COURT OF APPEAL OF ALBERTA

Distributed to Duty Judge

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APPLICANTS:	ATHABASCA WORKFORCE SOLUTIONS INC. and BEHROKH AZARIAN, HOMAYOUN HODAIE, MANDANA REZAIE, MEHRAN POOLADI-DARVISH, MEYSAM OVAICI, FIROOZ ABBASZADEH, MEHRAN JOOZDANI, LAYLA AMJADI, MEER TAHER SHABANI-RAD, ZAHRA AHMADI-NAGHDEHI, AFSHIN SHAMELI, MARYAM MOHSEN ZADEH, PARHAM MINOO, HALEH PEIRAVI, MOHAMMAD AHADZADEH ARDEBILI, RAMIN JALALPOOR, ELHAM VAKILI AZGHANDI, TARIQ MAHMOOD ROSHAN, AMIN JALALPOOR, FAISAL KHAN, POONAM DHARMANI and ALI NILFOROUSH
STATUS ON APPEAL:	APPELLANTS
STATUS ON APPLICATION:	APPLICANTS
RESPONDENTS:	GREENFIRE OIL & GAS LTD. and GREENFIRE HANGINGSTONE OPERATING CORPORATION
STATUS ON APPEAL:	RESPONDENTS
STATUS ON APPLICATION:	RESPONDENTS
NON-PARTIES:	ALVAREZ & MARSAL CANADA INC. IN ITS CAPACITY AS PROPOSAL TRUSTEE OF GREENFIRE OIL & GAS LTD. AND GREENFIRE HANGINGSTONE OPERATING CORPORATION

and

GREENFIRE ACQUISITION CORPORATION

DOCUMENT: **MEMORANDUM OF ARGUMENT OF THE REGIONAL MUNICIPALITY OF WOOD BUFFALO**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. This memorandum of argument is filed by the Regional Municipality of Wood Buffalo ("RMWB"), the highest ranking secured creditor in this proceeding under the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (the "BIA"), in response to applications for a declaration of right to appeal pursuant to section 193(a) or (c) of the BIA, or alternatively for leave to appeal pursuant to section 193(e) of the BIA, concurrently filed by two sets of Appellants: a) Athabasca Workforce Solutions Inc. ("Athabasca") and b) several individuals referred to in their brief as the "Investor Group" (collectively, the "Prospective Appellants").

2. The appeals sought by the Prospective Appellants relate to the approval by the Honourable Justice Nixon of the approval and vesting order ("AVO") and the interim financing and interim financing charge order (referred to as the "Interim Financing Order", and together with the AVO as the "Orders") granted on December 17, 2020, following an application brought by Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operation Corporation (collectively, "Greenfire").

3. RMWB opposes the applications brought by the Prospective Appellants. It submits that the Prospective Appellants have not satisfied the test for obtaining leave to appeal, as the proposed grounds of appeal are lacking in merit. Further, RMWB notes that the proposed appeal will increase risk of non-recovery for RMWB.

II. STATEMENT OF FACTS

4. RMWB substantially agrees with the chronology of the steps leading to this proceeding, as attached to Athabasca's Memorandum of Argument.

III. ISSUES

5. RMWB's submissions in response to these applications are limited to the issue of whether the Prospective Appellants have satisfied the test for obtaining leave to appeal pursuant to section 193(e) of the BIA. However, with respect to all relevant issues, including those not discussed in this memorandum, RMWB affirms the submissions of Greenfire Acquisition Corporation in their memorandum of argument. Silence on any issue or point of argument should in no way be construed as agreement with, or acquiescence to, the position of the Prospective Appellants.

IV. POINTS OF LAW

6. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.,*[1] the Ontario Court of Appeal listed a number of factors to be considered in evaluating an application for leave to appeal under s. 193(e). One such factor was whether the appeal is *prima facie* meritorious.[2] RMWB submits that these prospective appeals lack apparent merit.

a. The Prospective Appellants conflate a refusal to prefer the Prospective Appellants' evidence with a failure to consider their evidence

7. The Prospective Appellants allege that Justice Nixon, in declining to rule in their favour, failed to take into account their evidence or interests. This is not accurate. Justice Nixon did not ignore or fail to turn his mind to the Prospective Appellants' evidence or interests; he simply did not agree with their positions.

8. The Prospective Appellants accuse Justice Nixon of "failing to consider the interest of all of the creditors who opposed the Application."[3] The record demonstrates

[1] 2013 ONCA 282 [*Pine Tree*] [Tab 1].
[2] *Pine Tree* at para 29 [Tab 1].
[3] Memorandum of Argument of Athabasca at para 23(iv); Memorandum of Argument of the Investor Group at para 32(c).

otherwise. In fact, Justice Nixon duly concluded that "[b]ased on my analysis of the facts in evidence, none of the Greenfire creditors will be materially prejudiced or any further prejudiced as a result of the interim financing facility, or the interim lender charge" and stated that "[i]n aggregate, the stakeholders are better served by the proposed sales."[4]

9. Similarly, the Prospective Appellants assert that Justice Nixon erred in "broadly stating there was 'no better recovery for the creditors' other than the Transaction proposed by Greenfire, and disregarding the evidence on record of Investor Group's offer it was willing to put forward if given time to do so."[5] But Justice Nixon did not disregard this evidence. He considered it, noted that "the other parties, although objecting to the transaction, have not put anything definitive before the Court" and concluded that "the deal here is a bird in hand. That is much better than speculation, in terms of other alternatives."[6]

b. The Prospective Appellants overlook relevant evidence on which Justice Nixon relied, and then accuse him of having made a decision without evidence

10. The Prospective Appellants also raise several assertions to the effect that Justice Nixon's decision and findings were made without necessary evidence. To do this, they overlook relevant evidence upon which Justice Nixon relied.

11. For example, the Prospective Appellants take issue with Justice Nixon's finding that there was "no better recovery for the creditors" and assert that this was done "without any evidence to support that conclusion."[7] It is unclear to the RMWB where

[4] December 17, 2020 Hearing Transcript at 51, 54.
[5] Memorandum of Argument of Athabasca at para 22(ii). See also Memorandum of Argument of the Investor Group at para 31(a).
[6] December 17, 2020 Hearing Transcript at 53.
[7] Memorandum of Argument of the Investor Group at para 31(a).

Justice Nixon used the phrase "no better recovery for the creditors", but in any event, Justice Nixon clearly relied on cogent evidence in support of the benefits of the sale for the creditors as a whole, noting in particular that "Greenfire does not have the ability or the luxury of conducting, based on the evidence that is before me, even an expedited sale process, due to the significant risks that are facing the facility, coupled with its current lack of revenue."[8] This conclusion was not reached "without any evidence."

c. The alleged errors are not "palpable" or "overriding"

12. The proposed grounds of appeal raised by the Prospective Appellants relate to questions of fact, or at most, mixed fact and law. Accordingly, they are subject to the highly deferential standard of palpable and overriding error,[9] and in evaluating whether the proposed appeal has *prima facie* merit, there must be "on first impression… a palpable and overriding error of fact."[10] This means that it is not enough to show that Justice Nixon may have erred, or even that he did err. The Prospective Appellants must raise an error that is both "palpable" – that is, "obvious"[11] or "plainly seen"[12] – and "overriding" – that is, "shown to have affected the result"[13] or "determinative of the outcome of the case."[14]

13. The alleged errors raised by the Prospective Appellants are not palpable. They largely relate to concerns that, according to the Prospective Appellants, Justice Nixon put too little weight on the Prospective Appellants' evidence and submissions, or that

[8] December 17, 2020 Hearing Transcript at 54.
[9] *Housen v. Nikolaisen,* 2002 SCC 33 at paras 25, 37 [*Housen*] [Tab 2].
[10] *Resurgence Asset Management LLC v. Canadian Airlines Corporation,* 2000 ABCA 149 at para 35 [Tab 3].
[11] *Salomon v. Matte-Thompson,* 2019 SCC 14 at para 33 [*Salomon*] [Tab 4].
[12] *Housen* at para 6 [Tab 2].
[13] *L(H) v. Canada (Attorney General),* 2005 SCC 25 at para 55 [Tab 5].
[14] *Salomon* at para 33 [Tab 4].

Justice Nixon should have refused to approve the Orders given the overall body of evidence.

14. For example, the Prospective Appellants state that Justice Nixon "inappropriately relied heavily on the affidavit evidence of Robert Logan"[15] and claim that he erred in "stating that the opposing parties did not put any alternatives to the Court, but failing to appreciate this was because there was no opportunity for other parties to participate in respect of a sale of the Sale Assets."[16] These grounds of appeal put forward exacting critiques of how Justice Nixon exercised his discretion in a complex and contentious fact scenario. Such factual errors, even if they do exist, are not plainly seen, and are not subject to being overturned. As the Supreme Court indicated in *Housen,* "it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence."[17]

15. Further, many of the alleged errors are not overriding. The proposed grounds of appeal raise a number of alleged errors relating to findings of fact or inferences that fall well short of being determinative to the outcome of the case, and would not necessarily result in a decision in the Prospective Appellants' favour if disturbed. For example, it is argued that the Justice Nixon erred in "[concluding] the AER supported the Transaction".[18] The Prospective Appellants provide no explanation as to why this (or any other alleged errors) would have affected the result. As the Federal Court of Appeal

[15] Memorandum of Argument of the Investor Group at para 34. See also Memorandum of Argument of Athabasca at para 24.
[16] Memorandum of Argument of the Investor Group at para 32(d). See also Memorandum of Argument of Athabasca at para 23(v).
[17] *Housen* at para 23 [Tab 2].
[18] Memorandum of Argument of Athabasca at para 24. See also Memorandum of Argument of the Investors Group at para 33.

has stated, “when arguing palpable and overriding error, it is not enough to pull at the leaves and branches and leave the tree standing. The entire tree must fall.”[19]

V. CONCLUSION

16. While it is perhaps understandable that the Prospective Appellants want to attempt to improve their position through a further sales process, that opportunity would come at additional costs and risks. There is no guarantee that a better outcome would result and there is risk that no equivalent outcome would be available. That risk would not be borne by the Prospective Appellants, but by others, including RMWB. Justice Nixon appropriately weighed relative risks and comparative advantages and concluded that the Orders were the best available option in very difficult and unique circumstances. This is not an instance where further scrutiny by the Court of Appeal is necessary or appropriate.

VI. RELIEF SOUGHT

17. RMWB requests that this Court dismiss the Prospective Appellants’ applications.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th day of February, 2021.

BROWNLEE LLP
Per

_____
Gregory G. Plester
Counsel for the Regional
Municipality of Wood Buffalo

[19] *Mahjoub v. Canada (Citizenship and Immigration),* 2017 FCA 157 at para 61 [Tab 6].

LIST OF AUTHORITIES

1. *Business Development Bank of Canada v. Pine Tree Resorts Inc.,* 2013 ONCA 282 https://canlii.ca/t/fx7fp
2. *Housen v. Nikolaisen,* 2002 SCC 33 https://canlii.ca/t/51tl
3. *Resurgence Asset Management LLC v. Canadian Airlines Corporation,* 2000 ABCA 149 https://canlii.ca/t/5rvf
4. *Salomon v. Matte-Thompson,* 2019 SCC 14 https://canlii.ca/t/hxrk3
5. *L(H) v. Canada (Attorney General),* 2005 SCC 25 https://canlii.ca/t/1k864
6. *Mahjoub v. Canada (Citizenship and Immigration),* 2017 FCA 157 https://canlii.ca/t/h4xrx