that counsel for the Respondents has produced several hours of recordings and transcripts in which Steven purported to record conversations with him without his knowledge or permission. John states in his affidavit that the recordings appear to deal with alleged accounting issues related to Bondfield. John expresses his view in the affidavit that the recordings "to the extent they are accurate (which is not admitted) are irrelevant to this proceeding and I have not made any serious effort to review or consider them at this time in any detail". He states that to the extent he has reviewed the recordings "I note that in the recordings Steven badgers me to try to elicit incriminating statements, but in fact the only succeeds in extracting various contradictory answers which are proof of nothing other than his illicit agenda and the level of deceit he is prepared to engage in for his purposes". John states in the Affidavit that the recordings "did not accurately reflect the full extent of the conversations that took place in the relevant time period between myself, Steven and Ralph" and that he believes "that the recordings may have been edited or tampered with so that parts of the conversations have been edited out". John states that he is asking his counsel to seek to have the tapes sealed, and that a March 19 email from his counsel sets out the reasoning for this request.

30 The March 19, 2019 email is from John's counsel to counsel for Ralph (and Steven) and is marked "With Prejudice". In this email, John's counsel asks counsel for Ralph and Steven to withdraw the affidavit in its entirety and advises that if counsel intends to proceed with the affidavit, John's counsel will provide written reply materials and cross-examine Steven on the allegations, "all of which will become part of the public record". John's counsel states "I know you intend to seek a sealing order, which we may not necessarily oppose, but I think you can be pretty certain that the Globe and Mail (who are following this matter) will be successful [in] opposing a sealing order on the basis of the public interest in this matter".

31 On May 13, 2019, a lawyer in the firm representing John swore an affidavit to attach "[t]he complete email chain in relation to sealing the Supplemental Affidavit of Steven Aquino, sworn March 18, 2019, and related recordings and transcripts" because the chain attached to John's reply affidavit was incomplete. This email correspondence indicates that the recordings

TAB 10

2024 SCC 31, 2024 CSC 31
Supreme Court of Canada

Aquino v. Bondfield Construction Co.

2024 CarswellOnt 15328, 2024 CarswellOnt 15329, 2024 CSC 31, 2024 SCC 31, 2024 A.C.W.S. 3397, 496 D.L.R. (4th) 613, 54 B.L.R. (6th) 1

John Aquino, 2304288 Ontario Inc., Marco Caruso, Giuseppe Anastasio, also known as Joe Ana and Lucia Coccia, also known as Lucia Canderle (Appellants) and Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited, and KSV Kofman Inc., in its capacity as Trustee in Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited (Respondents) and Attorney General of Ontario and Insolvency Institute of Canada (Interveners)

Wagner C.J.C., Karakatsanis, Côté, Rowe, Martin, Jamal, O'Bonsawin JJ.

Heard: December 5, 2023
Judgment: October 11, 2024
Docket: 40166

Proceedings: affirming *Ernst & Young Inc. v. Aquino* (2022), 2022 ONCA 202, *(*sub nom. *Bondfield Construction Co. (Court-Appointed Monitor of) v. Aquino)* 160 O.R. (3d) 284100 C.B.R. (6th) 182022 CarswellOnt 3170473 D.L.R. (4th) 571, Coroza J.A., P. Lauwers J.A., Sossin J.A. (Ont. C.A.); affirming *Ernst & Young Inc. v. Aquino* (2021), 88 C.B.R. (6th) 60, 2021 CarswellOnt 42212021 ONSC 527, Dietrich J. (Ont. S.C.J.)

Counsel: Terry Corsianos, George Corsianos, Jacob Lee, for Appellants
Alan Merskey, Stephen Taylor, for Respondent, Ernst & Young Inc., in its capacity as court-appointed monitor of Bondfield Construction Company Limited
Jeremy Opolsky, Alex Bogach, for Respondent, KSV Kofman Inc., in its capacity as Trustee in Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited
Dona Salmon, Jennifer Boyczuk, for Intervener, Attorney General of Ontario
Natasha MacParland, Chanakya A. Sethi, Rui Gao, J. Henry Machum, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent and illegal transactions

When construction company and its affiliate filed for bankruptcy, trustee and monitor discovered false invoicing scheme perpetrated by A as directing mind of debtor companies, and they sought to recover funds, claiming that transactions were fraudulent — Trustee and monitor successfully applied to have debtor companies repay improperly taken funds and when debtor companies and A unsuccessfully appealed, Court of Appeal ruled that applicable bankruptcy law could be used by monitor and trustee to recover relevant funds — Debtor companies and A appealed — Appeal dismissed — Application judge did not misapply badges of fraud approach to inferring fraudulent intent — Court may find that debtor intended to defraud, defeat, or delay creditor under s. 96(1)(b)(ii)(B) of Bankruptcy and Insolvency Act (BIA) even if debtor was not insolvent at time of transfer at undervalue so there was no basis to interfere with application judge's conclusion that A intended to defraud, defeat or delay creditor under false invoicing scheme — Section 96(1)(b)(ii)(B) of BIA required party seeking to reverse transfer at undervalue to prove, among other things, debtor's intent to defraud, defeat, or delay creditor, and intent requirement was often proved through evidentiary shortcut of badges of fraud, which were suspicious circumstances from which court might infer debtor's intent to defraud, defeat, or delay creditor — BIA was clear that insolvency was not prerequisite to finding debtor intended to defraud, defeat, or delay creditor — Section 96(1)(b)(ii) of BIA was disjunctive: debtor must either be insolvent at

3 A "transfer at undervalue" is a transaction in which a debtor transfers property or provides services to another person for no consideration or conspicuously less than fair market value (*BIA*, s. 2). Section 96(1)(b)(ii)(B) of the *BIA* provides that a trustee in bankruptcy may apply to a court to impugn and recover from a non-arm's length party to a transaction some or all of the amount of the transfer at undervalue, if the trustee can show that the debtor intended to "defraud, defeat or delay a creditor". Section 96 of the *BIA* applies in a corporate restructuring through s. 36.1 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

4 The application judge and Court of Appeal for Ontario accepted that the false invoice payments were transfers at undervalue. They applied the doctrine of corporate attribution to attribute Mr. Aquino's fraudulent intent to the debtor companies and ordered the appellants to pay the trustee and monitor the monies they received under the false invoicing scheme.

5 The appellants now revive before this Court two arguments that were rejected by the courts below. First, the appellants argue that the application judge had no basis to conclude that the debtor companies, through the actions of Mr. Aquino, intended to defraud, defeat, or delay a creditor. They say that the companies were paying their creditors in full and on time when the false invoicing scheme was underway and that the companies' financial condition at those times could not be determined on the record before the court. I do not accept this submission. A court may find that a debtor intended to defraud, defeat, or delay a creditor under s. 96(1)(b)(ii)(B) even if the debtor was not insolvent at the time of the transfers at undervalue. I also see no basis to interfere with the findings of the application judge, affirmed by the Court of Appeal, that the record contains many *indicia* or badges of fraud showing that Mr. Aquino misled stakeholders as to the companies' true financial condition, reduced the funds available to pay long-term creditors, and increased the companies' debts.

6 Second, the appellants argue that Mr. Aquino's fraudulent state of mind cannot be attributed to the debtor companies under the corporate attribution doctrine. They invoke the so-called "fraud" and "no benefit" exceptions to corporate attribution previously recognized by this Court (*Canadian Dredge*, at pp. 681-82 and 712-13; *Livent*, at para. 100). They claim that there can be no attribution in this case because Mr. Aquino acted in fraud of the debtor companies and his actions did not benefit the companies. I do not accept this submission either. As the trustee notes, this position amounts to saying that the common law doctrine of corporate attribution allows "a fraudulent directing mind and his accomplices to avoid liability *because* they defrauded the company they ran" (R.F., at para. 1 (emphasis in original)). The corporate attribution doctrine does not countenance — much less require — such a perverse result.

7 This Court has established that the corporate attribution doctrine is not a "standalone" principle (*Livent*, at para. 97); there is no one-size-fits-all approach. The corporate attribution doctrine must be applied purposively, contextually, and pragmatically to give effect to the policy goals of the law under which a party seeks to attribute to a corporation the actions, knowledge, state of mind, or intent of its directing mind. Rules of attribution that may be appropriate in one context for one purpose may be inappropriate in another context for another purpose. When the rules of attribution undermine the purpose of the law under which attribution is sought, the court should adapt the attribution rules to promote the purpose of the relevant law.

8 In my view, the fraud and no benefit exceptions to corporate attribution do not apply in the context of a transfer at undervalue under s. 96 of the *BIA*. These exceptions would undermine rather than promote the purpose of this statutory provision. The purpose of s. 96 is to protect creditors from harmful actions by a debtor that would diminish the assets available for recovery. That purpose is served by attributing the actions, knowledge, state of mind, or intent of the corporation's directing mind to the corporation, even if the directing mind acted in fraud of the corporation, and even if the corporation did not benefit from the actions of the directing mind. By contrast, applying the fraud and no benefit exceptions would deny third-party creditors a statutory remedy that Parliament intended would be available to protect them.

9 Applying these principles to this appeal, Mr. Aquino's fraudulent intent should be attributed to the debtor companies because he was their directing mind and acted in the sector of corporate responsibility assigned to him. I would dismiss the appeal.

II. Background

10 Bondfield Construction Company Limited ("Bondfield") and its affiliate, 1033803 Ontario Inc., known as Forma-Con Construction ("Forma-Con"), were family-owned construction companies that worked on large-scale construction projects in Ontario. At all relevant times, Mr. Aquino was the president and directing mind of Bondfield and Forma-Con.

11 By 2018, Bondfield and Forma-Con were experiencing serious financial difficulties. The respondent Ernst & Young Inc. was retained to review their financial situation, which led to the commencement of restructuring proceedings regarding Bondfield in April 2019 and bankruptcy proceedings regarding Forma-Con in December 2019. The court appointed Ernst & Young Inc. as the monitor of Bondfield, and the respondent KSV Restructuring Inc. as the trustee in bankruptcy of Forma-Con.

12 The monitor and trustee's investigations revealed that, for years, Mr. Aquino and several other appellants had been fraudulently taking tens of millions of dollars from Bondfield and Forma-Con through a false invoicing scheme. The scheme was simple. Mr. Aquino and his accomplices made up false invoices from certain suppliers — including Mr. Aquino's holding company — for services that were never provided. Bondfield and Forma-Con then paid the false invoices promptly, often within a few days, at the direction of Mr. Aquino or other appellants. Bondfield paid more than $21.8 million and Forma-Con paid more than $11.3 million towards false invoices in the five years before the commencement of insolvency proceedings, the period within which alleged transfers at undervalue to non-arm's length parties are reviewable.

13 The trustee and monitor each commenced proceedings before the Ontario Superior Court to challenge the false invoice transactions as transfers at undervalue. Section 96 of the *BIA* provides a trustee and, through s. 36.1 of the *CCAA*, a monitor, with a remedy to unwind or claim reimbursement of some or all the value of the assets transferred from a debtor in circumstances that qualify as a transfer at undervalue.

14 In this case, the applications of the trustee and monitor were brought under s. 96(1)(b)(ii)(B) of the *BIA*, which required them to show that: (a) the false invoice transactions were transfers at undervalue; (b) the transfers occurred in the five-year period preceding the initial bankruptcy event; (c) the recipients of the transfers were not dealing at arm's length with the debtor companies; and (d) the debtor companies intended to defraud, defeat, or delay a creditor.

III. Judicial History

A. Ontario Superior Court of Justice, 2021 ONSC 527, 88 C.B.R. (6th) 60 (Dietrich J.)

15 The application judge held that the false invoice payments made by Bondfield and Forma-Con were transfers at undervalue under s. 96(1)(b)(ii)(B) of the *BIA* and could be recovered by the monitor and trustee. The transfers were at undervalue because Bondfield and Forma-Con had paid tens of millions of dollars to certain suppliers who provided nothing in return. In a separate costs endorsement, the application judge found the payments involved "serious corporate malfeasance and corporate looting" and "reprehensible and scandalous behaviour" (2021 ONSC 7514, at paras. 29 and 33, reproduced in A.R., at pp. 66-67). She also found the appellants were not dealing at arm's length with Bondfield or Forma-Con because they collaborated with them in orchestrating the false invoicing scheme.

16 The application judge ruled that Bondfield and Forma-Con made these payments with the intent to defraud, defeat, or delay a creditor. She rejected the appellants' argument that Bondfield and Forma-Con could not have had this intent because the payments were made at a time when they were not insolvent or at risk of insolvency. When evaluating a corporate debtor's intent to defraud, defeat, or delay a creditor, the corporate debtor's financial health at the time of the transfer is a relevant but not determinative consideration.

17 In the application judge's view, the record revealed several badges of fraud establishing that Mr. Aquino, as the directing mind of Bondfield and Forma-Con, had a fraudulent intent at the time of the false invoice payments. Bondfield and Forma-Con made the payments secretly, in haste, to non-arm's length persons, for no consideration, based on "phony invoices" for "services that were never delivered" (para. 157). Bondfield and Forma-Con also had several actual or potential long-term and off-balance sheet liabilities and were expanding their activities, even though they knew their lender was not willing to lend them more. In addition, Mr. Aquino was injecting capital into Bondfield to disguise its true financial condition from stakeholders, and unusual

accounting practices made it impossible to determine the companies' financial condition. Based on all the circumstances, the application judge found that the false invoice payments reduced the funds available to pay the companies' long-term creditors.

18 Finally, the application judge held that Mr. Aquino's fraudulent intent could be attributed to Bondfield and Forma-Con. The application judge ruled that, as a matter of statutory interpretation and public policy, the corporate attribution doctrine set out in *Canadian Dredge* does not apply under s. 96 of the *BIA*. In her view, because a purpose of the *BIA* is to provide proper redress to creditors, the "intention of the debtor" in s. 96 "should be interpreted liberally to include the intention of individuals in control of the corporation, regardless of whether those individuals had an intent to defraud the corporation itself" (para. 229).

19 The application judge determined that when Mr. Aquino authorized the false invoice payments, he was acting within his area of responsibility of engaging with suppliers and overseeing the provision of services and materials. The appellants, either as bogus suppliers or facilitators of the false invoicing scheme, were all parties or privies to the transfers at undervalue. They were therefore jointly and severally liable to repay the amounts transferred from Bondfield and Forma-Con.

B. Court of Appeal for Ontario, 2022 ONCA 202, 160 O.R. (3d) 284 (Lauwers J.A., Coroza and Sossin JJ.A. concurring)

20 The Court of Appeal affirmed the application judge's ruling that Mr. Aquino intended to defraud, defeat, or delay Bondfield and Forma-Con's creditors, and attributed Mr. Aquino's fraudulent intent to Bondfield and Forma-Con under s. 96(1)(b)(ii)(B) of the *BIA*. Accordingly, the court dismissed the appeal.

21 The court rejected the appellants' attempt to relitigate their position that Mr. Aquino did not intend to defraud, defeat, or delay Bondfield and Forma-Con's creditors because the fraudulent payments were made at times when the companies were financially stable. The court noted that the application judge "mustered a phalanx of facts in support of her conclusions" and "took a pragmatic view on the totality of the evidence" (paras. 38 and 46). The Court of Appeal affirmed that "the interests of creditors were imperilled by the transfers because Bondfield and Forma-Con were already experiencing mounting financial difficulties", and concluded that it would have been "entirely unreasonable" for Mr. Aquino "to believe that, during that time, the interests of the companies' creditors would not be endangered by this fraudulent scheme" (para. 45). The Court of Appeal deferred to the application judge's findings that Mr. Aquino intended to defeat the companies' creditors. At a minimum, Mr. Aquino was reckless as to whether the scheme would have this effect, which also established his fraudulent intent under s. 96.

22 The court attributed Mr. Aquino's fraudulent intent to Bondfield and Forma-Con under the common law corporate attribution doctrine. It distilled three principles from *Canadian Dredge*, *Livent*, and *DeJong*: (1) courts must be sensitive to the legal context in which a directing mind's intent is sought to be imputed to a corporation; (2) corporate attribution is an exercise grounded in public policy, and policy factors that favour imputing a directing mind's wrongdoing to a corporation are based on the social purpose of holding the corporation responsible; and (3) courts have discretion to refrain from attributing the directing mind's intent to the corporation when this would be in the public interest.

23 The court observed that the criminal and civil contexts in which the corporate attribution doctrine has traditionally been applied differ from the bankruptcy context. In the criminal and civil contexts, attributing the directing mind's intent to the corporation might be justified if the corporation benefits from the improper activities of the directing mind, but would be unjustified if the corporation does not benefit. In the bankruptcy context, the court noted, "the policy currents flow rather differently.... [A]ttributing the intent of a company's directing mind to the company itself can hardly be said to unjustly prejudice the company ..., when the company is no longer anything more than a bundle of assets to be liquidated with the proceeds distributed to creditors" (para. 77). The court found that it would make little sense to adopt an approach that would favour fraudsters over legitimate creditors.

24 Based on these considerations, the Court of Appeal reframed the test for corporate attribution in the bankruptcy context as turning on the following question: "[W]ho should bear responsibility for the fraudulent acts of a company's directing mind that are done within the scope of his or her authority — the fraudsters or the creditors?" (para. 78). The court held that it would be perverse and counter to the purpose of s. 96 of the *BIA* to allow the appellants to benefit at the expense of Bondfield and

TAB 11

2021 QCCS 2946
Quebec Superior Court

Arrangement relatif à Bloom Lake General

2021 CarswellQue 11345, 2021 QCCS 2946, 337 A.C.W.S. (3d) 436, 93 C.B.R. (6th) 285, EYB 2021-394691

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC. (PETITIONERS) and THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED (MISES-EN-CAUSE) and FTI CONSULTING CANADA INC. (MONITOR) and TWIN FALLS POWER CORPORATION AND CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED (TWINCO MISES-EN-CAUSE)

Pinsonnault, J.S.C.

Heard: June 3, 2021
Judgment: July 14, 2021
Docket: C.S. Montréal 500-11-048114-157

Counsel: Me Bernard Boucher, Me Milly Chow, Me Cristina Cataldo, for the CCAA Parties
Me Sylvain Rigaud, for the Monitor FTI Consulting Canada Inc.
Me Douglas Mitchell, for the Mise-en-cause Twin Falls Power Corporation
Me Guy P. Martel, Me Nathalie Nouvet, for the Mise-en-cause Churchill Falls (Labrador) Corporation Limited
Me Gerry Apostolatos, for the Mises-en-cause Quebec North Shore & Labrador Railway Company and Iron Ore Company of Canada
Me Nicolas Brochu, for the Mise-en-cause for the Salaried/non-union employees and retirees

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtors sought protection under Companies' Creditors Arrangement Act (CCAA) and monitor was appointed — Debtors submitted plan of arrangement, which was judicially approved — Under supervision of monitor, debtors sold all of their assets other than interest held by debtors in company T — Proceeds of sale were distributed among creditors according to terms of plan of arrangement — As result, debtors' interest in T was last asset to realize in context of CCAA proceedings — Debtors brought motion seeking order granting additional powers to monitor to complete final distribution — Motion granted — Court had exclusive jurisdiction to determine scope of monitor's powers in furtherance of purposes of CCAA — This is especially true if such powers relate directly to asset or property of debtor that is part of previously approved plan — Hence, exercise of judicial discretion was appropriate to grant to monitor expanded powers sought by debtors — Circumstances and nature of issues confronting debtors and monitor to bring CCAA process to conclusion within reasonable delay were taken into consideration — Expanded powers sought were necessary and appropriate to enable monitor to fulfill its statutory duties to properly value assets and liabilities of debtors — Powers were also necessary to recover value from last significant asset in debtors' estate — Ultimate objective was to facilitate winding up and termination of CCAA proceedings — Therefore, it was only appropriate to grant expanded powers requested.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers

Débitrices se sont placées sous la protection de la Loi sur les arrangements avec les créanciers des compagnies et un contrôleur a été nommé — Débitrices ont soumis un plan d'arrangement, lequel a été approuvé par un tribunal — Sous la supervision du contrôleur, les débitrices ont vendu tous leurs actifs, sauf un intérêt détenu par elles dans la compagnie T — Produit de

56 Wabush Iron Co. Limited and Wabush Resources Inc. are undoubtedly shareholders of Twinco and as such, the Twinco Interest is one of their assets to be monetized and realized with the assistance of the Monitor pursuant to the Plan sanctioned by the Court in June 2018.

57 Therefore, the valuation of the Twinco Interest is not only of particular importance to the present CCAA Proceedings, but it should be conducted by the Monitor for the benefit of the creditors irrespective of the dispute between the parties relating to the jurisdiction over the proposed liquidation and wind down of Twinco.

58 In fact, the monetization and the realization of the Twinco Interest do not necessarily require the wind down and the dissolution of Twinco to occur given the apparent extent of the Twinco Interest in Twinco.

59 The Court understands that the Twinco Requested Information is intended to provide the CCAA Parties and the Monitor with a general understanding of the approximate range of the Reimbursable Environmental/Maintenance Costs that could possibly be the subject of the CFLCo Reimbursement to better enable the CCAA Parties and Monitor to calculate the approximate value of the Twinco Interest.

60 The Twinco Requested Information is purely factual in nature and excludes documents that the Wabush shareholders already have in their possession such as financial statements for December 31, 2004, 2005, 2008, 2013-2019.

61 The Court also understands that it is the steadfast and the somewhat inexplicable refusal of Twinco and of its shareholder CFLCo to provide any of the Twinco Requested Information [25] to the CCAA Parties and to the Monitor that prevents the latter from determining with a minimum of accuracy what is the estimated value of the Twinco Interest.

62 This determination expected to be performed by the Monitor relates directly to an asset of the CCAA Parties that is covered by the Plan sanctioned by this Court, and such a determination falls squarely on the tasks, duties and responsibilities of the Monitor within the present CCAA Proceedings regardless of the eventual dissolution or not of Twinco.

63 Moreover, of obvious significance in the eyes of the Court, Twinco filed a proof of claim for $780,000 that was accepted by the Monitor pursuant to the Claims Process approved by the Court.

64 It is somewhat incomprehensible that Twinco would nevertheless affirm that it is a third party, a "stranger" with no link with the CCAA Proceedings and that it is neither the debtor, *nor a creditor*, an employee, a director, a shareholder, nor another party doing business with the CCAA Parties that include two of its shareholders (Wabush).

65 How can Twinco seriously pretend that it has no interest whatsoever in the recovery, and presently, in the liquidation of the CCAA Parties when it filed a proof of claim for $780,000?

66 Twinco even stands to retrieve by way of the final distribution, a portion of the Twinco Interest once realized by the Monitor, as the case may be.

67 Moreover, didn't Twinco attorn to the jurisdiction of the Québec Superior Court (Commercial Division) by deciding to file a proof of claim against the Wabush shareholders in the present CCAA Proceedings? [26]

68 The evidence satisfies the Court that Twinco and its shareholder CFLCo have demonstrated that they have no intention of providing any information to the CCAA Parties in a timely fashion that would assist the CCAA Parties and Monitor to determine the true value of the Twinco Interest, which would then form the basis for a potential consensual resolution, leading to a final distribution to creditors and a wind-up and termination the CCAA Proceedings.

69 The Court shares the CCAA Parties' counsel view that it is even possible that with the information on hand, the CCAA Parties and the Monitor may come to a determination that the amount of the CFLCo Reimbursement in dispute may not be sufficiently material on a cost-benefit analysis to continue to pursue recovery of such amount, significantly narrowing the issues in dispute in the CBCA Motion.

70 Who knows? Should the Twinco Interest be disposed of on a consensual basis, Twinco and CFLCo could very well decide to forgo the wind down and the dissolution proceedings completely, a decision that would rest with them without any further involvement of the CCAA Parties (i.e., the Wabush shareholders).

71 Be that as it may be, the CCAA Parties are *only* seeking to expand the Monitor's powers in the CCAA Proceedings to enable the Monitor to obtain the Requested Twinco Information necessary to value the Twinco Interest, which is now the most significant asset of the CCAA Parties remaining to be realized in the CCAA Proceedings apart from tax refunds.

72 With all due respect, the proposed relief sought with the present Motion does not entail any compromission of the rights and recourses of Twinco and of its shareholder CFLCo vis-à-vis the Twinco Interest other than enabling the CCAA Parties and the Monitor to be aware of its potential estimated value without prejudice to the arguments that Twinco and/or CFLCo may want to put forward in connection therewith.

73 The Court finds that the Expanded Monitor Powers sought in the present Motion are necessary and appropriate to enable the Monitor to, among other things:

(i) fulfill its statutory duties to investigate and properly value the assets and the liabilities of the CCAA Parties;

(ii) further the valid purpose of the CCAA to maximize the recovery of Plan creditors, by assisting the CCAA Parties with the recovery of value for the CCAA Parties' creditors from the last significant asset remaining of the CCAA Parties' estate other than tax refunds; and

(iii) facilitate the winding up and termination of these CCAA Proceedings.

74 The Court bears in mind that the Monitor was appointed by this Court pursuant to the authority granted upon this Court under the CCAA [27] .

75 Therefore, subject to the provisions of the CCAA, this Court has the exclusive jurisdiction to determine, *inter alia*, the scope of the powers of the Monitor in furtherance of the purposes of the CCAA especially if such powers relate directly to an asset or the property of the CCAA Parties that is part of the Plan previously sanctioned.

Section 23(1)(c) of the CCAA

76 In *Ernst & Young Inc. v. Essar Global Fund Limited* [28] , the Court of Appeal for Ontario reminded us that section 23 of the CCAA sets out a basic framework of the minimum mandatory duties and functions of the monitor under the CCAA which may be augmented through the exercise of discretion by the Court, and that, not surprisingly, the monitor's role has evolved since then over time:

> [106] The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the CCAA supervising judge. This framework is reflected in s. 23 of the CCAA, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.
>
> [107] Not surprisingly, as with the CCAA itself, the role of the monitor has evolved over time. [. . .]
>
> [Emphasis added]

77 Section 23(1)(c) of the CCAA requires the Monitor to "*make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs*".

78 In the present instance, the true value of the Twinco Interest is unknown as both Twinco and CFLCo have continuously refused to provide the CCAA Parties or the Monitor with any information in respect to the nature and quantum of the Reimbursable Environmental/Maintenance Costs that would assist the CCAA Parties and the Monitor to properly value the Twinco Interest.

79 The information required to determine the amount of maintenance and other indemnifiable expenses that may be subject to reimbursement by CFLCo is solely within the knowledge of Twinco.

80 Therefore, the Court is satisfied that without the Expanded Monitor Powers presently sought, it will be impossible for the Monitor to calculate what the true approximate value of the Twinco Interest may be in order for the Monitor to fulfill its statutory duties under the CCAA.

81 In the present circumstances, it is only appropriate for this Court to grant the Expanded Monitor Powers requested.

82 Moreover, the present circumstances are not necessarily unique, CCAA monitors have already been granted the type of additional powers sought by the CCAA Parties herein.

83 Recently, in *Arrangement relatif à 9227-1584 Québec inc.* [29], Justice Peter Kalichman then sitting in the Commercial Division of the Québec Superior Court reminded that under section 23(1)(c) of the CCAA, a monitor was required to make an assessment or proceed to investigate what the monitor considered necessary to determine the state of the debtor's financial affairs.

84 As the monitor was attempting to recover an asset, which was possibly of significant value to the debtors, Justice Kalichman also declared that being consistent with the purposes of the CCAA:

> • The monitor was authorized and empowered to exercise powers of investigation in respect of the debtors to (i) conduct an examination under oath of *any person* thought to have knowledge relating to the debtors, their business or their property; and (ii) to *order any such person to be examined to produce* any books, documents, correspondence or papers in that person's possession or power relating to the debtors, their business or their property;
>
> • Certain persons could be compelled to provide the monitor with a copy of their complete accounting with respect to the sale of certain property, which according to Justice Kalichman, was linked to the debtors and their assets.

85 In the aforementioned case, Justice Kalichman relied in part on the extended powers that had already been granted to the Monitor by the Court in the Amended and Restated Initial Order.

86 The Court was taken aback at the suggestion made by Twinco's counsel that such powers granted to a monitor in an Initial Order or the like should be somewhat discounted as they usually form part of a draft Initial Order prepared and submitted by the debtor's lawyer, alas, implying that the Commercial Division Justices blindly rubber stamp such draft Initial Orders, which could not be further from the reality.

87 With all due respect, the Court believes that the Monitor's powers to investigate, question and compel the communication of information and documents required *to determine with reasonable accuracy the state of the company's business and financial affairs* which includes the assessment of the value of assets or property of the debtor, should not be limited to the only corporate documents available to a shareholder pursuant to the provisions of the CBCA.

88 In *Osztrovics (Trustee of) v. Osztrovics Farms Ltd.*. [30], the Ontario Court of Appeal dismissed the suggestion that the trustee's power to obtain information "*relating in whole or in part to the bankrupt, his dealings or property*" only extended to

corporate documentation that pertained solely to the business and affairs of the corporation, and not another company in which the bankrupt held a significant interest.

89 The Ontario Court of Appeal also stated that applying a narrow interpretation of the trustee's investigatory powers only to the corporate documentation, that pertain solely to the business and affairs of the bankrupt, and not to information about another company in which the bankrupt has significantly invested, would frustrate the trustee's ability to discharge its duty to the bankrupt's creditors to value and realize upon the most significant asset in bankrupt's estate.

90 In *Osztrovics* , the bankrupt was a shareholder in a corporation, owning 48% of the company. The trustee requested that the company provides certain information that the trustee required to value the bankrupt's shares in that corporation. The latter refused and the trustee sought and obtained an order pursuant to sections 163 and 164 of the BIA requiring: (i) that company to disclose to it certain documents; and (ii) certain parties to submit to oral examinations.

91 While *Osztrovics* was decided in the context of bankruptcy proceedings under the *Bankruptcy and Insolvency Act* [31] , the Court believes that those principles apply equally to the CCAA proceedings [32] .

92 The Court may add that the fact that we find ourselves in the context of CCAA proceedings involving the liquidation of the CCAA Parties as opposed to their restructuring does not matter.

93 Liquidating CCAA proceedings have been accepted in practice and case law with an expanded view of the role of the monitor under such circumstances [33] .

94 All in all, in liquidating CCAA proceedings, the responsibilities and the powers of the Monitor remain essentially the same subject to any additional powers that may be granted by the Court at its discretion.

Section 23(1)(k) of the CCAA

95 Section 23(1)(k) of the CCAA expressly allows this Court to expand the list of duties and functions of the Monitor by directing the latter to "*carry out any other functions in relation to the debtor company that the court may direct*."

96 In previous decisions, Justices sitting in the Commercial Division of the Québec Superior Court expanded the monitor's powers to include the ability to compel *any person* reasonably thought to have knowledge relating to any of the debtors, their business or property to be examined under oath, and to disclose and produce to the monitor any books, documents, correspondence or papers in that person's possession or power. [34]

97 The counsel for the CCAA Parties pointed out, rightly so, to the Court that although CCAA courts have authorized relief similar to the Expanded Monitor Powers in respect to "any person" thought to have knowledge of the debtor, its business or property, the Expanded Monitor Powers here are narrower in that they are only directed at those persons reasonably thought to have knowledge relating to the Twinco Interest, the CFLCo Indemnity and the CFLCo Maintenance Obligations, including the Twinco Requested Information, and, subject to any further order of this Court, they are limited to a disclosure period of only 10 years, going back to 2010.

The broad judicial discretion conferred under Section 11 of the CCAA

98 Section 11 of the CCAA stipulates:

> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, 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.
>
> [Emphasis added]

TAB 12

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.

Tax --- Income tax — Administration and enforcement — Withholding of tax — Trust for monies withheld

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.

Table of Authorities

Cases considered by *Rowbotham J.A.*:

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Smoky River Coal Ltd., Re (1999), 1999 CarswellAlta 128, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

Generally — referred to

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

Generally — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

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 13

1994 CarswellQue 120
Supreme Court of Canada

RJR — MacDonald Inc. v. Canada (Attorney General)

1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, [1994] A.C.S. No. 17, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, 46 A.C.W.S. (3d) 40, 54 C.P.R. (3d) 114, 5 W.D.C.P. (2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

RJR — MacDonald Inc., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Imperial Tobacco Ltd., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: October 4, 1993
Judgment: March 3, 1994
Docket: 23460, 23490

Proceedings: Applications for Interlocutory Relief

Counsel: *Colin K. Irving* , for the applicant RJR — MacDonald Inc.
Simon V. Potter , for the applicant Imperial Tobacco Inc.
Claude Joyal and *Yves Leboeuf* , for the respondent.
W. Ian C. Binnie, Q.C. , and *Colin Baxter* , for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Subject: Constitutional; Intellectual Property; Civil Practice and Procedure; Public; Property

Headnote

Injunctions --- Injunctions involving Crown — Miscellaneous injunctions
Injunctions --- Availability of injunctions — Public interest
Injunctions --- Availability of injunctions — Need to show irreparable injury
Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restraint of governmental acts
Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Stay pending appeal
Jurisdiction of Supreme Court of Canada to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could

the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

39 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter* . A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

40 The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act* , S.C. 1988, c. 20.

2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms* .

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

(i) There is a serious constitutional issue to be determined.

(ii) Compliance with the new regulations will cause irreparable harm.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

41 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra* . If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

42 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

43 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

44 On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional

might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

45 Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

46 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores* , at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

47 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

48 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

49 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 , an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid* , however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

50 In *Metropolitan Stores* , Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

51 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269 , at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.) , at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.) , at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

52 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

53 The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores* , at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

54 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra* , at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

55 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

56 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294 , at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

57 In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.) , the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried *in the sense of a case with enough legal merit* to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

58 In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 , the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

59 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

60 The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores* , at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms* , could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 , at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

61 The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.) , at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

62 Beetz J. determined in *Metropolitan Stores* , at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

63 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

64 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

65 The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

66 This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863 , at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 , at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter* . In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

67 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

68 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid* , Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

69 The decision in *Metropolitan Stores* , at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280 , at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

70 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores* . A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives* , 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores* . The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

71 It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

72 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.) , per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants* , which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

73 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

TAB 14

2010 ABQB 637
Alberta Court of Queen's Bench

Royal Bank v. Cow Harbour Construction Ltd.

2010 CarswellAlta 2027, 2010 ABQB 637, [2011] A.W.L.D. 7, 193
A.C.W.S. (3d) 710, 37 Alta. L.R. (5th) 82, 504 A.R. 319, 72 C.B.R. (5th) 261

Royal Bank of Canada (Plaintiff) and Cow Harbour Construction Ltd. and 1134252 Alberta Ltd. (Defendants)

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

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

And In the Matter of a Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.

K.D. Yamauchi J.

Heard: September 22, 2010
Judgment: October 5, 2010
Docket: Edmonton 1003-11241, 1003-05560, BKCY 24-115359

Counsel: Ray Rutman for Royal Bank Canada
Stuart Weatherill, Kyle Kawanami for John Deere Credit Inc., DeLage Landen Financial Services, LiftCapital Corp.
Howard Gorman, Randal Van de Mosselaer for PricewaterHouseCoopers, in it capacity as receiver of Cow Harbour Ltd.
Frances Dearlove for Aecon Group Inc.

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Practice and procedure — Construction company entered protection under Companies' Creditors Arrangement Act (CCAA) — Liquidation of assets was deemed best way of proceeding — Buyer sent letter of intent to purchase which was endorsed by court — Lessor claimed that certain equipment in possession of company was covered by true lease, not financing lease — Amount of $900,000 was paid into court representing payments for equipment under lease term — Court declared that lease was financing lease and not true lease, and approved sale of assets — Lessor brought application for leave to appeal and for stay of proceedings — Application dismissed — Leave to appeal was properly before court, although lessor could also bring matter before court of appeal — CCAA specifically allowed for matter to be brought before court — Nature of lease was fact based matter and was of no importance to practice — Lease was not of significance to proceedings as whole, although it was important to lessor — Deal had been carefully negotiated and each creditor had given up something, while allowing construction company to continue rather than being sold piecemeal — Appeal was not meritorious as error not evident in trial judge's reasons — Appeal would delay proceedings as it would affect amounts to be disbursed from sale — Court required to weigh all relevant factors for determining whether leave to appeal was appropriate, and failure to meet one aspect of test was not fatal for leave.

APPLICATION by lessor for leave to appeal and stay of proceedings under *Companies' Creditors Arrangement Act.*

***K.D. Yamauchi J.*:**

I. Background

1 On April 7, 2010, Cow Harbour Construction Ltd. ("Cow Harbour") applied for a stay of proceedings against it under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). This Court granted that order (the "Initial Order") in

CCAA action 1003 05560 (the "CCAA Action"). This Court extended the stay of proceedings from time to time by a number of subsequent orders. It should be noted that this Court did not want to extend the stay for a lengthy period at any given time. Accordingly, this Court required the parties to this action, of which there are many, to appear before it often and regularly, so that Cow Harbour and the various professionals involved in this matter could provide this Court with regular updates on the status and progress of the restructuring.

2 It became clear as this matter progressed that Cow Harbour was not going to be able to restructure it affairs through a refinancing, a compromise or an equity restructuring. Rather, this matter evolved into a liquidation. This Court approved a process that would permit Cow Harbour to restructure by way of a sale of its assets. The process involved inviting potential purchasers to present proposals to purchase Cow Harbour's assets and undertaking. The intent behind this process was to effect a sale of Cow Harbour as a going concern. This process resulted in this Court being presented with three proposals to purchase certain of Cow Harbour's assets.

3 Aecon Group Inc. ("Aecon") presented a letter of intent to purchase a significant portion of Cow Harbour's assets (the "Original Aecon Proposal"). The Original Aecon Proposal was subject to a number of terms and conditions. This Court appointed PricewaterhouseCoopers Inc. ("PWC") to act as a transaction facilitator to assist the various parties' in their negotiations. As the transaction facilitator, PWC successfully negotiated a higher purchase price with Aecon. Aecon eventually presented a Letter of Intent to Purchase (the "LOI").

4 On August 5, 2010, this Court endorsed PWC's acceptance of the LOI, with a view that the parties would return to this Court to seek this Court's approval of an asset purchase agreement and vesting order.

5 One of Cow Harbour's assets that Aecon wanted to purchase was a Hitachi EX5500, serial number FF018NQ001008 (the "Equipment"). The Equipment was in Cow Harbour's possession as a result of an agreement dated April 1, 2009, between De Lage Landen Financial Services Canada Inc. ("DLL") and Cow Harbour (the "Agreement"). In the Agreement, DLL agreed to lease the Equipment to Cow Harbour for a 37-month term. The Agreement contained no option in which Cow Harbour could purchase the Equipment at the end of the term of the Agreement or otherwise.

6 After this Court granted the Initial Order, on May 14, 2010, DLL filed a notice of motion, returnable May 21, 2010. In it, DLL sought a declaration that, for the purposes of *CCAA* s.11.01, the Agreement was a true lease, and not a financing lease.

7 On May 21, 2010, this Court directed that Cow Harbour make certain payments to McLennan Ross LLP, counsel for the monitor this Court appointed pursuant to the Initial Order. Those payments represented all monthly payments from April 1, 2010, that Cow Harbour would have paid to lessors under leases for which there was a dispute as whether they were true leases or financing leases, or which the monitor's counsel had not been able to categorize as either (the "Disputed Lease Funds"). This Court directed McLennan Ross LLP to hold the Disputed Lease Funds, pending resolution of disputes pertaining to the categorization of the disputed leases.

8 The Agreement was one of the disputed leases. Accordingly, included in the Disputed Lease Funds was approximately $900,000 representing payments that Cow Harbour should have been making to DLL under the Agreement.

9 As part of the sale process, PWC prepared a proposed allocation of Aecon's purchase price, indicating the portion of the overall purchase price that Aecon allocated among Cow Harbour's assets. This Court received that allocation and placed it under seal. It was of the view that the creditors need not know how much of Aecon's purchase price was going to be allocated to the claims of other creditors.

10 DLL did not agree that the Equipment could be sold to Aecon without DLL's consent. At no time did DLL provide its consent to a sale of the Equipment to Aecon or anyone else.

11 The parties returned to court on August 25, 2010, at which time this Court heard a number of applications, including the following:

(a) DLL's application in the CCAA Action for an order declaring that DLL's interest in the Equipment is that of owner and lessor under a true lease. This application was made by way of a notice of motion in the CCAA Action only and was originally returnable May 21, 2010. It had previously been adjourned;

(b) DLL's application for an adjournment of the pending applications for an approval of the sale of Cow Harbour's assets to Aecon and a vesting order;

(c) RBC's application to appoint a PWC as receiver in action number 1003 11241 (the "Receivership Action"); and

(d) PWC's application for approval of the asset purchase agreement among Aecon, PWC, in its capacity as receiver of Cow Harbour and PWC, in its capacity as transaction facilitator (the "Asset Purchase Agreement") and a vesting order, vesting title of Cow Harbour's assets which formed the subject-matter of the Asset Purchase Agreement into Aecon's name (the "Vesting Order").

12 Counsel made their submissions on the DLL application during the morning of August 25, 2010. This Court took a recess of about 3 hours to consider the positions of the respective parties. This Court rendered its judgment, with oral reasons, that the Agreement constituted a financing lease and not a true lease. This Court then granted RBC's application for a receivership order, and granted an order approving the Asset Purchase Agreement and the Vesting Order. The Vesting Order included the Equipment. This Court granted those orders sequentially, in the sense that:

(a) first, it dealt with DLL's applications in the CCAA Action;

(b) second, it dealt with the receivership application; and

(c) third, it dealt with the applications to approve the Asset Purchase Agreement and the Vesting Order.

The second and third orders were dependent on the Court's determination of the nature of the Agreement.

13 Once this Court granted these orders, the transaction contemplated by the Asset Purchase Agreement closed on August 26, 2010.

14 On August 31, 2010, DLL served all parties to these proceedings with a notice of motion returnable September 3, 2010, for an order staying the provisions of the August 25, 2010 orders, as they related to the Equipment, in the Receivership Action and the CCAA Action. On September 2, 2010, DLL filed a Civil Notice of Appeal relating to issues in the Receivership Action and (notwithstanding the absence of leave to appeal) in the CCAA Action. On September 3, 2010, the parties argued the stay application. This Court denied the application on the basis that the issue was moot and further, that DLL had not met the test for a stay pending its appeal. This Court said:

> There was no appeal, there was no seeking of stay of the effect of my orders and this matter has closed. The issue is now moot., Transcript of Proceedings, September 3, 2010, p. 24, ll. 3-6.

II. Nature of the Applications

15 DLL brings two applications, being:

1. An application pursuant to *CCAA* s. 13, for leave to appeal this Court's August 25, 2010 order, which declared that the Agreement was a financing lease and not a true lease (the "Leave Application"); and

2. An application seeking an order in the nature of a stay pending appeal, holding back the Disputed Lease Funds insofar as they relate to funds payable under the Agreement and an order holding back from distribution a portion of the sale proceeds resulting from the Asset Purchase Agreement, equivalent to the net book value of the Equipment (the "Stay Application").

16 The Royal Bank of Canada ("RBC") and PWC, the court-appointed receiver, oppose these applications.

III. Leave Application

17 DLL seeks leave to appeal pursuant to *CCAA* s.13, which provides:

> 13. 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.

18 DLL has the right to seek leave from this Court or from the Court of Appeal or from a judge of the Court of Appeal. The legislation provides for this. If an applicant for leave is not successful at one level, does that preclude the applicant from making a further application to the "next level"? There can be no doubt that if a judge of the court of appeal refuses the applicant's leave to appeal, a judge of the lower court, even the judge who made the original order, could not overturn the court of appeal's decision. The converse, however, was not so clear. In *Westar Mining Ltd., Re*, 1993 CarswellBC 529, 17 C.B.R. (3d) 202 (B.C. C.A.) at para. 7, the majority held that "an application for leave to appeal may be commenced in any one of three ways, and that once that choice is made a party does not have any further right to pursue an application for leave to appeal." McEachern C.J.B.C., at para. 45, dissented and analyzed the issue as follows:

> Section 13 of the C.C.A.A. provides for an appeal with leave, and further provides that leave may be obtained from the judge who made the order, from this court, or from a judge of this court. I do not find any support in the language of s. 13 for my colleagues' conclusion that these are exclusive alternatives, so that the refusal of leave at any level precludes an application at another level. Maxwell on *Interpretation of Statutes*, 12th ed. (1969), pp. 232-233, suggests that in some cases "and" and "or" may be substituted for each other. While it is true that the C.C.A.A. must prevail, I see no conflict between it and the *Court of Appeal Act*, or with the practice which is followed in this province to obtain leave from the Court.

19 The Supreme Court of Canada allowed the appeal "for the reasons given by McEachern C.J.B.C.", *Westar Mining Ltd., Re*, 1993 CarswellBC 553, [1993] 2 S.C.R. 448 (S.C.C.). Thus, if DLL is unsuccessful in its application for leave before this Court, there is nothing preventing it from making a further leave application to "the court or a judge of the court to which the appeal lies."

20 Is this matter properly before this Court? In *General Publishing Co., Re*, 2002 CarswellOnt 2215, 34 C.B.R. (4th) 183 (Ont. S.C.J.) at para. 4, Justice Ground said, "the usual and preferred route to appeal an order under the CCAA is to bring the motion for leave before a judge of the Court of Appeal." In fact, in that case, Justice Ground was not prepared to hear the application, "as it would undoubtedly result in a non-productive, additional step in trying to resolve this issue." This Court agrees with the concern Justice Ground expressed for the reasons that follow.

21 Before moving on to consider those reasons, it is worthwhile noting how the Alberta Court of Appeal has dealt with this "concurrent" jurisdiction in another context. In *R. v. Harness*, 2005 CarswellAlta 963, 200 C.C.C. (3d) 431 (Alta. C.A.), the court was considering the effect of the *Criminal Code*, R.S.C. 1985, c. C-46, s. 678(2), which provides:

> 678(2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.

22 The *Harness* court at para. 23, explained how it would deal with this "concurrent jurisdiction" when it said:

> 23 Based on the rules of statutory interpretation and the case authorities, it is clear that s. 678(2) provides concurrent jurisdiction to hear applications to extend time, rather than a right of review or right to appeal the decision of a single judge to a full panel of the court. Both a single judge and the court have jurisdiction to grant a time extension, though often the rules of practice established by the court limit the applicant's right to choose which one will hear the application. Once a decision on an application to extend has been made, whether by a single judge or by a full panel of the court, there is no right of appeal within the court. However, a panel or a judge can consider the application

> afresh when the interests of justice so require, particularly when circumstances or conditions have changed since the last application. No such change is alleged here, nor does Harness suggest that there are new facts that might affect the outcome of his application. [emphasis added]

23 The *CCAA* permits DLL to apply to this Court to seek leave to appeal this Court's earlier decisions. Accordingly, despite the approach that the *General Publishing* court took in similar circumstances, this Court will consider this application. Whether the Alberta Court of Appeal will apply reasonaing similar to that which it applied in *Harness* is not a question that this Court needs to answer.

24 For DLL to obtain leave to appeal under the *CCAA*, it must meet the test set out by the Alberta Court of Appeal in *Fairmont Resort Properties Ltd., Re*, 2009 ABCA 360 (Alta. C.A.) at para. 10, where the court said:

> The test for leave involves a single criterion subsuming four factors. The single criterion is that 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; (4) whether the appeal will unduly hinder the progress of the action.

25 Before this Court considers the factors involved in the "test for leave," it is worthwhile to outline the applicable standard of review that the Court of Appeal will apply if leave were to be granted. In *Canadian Airlines Corp., Re*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) at paras. 28-29, the court held that:

> 28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the CCAA. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p. 95:
>
> > .... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

26 In *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the *CCAA*'s history and purpose, and observed at p. 341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.
>
> The standard of review of this Court, in reviewing the CCAA decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

27 It appears that this is the reason why the *General Publishing* court and this Court has difficulty in analyzing its own decisions. It is awkward, if not difficult, for a court to consider whether it has made a palpable and overriding error in its exercise of discretion or in findings of fact. These are the foundations on which it built its original decision and it undermines this Court's original decision if it were to second guess itself.

28 Nonetheless, Parliament has given this task to the "judge appealed from" so this Court will undertake that task.

29 *Fairmont Resort* provides us with the "test for leave." The test is but one test, in which "there must be serious and arguable grounds that are of real and significant interest to the parties." To determine whether DLL has met its onus, we must consider the four factors that *Fairmont Resort* outlines. The question then becomes whether DLL must satisfy all the factors. In other

words, if it fails on one (or more), does fail to meet the test? The answer to this question lies in the decision of O'Brien J.A. in *Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)*, 2005 CarswellAlta 1527, 15 C.B.R. (5th) 235 (Alta. C.A. [In Chambers]). In that case, Justice O'Brien went through and applied the four factors to the facts with which he was dealing. The applicant in that case had met some of the factors, but not others. Justice O'Brien at para. 15, made his decision not to grant leave after "weighing all the factors." In other words, success or failure to prove one or more of the factors does not guarantee that the applicant has met the "test for leave." The court must weigh all the factors.

Whether the point on appeal is of significance to the practice

30 DLL argues that the distinction between true leases and financing leases is one of significance to the practice. RBC argues, on the other hand, that the issue is of no significance to the practice. The finding that DLL's Equipment was the subject of a financing lease rather than a true lease is a factual finding that is specific only to that particular lease and does not have any impact on the practice in general.

31 DLL argues that this Court erred in holding that an agreement without a purchase option or any other contractual mechanism of transferring ownership from the purported lessor to the purported lessee, can be characterized as a financing lease. RBC argues that there is no single overriding factor in determining whether a particular lease is a true lease or a financing lease.

32 When characterizing leases pursuant to *CCAA* s.11.01, the court must have regard to the substance, rather than simply the form of the arrangement, *Smith Brothers Contracting Ltd., Re*, 1998 CarswellBC 678, 53 B.C.L.R. (3d) 264 (B.C. S.C.). In fact, when making its decision, this Court considered the non-exhaustive list of criteria that the *Smith Brothers* court suggested that courts look to when determining whether a document is a true lease or a financing lease. This Court outlined those criteria in its oral reasons, Transcript of Proceedings, August 25, 2010, pp. 57-59, and concluded that:

> [T]here is not one factor that is the *sine qua non* for determining whether a document is a true lease or a financing lease. One must look at the whole document to get a flavour of the [parties'] intentions, Transcript of Proceedings, August 25, 2010, p. 59, ll. 11-13.

33 This Court concluded that "When one examines the De Lage Landen Financial Services Canada document as a whole, it is clear that it is a security lease and not a true lease," Transcript of Proceedings, August 25, 2010, p. 59, ll. 23-24.

34 DLL argues that the characterization of a lease without a purchase option or any other mechanism of transferring ownership from the purported lessor to the purported lessee is a novel proposition in law and is an unresolved issue that is of significance to the practice, *Kerr Interior Systems Ltd., Re*, 2008 ABCA 291 (Alta. C.A.) at para. 9 . If that were the sole basis on which this Court rendered its decision, it might indeed be novel. However, this Court was guided by the broader principle of examining the whole document, which is an approach that is already well-established in the case law. Thus, there is nothing novel about this approach and this Court's finding that the Agreement was a financing lease, rather than a true lease, has no broad significance to the practice.

35 Furthermore, in *Philip Services Corp., Re*, 1999 CarswellOnt 4495, 15 C.B.R. (4th) 107 (Ont. S.C.J. [Commercial List]) at para. 4, Justice Farley determined that a lease which "does not specifically indicate that there is an option to buy the (hardware) assets at the end of the lease" could indeed be characterized as a capital or financing lease, having regard to the criteria set out in *Smith Brothers*. Notwithstanding the absence of an option to purchase in the agreement, Justice Farley undertook the same analysis set out in *Smith Brothers* to determine the nature of the lease. He said, at para. 3:

> That involves a functional analysis of the relationship - based on substance as opposed to form. Unfortunately there are no tags or labels which may be read with ease and "certainty" ("certainty" in the same way that a laboratory is able to conduct a DNA test and give probabilities or odds). Rather the task involves the weighing of the various materials involved. It is not a simple analysis of determining between black and white but rather the shade of grey where all factors are weighed and the balance as to whether the scales would tip towards a true lease relationship - or alternatively against being a true lease relationship.

36 DLL pointed out that the parties in *Philip Services* had a course of conduct thatresulted in the lessee purchasing leased assets from the lessor, although Justice Farley, at para. 1, described the course of conduct between the parties as "rather informal, flexible and sloppy." The fact that Justice Farley took care to point out that the leases themselves did not contain an option to buy assets at the end of the lease term indicates that this factor was in his mind when he balanced the various *Smith Brothers* factors. Depending on the circumstances of each case, the presence or absence of an option to purchase may or may not loom large in the court's analysis. In the case with which this Court was dealing, this "tag" or "label" was but one factor it considered.

37 Thus, this Court finds that the issue is of no importance to the practise.

Whether the point on appeal is of significance to the action itself

38 This Court acknowledges that the point on any potential appeal has significance to DLL. Otherwise why would this matter have come before this Court? That, however, is not the nature of this factor. This factor requires this Court to look at the action as a whole.

39 RBC argues that the appeal is of no significance to the action because the appeal is moot and, as such, it would be impossible to "unscramble the egg" even if DLL were successful, *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1 (Alta. C.A.) at para. 14. Indeed, DLL acknowledges this fact. However, DLL goes on to argue that while the CCAA Action has been concluded, there still remains the issue of the Disputed Lease Funds. DLL claims entitlement to approximately $900,000, representing the monthly lease payments to which it would be entitled if classified as a true lessor under *CCAA* s.11.01. DLL's claim to these funds rests on it being categorized as a true lessor. Additionally, the allocation of restructuring costs against DLL in these proceedings is dependent on whether DLL is classified as a true lessor.

40 It is important, at this stage, to explain the process that resulted in the Vesting Order. This Court appointed PWC to facilitate negotiations with the various parties and finalization of the transaction. From August 5, 2010, when this Court endorsed PWC's acceptance of the LOI, to August 25, 2010, when this Court approved the Agreement of Purchase and Sale and granted the Vesting Order, Aecon and PWC negotiated the allocation of the purchase price among the various creditors. At the beginning of the process, there was not overwhelming support from the general body of creditors for the Aecon transaction. However, through persistent and effective negotiations, PWC secured the support of holders of 92.8 percent of the debt that Cow Harbour owed to its creditors, representing a majority in number of 90.625 percent. As well, Aecon committed to running Cow Harbour's business and employing almost all of Cow Harbour's employees, except for certain management personnel.

41 Because of the circumstances involving certain of Cow Harbour's management, Cow Harbour would not put Aecon's transaction before the creditors as a plan of arrangement. Besides, it would have been impossible to meet the time requirements set forth in the *CCAA* to allow a plan of arrangement to be considered and approved. Cow Harbour's financial situation was deteriorating with each day. It had to meet payroll and other expenses and it did not have the financial wherewithal to meet those expenses. Aecon advised this Court that for it to facilitate the survival of Cow Harbour's business, this Court had to approve the transaction and allow a closing before the end of August, 2010. Like the parties in *General Publishing*, the parties in this case had a sword of Damocles hanging over their heads, as the failure of this Court to approve this transaction would surely have resulted in Aecon withdrawing its offer or, if it did not, Cow Harbour's continued financial difficulties would have resulted in its demise, whether or not it was in the Aecon's hands.

42 Given the support that the creditors showed, and the fact that Cow Harbour's business would continue to operate, this Court felt it was in the best interests of the stakeholders to approve the sale and grant the Vesting Order. To do otherwise might have resulted in a piecemeal liquidation of Cow Harbour's assets and a closing-down of its business. In other words, although this transaction was consummated under the Receivership Action, this Court considered the public policy reasons underlying *CCAA* proceedings, when it approved the Aecon transaction and granted the Vesting Order.

43 The Aecon transaction was carefully negotiated and each of the creditors sacrificed part of their respective claims. No creditor obtained everything it was seeking. Aecon advised this Court on August 25, 2010, that it would not consummate the transaction if it did not receive an order vesting all of the assets it was purchasing into its name, free and clear of all charges,

liens and encumbrances. If this Court were to give one creditor, even a creditor that was owed a trifling amount, preferential treatment, the other creditors would not have supported the Aecon transaction.

44 An appeal of this matter might be of significance to DLL specifically. However, this Court's characterization of the Agreement is of no significance to this action generally.

Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous

45 RBC argues that DLL has not demonstrated that it has a *prima facie* meritorious case. On September 3, 2010, DLL sought a stay of the various orders this Court granted on August 25, 2010. This Court held that because there was no appeal pending and that DLL did not seek a stay of the effect of the various orders this Court granted on that date after they were granted or at least before the Aecon transaction closed, this Court denied DLL's application on the ground of mootness. In other words, even if the Court of Appeal were to overturn this Court's August 25, 2010 decisions, DLL could not succeed in its claim to have the Equipment returned to it. The Equipment was part of a larger transaction.

46 Does this, of itself, mean that the proposed appeal lacks merit or is otherwise frivolous? The simple answer is no. Allowing the appeal may not provide DLL with a remedy, but that does not make the proposed appeal frivolous or one that lacks merit. Rather, we must analyze the strength of the appeal on the basis of the standard of review that would govern the appeal, *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.) at para. 20; *Canadian Airlines Corp., Re*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) at paras. 28-29.

47 As stated earlier in these reasons, it is difficult for this Court to find that it made an overriding and palpable error in its consideration of the issues the parties placed before it. Surely, this is the same awkwardness that Justice Ground faced in *General Publishing*. This Court gave its oral reasons for why it held the Agreement to be a financing lease rather than a true lease. Even taking an objective view of this with the benefit of hindsight, this Court would come to the same conclusion today.

48 This Court acknowledges that it is not necessary for DLL to show that it is guaranteed to win an appeal. It only needs to show that it has an arguable case, *Kerr Interior Systems Ltd., Re*, 2008 ABCA 291 (Alta. C.A.) at para. 11. Given this Court's various findings, it is difficult to see that DLL has an arguable case, in these circumstances. On these bases, this Court finds that any proposed appeal is not on its face meritorious.

Whether the appeal will unduly hinder the progress of the action

49 RBC and PWC argue that an appeal would unduly hinder the CCAA Action and the Receivership Action and create tremendous uncertainty concerning the various transition orders this Court granted in the CCAA Action. It should be noted at this stage that as part of the transition, this Court ordered that Disputed Lease Funds would be transferred from the monitor's counsel to the receiver's counsel, under the same terms as the May 21, 2010 order.

50 DLL, on the other hand argues that an appeal would not unduly hinder the progress of this action. The CCAA Action has been completed. The assets have been sold to Aecon. The hearing at which the other parties with disputed leases will have their agreements categorized has not yet been scheduled. DLL's application for a stay against Aecon has been denied, so there is no issue as to uncertainty surrounding Aecon's use of the Equipment. Accordingly, DLL argues that the progress of neither action would be unduly hindered by an appeal.

51 This Court finds that any appeal would unduly hinder the progress of the actions. Pursuant to the transition orders this Court granted on August 25, 2010, this Court must deal with many issues, including those concerning the remuneration of the chief restructuring advisor, the distribution of the Disputed Lease Funds, and who will be paying the administrative expenses. DLL is correct that Aecon's use of the Equipment is not an issue. However, the creditors seek a distribution of their respective share of the $180 million purchase price. This cannot happen if there is a pending appeal that could have an effect on the allocation. Thus, the progress of this action would be unduly hindered by the appeal to the prejudice of the creditors who supported the Aecon transaction.

52 More importantly, the transaction that PWC and Aecon negotiated with all the creditors rests on a fine balance. The uncertainty surrounding the finality of these issues unduly hinders the progress of these actions. A more thorough discussion of this fine balance will be undertaken when this Court discusses the Stay Application.

53 As a result of the foregoing, this Court dismisses DLL's application for leave to appeal. This result deals sufficiently with the Stay Application. However, as a courtesy to DLL, this Court will comment briefly on it.

IV. Stay Application

54 Earlier, this Court referred to DLL's application for a stay of this Court's orders approving the Aecon Asset Purchase Agreement and the Vesting Order. On September 3, 2010, the parties argued the stay application. This Court denied the application on the basis that the issue was moot and further, that DLL had not met the test for a stay. DLL argues that the application now before this Court differs from the one it argued on September 3, 2010, as it is not challenging the sale and Vesting Order. Rather, it is seeking to have this Court hold back monies representing DLL's alleged share of the Disputed Lease Funds and the net book value of the Equipment.

55 For DLL to obtain a stay of a stay of proceedings it must satisfy a tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), being:

> (a) Is there a serious question to be argued on appeal?
>
> (b) Will DLL suffer irreparable harm if this Court does not grant a stay?
>
> (c) Does the balance of convenience weigh in favour of a stay?

56 Unlike the factors that make up the "test for leave," the tripartite test does not require or permit courts to weigh these factors. The applicant must satisfy all three elements before a court will grant the stay. In other words, if the applicant does not establish one of the elements, its application will fail. Because of this, this Court will focus on the third element of the tripartite test; the balance of convenience.

57 On August 25, 2010, the Court heard Aecon's submissions that the Equipment is critical to the work that Aecon will be undertaking under contracts with Syncrude. For its negotiations to be successful, Aecon would have to satisfy Syncrude that it could fulfill the requirements under the Syncrude contracts. For this to occur, Aecon required the Equipment. Without the Equipment, Aecon would not have proceeded with the transaction.

58 As well, this Court heard submissions that outlined many details regarding the negotiations and work of Aecon, PWC and numerous creditors which led to the Asset Purchase Agreement. The negotiations were undertaken by these parties in good faith, which required significant compromise by the creditors, including RBC, Cow Harbour's largest creditor. PWC struck a balance among numerous interests.

59 Creditors representing 90.625 percent of all creditors negotiated in good faith and compromised their claims. Granting a stay in these circumstances would undermine the processes that Aecon, PWC, and the other creditors undertook in good faith. Holding back the net book value of the Equipment seriously upsets the fine balance that resulted from these negotiations. The creditors did not agree to compromise their claims so they could recover "something." They compromised their claims so they could receive a definite amount, as negotiated. Their receiving something less than that negotiated amount will result in this Court sanctioning an "unscrambling of the egg" and undermines the process that this Court approved and monitored. It should be noted also that DLL will be receiving an allocation of the purchase price representing a substantial portion of its claim.

60 DLL argues that this Court's finding that it holds a financing lease prejudices its right to argue that it should obtain a portion of the Disputed Lease Funds. That may be so, but it chose to have this Court deal with the nature of the Agreement in a summary fashion. Given this Court's finding that the Agreement is a financing lease, in the end, this argument carries little weight. However, this Court has dealt with that issue and it is not now open to DLL to attempt to re-argue it.

61 As a result, the balance of convenience favours this Court dening the stay.

V. Conclusion

62 For the foregoing reasons this Court dismisses DLL's application pursuant to *CCAA* s. 13, for leave to appeal this Court's August 25, 2010 order, which declared that the Agreement was a financing lease and not a true lease. As well, it dismisses DLL's application seeking an order in the nature of a stay pending appeal, holding back the Disputed Lease Funds insofar as they relate to funds payable under the Agreement and an order holding back from distribution a portion of the sale proceeds resulting from the Asset Purchase Agreement, equivalent to the net book value of the Equipment.

Application dismissed.

TAB 15

2021 ABCA 304
Alberta Court of Appeal

DGDP-BC Holdings Ltd v. Third Eye Capital Corporation

2021 CarswellAlta 2194, 2021 ABCA 304, [2022] A.W.L.D. 3254, 2021 A.C.W.S. 709

DGDP-BC Holdings Ltd. (Applicant) and Third Eye Capital Corporation (Respondent) and PricewaterhouseCoopers Inc. in its capacity as the Court-Appointed Receiver for Accel Canada Holdings Limited and Accel Energy Canada Limited (Respondent)

Kevin Feehan J.A.

Heard: September 3, 2021
Judgment: September 13, 2021
Docket: Calgary Appeal 2101-0173-AC

Counsel: I. Aversa, T.L. Czechowskyj, Q.C., S. Babe (no appearance), for Applicant
K.R. Cameron, C.D. Simard (no appearance), for Respondent, Third Eye Capital Corporation
R. Gurofsky, J. L. Cameron (no appearance), for Respondent, PricewaterhouseCoopers Inc in its capacity as Court-Appointed Receiver for Accel Canada Holdings Limited and Accel Energy Canada Limited

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Supreme Court of Canada — Leave to appeal Orders in bankruptcy proceedings approved sale of assets of debtor group between respondents and granted gross overriding royalty from subsidiary of respondent TECC to applicant — Interim lender's appeal of receivership orders was dismissed — Applicant applied for stay of orders pending its application for leave to appeal to Supreme Court of Canada — Application dismissed — Applicant had not met test for stay pending leave to appeal to Supreme Court of Canada — There was not serious question to be tried — Issues at play were not obviously of public or national importance; commercial dispute unique on these facts to these parties — Given that issue of repayment was solely financial matter in commercial dispute, applicant had not established irreparable harm if stay was not granted.

APPLICATION by interim lender for stay pending application for leave to appeal to Supreme Court of Canada.

***Kevin Feehan J.A.*:**

I. Overview

1 DGDP-BC Holdings Ltd applies for a stay of two June 14, 2021 orders of a supervising judge under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. These orders a) approved the sale transaction of assets from Accel Canada Holdings Limited and Accel Energy Canada Limited, between PricewaterhouseCoopers Inc, the Receiver, and Conifer Energy Inc; and b) granted the gross overriding royalty from Conifer to DGDP. The stay is sought pending DGDP's application for leave to appeal to the Supreme Court of Canada from the August 10, 2021 order of a single judge of this Court refusing leave to appeal from the June 14, 2021 orders: 2021 ABCA 284.

2 DGDP was an interim lender in the bankruptcy proceedings of the Accel Entities, and has unsuccessfully appealed earlier orders in these proceedings: 2021 ABCA 226. The factual background is set out in detail in the attached Appendix A: Chronology of Events, prepared by PricewaterhouseCoopers, and an overview of the proceedings is given below.

II. Facts

3 In October 2019, the Accel Entities both filed Notices of Intention to make a proposal pursuant to the *Bankruptcy and Insolvency Act*. The proceedings were converted and continued under the *Companies' Creditors Arrangement Act*, RSC 1985 c C-36, and in November 2019 an Amended and Restated Initial Order was granted by the Court. This order authorized an interim financing loan, secured by an Interim Lenders' Charge. The monies were borrowed jointly and severally from two interim lenders: DGDP (through its predecessor 2228139 Alberta Ltd), and Third Eye Capital Corporation. This interim financing loan was described in the Second Amended and Restated Debtor-in-Possession Financing Term Sheet as a "super priority (debtor-in-possession), interim, revolving credit facility". The Court granted the debtor-in-possession loans priority over the Accel Entities' other creditors through the Interim Lenders' Charge, and approximately $38 million was authorized at that time. PricewaterhouseCoopers was appointed as the Monitor.

4 On May 29, 2020, the Court approved a process for the sale of the Accel Entities' assets to Third Eye, to be negotiated by PricewaterhouseCoopers. The combined sale of the Accel Entities was not found to be viable, so the Accel Energy sale proceeded, and the sale of Accel Holdings was anticipated to follow later.

5 Third Eye then brought a receivership application under the *Bankruptcy and Insolvency Act*, with PricewaterhouseCoopers appointed as Receiver, which was granted by the Court on June 12, 2020. At this stage, Third Eye was both an interim lender and the successful bidder, pursuant to a credit bid, for the purchase of the Accel Entities' assets. Third Eye did not merely want PricewaterhouseCoopers appointed as Receiver, it also wanted a Receiver to be appointed with the power to borrow, and for the Receiver's Borrowings Charge to take priority over all other charges, including the Interim Lenders' Charge. The receivership order provided:

> The priority of the charges created in the CCAA Proceedings (and continued by this Order) in relation to the Receiver's Charge and the Receiver's Borrowing Charge created hereunder, shall be as follows:
>
> First - the Receiver's Charge;
>
> Second - the Receiver's Borrowings Charge;
>
> Third - the Administration Charge as defined in the CCAA Proceedings;
>
> Fourth - the Interim Lenders' Charge as defined in the CCAA Proceedings;
>
> Fifth - the Intercompany Advance Charge as defined in the CCAA Proceedings;
>
> Sixth - the Directors' Charge as defined in the CCAA Proceedings.

6 The Receiver borrowed over $10 million after being appointed with the power to borrow. DGDP objected to the granting of this order, and later appealed it, arguing that the transaction should not have been approved unless the Interim Lenders' Charge was paid in full. This Court dismissed DGDP's appeal, holding that the supervising judge had the discretion and jurisdiction to approve the sale, and there was no indication of any error in principle in the way she exercised her discretion, nor was it unreasonable: 2021 ABCA 226, paras 20-22, 27, 36. See also *Canada v Canada North Group Inc* 2021 SCC 30, para 22.

7 On May 10, 2021, the Receiver brought an application for:

> 1) Advice and direction as to whether the Receiver may enter into a revised purchase and sale agreement with a subsidiary of Third Eye (Conifer), and
>
> 2) An order regarding the transaction contemplated by the revised purchase and sale agreement (and the assets subject thereto), providing that either:
>
> i. the Interim Lenders, including DGDP, agree to accept gross overriding royalties from the subsidiary of Third Eye, Conifer, as repayment in full of the interim financing facility; or

ii. the Court otherwise advises and directs the Receiver to enter into the revised purchase and sale agreement.

8 On May 12, 2021, amended June 4, 2021, Third Eye brought an application for an order:

1) Approving the granting of a gross overriding royalty from Conifer to DGDP, and

2) Declaring that this gross overriding royalty shall fully and finally satisfy and repay all amounts owing to DGDP under the interim financing facility.

9 DGDP opposed the validity of the revised purchase and sale agreement to Conifer, and in response brought its own application on May 21, 2021 to direct Conifer to grant a gross overriding royalty to DGDP with a proposal that differed from Third Eye's proposal in a number of ways. DGDP's proposal would apply to both current and future wells, whereas Third Eye's would only apply to existing wells. Also, the proposals differed on the opening balance amount, and on a number of technical terms. DGDP opposed Third Eye's proposed gross overriding royalty and objected to receiving it. PricewaterhouseCoopers says the real issues in dispute at that time were really only the commercial terms of the approved gross overriding royalty.

10 On June 14, 2021, the Court granted the Receiver's application, granted Third Eye's application, and approved Third Eye's proposed gross overriding royalty, holding that "[t]here is no commercial reason here to include future wells as the original bargain did not include these either" and that "[t]o do so here would be to unfairly burden Conifer on a going forward basis in very uncertain economic circumstances". The gross overriding royalty was granted in full and final satisfaction of DGDP's advances under the debtor-in-possession financing terms sheet. In making this order, the Court rejected DGDP's proposed alternative gross overriding royalty.

11 After the June 14, 2021 orders, DGDP applied for the following orders:

1) An order granting permission to appeal the entirety of the June 14, 2021 orders, or in the alternative, an order granting permission to appeal paragraphs 2 and 5 of the June 14, 2021 order that addressed the gross overriding royalty provisions; and

2) A stay (pending the determination of relief sought on appeal) of the June 14, 2021 orders which a) approved the sale transaction between the Receiver and Conifer, and b) granted the gross overriding royalty from Conifer to DGDP.

12 DGDP said the sale to Third Eye constituted an "illegal preference". PricewaterhouseCoopers opposed this application and sought a lifting of the stay that automatically arises under the *Bankruptcy and Insolvency Act* if leave is granted, arguing that if the stay was not lifted the transaction with Conifer would likely not close and there would be insufficient funds to continue the insolvency proceedings into September.

13 On August 10, 2021, a single judge of this Court dismissed DGDP's application for leave to appeal, and therefore the stay issue did not arise. It was held that the supervising judge was not prohibited from approving the sale, and was well-positioned to understand the impact of the order on DGDP's interests: 2021 ABCA 284. There was no evidence of an "illegal preference", para 56:

Additionally, far from being inferior, DGDP obtains an advantage through the GORR [gross overriding royalty]: its debt is ranked *pari passu* with the receivers borrowing charge, and the GORR attaches to Accel Energy's lands, which were transferred free and clear of the Interim Lenders Charge earlier this year.

14 As indicated, DGDP now applies for a stay of the June 14, 2021 orders pending DGDP's application for leave to appeal the August 10, 2021 order to the Supreme Court of Canada.

III. The test for a stay

15 Pursuant to s 65.1 of the *Supreme Court Act*, RSC 1985, c S-26, a judge of this Court may, on request of the party who has filed and served an application for leave to appeal, or before such filing and service if satisfied that the party seeking the stay intends to apply for leave to appeal and delay would result in a miscarriage of justice, order that the proceedings be stayed with respect to the judgment from which leave to appeal is being sought: *Baier v Alberta* 2006 ABCA 187, para 10, 26 CPC (6th) 234; *Lamouche v Calaheson* 2016 ABCA 227, paras 6, 8, 10, 15-16; *Ville de Montréal c Litwin Boyadjian inc (Syndic de Société de vélo en libre-service),*2019 QCCA 1152, para 35.

16 The familiar tripartite test for a stay pending appeal is set out in *RJR-MacDonald Inc v Canada (Attorney General),*[1994] 1 SCR 311, 334, 111 DLR (4th) 385. The applicant has the burden of showing that:

1) there is a serious question to be tried, or an arguable issue that is not frivolous or vexatious;

2) there will be irreparable harm if the stay is not granted; and

3) the balance of convenience favours granting the stay.

See also *Santoro v Bank of Montreal*, 2019 ABCA 423, paras 13-15; *Poole v City Wide Towing and Recovery Service Ltd*, 2020 ABCA 400, para 4.

a) Serious question to be tried

17 Generally, whether there is a serious question to be tried assesses whether the applicant's position is reasonably arguable and not frivolous or vexatious. However, in the context of a leave motion to the Supreme Court of Canada, there is an additional consideration of whether the Court might regard the matter as one of public and national importance: *Wenzel Downhole Tools Ltd v National Oilwell Varco, Inc,*2008 ABCA 434, para 3, 446 AR 93; *Santoro*, paras 19-20; *City Wide*, para 5.

18 This Court has also held that where there has already been an adjudication on the merits, rather than, for example, an interlocutory injunction application, the bar must be higher: *CNOOC Petroleum North America ULC v 801 Seventh Inc,*2020 ABCA 212, paras 16-17.

19 In the August 10, 2021 decision DGDP wishes to appeal, it was held that the issues at play here are "of little significance to bankruptcy practice generally and this action in particular", 2021 ABCA 284, para 50. Third Eye and PricewaterhouseCoopers say the issues on appeal are not of public or national importance.

20 DGDP submits that in the August 10, 2021 decision, the Court mischaracterized the issues by finding that the matter of the chambers judge's jurisdiction and discretion had been already addressed in DGDP's prior appeal of the June 12, 2020 order; the *Bankruptcy and Insolvency Act* contains no provisions applicable to the Court overturning existing priorities between secured creditors or altering contractual payment rights on approval of a receivership sale; and in order for a Court to have statutory discretion to strip a party of its legal rights, the empowering statute must have explicit language to that effect, citing *Crystalline Investments Ltd v Domgroup Ltd* 2004 SCC 3, para 43, [2004] 1 SCR 60.

21 I agree that the decisions below are not obviously of public or national importance. What DGDP seeks in essence is to be paid in priority in cash, not through the Third Eye gross overriding royalty, or in the alternative through its own proposed gross overriding royalty, a commercial dispute unique on these facts to these parties. Given the higher bar for the first tripartite factor after the detailed decisions on the merits, it is doubtful that DGDP meets the first criterion; however, given my findings below on irreparable harm, it is ultimately immaterial.

b) Irreparable harm

22 Irreparable harm is limited to harm that cannot be compensated by an award of costs or damages or otherwise satisfactorily redressed, rectified, or made right at some later point in time: *CNOOC*, paras 40-41; *City Wide*, para 9.

23 The August 10, 2021 decision held that DGDP will obtain an advantage from the gross overriding royalty, as its priority position will be improved and DGDP's share of the Interim Facility will be satisfied in full, particularly, says Third Eye, since it is grounded in an interest in land. The gross overriding royalty was considered to be a form of repayment, para 55:

> There can be no question that the GORR [gross overriding royalty] constitutes a form of repayment. The GORR provides for a stream of cash paid over time, with a put option that will force Conifer to repay the outstanding balance when the conditions of the put option are met.

24 DGDP disagrees, and argues that the Court cannot conclude that it will be repaid by the gross overriding royalty, because it is possible it will not be provided repayment in full due to royalties or through the put option. However, given that the issue of repayment is a solely financial matter in a commercial dispute, I am not convinced DGDP has established irreparable harm if the stay is not granted. Monetary disputes may be compensated by an award of damages or costs, or can be otherwise redressed or rectified, and do not constitute irreparable harm in this commercial context.

c) Balance of convenience

25 Given my findings on irreparable harm, it is unnecessary to address the balance of convenience. I make brief comments nonetheless.

26 The issue here is whether "the interests of the appellants in a stay outweigh the interests of the other stakeholders and the estate as a whole": *Matco Capital Limited v Interex Oilfield Services Ltd* 2007 ABCA 317, para 11.

27 Third Eye and PricewaterhouseCoopers submit that if the transaction is not closed expeditiously, this will render it likely unfeasible to do so in the future, and the entirety of the receivership proceedings may collapse due to the financial realities facing the estate, to the detriment of the whole body of stakeholders. Third Eye has advised that there are no further funds to run the operations or carry out another sales process. It is important, they argue, that this transaction close promptly to get the assets into the hands of a solvent entity, Conifer. In comparison, if a stay is not granted, they say DGDP will be repaid in full through the gross overriding royalty and thus suffer no prejudice.

28 I agree. The balance of convenience favours Third Eye and PricewaterhouseCoopers in this case.

29 Additionally, the denial of a stay will not result in a miscarriage of justice in this commercial context.

IV. Conclusion

30 The applicant has not met the test for a stay pending leave to appeal to the Supreme Court of Canada. Accordingly, the application is dismissed.

Application dismissed.

Appendix: Chronology of Events"A"

Date	Event
October 21, 2019	Energy and Holdings each filed a notice of intention to make a proposal pursuant to the Bankruptcy and Insolvency Act. PricewaterhouseCoopers Inc. LIT acted as the proposal trustee. {30}
November 22, 2019	Energy and Holdings' BIA proposal proceedings are converted and continued under the Companies' Creditors Arrangement Act by the issuance of an Initial Order by Mah J. PricewaterhouseCoopers Inc. LIT was appointed as the Monitor.{31}
November 27, 2019	The Initial Order is amended and restated by Horner J. (the "ARIO"). Amongst other things, the ARIO authorized Accel to borrow monies under the Interim Facility, provided jointly by two lenders arranged by Third Eye Capital Corporation ("TEC") and 2228139 Alberta Ltd. ("222") as to 53.33% and 46.67% respectively of the Interim Facility, and granted them the Interim Lender's Charge as security for such advances. Energy and Holdings are jointly and severally liable for the Interim Facility and cross-guaranteed advances thereunder. Further,

	TEC is the Interim Lenders' agent ("DIP Agent") and is authorized to act in its sole discretion pursuant to the applicable Interim Financing Agreement and agency—agreement.{32}
December 13, 2019	Horner J. granted an order approving a sales and investment solicitation process—("CCAA SISP") to be conducted by Accel with the assistance of TD Securities as selling agent and oversight of the Monitor. 33
May 29, 2020	Horner J. granted an order: i) declaring the TEC Bid to be the Successful Bid—pursuant to the CCAA SISP; ii) approving the Support Agreement between inter

30 Receiver's Key Evidence, pp 010-022: Lu Affidavit, Exhibit I: Application by Receiver: Advice & Directions at para 8.

31 Receiver's Key Evidence, pp 491-509: Affidavit of Christopher Morris, sworn November 30, 2020 **[Morris Affidavit]**, Exhibit D: Initial CCAA Order.

32 Receiver's Key Evidence, pp 436-479: Morris Affidavit, Exhibit A: Second Amended and Restated DIP Financing Term Sheet; Receiver's Key Evidence, pp 480-490: Morris Affidavit, Exhibit B: Agency Agreement; Receiver's Key Evidence, pp 510-534: Morris Affidavit: Exhibit E: ARIO.

33 Receiver's Key Evidence, pp 597-614: Affidavit of Stella Kim, sworn November 24, 2020 **[Kim Affidavit]**, Exhibit

B: Order Approving Sale and Investment Solicitation Process.

	alia TEC and Stream Asset Financial Winterfresh LP ("Stream"), whereby Stream agreed support the TEC Bid; and iii) authorizing and directing the Monitor to negotiate a definitiv purchase and sale agreement with TEC in—accordance with the TEC Bid.{34}
June 10, 2020	DGDP took an assignment of 222's interest in the Interim Facility. At the time of the assignment, DGDP was aware of a pending receivership application by TEC against Acce and the priorities sought with such receivership order. DGDP objected to the contemplated subordination of the Interim Lenders' Charge to the—Receiver's Borrowings Charge.{35}
June 11, 2020	TEC offers DGDP the opportunity to fund the Receiver's Borrowings. 36
June 12, 2020	Horner J. granted TEC's application for a receivership order over Accel. Amongst other th the Receivership Order: i) appointed PwC as Receiver over Accel and its Property; and ii) granted two additional Court-ordered charges, being the Receiver's Charge and the Receiv Borrowings Charge, both of which were given priority over the previously granted Interim Lenders' Charge.37
June 25, 2020	DGDP filed its first application for leave to appeal the terms of the Receivership—Order granted the Receiver's Borrowings Charge priority over the Interim Lenders' Charge ("DG Leave to Appeal #1").38
July 13, 2020	Hughes J.A. enters a Consent Order whereby DGDP, TEC and the Receiver all agreed to: adjourn DGDP Leave to Appeal #1 sine die; ii) that there would be no stay of proceedings pursuant to s. 195 of the BIA; and iii) that all funding provided by TEC to the Receiver in accordance with Receiver's Certificates would enjoy the benefit of the Receiver's Borrowi Charge, subject to the—outcome of DGDP Leave to Appeal #1.39

34 Receiver's Key Evidence, pp 551-557: Morris Affidavit, Exhibit H: Order (Selection of Successful Bid, Approval of Support Agreement, Sealing).

35 Receiver's Key Evidence, pp 542-550: Morris Affidavit, Exhibit G: Assignment of DIP Indebtedness and Security; Receiver's Key Evidence, pp 580-582: Affidavit of Dominique Huber, sworn June 11, 2020 **[Huber Affidavit],** Exhibit I: June I 0, 2020 letter from DGDP counsel to TEC counsel.

36 Receiver's Key Evidence, pp 583-586: Huber Affidavit, Exhibit 2: June 11, 2020 letter from TEC counsel to DGDP counsel.

37 Receiver's Key Evidence, pp 558-577: Morris Affidavit, Exhibit J: Consent Receivership Order.

38 Receiver's Key Evidence, pp 587-589: Application for Permission to Appeal, filed June 25, 2020.

39 Receiver's Key Evidence, pp 590-592: Consent Order of Justice Hughes, filed July 13, 2020.

October 23, 2020	DGDP requested that DGDP Leave to Appeal #1 be returned to the chambers list—fo hearing.{40}
December 4, 2020	McDonald J.A. grants DGDP leave to appeal in DGDP Leave to Appeal # l.41
December 4, 2020	Horner J. granted an order (the "Energy SAVO") approving the Energy—Transaction the opposition raised by DGDP.42
December 14, 2020	DGDP filed its second application for leave to appeal the Energy SAVO on the basis Horner J. did not have the jurisdiction to vest out the Interim Lenders' Charge against Energy assets, without its consent, in circumstances where Holdings' obligations und Interim Facility remained outstanding ("DGDP—Leave to Appeal #2").{43}
January 29, 202 l	Wakeling J.A. grants DGDP leave to appeal in DGDP Leave to Appeal #2;—howeve grants TEC's cross-application to lift the stay of proceedings to allow the Energy Tra close. {44}
February 23, 202 l	The Energy Transaction closes and DGDP receives a cash payment in full—satisfact amount borrowed by Energy under the Interim Facility, being over $7 million.45
April 22, 202 l	TEC proposed a draft asset purchase and sale agreement to the Receiver to complete Holdings Transaction, through which Conifer would acquire the majority of Holding substantially via a credit bid of a material portion of the pre-filing debt owed to it by (the "Holdings APA"). As the cash consideration set out in the original en bloc TEC less the cash already utilized in the Energy Transaction, was insufficient to repay in c remaining amounts secured by the Interim Lenders' Charge, the Holdings APA conte repayment of the Interim Lenders' Charge and Receiver's Borrowings Charge (funde through a GORR prior to closing (the

40 Receiver's Key Evidence, pp 615-620: Kim Affidavit, Exhibit J: October 23, 2020 correspondence to ABCA requesting hearing of Leave to Appeal Application.

41 *DGDP-BC Holdings Ltd v Third Eye Capital Corporation.* 2020 ABCA 442.

42 Receiver's Key Evidence, pp 621-711: Sale Approval and Vesting Order of Justice Horner, filed December 4, 2020.

43 Receiver's Key Evidence, pp 712-716: Application for Permission to Appeal, filed December 14, 2020.

44 *DGDP-BC Holdings v Third Eye Capital Corp, Pricewaterhouse Coopers.* 2021 ABCA 33.

45 Receiver's Key Evidence, pp 717-725: Second Report of the Receiver to the Court of Appeal **[Receiver's Second Report]** at paras 2.1-2.7, Appendices "A", "B".

"Conifer GORR"). The Conifer GORR contemplated being applied to the assets in th Holdings APA, as well as the previously-acquired Energy and "ACRL assets". At the Holdings owed approximately $23.9 million under the Interim Facility, approximatel million of which was owed to DGDP. The TEC related Interim Lenders agreed to acc satisfaction of the Interim Facility—through the granting of the Conifer GORR. DGI {46}

May 10, 2021	The Receiver filed an application for advice and direction with respect to the propose Holdings APA, and specifically whether the Receiver could enter into same given the contemplated repayment of the Interim Lenders' Charge by way of the granting of the GORR. Subject to the Court answering that question in the affirmative, the Receiver sought a sale approval and vesting order—respecting the Holdings APA (the "Holdin SAVO").47
May 12, 2021	TEC filed an application for approval of the Holdings SAVO and the Conifer GORR final satisfaction ofall amounts advanced by DGDP to Holdings—(the "TEC GORR'
May 21, 2021	DGDP filed an application for approval of a GORR, albeit on different commercial te the TEC GORR (the "DGDP GORR"). One of the variations in terms was the inclusi DGDP's outstanding legal fees and accrued interest in the "Opening Balance" of the I GORR. The TEC GORR did not include the legal fees and the interest varied due to a waiver given—by TEC as DIP Agent in February 2021. {49}
June 7, 2021	Watson J.A., Slatter J.A. and Khullar J.A. heard oral argument from respective couns DGDP, TEC and the Receiver on the two appeals underlying DGDP—Leave to Appe DGDP Leave to Appeal #2.50

46 Receiver's Key Evidence, pp 048-066: Lu Affidavit, Exhibit 5: Fourth Report of the Receiver at paras 5.3-5.6; Receiver's Key Evidence, pp 067-122: Lu Affidavit, Exhibit 9: Supplement to the Fourth Report of the Receiver **[Supplement]** at Appendix C, Recital H, para 3.2(d). "ACRL Assets" are assets that were previously owned by Accel Canada Resources Limited and sold to TEC in separate receivership proceedings. Receiver's Key Evidence, pp 346- 412: Lu Affidavit, Exhibit 13: Transcript of Proceedings dated June 14, 2021 **[Oral Decision),** 2:21-29.

47 Receiver's Key Evidence, pp 0 I 0-022: Lu Affidavit, Exhibit I: Application by Receiver: Advice & Directions.

48 Receiver's Key Evidence, pp 005-009 and 023-034: Lu Affidavit at para 3, Exhibit 2: TEC Application (as amended).

49 Receiver's Key Evidence, pp 035-047: Lu Affidavit, Exhibit 3: DGDP Application.

50 *DGDP-BC Holdings Ltd v Third Eye Capital Corporation.* 2021 ABC,A 226.

June 11, 2021	Horner J. heard the Receiver's May 10th Application, TEC's May 12th Application— amended on June 4{th}{,} 2021), and DGDP's May 21{st} Application, concurrently DGDP seemingly acknowledging it would accept a GORR as a means of satisfying t Facility, the Receiver sought approval of the Holdings APA and SAVO if, as a prelim matter, the Court found it had jurisdiction to grant—either GORR. {51}
June 14, 2021	Horner J. granted the Holdings SAVO, authorizing the Receiver to enter into the Hol APA, and granted TEC's Application in favour of the TEC GORR, subject to revising Opening Balance thereunder to include DGDP's requested legal fees and interest (set the purported interest waiver) in full and final satisfaction of DGDP's advances to Ho under the Interim Facility (the—"Holdings SAVO/GORR Decision").52
June 17, 2021	Watson J.A., Slatter J.A. and Khullar J.A. delivered a concurring decision dismissing appeals raised in each of DGDP Leave to Appeal #1 and—DGDP Leave to Appeal #
June 24, 2021	DGDP filed its third application for leave to appeal the Holdings SAVO/GORR Deci the basis that Horner J. did not have the jurisdiction to grant such orders, without its in circumstances where a credit bid would "clearly—constitute an illegal preference" Leave to Appeal #3").{54}

August 10, 2021	Veldhuis J.A. dismissed DGDP Leave to Appeal #3.55—TEC notified DGDP of the anticipated closing date of the Holdings Transaction,—and requests copies of DGDP invoices for the purposes of calculating the Opening Balance under the TEC GORR.

51 Receiver's Key Evidence, pp 067-122: Lu Affidavit, Exhibit 9: Supplement at para 6; Receiver's Key Evidence, pp 346-412: Lu Affidavit, Exhibit 12: Transcript of Proceedings dated June 11, 2021, 55:32-56:22.

52 Receiver's Key Evidence, pp 413-424: Lu Affidavit, Exhibit 13: Oral Decision, 5:21-37; Receiver's Key Evidence, pp 123-341: Lu Affidavit, Exhibit I 0: Sale Approval and Vesting Order of Justice Horner; Receiver's Key Evidence, pp 342-345: Lu Affidavit, Exhibit 11: TEC GORR Order.

53 *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*,. 2021 ABCA 226.

54 Receiver's Key Evidence, pp 726-729: Application for Permission to Appeal, filed June 24, 2021.

55 *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 284.

56 Third Report, Appendix "B".

August 13, 2021	DGDP advised TEC and the Receiver of its intention to seek leave to appeal Veldhui Decision dismissing leave to appeal to the Supreme Court of Canada, and a stay of ex of the Decision pending leave. DGDP also delivers the requested legal invoices.{57} Receiver advised DGDP that it expects DGDP to imminently make—scheduling arra with the Court of Appeal for the hearing of the stay application.58
August 17, 2021	DGDP advised the parties that based on its communications with the Court of Appea earliest possible hearing date for DGDP's application for a stay was either September September 23rd, 2021. 59—The Receiver wrote to the Case Management Office of t of Appeal requesting assistance in scheduling DGDP's application for a stay on an ur expedited basis.60
August 18, 2021	The Court of Appeal Registry, on behalf of the CMO, advised the parties to file—the application materials forthwith for consideration of an expedited and urgent hearing b Duty Justice .61
August 20, 2021	DGDP files its Application for a Stay of Proceedings Pending Leave to Appeal to—t Supreme Court of Canada.

57 Third Report, Appendix "B".
58 Third Report, Appendix "B".
59 Third Report, Appendix "B".
60 Third Report, Appendix "B".
61 Third Report, Appendix "B".

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TAB 16

2023 BCCA 368
British Columbia Court of Appeal

British Columbia v. Peakhill Capital Inc.

2023 CarswellBC 2801, 2023 BCCA 368, 2023 A.C.W.S. 4758

His Majesty the King in Right of the Province of British Columbia (Appellant / Respondent) and Peakhill Capital Inc. (Respondent / Petitioner) and KSV Restructuring Inc., Cenyard Pacific Developments Inc., and Cenyard Southview Gardens Ltd. (Respondents / Respondents)

Saunders J.A., In Chambers

Heard: September 25, 2023
Judgment: September 25, 2023
Docket: Vancouver CA49320

Counsel: O.J. James, for Appellant
W.L. Roberts, A.T. Paczkowski, for Respondent, Cenyard Southview Gardens Ltd.
J.D. Schultz, E. Newbery, for Respondent, Cenyard Pacific Developments Inc.
V.L. Tickle, for Respondent, KSV Restructuring Inc.
E. Laskin, for Respondent, Peakhill Capital Inc.

Subject: Civil Practice and Procedure; Insolvency; Property; Provincial Tax

Headnote

Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — Miscellaneous

Creditor protection proceedings were commenced under Companies' Creditors Arrangement Act — Reverse vesting order was granted approving sale transaction in respect of lands — Province appealed order approving sale which triggered s. 195 of Bankruptcy and Insolvency Act, automatically staying all proceedings under judgment until appeal was disposed of — C Ltd. applied for order lifting stay of proceedings — Application granted — Test to consider for lifting stay of proceedings was same three-part test that was usually applied — There was serious question to be determined and there would be irreparable harm if stay was not lifted — Balance of convenience favoured lifting stay with terms proposed.

APPLICATION for order lifting stay of proceedings.

***Saunders J.A., In Chambers*:**

1 The applicant, Cenyard Southview Gardens Ltd., applies for an order lifting a stay of proceedings that was triggered by s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3.

2 The creditor protection proceedings were commenced under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, by Coromandel Properties (2016) Ltd. KSV Restructuring Inc. is the receiver of Coromandel's assets pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, and it has, in particular, the purpose of conducting the court-supervised sale of land that is the subject of disagreement between the parties.

3 The appeal arises from a reverse vesting order granted by Mr. Justice Loo on August 25, 2023, approving a sale transaction in respect of lands in the city of Vancouver, British Columbia. The Province of British Columbia took the position before Mr. Justice Loo that the reverse vesting order should not be granted and that the property should be transferred the way we are usually accustomed to property transferring, attracting property transfer tax. The result of this transaction going by reverse vesting order is that no property transfer tax is payable.

4 The Province is the appellant and is appealing the order approving the sale. The appeal triggered s. 195 of the *Bankruptcy and Insolvency Act* which automatically stays all the proceedings under a judgment until the appeal is disposed of.

5 The issues on appeal are likely to be a jurisdictional point as to whether a reverse vesting order can be made under the *Bankruptcy and Insolvency Act* and, also, the implications of the transaction on payment of property transfer tax that would be payable were the property to be disposed of through the alterative of a normal vesting order.

6 The sale transaction is scheduled to close on September 29, 2023, and the appeal cannot be heard before that date. In fact, some confidence is required earlier than that date in order to free up the financing for the closing on September 29. This is the reason we are hearing this on short notice today.

7 Cenyard applies for an order lifting the statutory stay so that the sale transaction can complete on time and the application has been prepared so as to acknowledge that the funds should be secured in an appropriate way so that the Province is not prejudiced.

8 The application is conceptually a stay of the statutory stay. The test to consider for lifting the stay of proceedings here is the same three-part test that this court usually applies to stays under *RJR-MacDonald Inc. v. Canada (Attorney General),*, [1994] 1 S.C.R. 311:

> a) there is some merit to the appeal in the sense that there is a serious question to be determined;
>
> b) the party seeking the stay will suffer irreparable harm if the stay is not granted; and
>
> c) the balance of convenience favours a stay.

9 I certainly recognize that there is a serious question here to be determined, it is of importance to the parties and it is of importance to the practice. There is some merit to the appeal - I understand that the large issue of jurisdiction has not been looked at by appellate courts and so this is a new issue in bankruptcy practice. And one cannot say that the applicant has not met that first test.

10 There will be irreparable harm if the stay is not lifted - the transaction is highly unlikely to proceed, the offers that were made other than this offer were quite inferior to this one so there will be financial losses to the parties, and other matters will fall out from the collapse of the transaction - including a loss of deposit. Third, the balance of convenience clearly favours lifting the stay with the terms proposed.

11 The parties have worked together to prepare an order that they either consent to, or do not oppose. I think, as I hear it today, they are consenting to at least some of the terms, if not all of the terms. I am certainly satisfied that the order applied for should issue and I will read it into the record.

12 The transaction is referred to as the "Primary Transaction" and I will order that the stay imposed by operation of s. 195 of the *Bankruptcy and Insolvency Act* of the order of Mr. Justice Loo pronounced on August 25, 2023 granting a reverse vesting order in the action below is lifted on these terms:

> 1. Upon closing of the Primary Transaction, the Applicant, or its assignee Cenyard Investments Ltd. (the "Assignee"), will pay $3,342,100 (the "Disputed Amount") into trust with its solicitors, Lawson Lundell LLP, and the Disputed Amount will be held in trust by Lawson Lundell LLP on the terms set out in paragraph (2) below, unless otherwise agreed to in writing by the Applicant, or the Assignee and the Appellant, or pursuant to a further order of this Court;
>
> 2. If the appeal is allowed, the Disputed Amount will be paid to the Appellant upon the expiry of the applicable appeal period. If the Appeal is dismissed, the Disputed Amount will be repaid to the Applicant or the Assignee upon the expiry of the applicable appeal period. If a further appeal, or an application for leave to appeal from the Court of Appeal's decision is filed, the Disputed Amount shall remain in trust with Lawson Lundell LLP, pending determination of the further appeal or application for leave to appeal, as the case may be;

3. By consent, no party to this appeal, including the Assignee, may assert the appeal is moot as a result of the closing of the Primary Transaction referred to in the reverse vesting order, or assert that the appeal ought not to be allowed as a result of this order; and

4. By consent, if the Primary Transaction referred to in the reverse vesting order closes, the remedies on appeal will be limited to remedies related to the Disputed Amount and costs of the appeal, and the Primary Transaction will stand and will not be reversed.

13 Costs of this application will be in the cause.

[Discussion with counsel re: clarifying order and dispensing with signatures]

14 Because this order is by consent, I ask that counsel sign the order.

Application granted.

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TAB 17

2022 ABCA 185
Alberta Court of Appeal

HML Contracting Ltd v. Pinder

2022 CarswellAlta 1240, 2022 ABCA 185, [2022] A.W.L.D. 2764, 2022 A.C.W.S. 1442, 47 Alta. L.R. (7th) 263

HML Contracting Ltd. (Respondent / Plaintiff) and Daniel Pinder (Appellant / Defendant) and Twisted Pair Technical Services Inc. (Not a Party to the Appeal / Defendant)

Frederica Schutz, Elizabeth Hughes, Bernette Ho JJ.A.

Heard: March 1, 2022
Judgment: May 17, 2022
Docket: Edmonton Appeal 2103-0265AC

Proceedings: affirming *HML Contracting Ltd. v. Twisted Pair Technical Services Inc.* (2021), 38 Alta. L.R. (7th) 392, 2021 ABQB 8992021 CarswellAlta 2831, L.K. Harris J. (Alta. Q.B.)

Counsel: B.W. Mielke, M. Deren-Dube, for Respondent
M.P. Blimke, P.J.C. Prowse (No Appearance), M. Boyles (No Appearance), for Appellant

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — Stay of execution

Plaintiff was granted judgment against defendant guarantor — There was second action by defendant against plaintiff and others, in which defendant alleged he was squeezed out of business in breach of unanimous shareholders agreement, and this resulted in default on loan — Defendant brought appeal from judgment granted against him pursuant to guarantee — Defendant's application for stay of execution pending appeal was dismissed — Defendant appealed — Appeal dismissed — Notwithstanding error in conflating test for equitable set-off with test for a stay of execution, trial judge ultimately applied correct legal test for stay of execution.

APPEAL by defendant from judgment reported at *HML Contracting Ltd. v. Twisted Pair Technical Services Inc.* (2021), 2021 ABQB 899, 2021 CarswellAlta 2831, 38 Alta. L.R. (7th) 392 (Alta. Q.B.), dismissing defendant's application for stay of proceedings pending appeal.

***Per curiam*:**

1 The appellant, Daniel Pinder, appeals the dismissal of his application for a stay of execution of a summary judgment granted against him pending the resolution of a separate but related action.

2 For the reasons that follow, the appeal is dismissed.

Background

3 This appeal concerns two related actions that arise out of the same series of transactions. The first action relates to the enforcement of a guarantee and the second action is a shareholder dispute.

4 In 2015, Mr. Pinder's company, Twisted Pair Technical Services Inc. (Twisted Pair), and its competitor HML Contracting Ltd. (HML) merged. As part of the merger, Mr. Pinder agreed to sell his interest in Twisted Pair and buy shares in 1917959 Alberta Ltd (191). The parties signed a unanimous shareholder agreement to give effect to the arrangement. As part of this

transaction HML also agreed to advance a loan to Twisted Pair in the amount of $300,000 by way of promissory note. As a condition of the loan, HML sought an executed personal guarantee from Mr. Pinder.

5 In early 2016, HML demanded payment on the loan and then filed a Statement of Claim against Twisted Pair and Mr. Pinder (the Guarantee Action). By the end of 2016, a receiver was appointed over Twisted Pair and Twisted Pair was assigned into bankruptcy. In 2020, HML obtained summary judgment against Mr. Pinder in the amount of $176,900.59 for the outstanding balance of the loan plus costs of $111,906.58 for a total of $288,807.17. That judgment was upheld on appeal: *HML Contracting Ltd v Pinder*, 2022 ABCA 184.

6 In 2021, Mr. Pinder applied, under section 17(1) of the *Judicature Act*, RSA 2000, c J-2, for a stay of execution of the summary judgment in the Guarantee Action pending the resolution of the separate but related shareholder dispute. In the ongoing shareholder dispute, Mr. Pinder — in his capacity as shareholder of 191 — is a plaintiff and HML is one of the defendants (the Shareholder Action). In 2019, Mr. Pinder filed a claim seeking $3 million in damages for breach of contract, breach of fiduciary duty, and oppression from HML, GCS General Contracting Services Inc., and their principals: Mark Beck and Casey Beckhuson. The claim was later amended in 2021 to add 191 as a plaintiff and add another corporate defendant. Mr. Pinder submits that the only assets that could be used to satisfy the summary judgment are his shares in 191, and if the stay is not granted the respondent could seize those shares bringing the Shareholder Action to an end. Alternatively, he submits that HML could petition him into bankruptcy.

7 The chambers judge dismissed Mr. Pinder's application for a stay of execution: *HML Contracting Ltd v Twisted Pair Technical Services Inc*, 2021 ABQB 899. The chambers judge interpreted *Royal Trust Corporation of Canada v Kendal Adjusters Ltd (Dairy Queen)* 1984 ABCA 241 (Alta. C.A.) as standing for the proposition that the court has "discretion to order a stay of execution under the *Judicature Act*, and further, that it [has] inherent jurisdiction to order a stay of proceedings to allow time for related proceedings to conclude where the related proceedings provided the judgment debtor with a just claim for damages that could be set off against the judgment already obtained": 2021 ABQB 899 at para 8. The chambers judge held that this discretion was not unfettered and may only be exercised in circumstances where there is a "plausible counterclaim or set off" or "where exceptional circumstances exist", relying on *Schacher v National Bailiff Services*, 1999 ABQB 46 at para 61 and *Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited (AMEC E&C Services Limited and AGRA Monenco Inc)*, 2015 ABQB 429 at para 12, aff'd 2015 ABCA 406 (Alta. C.A.) [*Attila QB*,].

8 The chambers judge held that to satisfy either the "plausible counterclaim or set off" or "exceptional circumstances" requirement, it was necessary that both actions have mutuality of parties: 2021 ABQB 899 at para 37 citing *Chubak v Corner Brook Farms Ltd*, 2015 ABQB 806. The chambers judge noted that while *Schacher* and *Royal Trust* were silent on mutuality, that silence was likely due to mutuality of parties not being an issue in either of those cases. The chambers judge found that there was a lack of mutuality of parties as between the Guarantee Action and the Shareholder Action, and therefore Mr. Pinder could not establish that there exists either a "plausible counterclaim or set off" or "exceptional circumstances" to justify a stay (2021 ABQB 899 at para 36):

> HML has a judgment against Pinder. But it is Pinder who claims against not only HML, but also Mark Beck, Casey Beckhuson and GCS General Contracting Services Inc. for the breach of the USA. Conceivably Pinder could obtain a judgment against Defendants other than HML, in which case there could be no set off.

9 For that reason, the application for a stay of execution pending resolution of the Shareholder Action was dismissed.

10 In the alternative, the chambers judge held that Mr. Pinder could not meet the tripartite test for a stay of proceedings *pending appeal* because he would not suffer irreparable harm if the summary judgment was enforced, and the balance of convenience was not in Mr. Pinder's favour.

11 Both parties acknowledge that the chambers judge's reasons wrongly state that Mr. Pinder was seeking a stay pending appeal.

Grounds of Appeal and Parties' Positions

12 While Mr. Pinder's factum argues two separate grounds of appeal, these are merely restatements of the same ground of appeal, namely that the chambers judge applied the wrong test for a stay of execution pending resolution of a second action.

13 Mr. Pinder argues that the chambers judge erred in stating that he was seeking a stay pending appeal and that this error tainted the remainder of the chambers judge's analysis. He argues that this error caused her to apply the wrong test and to consider the wrong facts. Mr. Pinder points to paragraph 56 of the chambers judge's decision where, with respect to the balance of convenience under the tripartite test, the chambers judge considered that the appeal in the Guarantee Action was scheduled to be heard in four months. Mr. Pinder argues that the timing of the appeal in the Guarantee Action was irrelevant to the remedy sought.

14 The respondent argues that this error is of no consequence, and that it is clear from the entirety of the chambers judge's reasons that the relevant considerations for a stay of execution pending resolution of the Shareholder Action were considered.

Standard of Review

15 The applicable standard of review is set out in *Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited*, 2015 ABCA 406 at para 13 [*Attila CA*]:

> The statement of the legal test for a stay is a question of law reviewed for correctness. Findings of fact, such as those relating to irreparable harm and the balance of convenience, are entitled to deference. The ultimate exercise of . . . discretion in granting or denying a stay will not be overruled unless it is based on an error of principle, or is unreasonable: *WestJet v ELS Marketing Inc*., 2014 ABCA 372 at para. 4, 13 Alta LR (6th) 181; *Alberta (Treasury Branches) v Ghermezian*, 2000 ABCA 61 at para. 10, 250 AR 327.

Analysis

16 Section 17(1) of the *Judicature Act* states:

> **Stay of proceedings**
>
> 17(1) In a proceeding
>
> (a) for the recovery of a debt or liquidated demand,
>
> (b) for the enforcement of a security or charge on land,
>
> (c) for the determination or specific performance of an agreement for the sale of land, or
>
> (d) for the possession of land,
>
> the Court in its discretion may at any stage of the proceeding grant a stay of proceedings on any terms that the Court may prescribe, and in like manner the Court in its discretion may with or without imposing terms, after final judgment in any proceeding whatsoever, grant a stay of execution of an order for sale or of other similar process, including a stay of an order for possession of land, and may by an order granting the stay extend the time for payment of a judgment debt or the time for doing any act or making any payment prescribed by a previous order of the Court.

17 As noted by the chambers judge, Rule 1.4(2)(h) of the *Alberta Rules of Court*, Alta Reg 124/2010 also authorizes the court to "adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order".

18 The test for a stay of execution of a judgment pending resolution of a second action is the well-known tripartite test. The applicant must show (1) that there is an arguable issue, (2) that it will suffer irreparable harm if the stay is not granted, and

(3) that the balance of convenience between the parties favors the granting of a stay: *Attila CA* at para 33; see also *Desautels Creative Printing Papers Inc v Printcrafters Inc*, (1999), 138 Man R (2d) 309, [2000] 4 WWR 575 (CA).

19 Even if the tripartite test is not met, the court has a residual discretion to grant a stay "when the interests of justice so require": *Attila CA* at para 33.

20 Lack of mutuality of parties is not a bar to a stay of execution of a summary judgment. The chambers judge erred in finding that *Chubak* establishes a threshold requirement of mutuality by conflating the test for equitable set-off with the test for a stay of execution.

21 In *Chubak*, the party resisting summary judgment raised the defence of equitable set-off on the basis of a separate action that sought damages for breaches of separate agreements. Whether equitable set-off requires mutuality of parties was the issue squarely before Master Robertson. Relying on the leading authority *Holt v Telford*, [1987] 2 SCR 193, as well as the legal distinction between a corporate entity and its shareholders, Master Robertson held that the resisting party could not rely on the defence of equitable set-off and summary judgment was granted. Master Robertson then considered the alternative argument of whether to grant a stay of execution of the summary judgment. At para 61, Master Robertson correctly stated that the test for a stay of execution is the tripartite test. As there was no evidence on irreparable harm, he went on to consider whether a stay ought to be granted under the court's inherent jurisdiction but declined to do so.

22 While claims for equitable set-off and applications for a stay of execution of a judgment often arise at the same time, they are distinct legal concepts for which separate considerations apply. A stay of execution pending the determination of a second action is not a set-off although it may ultimately produce a situation where there might be a set-off: *Royal Trust* at para 14. On the flip side, the existence of a plausible counterclaim or set-off does not on its own justify a stay: *Attila QB* at para 26 citing *Bernum Petroleum Ltd v Birch Lake Energy Inc,*2014 ABQB 652 at para 114.

23 Notwithstanding the chambers judge's error in conflating the test for equitable set-off with the test for a stay of execution, given the alternate analysis starting at paragraph 39 of her reasons we are not persuaded that the chambers judge erred by applying the wrong test for a stay. While the chambers judge misstated that Mr. Pinder sought a stay of the judgment obtained in the Guarantee Action pending its appeal, rather than pending the outcome of the Shareholder Action, we are of the view that this did not materially affect her decision because she considered the substance of each of the arguments advanced by Mr. Pinder.

24 The chambers judge started her consideration of the tripartite test by reviewing the merits of the Shareholder Action, thus she was aware the Shareholder Action was relevant to deciding the application before her. She ultimately agreed with Mr. Pinder that he only needed to establish that he had an arguable case to meet the first part of the tripartite test, which was a low threshold. She concluded that Mr. Pinder met the first part of the test.

25 The chambers judge then turned to whether Mr. Pinder had established he would suffer irreparable harm should a stay not be granted. She determined that the evidence did not support a conclusion that Mr. Pinder would suffer irreparable harm. She did not accept that Mr. Pinder would suffer irreparable harm if his shares in 191 were seized because there was no evidence as to what those shares might be worth. She considered Mr. Pinder's argument that a bankruptcy would cause him to lose control over the Shareholder Action to be speculative, and that he provided no details as to his net worth, assets, or liabilities to demonstrate that he did not have enough cash and assets to pay the judgment granted in the Guarantee Action.

26 We conclude that the chambers judge ultimately applied the correct legal test for a stay of execution of a judgment pending resolution of a second action and her findings relative to the evidence before her are entitled to deference. She was also aware of the court's inherent jurisdiction to issue a stay. In the end result, based on the record, we are not satisfied that the chambers judge's misapprehension of the length of time that the stay would be in place caused her to err in principle or exercise her discretion in an unreasonable manner when she refused to grant a stay.

Conclusion

27 The appeal is dismissed.

Appeal dismissed.

End of Document

TAB 18

2013 ONSC 3284
Ontario Superior Court of Justice [Commercial List]

Ghana Gold Corp., Re

2013 CarswellOnt 7793, 2013 ONSC 3284, 229 A.C.W.S. (3d) 328

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

And In the Matter of a Plan of Compromise or Arrangement of Ghana Gold Corporation, Ghana Gold Inc., Coastal Explorations Limited and Aburi Goldfields Ghana Ltd.

Newbould J.

Heard: June 3, 2013
Judgment: June 7, 2013
Docket: CV-13-10107-00CL

Counsel: C. Michael Citak, G.F. Camelino for Minatura (BVI) Ltd.
John T. Porter, Kyla E.M. Mahar for Applicants
Ian Aversa for FCMI Parent Co. and FCMI Financial Corporation
Greg Azeff, Asim Iqbal for Monitor Ernst & Young Inc.

Subject: Insolvency; International; Civil Practice and Procedure; Contracts; Corporate and Commercial; Environmental; Torts

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Debtors were four related mining companies — Debtors C. Ltd. and A. Ltd. were involved in joint venture with M. Ltd. in Ghana — M. Ltd. was to acquire 50 per cent interest in A. Ltd. — C. Ltd. and A. Ltd. commenced action, apparently in Ontario, against M. Ltd. for damages for breach of shareholders' agreement — M. Ltd. commenced action in Ghana against C. Ltd. and A. Ltd. for specific performance, injunctive relief, and accounting — Debtors successfully applied for protection under Companies' Creditors Arrangement Act — M. Ltd. brought motion for order removing debtor A. Ltd. from creditor protection proceedings and requiring dispute involving A. Ltd. to be resolved in Ghana — Motion dismissed — There had been no failure to make material disclosure when debtors applied for protection under Act — Dispute with M. Ltd. had been quite apparent in pleadings that had been exhibits to affidavit — A. Ltd. was properly classified as debtor under control of C. Ltd. — Removal of A. Ltd. from creditor protection proceedings would be prejudicial to restructuring — M. Ltd. did not satisfy requirements for injunctive relief pending resolution of dispute — Ontario had jurisdiction over all issues in dispute and was more appropriate forum than Ghana.

Conflict of laws --- Bankruptcy — General principles

Debtors were four related mining companies — Debtors C. Ltd. and A. Ltd. were involved in joint venture with M. Ltd. in Ghana — M. Ltd. was to acquire 50 per cent interest in A. Ltd. — C. Ltd. and A. Ltd. commenced action, apparently in Ontario, against M. Ltd. for damages for breach of shareholders' agreement — M. Ltd. commenced action in Ghana against C. Ltd. and A. Ltd. for specific performance, injunctive relief, and accounting — Debtors successfully applied for protection under Companies' Creditors Arrangement Act — M. Ltd. brought motion for order removing debtor A. Ltd. from creditor protection proceedings and requiring dispute involving A. Ltd. to be resolved in Ghana — Motion dismissed — There had been no failure to make material disclosure when debtors applied for protection under Act — Dispute with M. Ltd. had been quite apparent in pleadings that had been exhibits to affidavit — A. Ltd. was properly classified as debtor under control of C. Ltd. — Removal of A. Ltd. from creditor protection proceedings would be prejudicial to restructuring — M. Ltd. did not satisfy requirements for injunctive relief pending resolution of dispute — Ontario had jurisdiction over all issues in dispute and was more appropriate forum than Ghana.

30 In my view, there was no failure to make material disclosure in the material that led to the Initial Order. The dispute and the reasons for it are quite apparent in the pleadings that were exhibits to the affidavit. It is a counsel of perfection to say what should have been said in the affidavit itself.

31 Even if there had been a failure to make material disclosure, I would not exercise my discretion to set aside the Initial Order. That order, among other things, permitted necessary DIP financing that has been advanced and used to pay the indebtedness, interest and fees up to $750,000 owed to the secured creditor, an affiliate of the DIP lender, who negotiated the DIP financing in a process that called for a very timely SISP. Without Aburi, the project would not be financeable or saleable. Aburi operates the project pursuant to an operating agreement between Aburi and Romex Mining Corp. It is Romex that holds the licence from the Ghanaian EPA.

Is Aburi an affiliated debtor?

32 Minatura has asserted in its material that Aburi has no debts. It also asserts that Aburi is not an affiliated company to the other applicants within the meaning of the CCAA as it is not controlled by any of them. Section 3(3) of the CCAA provides that a company is controlled if more than 50% of its voting securities are held by another person or company.

33 Aburi is a debtor. As of May 6, 2013, the applicants had accounts payable of approximately $2.2 million apart from the US$4 million owed to FCMI. The Monitor advises that Aburi is the debtor for approximately $1.3 million of these accounts payable. As well, Aburi owed approximately $1.6 million in intercompany debt to Coastal. The pre-filing cash available to the applicants was only $165,000.

34 Section 3.1(b) of the shareholders' agreement contemplated that 50% of the shares of Aburi would be issued to Minatura after it provided $480,000 to the operator of the project, which it did. These shares were to be placed in escrow with an escrow agent and released to Minatura once all of the contributed equipment to be provided by Minatura was delivered to the Aburi property. After Coastal sent notice of termination of the shareholders' agreement to Minatura, Robert Griffiths transferred all of the shares of Aburi to Coastal, making Coastal the sole named shareholder of Aburi. It was this status that led to the applicants' position that they had more than 50% control of Aburi.

35 At the time of the CCAA application, therefore, Aburi was a debtor and 100% of its shares were held by Coastal.

36 The issue for Minatura is whether that control should be set aside by virtue of the alleged improper steps taken by Coastal in taking the position that the shareholders' agreement had been terminated by virtue of the failure of Minatura to deliver the balance of the equipment that it was to contribute to the project. That in turn depends on whether the corrected licence issued by the Ghanaian EPA is, as asserted by Minatura, invalid.

Should the CCAA be stayed as it relates to Aburi?

37 It my view, it should not. It is clear from the record that Aburi did consent to being an applicant in this CCAA proceeding. Its board of directors authorized the proceeding. There is no basis for the declaration sought by Minatura that Aburi did not consent to the proceedings.

38 What Minatura is asserting in the litigation it has commenced in Ghana is that the corporate steps that were taken by Coastal should be set aside. However, until a court set aside those corporate steps, they would stand. What Minatura therefore seeks, essentially, is some kind of interim injunction requiring the parties to act on the basis that the corporate steps that were taken by Coastal should be ignored. It would effectively be a mandatory injunction requiring the parties to temporarily set aside the removal of the Minatura nominees to the board of Coastal.

39 The normal test for an interlocutory injunction is the tri-partite test contained in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), which includes a consideration of whether there is a serious issue to be tried. A higher test of a strong *prima facie* case being required to be established applies where a mandatory injunction is sought. See the discussion by Karakatsanis J. (as she then was) in *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793 (Ont. S.C.J.).

40 The higher test of a strong *prima facie* case is also required where the practical effect of an injunction will be to put an end to the action or impose such hardship on a party as to remove the potential benefit of the action. See *RJR-MacDonald Inc. v. Canada (Attorney General)* at paras. 56 and 57.

41 In this case, it appears clear from the record that if the CCAA proceedings by Aburi are stayed, the strong likelihood is that the restructuring of the applicants business will fail. As stated by the Monitor, the Aburi project is a key asset of the applicants and is integral to its value and if the relief sought by Minatura is granted, it would be highly detrimental to the prospects of a successful restructuring. As well, the SISP could not possibly be successful if any party offering to finance or acquire the assets did not know if it was investing in 50% or 100% of Aburi.

42 In the circumstances, I am of the view that Minatura is required to establish a strong *prima facie* case that it will succeed on the merits of its position. Be that as it may, I am not satisfied on the record before me that Minatura can establish either the stronger *prima facie* case or the weaker serious issue to be tried case.

43 Minatura's case boils down to the assertion that a valid EPA licence has not been issued. It is a fact that the Ghanaian EPA issued a licence. The evidence of the applicants is that once the error in the licence was discovered, the EPA issued a correcting page to its issued licence, and informed the applicants that no further document was required as the licence was valid with the correcting page. Although an officer of Minatura asserted in e-mail correspondence that some formal procedure of the EPA was necessary, no evidence of Ghanaian law was filed by Minatura to support that position.

44 The evidence of the applicants is that after they provided to Minatura the position of the EPA that no further steps were necessary to confirm the correction to the licence, Minatura was invited by the EPA and the applicants to contact the EPA to discuss it. During argument, counsel for Minatura said that Minatura did not contact the EPA to discuss the issue out of a concern of a possible fraud involving the EPA in the issuing of the correcting page for the licence, although he was quick to say there was no evidence of such fraud but only a suspicion. On his cross-examination, Mr. Turley of Minatura speculated that it might be that Aburi had itself fraudulently drafted the correcting EPA page, although he had no evidence of that. If there was any such concern, one would think that the person with the concern would contact the EPA to find out if the correcting page was legitimate.

45 On the cross-examination of Mr. Turley, counsel for Minatura took the position that questions as to whether there had been a breach of the shareholders' agreement were improper and constituted a breach of process. In light of the position now asserted by Minatura on this motion that a stay of the CCAA process regarding Aburi should be ordered, it is difficult to understand the position of counsel for Minatura on the cross-examination of Mr. Turley.

46 What we are left with on the record is that the Ghanaian EPA issued a licence and a correcting document. There is no evidence that more from the EPA was required and no cogent evidence of any kind to establish a strong *prima facie* case, let alone any serious issue, of fraud. Thus there are no grounds for a stay to be granted.

47 There is also an issue as to whether Minatura would be entitled to an order for specific performance. No evidence was provided by Minatura as to Ghanaian law, and on this motion it must be assumed that Ghanaian law is the same as Ontario law. See the discussion on this subject in *Bank of Nova Scotia v. Wassef* (2000), 11 C.P.C. (5th) 338 (Ont. S.C.J.) at para. 17.

48 In this case, if it were established that there had been a breach of the shareholders' agreement by Coastal in taking the position that the shareholders' agreement had been breached by Minatura, it is highly problematical that the relief would be an order enforcing the shareholders' agreement and requiring two Minatura nominees to be two of the four directors of Aburi.

49 Of obvious concern would be the deadlock in the board of Aburi, with each side opposing the other. Ontario courts are reluctant to say to the parties that they must continue to operate under the terms of an agreement in the face of the deterioration of their relationship. It would be difficult for such an order to be supervised in a way that would make sense given the commercial realities that exist between the parties. See the discussion in *Natrel Inc. v. Four Star Dairy Ltd.*, 1996 CarswellOnt 1205 (Ont.

Gen. Div.)at para. 13. See also R.J. Sharpe, *Injunctions and Specific Performance* looseleaf ed. (Toronto: Canada Law Book 2012) at paras. 7.340, 7.510.

50 As well, a plaintiff deprived of an investment property does not have a fair, real or legitimate claim to specific performance unless it can show that money is not a complete remedy because the land has a peculiar and special value to it. Where an investment property's particular qualities are only of value due to their ability to further profitability, a claim for specific performance cannot be justified. See *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2012] 2 S.C.R. 675 (S.C.C.) at paras. 40-41.

51 It is not necessary to consider the second and third test in *RJR-MacDonald Inc. v. Canada (Attorney General)* of irreparable harm and balance of convenience. However, it is clear that the applicants would suffer irreparable harm given the negative impact of any stay on the success of the CCAA proceedings. Moreover, Minatura has no assets in Canada or the United States and has given no undertaking as to damages.

Jurisdiction to decide the litigation between the parties

52 Minatura takes the position that Ontario lacks jurisdiction to deal with the dispute between the parties and that even if it did, the dispute should be dealt with in Ghana on a *forum non conveniens* analysis.

53 The applicants say that Ontario has jurisdiction and that a forum selection clause in the shareholders' agreement directing the dispute to be litigated in Canada should be enforced.

54 The starting point in the analysis is *Van Breda v. Village Resorts Ltd.*, [2012] 1 S.C.R. 572 (S.C.C.), which dealt with the subject of both jurisdiction and *forum non conveniens* in the context of tort actions. It did not deal with a breach of contract case or a CCAA proceeding. In a lengthy judgment, LeBel J. for the Court confirmed the test of a real and substantial connection to ground jurisdiction in a Canadian court. He listed presumptive connecting factors for a tort case. In dealing with presumptive factors, he stated:

> [82] Jurisdiction must - irrespective of the question of forum of necessity, which I will not discuss here - be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. The Court of Appeal was moving in this direction in the cases at bar. This means that the courts must rely on a basic list of factors that is drawn at first from past experience in the conflict of laws system and is then updated as the needs of the system evolve. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts.
>
> [85] The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law.

(a) CCAA proceeding

55 Aburi is one of the applicants in the CCAA proceeding. The evidence of Mr. Griffis is that the centre of main interest of all of the applicants, including Aburi, is Ontario. See paragraphs 18 to 20 of his affidavit sworn May 8, 2013. Included in the list of factors in his affidavit are (i) all corporate decision making occurs at the head office in Ontario, (ii) all treasury management functions, including a centralized cash management system, are conducted from the head office, (iii) the only financing available to the applicants is with FCMI, which manages its financing in Toronto and (iv) the board of directors' meetings are customarily held in Ontario. In his responding affidavit, Mr. Turley, the president of Minatura, made the bald allegation that Aburi's banking is done in Ghana. What banking he is talking about is not stated, and I do not take his statement to be contradicting the affidavit of Mr. Griffis that all treasury management functions, including a centralized cash management system, are conducted from the head office in Ontario. Mr. Turley may be talking about a bank account in Ghana used to pay suppliers or Ghanaian employees.

TAB 19

Alberta Statutes
Judicature Act

R.S.A. 2000, c. J-2

Currency

R.S.A. 2000, c. J-2, as am. R.S.A. 2000, c. A-30, s. 91; R.S.A. 2000, c. 16 (Supp.), ss. 27, 36, 73 [s. 73(3) not in force at date of publication. Repealed 2004, c. 11, s. 3(5).]; S.A. 2001, c. 24, s. 9; 2002, c. 32, s. 9; 2003, c. 41, s. 1; 2003, c. 42, s. 11; 2004, c. 11, s. 3(1)-(4) [s. 3(2) amended 2006, c. 4, s. 2.]; 2005, c. 15, s. 7; 2007, c. 21; 2008, c. 13, s. 14; 2009, c. 53, s. 1; 2011, c. N-6.5, s. 13 [Not in force at date of publication.]; 2011, c. 20, s. 8(17); 2013, c. 10, s. 20; 2013, c. 11, s. 2(2); 2013, c. 23, s. 8; 2014, c. 13, s. 29; 2017, c. 22, s. 30; 2018, c. 20, s. 9; Alta. Reg. 137/2022, s. 7; 217/2022, s. 120; 2022, c. 21, s. 45; Alta. Reg. 75/2023, s. 43.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Currency
Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

End of Document

Alberta Statutes
Judicature Act
Part 2 — Powers of the Court (ss. 10-22)

R.S.A. 2000, c. J-2, s. 13

s 13. Part performance

Currency

13.Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Currency

Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

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