

COURT OF APPEAL FILE NUMBER 2601-0007AC  
 COURT FILE NUMBER 2501-18462  
 REGISTRY OFFICE CALGARY  
 APPLICANT MACQUARIE BANK LTD.  
 STATUS ON APPEAL APPELLANT  
 STATUS ON APPLICATION RESPONDENT  
 DOCUMENT **BOOK OF AUTHORITIES OF MACQUARIE BANK LTD.  
 (Application for Permission to Appeal)**



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

**GOODMANS LLP**  
 Bay Adelaide Centre  
 333 Bay Street, Suite 3400  
 Toronto, Ontario M5H 2S7

Attn: Robert J. Chadwick / Joseph Pasquariello / Erik Axell

Email: [rchadwick@goodmans.ca](mailto:rchadwick@goodmans.ca)  
[ipasquariello@goodmans.ca](mailto:ipasquariello@goodmans.ca)  
[eaxell@goodmans.ca](mailto:eaxell@goodmans.ca)

Tel: 416.979.2211  
 Fax: 416.979.1234

Lawyers for the Appellant, Macquarie Bank Ltd.

CONTACT INFORMATION OF ALL OTHER PARTIES:

**Gowling WLG (Canada) LLP**  
 1 First Canadian Place  
 100 King Street West, Suite 1600  
 Toronto ON M5X 1G5

Attn: Clifton Prophet / Sam Gabor / Katherine Yurkovich

Tel: 403.267.8144  
 Fax: 403.264.5973

Email: [clifton.prophet@gowlingwlq.com](mailto:clifton.prophet@gowlingwlq.com)  
[sam.gabor@gowlingwlq.com](mailto:sam.gabor@gowlingwlq.com)  
[kate.yurkovich@gowlingwlq.com](mailto:kate.yurkovich@gowlingwlq.com)

Lawyers for the Respondent, Canacol Energy Ltd. *et al*

**Cassels Brock & Blackwell LLP**  
 Suite 3700, Banker Hall West, 888 3<sup>rd</sup>  
 Street SW  
 Calgary, AB T2P 5C5

**Bennett Jones LLP**  
 100 King Street West  
 Suite 3400  
 Toronto, ON M5X 1A43

Attn: Jeffrey Oliver / Ryan Jacobs /  
Joseph Bellissimo / Matteo Clarkson-  
Maciel

Tel: 403.350.2920 / 416.869.5300  
Fax: 403.648.1151 / 416.360.8877

Email: [joliver@cassels.com](mailto:joliver@cassels.com)  
[rjacobs@cassels.com](mailto:rjacobs@cassels.com)  
[jbellissimo@cassels.com](mailto:jbellissimo@cassels.com)  
[mclarksonmaciel@cassels.com](mailto:mclarksonmaciel@cassels.com)

Lawyers for the DIP Lenders

**Blake, Cassels & Graydon LLP**  
199 Bay St.  
Suite #4000  
Toronto, ON M5L 1A9

Attn: Kelly Bourassa / Jenna Willis

Tel: 403.260.9697 / 416.863.2421  
Fax: 403.360.9700

Email: [kelly.bourassa@blakes.com](mailto:kelly.bourassa@blakes.com)  
[jenna.willis@blakes.com](mailto:jenna.willis@blakes.com)

Lawyers for the Revolving Credit Facility  
Lenders

&

4500, Bankers Hall East, 855 2<sup>nd</sup> Street SW  
Calgary, AB T2P 4K7

Attn: Kelsey Meyer / Raj Sahni / Shawn Kirkman / Chyna Brown

Tel: 416.863.1200 / 403.298.3100  
Fax: 416.863.1716 / 403.265.7219

Email: [meyerk@bennettjones.com](mailto:meyerk@bennettjones.com)  
[sahnir@bennettjones.com](mailto:sahnir@bennettjones.com)  
[kirkmans@bennettjones.com](mailto:kirkmans@bennettjones.com)  
[browncil@bennettjones.com](mailto:browncil@bennettjones.com)

Lawyers for the Monitor

**Miller Thomson LLP**  
40 King Street West  
Suite 6600  
Toronto, ON M5H 3S1

Attn: Gavin Finlayson / Greg Azeff / Matthew Cressatti / James  
Reid

Tel: 416.595.8500  
Fax: 416.595.8695

Email: [gfinlayson@millerthomson.com](mailto:gfinlayson@millerthomson.com)  
[gzeff@millerthomson.com](mailto:gzeff@millerthomson.com)  
[mccressatti@millerthomson.com](mailto:mccressatti@millerthomson.com)  
[jwreid@millerthomson.com](mailto:jwreid@millerthomson.com)

Lawyers for the Board of Directors of Canacol Energy Ltd.

**TABLE OF AUTHORITIES****TAB AUTHORITY**

1. [\*Duke Energy Marketing Limited Partnership v. Blue Range Resource Corporation\*, 1999 ABCA 255](#) citing [\*Re Multitech Warehouse Direct\* \(1995\), 32 Alta. L.R. \(3d\) 62 at 63 \(C.A.\)](#)
2. [\*Bellatrix Exploration Ltd v BP Canada Energy Group ULC\*, 2020 ABCA 178](#)
3. [\*Sun Indalex Finance, LLC v United Steelworkers\*, 2013 SCC 6, \[2013\] 1 SCR 271](#)
4. [\*Wiebe v Weinrich Contracting Ltd.\*, 2020 ABCA 396](#) citing J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2013), at pp. 139
5. [\*Tacora Resources Inc. \(Re\)\*, 2023 ONSC 6126](#)
6. [\*Re Kerr Interior Systems Ltd.\*, 2008 ABCA 291](#)
7. [\*Nortel Networks Corporation \(Re\)\*, 2016 ONCA 749](#) citing [\*Nortel Networks Corp., Re\*, 2016 ONCA 332](#)
8. [\*Re Great Basin Gold Ltd.\*, 2012 BCSC 1459](#)
9. [\*Royal Oak Mines Inc., Re\*, 6 C.B.R. \(4th\) 314 \(ON SC\)](#)

**Duke Energy Marketing Limited Partnership v. Blue Range Resource Corporation, 1999  
ABCA 255**

Date: 19990824  
Docket: 99- 18395  
99-18397  
99-18410  
99-18411  
99-18418  
99-18424

1999 ABCA 255 (CanLII)

IN THE COURT OF APPEAL OF ALBERTA

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MEMORANDUM OF DECISION OF THE  
HONOURABLE MADAM JUSTICE FRUMAN

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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  
BLUE RANGE RESOURCE CORPORATION

BETWEEN:

**APPEAL # 99-18395**

DUKE ENERGY MARKETING LIMITED PARTNERSHIP

Appellant

- and -

BLUE RANGE RESOURCE CORPORATION and  
HUMBLE PETROLEUM MARKETING LTD.

Respondents

APPEAL FROM THE ORDER OF  
THE HONOURABLE MR. JUSTICE S.J. LoVECCHIO DATED JUNE 18, 1999.

AND BETWEEN:

**APPEAL # 99-18397**

ENGAGE ENERGY CANADA, L.P.

Appellant  
(Applicant)

- and -

BLUE RANGE RESOURCE CORPORATION

Respondent

APPEAL FROM THE ORDER OF  
THE HONOURABLE MR. JUSTICE S.J. LoVECCHIO DATED JUNE 18, 1999.

AND BETWEEN:

**APPEAL # 99-18410**

ENRON CAPITAL & TRADE RESOURCES CANADA CORP.

Appellant  
(Applicant)

- and -

BLUE RANGE RESOURCE CORPORATION, HUMBLE PETROLEUM MARKETING LTD.,  
PRICEWATERHOUSECOOPERS INC., in its capacity as Monitor, ROYAL BANK  
OF CANADA, NATIONAL BANK OF CANADA, and FIRST NATIONAL BANK OF  
CHICAGO

Respondents  
(Respondents)

APPEAL FROM THE ORDER OF  
THE HONOURABLE MR. S.J. JUSTICE LoVECCHIO  
DATED JUNE 30, 1999 AND FILED JULY 8, 1999

AND BETWEEN:

**APPEAL #99-18411**

DUKE ENERGY MARKETING LIMITED PARTNERSHIP

Appellant

- and -

BLUE RANGE RESOURCE CORPORATION and  
HUMBLE PETROLEUM MARKETING LTD.

Respondents

APPEAL FROM THE ORDER OF  
THE HONOURABLE MR. JUSTICE S.J. LoVECCHIO DATED JUNE 30, 1999.

AND BETWEEN:

**APPEAL #99-18418**

ENGAGE ENERGY CANADA, L.P.

Appellant  
(Applicant)

- and -

BLUE RANGE RESOURCE CORPORATION and  
HUMBLE PETROLEUM MARKETING LTD., PRICEWATERHOUSECOOPERS INC.,  
in its capacity as Monitor, ROYAL BANK OF CANADA, NATIONAL  
BANK OF CANADA, and FIRST NATIONAL BANK OF CHICAGO

Respondents

APPEAL FROM THE ORDER OF  
THE HONOURABLE MR. JUSTICE S.J. LoVECCHIO DATED JUNE 30, 1999.

AND BETWEEN:

**APPEAL # 99-18424**

BIG BEAR EXPLORATION LTD.

Appellant  
(Respondent)

- and -

ENRON CAPITAL & TRADE RESOURCES CANADA CORP.

Respondent  
(Applicant)

APPEAL FROM THE ORDER OF  
THE HONOURABLE MR. JUSTICE L.D. WILKINS DATED JULY 16, 1999.

**COUNSEL:**

L.B. Robinson - Engage Energy Canada, L.P.

J.L. Ircandia - Blue Range Resource Corporation et al  
M. Marion

A.R. Anderson - Enron Capital Trade Resources Canada Corp.  
B. Urrell

H.A. Gorman - Duke Energy Marketing Limited Partnership

R. J. Wilkins - Big Bear Exploration Ltd.

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MEMORANDUM OF DECISION OF THE  
HONOURABLE MADAM JUSTICE FRUMAN

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**FRUMAN, J.A.:**

[1] Blue Range Resource Corporation, a company which produces and sells natural gas, experienced serious financial problems. On March 2, 1999, it successfully petitioned the court for an order staying proceedings against it under s. 11 of *The Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. A series of further applications were heard, resulting in numerous orders adversely affecting companies which had contractual arrangements with Blue Range, and its subsidiary, Humble Petroleum Marketing Ltd. Six of those orders are the subject of applications for leave to appeal under s. 13 of the CCAA.

**Leave Under the CCAA**

[2] Section 13 provides that any person dissatisfied with an order or decision made under the CCAA may appeal from it, with leave from either the judge appealed from, or the Court of Appeal. The section does not clarify the grounds upon which leave may be granted. The test that has been adopted in Alberta requires the applicant to show "serious and arguable grounds that are of real and significant interest to the parties": *Re Multitech Warehouse Direct* (1995), 32 Alta. L.R. (3d) 62 at 63 (C.A.); *Luscar Ltd. v. Smoky River Coal Ltd.*, [1999] A.J. No. 185 at para. 22 (C.A.).

[3] An appellate court should exercise its power sparingly, when asked to intervene in issues which arise in CCAA proceedings. A judge exercising a supervisory function under the CCAA has an ongoing management process, much like a trial judge making orders in the course of a trial: *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 at 272 (B.C.C.A.).

[4] In *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 at 282 (B.C.C.A.), Hinds J. summarized the matters to be considered in granting leave to appeal an issue under the *Bankruptcy Act*:

- (a) whether the point on appeal is of significance to the practice;
- (b) whether the point raised is of significance to the action itself;
- (c) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
- (d) whether the appeal will unduly hinder the progress of the action.

[5] The parties agree, as do I, that these four elements are subsumed in the more general wording of the *Multitech* test. In particular, the importance to the practice or to the industry should be considered. While many matters involving competing claims on money will be significant to the parties, they may have little precedential value. This element is entirely

consistent with the requirement that an appellate court exercise its powers sparingly.

[6] In this case, unlike *Multitech* and *Smoky River*, a plan of arrangement is already in place and an appeal would not unduly hinder the progress of restructuring Blue Range's affairs. It is therefore unnecessary to consider any potential delay caused by granting leave.

[7] The leave applications relate to orders granted by LoVecchio J. on June 18 and June 30, 1999, and by Wilkins J. on July 16, 1999.

### **June 18, 1999 Order - CA Appeal Nos. 18395 and 18397**

#### Variation Order

[8] The original CCAA stay order permitted termination of various contracts. Engage Energy Canada, L.P. and Duke Energy Marketing Limited Partnership applied for a variation of the initial stay order to provide that Blue Range should only be permitted to terminate its gas marketing contracts with them if Blue Range was incapable of performing them, or termination was essential to the success of the restructuring. LoVecchio J. dismissed the application. Although he recognized that the applicants would potentially suffer substantial losses as a result of the termination of the contracts, he found that an order authorizing the termination was appropriate in the circumstances, especially since it did not affect the creditors' rights to claim for damages.

[9] Engage and Duke seek leave to appeal. No legal principles are in issue, nor is there any suggestion that the chambers judge lacked jurisdiction to make the initial order or to refuse a variation. A chambers judge has a broad discretion under the CCAA. It is clear from his reasons that LoVecchio J. was aware of the circumstances, understood the competing issues and attempted to balance the interests of all the parties. He is owed considerable deference. Engage and Duke allege no errors, other than their disagreement with the exercise of his discretion. They have not made out serious and arguable grounds, and their application for leave to appeal is denied.

#### Set-Off

[10] At the time of the CCAA stay order, Engage and Duke had received but not yet paid for natural gas deliveries made by Blue Range in February and March of 1999. As a result of the termination of their gas purchase contracts with Blue Range, they would have to buy natural gas at higher prices, resulting in damages. Engage and Duke sought orders permitting them to set-off anticipated damages they would incur, against the payments owed by them to Blue Range for natural gas deliveries. LoVecchio J. dismissed their application, based on his finding that the future damages were sufficiently independent from the obligation to pay for gas already delivered that equitable set-off was not appropriate.

[11] Engage and Duke seek leave to appeal. Section 18.1 of the CCAA provides that the law

## In the Court of Appeal of Alberta

**Citation: Reference re Companies' Creditors Arrangement Act, 1995 ABCA 304**

**Date:** 19950714  
**Docket:** 9503-0432-AC  
**Registry:** Edmonton

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

**And In The Matter of a Proposed Plan of Arrangement  
of Multitech Warehouse Direct Inc.**

**Oral Reasons for Decision of  
The Honourable Madam Justice Hunt**

### Application for Leave to Appeal

COUNSEL:

G. J. Leia and M. J. Chamberlain, for the Multitech Warehouse

D. Peck, for the Bank of Nova Scotia

M. McCabe, for the M. J. McKenna & Associates

S. L. Bercov, for the Sharp Electronics Ltd.

A. R. Anderson, for the Phillips Co.

L. Robinson, for the Jutan International

R. Zechel, for the World Bank

**TRANSCRIPT OF ORAL REASONS  
FOR DECISION OF THE  
HONOURABLE MADAM JUSTICE HUNT  
DELIVERED JUNE 15, 1995**

[1] This is an application for leave under s. 13 of the *Companies' Creditors Arrangement Act* which states that any person dissatisfied with an order under the Act may appeal with leave. The decision to which leave is being sought is a decision of Mr. Justice MacCallum of May 31, 1995. In his decision he sanctioned a plan of arrangement that had been put forward by Multitech (the party seeking leave to appeal). I am informed that this plan had been approved by 90% of the creditors of Multitech and, as I understand

it, all of the parties who were represented before me today, which included the secured creditors and some of the unsecured creditors, had voted in favour of the plan.

[2] The preamble to Mr. Justice MacCallum's order makes it clear that he had refused to grant an adjournment application by Multitech and that he had further refused to allow Multitech to withdraw its application for a sanction order after the terms of that order had been discussed and set. At the same time, an application to dismiss a petition in bankruptcy concerning Multitech was adjourned and in argument this afternoon counsel for Multitech admitted that at that point Multitech had not filed material that would have been adequate to support an application to dismiss the petition in bankruptcy. That material has now been filed and the question of the bankruptcy petition is scheduled to be heard by Mr. Justice MacCallum on June 30, 1995.

[3] There is nothing in the leave provisions in the statute that specify the grounds on which such leave should be granted. Counsel have referred me to a decision of the Quebec Court of Appeal, **Cavendish Shopping Centre Co. v. Bertrand** (1993) Q.J. #860. In that decision the Quebec Court of Appeal suggests that to support a leave application there should be "serious and arguable grounds that are of real and significant interest to the parties" and none of those represented take issue with this as an appropriate test.

[4] I also want to make brief reference to a decision of Mr. Justice McFarlane in Chambers of the British Columbia Court of Appeal in the case **Re Pacific National Lease Holding Corporation** reported at (1993) 15 C.B.R. (3d) 265, where he said at p. 272:

"But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing."

[5] In my opinion, this is a sensible approach to take to leave applications given the purpose and function of the **C.C.C.A.** In an application of this nature, of course, the onus is on the applicants to establish a case for leave. I have concluded that that onus has not been discharged and, therefore, the application for leave is denied.

[6] As I understand the lengthy arguments I have heard this afternoon, the real complaint here is that the plan which was put forward by Multitech, of which Mr. McKenna is the principal, did not specifically deal with the status of the outstanding petition in bankruptcy. It is argued that, because the petition in bankruptcy was not dismissed on the

same day as the sanction order was granted, resulting uncertainty makes the plan untenable.

[7] In my opinion, this does not meet the test of grounds for a serious and arguable ground of appeal. The leave applicant, Multitech, and other parties supporting Multitech's position, and in particular M. J. McKenna and Associates, of which Mr. McKenna is also the principal, argued that there is possible prejudice because under the plan certain payments are to be made on June 21. (I note parenthetically that on June 12 and 14 Mr. Justice MacCallum was asked by Multitech to extend time for leave to appeal until after June 30 when the application to dismiss the petition in bankruptcy is to be heard; he refused on both occasions to extend the time.)

[8] Essentially these parties argue that they could be prejudiced. There could be prejudice resulting from the fact of these payments being made on June 21, should the petition in bankruptcy not be dismissed on June 30. I find myself unconvinced by this argument. The secured creditors who are to be paid on June 21 would be entitled to payment in any event should bankruptcy transpire.

[9] An argument was made that landlords who are to receive payments under the plan could also be prejudiced, but later argument revealed that no payments are due to those parties until My 21 in any event.

[10] It is further argued that there could be prejudice to the unsecured creditors described as the 30-day suppliers group, but I note that the party Jutan is the main one of these and Jutan argued this afternoon in support of denial of this leave application. There are no payments to be made to unsecured creditors other than the 30 day suppliers group until January, 1996.

[11] It is also argued on behalf of M. J. McKenna & Associates that there is possible prejudice to it, but I note, as I have said already, that Mr. McKenna is also the principal of this company, as well as of Multitech and it was Multitech that proposed the plan in the first place. The failure to include a provision in the plan that was proposed, namely a failure to include a provision relating to what would happen with the outstanding petition in bankruptcy, is not, in my view, a ground of appeal of sufficient strength to support this leave application.

[12] I add that Multitech has argued that the case for dismissing the bankruptcy petition is a very strong case. I simply note that this argument does not particularly help it in the leave application because, of course, this position proves correct on June 30, the

petition in bankruptcy will be dismissed and the problems that brought them here today will become academic.

[13] As I have already indicated, I am not convinced on the prejudice arguments, but I also want to note the arguments for prejudice on the other side, that is, on the side of the parties that have opposed the leave application today. These are primarily those who are entitled to payments on June 21. They have argued that they will be prejudiced by not receiving the payments on June 21 under a plan to which they all agreed and which has been sanctioned by the Court. They have also argued prejudice through undoubted delays, should leave be granted with the ensuing appeals and, as well, the additional costs of litigation resulting which would have the undoubted effect of diminishing the estate of Multitech.

[14] As I say, I am not convinced of the prejudice arguments made on behalf of the leave application, but I simply note that, if there are prejudice arguments in this case, in my opinion they are stronger on the side of those parties which have opposed the leave application.

[15] For those reasons the application for leave to appeal is dismissed.

DATED at EDMONTON, Alberta

this 14th day of July,

A.D. 1995

## In the Court of Appeal of Alberta

**Citation: Bellatrix Exploration Ltd v BP Canada Energy Group ULC, 2020 ABCA 178**

**Date:** 20200501

**Docket:** 2001-0039-AC

**Registry:** Calgary

**Between:**

**Bellatrix Exploration Ltd.**

Applicant  
(Appellant)

- and -

**BP Canada Energy Group ULC**

Respondent  
(Respondent)

- and -

**Borden Ladner Gervais LLP**

Interested Party  
(Monitor)

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**Reasons for Decision of  
The Honourable Madam Justice Jo'Anne Strekaf**

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Application for Permission to Appeal

### **Test for Leave**

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

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

[17] “An appellate court should exercise its power sparingly, when asked to intervene in CCAA proceedings”: *Duke Energy Marketing Limited Partnership v Blue Range Resource Corporation*, 1999 ABCA 255 at para 3 (*Blue Range 1999*).

### **Positions of the parties**

[18] The applicant submits that the grounds raised involve questions of law, reviewable on a correctness standard. It argues that the CCAA judge misinterpreted the definition of “derivatives agreement” by failing to give appropriate weight to the requirement that it be a “financial agreement”. There was no consideration of whether the Contract served an “important financial purpose” for the respondent. He further erred in holding that the definition of “derivatives agreement” applied to contracts that do not stipulate a fixed price, and in not finding that the solvent party entered into other transactions to meet the requirement that there be “recurrent dealings”.

[19] The respondent submits that the proposed grounds of appeal involve findings of mixed fact and law that are entitled to deference on appeal. In any event, the CCAA judge correctly interpreted the *Regulations*.

### **Analysis**

#### ***1) Significance to the practice***

[20] The proposed grounds of appeal raise questions about the requirements for contracts to qualify as eligible financial contracts that are exempt from disclaimer under the CCAA. At issue is the interpretation and application of the phrases “financial agreement”, “derivatives agreement” and “the subject of recurrent dealings in the over-the-counter commodities market”.

[21] All of this language was introduced in 2007 when the CCAA was amended and the *Regulations* passed. There has been no appellate consideration of these provisions since that time.

**Sun Indalex Finance, LLC** *Appellant*

v.

**United Steelworkers, Keith Carruthers, Leon Kozierek, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville** *Respondents*

- and -

**George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors** *Appellant*

v.

**United Steelworkers, Keith Carruthers, Leon Kozierek, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville** *Respondents*

- and -

**FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited** *Appellant*

v.

**United Steelworkers, Keith Carruthers, Leon Kozierek, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville** *Respondents*

- and -

**United Steelworkers** *Appellant*

**Sun Indalex Finance, LLC** *Appelante*

c.

**Syndicat des Métallos, Keith Carruthers, Leon Kozierek, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville** *Intimés*

- et -

**George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7** *Appelant*

c.

**Syndicat des Métallos, Keith Carruthers, Leon Kozierek, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville** *Intimés*

- et -

**FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited** *Appelante*

c.

**Syndicat des Métallos, Keith Carruthers, Leon Kozierek, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville** *Intimés*

- et -

**Syndicat des Métallos** *Appelant*

v.

**Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services** *Respondents*

and

**Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association** *Intervenors*

**INDEXED AS: SUN INDALEX FINANCE, LLC v. UNITED STEELWORKERS**

**2013 SCC 6**

File No.: 34308.

2012: June 5; 2013: February 1.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO**

*Pensions — Bankruptcy and Insolvency — Priorities — Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Company entering into debtor in possession ("DIP") financing allowing it to continue to operate — CCAA court granting priority to DIP lenders — Proceeds of sale of business insufficient to pay back DIP lenders — Whether pension wind-up deficiencies subject to deemed trust — If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), (4), 75(1)(a), (b) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.*

c.

**Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite) et Surintendant des services financiers** *Intimés*

et

**Surintendant des services financiers, Institut d'insolvabilité du Canada, Congrès du travail du Canada, Fédération canadienne des retraités, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens** *Intervenants*

**RÉPERTORIÉ : SUN INDALEX FINANCE, LLC c. SYNDICAT DES MÉTALLOS**

**2013 CSC 6**

N° du greffe : 34308.

2012 : 5 juin; 2013 : 1<sup>er</sup> février.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Abella, Rothstein, Cromwell et Moldaver.

**EN APPEL DE LA COUR D'APPEL DE L'ONTARIO**

*Pensions — Faillite et insolvabilité — Priorités — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la Loi sur les arrangements avec les créanciers des compagnies (« LACC ») — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Financement obtenu par la société à titre de débiteur-exploitant (« DE ») lui ayant permis de poursuivre ses activités — Tribunal chargé d'appliquer la LACC ayant accordé priorité aux prêteurs DE — Insuffisance du produit de la vente pour rembourser les prêteurs DE — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — Dans l'affirmative, la prépondérance fédérale fait-elle en sorte que la priorité issue de l'application de la LACC a préséance sur la fiducie réputée? — Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8, art. 57(3), (4), 75(1a), b) — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36.*

merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

[72] Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

[73] In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the CCAA court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty

Troisièmement, Indalex était autorisée à verser toutes les prestations de retraite. Même si l'ordonnance excluait les paiements spéciaux de solvabilité, elle ne réglait pas les droits concurrents des créanciers, et la suspension permettait aux participants de présenter leurs arguments au sujet de la fiducie réputée, alors qu'ils en auraient tout simplement perdu le bénéfice dans le contexte d'une faillite, qui était la solution de rechange.

[72] Bien que la suspension en elle-même n'ait pas placé Indalex en situation de conflit d'intérêts, les procédures qui ont suivi ont eu des conséquences négatives. Le 8 avril 2009, Indalex a déposé une motion en modification et reformulation de l'ordonnance initiale pour demander un financement DE. Cette motion avait été prévue. M. Stubbs avait mentionné dans son affidavit à l'appui de la demande d'ordonnance initiale que les prêteurs avaient consenti au financement, mais qu'Indalex devrait être autorisée à obtenir le financement pour poursuivre ses activités. Toutefois, le 8 avril, l'ordonnance initiale n'avait pas encore été signifiée aux participants. Un court préavis avait été donné au Syndicat, plutôt qu'à chacun des participants, mais le Syndicat n'a pas comparu. Les participants n'étaient tout simplement pas représentés lors de l'examen de la motion en modification de l'ordonnance initiale de suspension et en autorisation d'accorder la charge DE.

[73] En demandant au tribunal d'autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d'appliquer la LACC de faire échec à la priorité dont bénéficiaient les participants. Il s'agit d'un cas où les administrateurs d'Indalex ont permis que les intérêts de la société l'emportent sur ceux des participants. Ce faisant, ils ont peut-être rempli leurs obligations fiduciaires envers Indalex, mais ils ont fait en sorte qu'Indalex a manqué à ses obligations en tant qu'administrateur des régimes. L'intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d'insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l'administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l'occurrence, ce devoir de l'administrateur des régimes impliquait, plus

meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

[74] The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

[75] The Monitor and George L. Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The CCAA judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order.

particulièrement, qu'il donne à tout le moins aux participants la possibilité d'exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l'encontre des intérêts des participants. Étant donné qu'Indalex soutenait la motion visant l'octroi d'une priorité à son prêteur, elle ne pouvait pas simultanément défendre l'existence d'une priorité fondée sur la fiducie réputée.

[74] La Cour d'appel a constaté d'autres manquements. Je partage l'opinion du juge Cromwell qu'aucune des procédures subséquentes n'a porté atteinte aux droits des participants. La suite des événements, notamment la deuxième motion en approbation du financement DE et le processus de vente, était prévisible et, à cet égard, typique des réorganisations. Dans tous les cas, des avis ont été donnés. Les participants ont été représentés par des avocats compétents. Fait plus important, le tribunal a ordonné que des fonds soient réservés et qu'une audience soit tenue pour que les questions en litige soient pleinement débattues.

[75] Le contrôleur et George L. Miller, le syndic de faillite d'Indalex É.-U., soutiennent que les participants auraient dû interjeter appel de l'ordonnance initiale modifiée autorisant la charge DE et qu'ils ne devaient pas être admis à prétendre plus tard que leur créance avait priorité sur celle des prêteurs DE. Ils plaident que la règle interdisant les contestations indirectes empêche les participants de contester l'ordonnance autorisant le financement DE. Cet argument n'est pas convaincant. Les participants n'ont pas reçu avis de la motion demandant au tribunal d'autoriser le financement DE. L'avocat des participants au régime des cadres a défendu leur position dès qu'il a pu le faire et l'a réitérée chaque fois qu'il en a eu l'occasion. À l'audition de la motion visant l'augmentation du prêt DE, il n'a retiré leur opposition que lorsqu'on lui a dit que son seul objet était d'augmenter le montant du prêt autorisé. Le juge chargé d'appliquer la LACC a fixé une date d'audience expressément pour la présentation des arguments qu'Indalex aurait pu faire valoir, en qualité d'administrateur des régimes, lorsqu'elle a demandé la modification de l'ordonnance initiale.

business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

### III. Procedural Fairness in *CCAA* Proceedings

[275] The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

[276] I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some

en faillite après l'homologation de la vente de l'entreprise. Cette manoeuvre visait entre autres à nuire aux intérêts des participants aux régimes. À l'époque, Indalex cumulait toujours ses deux fonctions, du moins sur le plan juridique. Cependant, ses obligations fiduciaires ne se trouvaient de toute évidence pas au centre de ses préoccupations. Les conflits d'intérêts se sont multipliés au cours de la procédure. Au lieu d'essayer de les régler, Indalex les a balayés du revers de la main. Elle a ainsi manqué à ses obligations fiduciaires et aux prescriptions du par. 22(4) de la *LRR*.

### III. L'équité procédurale dans une procédure intentée sous le régime de la *LACC*

[275] La manière dont l'instance s'est déroulée devant la Cour supérieure résultait, du moins en partie, du non-respect par Indalex de ses obligations fiduciaires. Les points de procédure soulevés devant la cour n'ont pas permis d'atténuer les conséquences de ces manquements. Certes, les bénéficiaires ont finalement obtenu ou reçu certains renseignements concernant la procédure et ils ont pu être représentés par un avocat à diverses étapes, mais l'esprit et les principes du système canadien de justice civile n'ont pas été respectés, et c'est là le problème fondamental.

[276] Je reconnais que, souvent, le temps presse dans ce genre de procédure. La situation d'un débiteur nécessite la prise de mesures rapides et efficaces. Un litige qui s'éternise, comme certaines actions civiles, ne saurait convenir pour l'application de la *LACC*. Toutefois, la procédure prévue par cette loi n'est pas de nature purement administrative. Il s'agit également d'un processus judiciaire, assujéti à ce titre aux principes du système contradictoire. Les règles fondamentales de ce système ne sauraient être bafouées. Toutes les parties intéressées ont droit à une procédure équitable qui leur permet d'exprimer leur point de vue et d'être entendues. Il ne suffit pas à cet égard de répondre que rien d'autre ne pouvait être tenté, qu'il n'existait pas de solution meilleure ou, essentiellement, qu'entendre les participants aurait constitué une perte de temps. Dans toute procédure,

way remain fundamental principles of justice. Those principles retain their place in the CCAA, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

#### IV. Imposing a Constructive Trust

[277] In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203-4: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

que ce soit en droit administratif, pénal ou civil, le droit d'être informé et celui d'être entendu d'une manière ou d'une autre demeurent des principes fondamentaux de la justice. Ils demeurent applicables sous le régime de la LACC, comme le font remarquer certains auteurs et juges (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (C.J. Ont. (Div. gén.)), par. 5 (le juge Farley). Ces principes n'ont pas été respectés en l'espèce, et mes collègues le reconnaissent, mais minimisent les conséquences de tels manquements et vices de procédure.

#### IV. Imposition d'une fiducie par interprétation

[277] Dans les circonstances, la décision de la Cour d'appel d'imposer une fiducie par interprétation ne me paraît pas erronée (par. 200-207). Il s'agit d'une décision équitable conforme aux exigences de la justice, selon les principes énoncés par notre Cour dans les arrêts *Canson Enterprises Ltd. c. Boughton & Co.*, [1991] 3 R.C.S. 534, et *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217. Pareille réparation pour le tort causé par Indalex est fondée (*Soulos*, par. 36, la juge McLachlin (maintenant Juge en chef)). Les faits de l'espèce respectent les quatre conditions qui justifient généralement l'imposition d'une fiducie par interprétation (*Soulos*, par. 45), comme le constate la juge Gillese aux par. 203-204 de ses motifs : (1) le défendeur était assujéti à une obligation en equity relativement aux actes qui ont conduit à la possession des biens; (2) il a été démontré que la possession des biens par le défendeur résultait des actes qu'il a ou est réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'equity lui imposait à l'égard du demandeur; (3) le demandeur a établi qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations; (4) il n'existe pas de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire, comme la protection des intérêts des créanciers intervenants.

## In the Court of Appeal of Alberta

**Citation: Wiebe v Weinrich Contracting Ltd, 2020 ABCA 396**

**Date:** 20201109

**Docket:** 1903-0139-AC

**Registry:** Edmonton

**Between:**

**Roy Wiebe and Parkland Aerospace Corp**

Appellants  
(Defendants)

- and -

**Weinrich Contracting Ltd**

Respondent  
(Plaintiff)

- and -

**Parkland Airport Development Corporation, Deloitte Restructuring Inc,  
and 2155734 Alberta Ltd**

Not Parties to the Appeal

**The Court:**

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**The Honourable Mr. Justice Peter Martin  
The Honourable Madam Justice Ritu Khullar  
The Honourable Madam Justice Dawn Pentelchuk**

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### Memorandum of Judgment

Appeal from the Order by  
The Honourable Mr. Justice S.D. Hillier  
Dated the 17th day of April, 2019  
Filed the 14th day of June, 2019

(Docket: 1603-20319; 1603-12839)

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

[29] Stays of proceedings against the debtor company are common and are included in the initial commercial template order in CCAA proceedings in Alberta.<sup>1</sup>

[30] The CCAA has been described as “skeletal in nature”; that is, legislation not “contain[ing] a comprehensive code that lays out all that is permitted or barred”: *Metcalf & Mansfield Alternative Investments II Corp (Re)*, 2008 ONCA 587, 92 OR (3d) 513, at para 44, *per* Blair JA). Thus, decisions of the court are frequently based on discretionary grants of jurisdiction grounded in the broad language of s 11 of the CCAA:

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].

[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).

[32] While the CCAA provides no express authority to grant a stay of proceedings against third parties other than the debtor company, such orders are quite common. Orders have also been granted *releasing* claims against third parties as part of approving a plan of arrangement. In short, “[c]ases support the view that third-party rights may be affected by a stay order”: *Luscar Ltd v Smoky River Coal Limited*, 1999 ABCA 179, 237 AR 326 at para 60. If it is just and convenient

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<sup>1</sup> Available here: <https://albertacourts.ca/qb/areas-of-law/commercial/templates-and-forms>. See appellants’ factum at paras 62, 65.

Aerospace argued that the Initial Stay and the tolling order only applied to actions against the debtor, Parkland Airport, and not to them, because those orders do not specifically say that they apply to actions against third parties. However, they made no arguments about the supervising judge's authority to grant a stay with retroactive effect, nor the considerations that should guide the exercise if that authority exists. The Monitor offered no insight on the proper interpretation or scope of the Initial Stay or the tolling order.

[40] Further, the supervising judge made comments that appear to be incompatible as to whether his order was a clarification of the effect of the tolling order, or a new order with retroactive effect (compare transcript, p 31/lines 35-38 with transcript p 33/lines 1-31). That was quite understandable. The issue was sprung on him at the May 8, 2019 hearing without warning and with no written material or citation of relevant law. The transcript of the proceedings indicates that the tolling order was not placed before him and there is no indication that he recalled the particulars of that order.

[41] Given the record, it is impossible to discern whether the supervising judge intended to merely clarify the Initial Stay and/or the tolling order (believing they already encompassed Weinrich's entire action) or whether he intended to retroactively expand the terms of those orders to preserve the entirety of Weinrich's action.

[42] Whether a supervising judge in CCAA proceedings has the jurisdiction to grant a retroactive stay of proceedings regarding third party claims is a novel issue yet to be considered by a Canadian commercial court. Given the broad wording of s 11 and applying a purposive and liberal interpretation to the legislative scheme, we do not foreclose the possibility that such an order might be granted in appropriate circumstances. The exercise of that discretion would be guided by the principles articulated in *Callidus*: that the jurisdiction granted by s 11 is constrained only by restrictions set out in the CCAA itself, the discretion must be exercised in furtherance of the remedial objectives of the CCAA, and the order made must be appropriate in the circumstances, the applicant has been acting in good faith and the applicant has been acting with due diligence: at paras 49, 67.

[43] However, it is not necessary for us to determine this issue to resolve this appeal.

### 3. Procedural unfairness in the proceeding below

[44] Despite the pressures of "real-time litigation" that mark insolvency proceedings, the principles of procedural fairness cannot be ignored. In *Rescue! The Companies' Creditors Arrangement Act*, 2<sup>nd</sup> Ed, Toronto: Carswell, 2013 [*Rescue!*], Professor Sarra quoted with approval an article by Madam Justice Romaine (at page 139):

It is, however, important to remember that, while there may be greater flexibility in the Canadian system [of restructuring], there are rules and over-arching principles, binding and persuasive Canadian case law, good practices, and model orders that

the Canadian court and stakeholders expect to be observed. While efficiency and speed are important considerations, so are due process, respect for the interests of stakeholders on either side of the border and the very important consideration that justice must be seen to be done through the observance of fair and familiar principles and processes.

[45] A fundamental principle of an adversarial system is that a party is entitled to know the case that must be met. Absent an application and notice, the party is unable to make full argument. The only application before the supervising judge was 215's application to approve the sale of Parkland Airport's assets, and it only requested an extension of the Initial Stay against Parkland Airport pending closing. There was no application to expand the Initial Stay or the May 2, 2017 tolling order.

[46] In oral argument, it was 215's counsel, not Weinrich, who introduced the idea of the supervising judge including a provision in the vesting and sale order to ensure Weinrich could pursue its claims relating to various transactions it challenged, including against Wiebe and Parkland Aerospace. This was done to assuage Weinrich's expressed concerns with the court accepting 215's offer:

And if the Court is inclined I would say, we can specifically include a provision in the order which preserves rights against other parties, certainly not against the assets because 215 wants these assets free and clear except for the -- except for the claims that we have. But that issue can be addressed in another forum outside of this process and I want to be crystal clear on that because there's nothing in what we are asking the Court to do which precludes that from happening and if the Court needs to specifically ensure that that is the case, then a provision can be inserted in the order which says just that. If these parties wish to (INDISCERNIBLE) on and deal with these other claims and seek damages for what they perceive to be wrongs done, then have at it, but this process will not bring that to an end and we're not purporting to obtain or seek a release for that, 'cause there is no plan.

(Transcript, p 16/lines 28-37)

[47] What was to be an application to determine whether 215's offer to purchase would be approved, quickly evolved to include a discussion about preserving Weinrich's action against "other parties", including Wiebe and Parkland Aerospace. Unfortunately, counsel for the appellants had a matter of minutes' notice before being called on to respond. Predictably, under that time pressure, counsel was unable to marshal arguments about whether the supervising judge had the authority to grant a stay with retroactive effect or whether it was appropriate in the circumstances. Indeed, that issue was not mentioned, much less argued. Counsel simply argued that the Initial Stay and the tolling order did not apply to the actions against his clients.

# **Rescue!**

## ***The Companies' Creditors Arrangement Act***

**Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.**

University of British Columbia Faculty of Law and  
Peter Wall Institute for Advanced Studies

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inception of the insolvency proceeding.<sup>71</sup> The insurer was ordered to pay special costs to all parties.<sup>72</sup>

Madam Justice Romaine has made the following observation about the supervisory role of the court:<sup>73</sup>

The CCAA is brief, although not as brief as it used to be, and the development of insolvency law has been precedent-driven, rather than statute-driven, and pragmatic in its application. Supervising judges in insolvency matters are required to make numerous procedural and substantive decisions, often in the absence of extensive statutory guidance, in the context of what one of Canada's most influential jurists in the area of insolvency law and a tireless proponent of cross-border cooperation,<sup>74</sup> the Honourable James M. Farley, Q.C., has famously called "real time litigation".

It is, of course, the relatively brief and flexible nature of the CCAA that has enabled US/Canadian cross-border restructuring to be accomplished — the Canadian court with the tools available to it of judicial discretion, broad and purposive interpretation of the Act and the occasional resort to inherent jurisdiction can react and respond to developments during a restructuring without being unduly restrained by statutory provisions that were not designed for a coordinated restructuring with another jurisdiction.

It is, however, important to remember that, while there may be greater flexibility in the Canadian system, there are rules and over-arching principles, binding and persuasive Canadian case law, good practices and model orders that the Canadian court and stakeholders expect to be observed.

While efficiency and speed are important considerations, so are due process, respect for the interests of stakeholders on either side of the border and the very important consideration that justice must be seen to be done through the observance of fair and familiar principles and processes. It is no accident that the cases that appear to represent a failure of comity often bear the characteristics of lack of respect for the procedural differences of the other regime, or the perception of lack of consideration for local interests and values.

It is a strength of the Canadian system, in my view, that we can pick and choose practices that have worked well in other jurisdictions, and there is no doubt that our insolvency law has benefited from such an ability to adapt to changing global

<sup>71</sup> *Re Pope & Talbot Ltd.* (2011), 74 C.B.R. (5th) 281 (B.C.S.C.).

<sup>72</sup> *Ibid.* at para. 20.

<sup>73</sup> The Honourable Barbara Romaine, "Reflections on Comity and Sovereignty — Ten Years Later", in J. Sarra and B.E. Romaine, eds., *Annual Review of Insolvency Law, 2012* (Toronto: Carswell, 2013), citing Logan Willis, "Cross-border DIP Issues in *Re InterTAN Canada Ltd.*" (INSOL International, Case Study Series, 6 July 2011).

<sup>74</sup> Pamela LJ Huff, "The Honourable James M. Farley, Q.C.: International Advocate for the Canadian Insolvency Process and Cross-Border Cooperation", in Janis P Sarra, ed., *Annual Review of Insolvency Law, 2006* (Toronto: Carswell, 2007) at 41.

**CITATION:** Tacora Resources Inc. (Re), 2023 ONSC 6126  
**COURT FILE NO.:** CV-23-00707394-00CL  
**DATE:** 20231030

**SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)**

**RE:** **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF TACORA RESOURCES INC.**

**BEFORE:** KIMMEL J.

**COUNSEL:** *Ashley Taylor, Eliot Kolers, Lee Nicholson, Natasha Rambaran and RJ Reid*, for the Applicant, Tacora Resources Inc.

*Alan Merskey, Jane Dietrich and Ryan Jacobs*, for the Monitor (FTI Consulting Canada Inc.)

*Robert Chadwick, Caroline Descours, Peter Kolla and Carlie Fox*, for Cargill, Incorporated and Cargill International Trading Pte Ltd.

*Richard Swan, Sean Zweig and Alexander Payne*, for the Ad Hoc Group of Senior Noteholders and the Indenture Trustee

*Natasha MacParland*, for Crossingbridge Advisors, LLC

*Joe Thorne*, for 1128349 B.C. Ltd.

**HEARD:** October 24, 2023

**ENDORSEMENT – COME-BACK HEARING**  
**(ARIO AND SOLICITATION ORDER)**

**The Come-Back Motion**

[1] The court made an initial order under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”) in respect of Tacora Resources Inc. (“Tacora” or the “company”) on October 10, 2023 (the “Initial Order”). The come-back hearing was originally scheduled for October 19, 2023, but was adjourned to October 24, 2023 by order dated October 13, 2023 to afford the company and the participating stakeholders additional time to address certain issues of disagreement among them, and in particular their disagreement over the terms and source of debtor in possession (“DIP”) financing that the company needs to carry out its intended restructuring efforts.

[2] The court’s October 13, 2023 order adjourning the come-back hearing also extended the expiry of the stay of proceedings provided for in the Initial Order from October 20, 2023 to October 27, 2023 (the “Stay Period”). A further stay extension order was granted on October 27, 2023

[107] The Cargill DIP Financing is conditional on the DIP Charge being granted. The only alternative funding option that would be available to the company would also require a DIP charge. Under the AHG DIP proposal, the DIP facility would have been substantially larger; the increased amount being necessary as the Advanced Payments Facility and other financing available from Cargill would no longer be available under the AHG DIP Proposal. Any prejudice to the secured creditors that may result from the granting of a DIP charge is therefore reduced under the DIP Financing Agreement as compared to the alternative AHG DIP Proposal.

[108] Material prejudice in the context of s. 11.2(4) requires consideration of how much the creditors are being primed by a priority DIP charge, not who is the priming creditor. On an objective test it is clear that the Cargill DIP Facility is far less prejudicial to creditors generally than the AHG DIP, including because the company will require significantly less financing due to the operational agreements already in place with Cargill.

[109] By letter dated October 6, 2023, the AHG communicated, amongst other things, certain concerns regarding the Applicant accepting DIP financing from the DIP Lender. Those stated concerns included potential prejudice to the AHG from such financing. The proposed Monitor took note of the concerns expressed, noting that: “[u]nder the Ad Hoc Group DIP proposal, the DIP facility would have been substantially larger” and, as a result, “[a]ny prejudice to the secured creditors that may result from the granting of a DIP charge is therefore reduced under the [Cargill] DIP Financing Agreement as compared to the alternative Ad Hoc Group DIP Proposal.”

[110] The AHG complaint that the Senior Noteholders are being “primed” ignores the fact that the AHG DIP Proposal would prime the Senior Noteholders by a larger margin than the Cargill DIP Facility.

[111] Additionally, the AHG’s argument ignores Tacora’s other creditors, including Senior Noteholders who are not part of the AHG, trade creditors, employees, lessors and other unsecured creditors. Under the AHG DIP Proposal, the company will need to realize approximately \$30 million more in connection with a restructuring transaction for these creditors to have the same recovery as under the Cargill DIP Facility due to the additional financing that will be required with the AHG DIP Proposal. Accordingly, it is clear that creditors broadly will be less prejudiced with the Cargill DIP Facility.

[112] A further instance of prejudice that the AHG identifies arises from the implications of the Offtake Agreement and the impediments that it could present to the restructuring process if interested third party purchasers or investors are dissuaded by its “life of mine” and other terms (as some already have expressed concerns about in the Solicitation Process and the earlier Strategic Process also undertaken by Greenhill prior to that). Consideration of this must begin with an acknowledgment that, while the AGH asserts that the Offtake Agreement is not commercially reasonable and that it unduly restricts the company’s restructuring efforts, that agreement was in place prior to the issuance of the notes.

[113] This motion must proceed on the basis that the Offtake Agreement is, as of the date of the hearing of this motion, a valid and enforceable agreement to which the company is a party. It is

**In the Court of Appeal of Alberta****Citation: Kenroc Building Materials Co. Ltd. v. Kerr Interior Systems Ltd., 2008 ABCA 291****Date:** 20080825**Docket:** 0803-0135-AC**Registry:** Edmonton**Between:****Kenroc Building Materials Co. Ltd.**

Applicant

- and -

**Kerr Interior Systems Ltd. and  
Composite Building Systems Inc.**

Respondents

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**Reasons for Decision of  
The Honourable Mr. Justice Keith Ritter**

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**Application for Leave to Appeal**

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**Reasons for Decision of  
The Honourable Mr. Justice Ritter**

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[1] The applicant creditor, Kenroc Building Materials Co. Ltd. (“Kenroc”), applies for leave to appeal an Alberta Court of Queen’s Bench judgment, pursuant to ss. 13 and 14 of the *Companies’ Creditors Arrangements Act*, R.S.C. 1985, c. C-36 (“CCAA”). The judgment, granted May 16, 2008, sanctioned the Plan of Arrangement (the “Plan”) proposed by the respondent debtors, Kerr Interior Systems Ltd. (“Kerr”) and Composite Building Systems Inc. (“Composite”). At issue is the interplay of the CCAA and the Saskatchewan *Builders’ Lien Act*, S.S. 1984-85-86, c. B-7.1. Kenroc argues that the chambers judge erred in law in several respects and that given the precedential importance of her “errors” to practitioners dealing with the CCAA, leave should be granted.

**Facts**

[2] 101051911 Saskatchewan Ltd. (“101”) is the owner of real property located in Saskatoon known as the Second Avenue Lofts. Kenroc supplied building products to Kerr, which Kerr used in providing construction services to 101 in the Second Avenue Lofts. On November 7, 2007, 101 owed Kerr more than \$300,000.00 for its building services. On November 15, 2007, Kenroc registered a builders’ lien against the Second Avenue Lofts in the amount of \$103,355.23. When Kenroc registered its lien it was aware that an initial order under the CCAA had been granted by the chambers judge on November 7, 2007.

[3] The initial order under the CCAA provided for a stay of proceedings, preventing entities from pursuing rights and/or remedies against the debtors, and a corresponding (in length of time) extension for the filing and enforcement of builders liens.

[4] 101 subsequently paid the sum of \$150,000.00, which was part of what it owed Kerr, into court and obtained an order from the Saskatchewan Court of Queen’s Bench discharging Kenroc’s lien as well as a lien filed by a second creditor of Kerr’s, Winroc (Winroc has a companion application dealt with in separate reasons).

[5] The Plan proposed by Kerr and Composite under the CCAA treated both Kenroc and Winroc as part of the sole class of “unsecured creditors”, consisting of others who had potential builders lien claims and unsecured creditors generally. Under the Plan, each member of this class was to receive 52% of the face value of the indebtedness to them, whereas under builders’ lien enforcement, there was potential to receive more than 52%.

[6] Kerr and Composite point out that other creditors were also entitled to file builders’ liens but nevertheless chose to be part of the general creditors group. They suggest that there are 34 proven creditors that have or may have lien claims with potentially \$3,226,768.69 of the debt owed. Of these 28, with a total debt of \$2,761,842.71 voted acceptance of the Plan. Of course, if all creditors entitled to liens had pursued a lien, the lien fund would have been diluted so that most creditors

would do as well or better under the Plan as they would do by pursuing the lien fund. According to a report prepared by the court-appointed monitor, only 8 of the 34 creditors (\$574,536.51) would be potentially better off under the lien fund, and 6 of those 8 voted in favour of the Plan.

### **Test for Leave to Appeal under the CCAA**

[7] In order to obtain leave, Kenroc must show serious and arguable grounds that are of real and significant interest to the parties: *Multitech Warehouse Direct Inc., Re* (1995), 32 Alta. L.R. (3d) 62 at paras. 3-5 (C.A.). In determining whether the test is met four factors are considered:

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.

*Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, 261 A.R. 120 at para. 7, citing *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 at 396 (B.C.C.A.).

### **Analysis**

[8] I conclude that Kenroc is to be given leave with respect to the decision below. Since I have reached this conclusion, my analysis will be brief as it is for the panel hearing the appeal to deal with the actual merits of the appeal.

[9] With respect to the factor of significance to the practice, the parties to this application have not advanced any case law demonstrating that the effect of the Saskatchewan *Builders' Lien Act* provisions on the classification of creditors under the CCAA has been dealt with previously. An unresolved issue has to be of significance to the practice.

[10] With respect to the significance of the issue to the action itself, although most of the potential builders' lien claimants appear content to have themselves treated as general creditors, if this claim and Winroc's companion claim are successful, the general creditors pool will be reduced. Moreover, this issue is significant to Kenroc, who contends it means the difference between 100% recovery and 52% recovery.

[11] With respect to the merits of the claim, Kenroc is able to identify a pathway to success provided its interpretation of the Saskatchewan *Builders' Lien Act* is accepted, together with its interpretation of the interplay of that statute and the CCAA. It advances an arguable case. It need not show that it is guaranteed to win at the appeal, as that hurdle would be practically impossible to overcome.

## COURT OF APPEAL FOR ONTARIO

CITATION: Nortel Networks Corporation (Re), 2016 ONCA 749

DATE: 20161014

DOCKET: M46504

Hoy A.C.J.O., Benotto and Huscroft JJ.A.

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 or arrangement of Nortel Networks Corporation,  
Nortel Networks Limited, Nortel Networks Global Corporation and Nortel  
Networks Technology Corporation

BETWEEN

SNMP Research International Inc. and SNMP Research Inc.

Claimants

and

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global  
Corporation and Nortel Networks International Corporation and Nortel Networks  
Technology Corporation

Debtors

Heard: In writing on October 3, 2016

## ENDORSEMENT

[1] This motion for leave to appeal arises out of the Nortel insolvency.

[7] We conclude that leave should not be granted.

[8] On the first factor, the proposed appeal turns on the supervising judge's findings of fact about the sufficiency of the evidence SNMP marshalled to oppose Nortel's motion for summary judgment. Those findings are entitled to deference and cannot be disturbed on appeal absent palpable and overriding error: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 81. We see no such error in the supervising judge's reasons.

[9] Our conclusion on the second factor follows from our conclusion on the first. Contrary to SNMP's submissions, the proposed appeal turns on the particular facts of this case and does not raise broader issues about the intersection of copyright law and insolvency law. The supervising judge's decision does no more than decide that in this case, on these facts, SNMP did not meet its burden under s. 35(2) of the *Copyright Act*, R.S.C. 1985, c. C-42, to prove that Nortel derived revenues from its infringement of SNMP's copyright. The proposed appeal does not raise issues of significance to the practice.

[10] On the third factor, we observe that this court very recently refused leave to appeal in another Nortel matter, one which addressed the allocation of some \$7.3 billion in proceeds from the sale of Nortel's assets: *Re Nortel Networks Corporation*, 2016 ONCA 332, 130 O.R. (3d) 481, leave to appeal to S.C.C. requested. In that case, the court observed that even if the allocation issue was

significant to the CCAA proceeding, that factor, standing alone, was insufficient to warrant granting leave. The court observed, at para. 95: “To perhaps state the obvious, typically parties tend to seek leave to appeal a decision that is of significance to an action.”

[11] Finally, this motion for leave has to be considered in the context of the Nortel litigation as a whole. As this court emphasized in the allocation decision, these proceedings have dragged on for several years, to the detriment of individuals and businesses awaiting a resolution. The fact that this is a liquidation rather than a restructuring does not render the delay immaterial. Given our conclusions on the other three leave factors, we are not satisfied that a further delay is justified in these circumstances.

[12] For these reasons, the motion for leave to appeal is dismissed.

[13] The responding party shall be entitled to its costs of the motion, fixed at \$1,500.

“Alexandra Hoy A.C.J.O.”

“M.L. Benotto J.A.”

“Grant Huscroft J.A.”

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Great Basin Gold Ltd. (Re)*,  
2012 BCSC 1459

Date: 20121001  
Docket: S126583  
Registry: Vancouver

***In the Matter of the Companies' Creditors Arrangement Act,  
R.S.C. 1985, c. C-36, as amended  
and  
In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44  
and  
In the Matter of Great Basin Gold Ltd.***

Before: The Honourable Madam Justice Fitzpatrick

## Reasons for Judgment

Counsel for Petitioner:	P.J. Reardon J.L. Cockbill W. Rostom (via phone)
Counsel for Monitor:	J. McLean, Q.C. A. MacFarlane (via phone) R. Adlington (via phone) P.J. Reynolds
Counsel for Credit Suisse AG:	P.L. Rubin K. McEachern D. O'Donnel (via phone) M. Chow (via phone)
Counsel for Ad Hoc Group of Convertible Debenture Holders:	J.R. Sandrelli C. Cheuk R. Jacobs S. Kukulowicz K. Mak B. Grossman (via phone)
Counsel for CIBC:	M. Stewart (via phone)
Place and Date of Hearing:	Vancouver, B.C. September 26 and 27, 2012
Place and Date of Judgment:	Vancouver, B.C. October 1, 2012

stakeholder group must be considered. Critical to the court's analysis will be evidence of the debtor company's actions in the face of these proposals. What is the underlying reason for these transactions? What due diligence was done in the face of these proposals? What negotiations took place? What are the true consequences of not obtaining this relief? What alternatives, if any, are available?

[182] Urgency is a continuing theme on many of these applications, just as it is on this application. Often materials are served on very short notice and participating stakeholders may not be afforded sufficient time to adequately consider the relief sought. Again, the court must be vigilant to ensure that it is not rushed to a decision based on an illusory sense of urgency which is not supported by the evidence. There are, no doubt, many cases where the matter is truly urgent. Issues can quickly arise from unforeseen circumstances or even perhaps due to a misstep by the management of the debtor company. In addition, once a filing takes place, many issues must be addressed quickly. The court must guard against deciding issues in the face of "manufactured" urgency, whether created by leverage from a stakeholder seeking certain relief or otherwise.

[183] In addition, it is often the case that these applications are brought on an urgent basis where the court is asked to decide the issue without a full review of the evidence before it. The court will, of necessity, seek the input of the monitor, who will have the necessary background and hopefully, knowledge and insight on these important issues. However, if the monitor is, as in this case, only recently appointed, the ability of the monitor to provide meaningful input may be limited.

[184] It is in the context of this framework and the submissions of the Ad Hoc Group concerning how the Credit Suisse DIP proposal came about that I now address that proposal.

[185] I have already referenced the evidence of GBG concerning the background of the GBG Group, and in particular, the events leading to the Board's efforts to secure appropriate DIP financing on a timely basis. The evidence sets out in detail the Board's detailed consideration of the more negative aspects of the Credit Suisse

**Ontario Supreme Court  
Royal Oak Mines Inc., Re,  
Date: 1999-03-10**

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

In the Matter of the Courts of Justice Act, R.S.O., 1990, C. C-43, as amended

In the Matter of a Plan of Compromise or Arrangement of Royal Oak Mines Inc., and others

Ontario Court of Justice, General Division [Commercial List] Blair J.

Judgment: March 10, 1999

Docket: 99-CL-003278

*David E. Baird, Q.C., and Mario J. Forte, for Applicants.*

*Peter H. Griffin, for Trilon Financial Corporation and Northgate Exploration Limited.*

*Ronald N. Robertson, Q.C., for Unofficial Senior Subordinated Noteholders' Committee.*

*Sean Dunphy, for Bankers Trust and Macquarrie Limited.*

*Hilary Clarke, for Bank of Nova Scotia.*

**Blair J.:**

[1] These reasons are an expanded version of an endorsement made at the time of the granting of an Initial Order in favour of the Applicants under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, on February 15, 1999. At the time, I indicated that I would release additional reasons with respect to certain of the issues raised on the Initial Application at a later date. In doing so, I propose to incorporate significant portions of the earlier handwritten endorsement.

[2] Royal Oak Mines Inc. ("Royal Oak"), and a series of related corporations, applied for the protection of the Court afforded by the Companies' Creditors Arrangement Act (the "CCAA") while they endeavour to negotiate a restructuring of their debt with their creditors. Royal Oak is a publicly traded mining company of considerable import in the mining industry. It currently operates four gold and copper mines (two in the Timmins area of Ontario, one in Yellowknife in the North West Territories, and one (the Kemess mine) in the interior of British Columbia).

[23] Subsection 11(3) of the Act does not stipulate that the Initial Order shall be granted for a period of 30 days. It provides that the Court in its discretion may grant an order for a period *not exceeding* 30 days. Each case must be approached on the basis of its own circumstances, and an agreement in advance on the part of all affected secured creditors, at least, may create an entirely different situation. In the absence of such agreement, though, the preferable practice on applications under subsection 11(3) is to keep the Initial Order as simple and straightforward as possible, and the relief sought confined to what is essential for the continued operations of the company during a brief “sorting-out” period of the type referred to above. Further issues can then be addressed, and subsequent orders made, if appropriate, under the rubric of the subsection 11(4) jurisdiction.

[24] It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company’s urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances—as opposed, for instance, to a receivership or bankruptcy—and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to “keep the lights [of the company] on” and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

[25] For similar reasons, things like the proliferation of advisory committees and the attendant professional costs accompanying them, and the extension of broad protection to directors, are better left for orders other than the Initial order.

[26] I conclude these observations with a word about the “comeback clause”. The Initial Order as granted in this case contained the usual provision which is known by that description. It states: