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REGISTRY OFFICE:	CALGARY
	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 CANACOL ENERGY LTD., 2654044 ALBERTA LTD., CANACOL ENERGY ULC, 2498003 ALBERTA ULC, CANTANA ENERGY GMBH, CNE OIL & GAS S.R.L, CANACOL ENERGY COLOMBIA S.A.S., SHONA HOLDING GMBH, CNE ENERGY S.A.S., and CNE OIL & GAS S.A.S
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Court of King's Bench of Alberta

Citation: Canacol Energy Ltd (Re), 2026 ABKB 467

Date: 20260624
Docket: 2501 18462
Registry: Calgary

2026 ABKB 467 (CanLII)

Between:

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

and in the matter of a plan of compromise or arrangement of Canacol Energy Ltd., 2654044 Alberta Ltd., Canacol Energy ULC, 2498003 Alberta ULC, Cantana Energy GmbH, CNE Oil & Gas, S.R.L., Canacol Energy Colombia S.A.S., Shona Holding GMBH, CNE Energy S.A.S., and CNE Oil & Gas S.A.S.

Applicants

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] Canacol Energy Ltd. ("Canacol") and the other applicants (together, the "Canacol Group") are engaged in exploration, development, production, processing, and sale of natural gas in Colombia. Canacol is a publicly traded company headquartered in Calgary. Canacol is listed both on the TSX and the principal stock exchange in Colombia. The Canacol Group is comprised of Canadian subsidiaries, Colombian subsidiaries, Swiss subsidiaries, and a Panamanian subsidiary.

[2] The Canacol Group is insolvent and unable to meet natural gas supply obligations to its customers due to declining production. The Canacol Group's inability to meet its delivery obligations has resulted and will continue to result in significant contractual penalties that are an obstacle to restructuring. The Canacol Group is optimistic that in the long-term following a restructuring, it will be able to grow its natural gas production, but today it does not have the financial wherewithal to make the investments necessary to maintain and enhance production.

V. Disclaiming Contracts Under the *CCAA*

[21] *CCAA* s 32 permits a debtor company to give notice to counterparties and the monitor that it disclaims any agreement to which it is a party.[1] Counterparties may apply to the Court within 15 days for an order that the agreement shall not be disclaimed. The monitor must decide whether to approve the disclaimer. If the monitor does not approve the disclaimer, the debtor company may apply to the Court for an order that the agreement be disclaimed. *CCAA* s 32(4) provides the following non-exhaustive criteria for the Court to consider on such an application:

> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[22] The Monitor approves of the Canacol Group's disclaimer of the Canacol Agreements in the sense that it supports the Canacol Group's proposed action and its application to the Court. Under normal circumstances, the monitor's support is all that is required and it would fall to the counterparties to bring an application to the Court contesting the disclaimer. But that is not how things have proceeded in the present case.

[23] The Canacol Group has instead followed what it describes as a "modified procedure" in seeking the proposed Disclaimer Orders. The Canacol Group has taken on the burden of a court application where under normal circumstances that would not be required. The Canacol Group explained that it took this approach because it requires court orders that can be recognized and enforced in other jurisdictions. I am satisfied that the modified procedure followed by the Canacol Group is appropriate in the circumstances and does not prejudice any stakeholders. Had the Canacol Group proceeded in the normal course, the likely outcome would have been court applications brought by the various counterparties. And, in that regard, I note that one counterparty, Petromil Gas S.A.S. E.S.P. ("Petromil"), cross-applied for a declaration that its agreement with the Canacol Group is an EFC. It makes no difference that this application was brought by the debtor company instead of its counterparties.

VI. Eligible Financial Contracts

[24] The starting point is that "the *CCAA*'s main objective is the financial and commercial rehabilitation of an insolvent company": ***Montréal (City) v Deloitte Restructuring Inc***, 2021 SCC 53 at para 113 *per* Brown J dissenting but not on this point. Accordingly, "the *CCAA*'s provisions must be interpreted expansively to enable its remedial objectives to be achieved, and in particular to allow a company to continue its activities and to avoid the social and economic losses that can result from its liquidation": ***Montréal (City)*** at para 115 *per* Brown J dissenting but not on this point. The natural and necessary corollary of expansive construction of powers under the *CCAA* is narrow construction of limits on those powers.

[25] The power to disclaim contracts is limited by *CCAA* s 32(9) which provides that EFCs cannot be disclaimed. An EFC is defined in *CCAA* s 2(1) to be "an agreement of a prescribed

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[1] *CCAA* s 32 uses the phrase "disclaimer or resiliation." For the sake of economy in these reasons, apart from where required as part of a quotation, I only use the term "disclaimer."

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[33] Justice Romaine considered ***Blue Range*** and ***Androscoggin*** in ***Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)***, 2006 ABQB 153 ("***Calpine***"). The agreement in issue in ***Calpine*** was a "call on production" from producing assets that Calpine sold to Pengrowth. The call on production was essentially a right of first refusal to purchase natural gas. After an initial *CCAA* order was granted in respect of Calpine, Pengrowth purported to terminate the agreement on the grounds that it was not subject to the *CCAA* stay because it was an EFC. Calpine sought a declaration that agreement was not an EFC. Romaine J explained at para 18 that the agreement did not have the characteristics of an EFC because it did not have a "certain price" (which she equated to a fixed price). But the critical point for Romaine J at para 19 was that the agreement in issue "cannot be 'marked to market'" (*i.e.* valued relative to the current market price).

[34] Though ***Blue Range***, ***Androscoggin CA***, and ***Calpine*** are important decisions, they predated the *EFC Regulation*, which was introduced in 2007. The Court of Appeal observed in ***Bellatrix Exploration Ltd v BP Canada Energy Group ULC***, 2021 ABCA 148 at para 12 ("***Bellatrix CA***") that the *EFC Regulation* has "yet to [be] considered by an appellate court." And that remains true today. The Court of Appeal went on to note that ***Blue Range*** and ***Androscoggin*** "considered the [EFC] issue in the context of prior legislation, which used different language." Despite the novelty of the issue, the Court in ***Bellatrix CA*** at paras 2 and 14 declined to interpret the *EFC Regulation* on the grounds that the case before it had become moot and that it was best to leave the question for another day when there was a better "evidentiary record in the context of a live controversy."

[35] The only significant analysis of the *EFC Regulation* is found in ***Bellatrix Exploration Ltd, Re***, 2020 CarswellAlta 350 ("***Bellatrix QB"***). Justice Strekaf granted leave to appeal in ***Bellatrix Exploration Ltd v BP Canada Energy Group ULC***, 2020 ABCA 178 finding that the disclaimer of contracts and the interpretation of the *EFC Regulation* was "a significant issue in insolvency practice generally" (para 23) and the appeal was arguable (paras 28-29). The appeal, as noted in the previous paragraph, did not decide the issue because a change in circumstances rendered the matter moot. Accordingly, we are left with the first instance decision, ***Bellatrix QB***.

[36] Justice Jones began his analysis in ***Bellatrix QB*** with the question of what a derivatives agreement is. He started from the premise that "a derivatives agreement must first be a financial agreement": ***Bellatrix QB*** at para 121. From this, he reasoned at para 125 that "a financial agreement is one which serves an important financial purpose." Justice Jones found at para 127 that the contracts before him in ***Bellatrix QB*** had a financial purpose because they allow for "price diversification." And he was satisfied from his assessment of public statements made by Bellatrix after contracting and his review of its portfolio of contracts that price diversification was a genuine corporate objective.

[37] I disagree with the approach to evidence in ***Bellatrix QB***. The *CCAA* is a business statute, so it must be understood to facilitate established business practices, unless the language used clearly indicates something different. This means that, consistent with the principles of contract law, a party entering a contract using objective criteria must be able to determine *ex ante* if it is an EFC so that it may plan its affairs to account for the possibility of counter-party insolvency. That means that the dominant considerations in determining whether a contract is an EFC must be: (1) the contract itself; and (2) the market in which the contract exists. Though ***Bellatrix QB*** considers one party's subjective intention with respect to the contract – price

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diversification – I am not persuaded that subjective intentions of the parties should carry any weight in a court's EFC analysis unless such intentions were communicated to the counterparty prior to contracting or that use of the type of contract was so well known in the industry that all market participants may be presumed to understand the purpose of the contract. The EFC analysis, just like contract interpretation, must seek to determine the objective nature of the contract based on what was known or knowable by the parties at the time of contracting: see, for example, ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at paras 57 and 59. Likewise, the determination of whether an agreement is an EFC should not involve *ex post facto* analysis of how the agreement was used by the parties.

[38] An important interpretive question in ***Bellatrix QB*** concerned the meaning of *EFC Regulation* s 2(a)(ii) which provides that a "derivatives agreement" that is the "subject of recurrent dealings" in "commodities markets" is an EFC. The parties in ***Bellatrix QB*** disagreed whether it is the agreement itself that is the "subject of recurrent dealings" in "commodities markets" or whether it is the underlying commodity – natural gas in that case – which must be the "subject of recurrent dealings" in "commodity markets." Justice Jones acknowledged at para 170 that he was "not without some doubt" but he concluded that the correct interpretation of *EFC Regulation* s 2(a)(ii) was that "derivatives agreements can be EFCs if the underlying commodity is the subject of recurrent dealings."

[39] Justice Jones identified two main reasons why he interpreted *EFC Regulation* s 2(a)(ii) as referring to the underlying commodity instead of the derivative agreement itself. First, at para 171 he observed that the legislature "had intended to require interests in the derivatives agreement itself to be disposed of or acquired on some type of market it could have said so." Second, at para 172 he posited that *EFC Regulation* s 2(a)(ii) was necessary to "distinguish trades [...] in the underlying reference item (in this case, natural gas) from trades in the agreement itself, as contemplated in (i)."

[40] I consider Justice Jones' interpretation of *EFC Regulation* s 2(a)(ii) to be incorrect. A plain reading of *EFC Regulation* s 2(a) shows that it is about derivatives agreements, not whatever the underlying subject of the derivatives agreement may be, and then subsections (i) and (ii) describe the characteristics that a derivatives agreement must have to be an EFC for the purposes of the *CCAA*. The use of the words "or other regulated market" in subsection (i) tells us that it is about derivatives agreements that trade on regulated markets. Subsection (ii), then, is intended to capture derivatives agreements that are "the subject of recurrent dealings" on unregulated markets (*e.g.* over the counter).

[41] The plain reading of the words in *EFC Regulation* 2(a) in the previous paragraph is supported by the *Regulatory Impact Statement* that accompanied the initial publication of the *EFC Regulation* in the *Canada Gazette*, Part II, Vol. 141, No. 24 (November 28, 2007) at 2384 which explains that:

> The paragraphs on derivatives agreements have been restructured for ease of reading and future agreements have been moved under that heading. In addition, it has been clarified that, in order to meet the definition of "eligible financial contract," derivatives agreements must be traded on regulated markets or be subject to recurrent dealings in the markets. This will ensure that contracts that are strictly bilateral in nature are not captured by the definition. [emphasis added]

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[42] Where the words of a statute or regulation are precise and communicate a clear meaning, they must be the court's dominant consideration: ***Dow Chemical Canada ULC v Canada***, 2024 SCC 23 at para 101. And nothing about the *CCAA*'s overall purpose – rehabilitation of insolvent corporations – or the purpose of the *EFC Regulation* – defining EFCs, including the scope of the exception to the power to disclaim contracts – weighs in favour of departing from the plain meaning of the words in the *EFC Regulation*. For a recent summary of the principles of statutory interpretation, see ***Chief Electoral Officer of Alberta v Sylvestre***, 2025 ABKB 712 at paras 56-63.

[43] Some of the Respondents point out that despite whatever misgivings I may have about the interpretation of *EFC Regulation* 2(a)(ii) in ***Bellatrix QB***, I am bound by the principle of horizontal *stare decisis*: ***R v Kirkpatrick***, 2022 SCC 33 at para 202; ***R v Sullivan***, 2022 SCC 19 at paras 65, 75. I agree. But horizontal *stare decisis* is not meant to stifle debate over the law or the law's development. Instead, its purpose is to ensure stability in the law until a potentially incorrect interpretation of the law receives due consideration by a higher court. Accordingly, I have stated my view as to how *EFC Regulation* s 2(a) should be interpreted so that in the future when the issue comes before an appellate court, it is clear that there is disagreement amongst superior court judges as to the correct interpretation.

[44] My view on the interpretation of *EFC Regulation* s 2(a), does not affect the outcome of this decision because, as will be seen in the following discussion, the issue in this case turns on whether the agreements in question are "derivatives agreements" under *EFC Regulation* s 1. Accordingly, I am not required to apply *EFC Regulation* s 2(a). If I applied my interpretation of *EFC Regulation* s 2(a) to the agreements in issue, it would only reinforce my conclusion.

VII. The Colombian Natural Gas Market

[45] The leading cases on whether natural gas contracts are EFCs concern the North American natural gas market. For the most part, the North American natural gas market is unregulated and interconnected by pipelines and storage facilities throughout Canada and the US. Natural gas shipped on the major pipelines trades at significant delivery points and storage facilities such as AECO Hub and Henry Hub. Natural gas derivatives contracts also trade over the counter ("OTC') and on the NYMEX and other commodities exchanges. The natural gas market in North America is both a physical market and a market for financial products derived from or connected in some way to the underlying physical natural gas supply.

[46] The reality of the North American natural gas market discussed by Fruman JA in ***Blue Range*** means that contracts that might not appear on their face to be EFCs may be understood to be EFCs when viewed in the context of the market and how they may be used in the market. A simple example is that a fixed price contract for physical delivery of natural gas at a recognized delivery point in the North American natural gas market may be understood to be a hedge against the market price of natural gas at the same delivery point or perhaps even a different delivery point.

[47] The question of whether agreements are "derivatives agreements" within the meaning of the *EFC Regulation* must be assessed in the context of the relevant market. The reason for this is that the question of whether an agreement has a "financial purpose" depends in significant part on what can be done with an agreement which, in turn, is controlled by the relevant market. For

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the agreements in issue, this requires consideration of the characteristics of the Colombian natural gas market.

[48] There are many affidavits from the Canacol Group and the Respondents that describe the Colombian natural gas market. Though the affidavits emphasize different aspects of the Colombian natural gas market, the evidence is consistent and shows that the Colombian natural gas market is different from the North American natural gas market in important ways.

[49] Colombia does not export natural gas. Most natural gas consumed in Colombia is produced domestically and sold by producers pursuant to long-term supply contracts. Some natural gas is imported through the country's only LNG regasification facility located near Cartagena which is fully contracted. Zamir Centanaro the affiant for CoreX Energy S.A.S. E.S.P. ("CoreX") characterized the Colombian natural gas market as a "physical market in which supply is contracted based on the geographic location of production fields and pipeline infrastructure."

[50] There are limited opportunities for the Respondents to obtain alternative supply if the Canacol Group were to cease supplying natural gas. Colombia's lone LNG import regasification terminal would not be capable of offsetting shortages of natural gas. There is no significant natural gas storage infrastructure to buffer fluctuations in supply or to facilitate trading. Because of declining domestic natural gas production and limited LNG regasification capacity, the Colombian natural gas market is tight with no excess supply.

[51] Because most natural gas in Colombia is sold pursuant to long-term supply contracts, the secondary market for natural gas is small and insufficient to constitute an alternative supply source for the volumes provided by the Canacol Group. As one affiant put it, "Colombia's secondary gas market functions as a very short-term balancing mechanism."

[52] Counterparties are concerned that any reduction in supply that may result from the disclaimer of contracts will have a significant effect on prices because the Colombian natural gas market is very tight. They speculate that shortfalls in supply, the inability to source alternative supplies of natural gas, and limited capacity of industrial consumers to switch fuels would result in significant price escalation.

[53] There are two components to the Colombian natural gas market: (1) regulated; and (2) non-regulated. The regulated market is comprised of households and small commercial enterprises with consumption below 100 thousand cubic feet per day ("MCF/d"). The regulated market prices are set by the Comisión de Regulación de Energía y Gas ("CREG") through a tariff formula, which ensures affordability of natural gas supply in which the purchase price of the natural gas is transferred to the customer on a pass-through basis. The non-regulated market is comprised of large consumers with consumption above 100 MCF/d. The non-regulated market prices are set competitively through auctions or direct negotiations and are not subject to any tariff set by the CREG.

[54] Disclaiming agreements for the supply of the regulated market would result in increased charges to end users under the tariffs. The cost of gas is part of the variable component of the tariff that is passed through to end users. If the disclaimer of contracts resulted in the curtailment of supply, those Respondents supplying natural gas to the regulated market would be required to acquire replacement gas supplies likely at higher prices. The increased price of replacement supply would be passed on to regulated customers through the tariff.

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[55] The characteristics of the Colombian natural gas market suggest that there is limited opportunity for the agreements in issue to function as EFCs. First, there was scant evidence that there is an active natural gas derivatives market in Colombia. This conspicuous deficiency suggests that the agreements in issue do not have a financial purpose distinct from the underlying physical supply obligation and are not EFCs.

[56] Second, for the regulated market the evidence is that the long-term supply agreements and fixed annual pricing do not function as hedges against market pricing because any increases in pricing are passed on to end-users under the tariff.

[57] Third, the secondary market is so small that the large long-term supply contracts in issue cannot realistically be seen as hedging against exposure to that market because the secondary market could not supply the required volumes. In other words, the exposure to market pricing is entirely theoretical.

[58] Fourth, the true purpose of most of the long-term supply arrangements in the Colombian natural gas market is supply certainty. Fixed pricing appears to be a feature of all Colombian long-term natural gas agreements not for the purpose of hedging against a market price but as a practical necessity because of the absence of what Fruman JA in ***Blue Range*** at para 46 called a "liquid and volatile market" that permits consistent price discovery and thus a genuine market price for the commodity.

VIII. Are the Agreements EFCs?

a. Consumer Offtake Agreements

[59] The Consumer Offtake Agreements set out in Schedule A to these reasons are take or pay arrangements with fixed prices denominated in US dollars. The prices change each year based on a fixed percentage or the US Producer Price Index which is a measure of inflation. The gas supplied pursuant to the Consumer Offtake Agreements, as discussed above, goes to residential and small commercial consumers who are charged for the gas pursuant to a tariff established by CREG.

[60] The Consumer Offtake Agreements do not bear the hallmarks of derivatives agreements. They are physical supply agreements that lack financial settlement mechanisms and do not transfer or hedge financial risk because they do not transfer exposure to market price movements or allow either party to profit or lose from changes in the market. The provisions for compensation for non-delivery and early termination do not mark to market.

[61] The Consumer Offtake Agreements have standardized terms required by CREG, some of which some Respondents have argued are analogous to set-off or netting provisions. These Respondents also argue that the right to set off under the Colombian Civil Code is relevant. Though set-off or netting provisions are one indicator that an agreement is an EFC, the billing dispute provisions and the rights of set off under general Colombian law are not indicia that the Consumer Offtake Agreements are EFCs. Even if I were to consider the billing dispute provisions and the right of set off in Colombian law to be akin to set off or netting provisions, that would not outweigh the other characteristics that suggest that the Consumer Offtake Agreements are mere supply agreements.

[62] The evidence of the affiants of the various counterparties to the Consumer Offtake Agreements is that price increases are passed through to end users according to the terms of the

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tariff. This evidence was adduced in support of their argument that disclaimer of the Consumer Offtake Agreements would be unfair and cause financial hardship. But this reality undermines any suggestion that the Consumer Offtake Agreements have a financial purpose. The counterparties to the Consumer Offtake Agreements are not, according to their own evidence, exposed to market pricing. Rather, it is their customers who are exposed to market pricing pursuant to the pass-through terms of the tariff. The protection of end users from the vagaries of market pricing may be a laudable objective but it does not make the Consumer Offtake Agreements into EFCs.

[63] The evidence adduced by one Consumer Offtake Agreement counterparty, Petromil, focussed mainly on the potential economic harm to the public. To the extent that its affiant, Ms. Murgas, addressed financial harm to Petromil, she noted that Petromil would suffer financial penalties under its downstream agreements for failure to meet its delivery obligations. The fact that Petromil points to this kind of financial harm and not other forms of financial harm indicates that the true purpose of its Consumer Offtake Agreement is managing supply risk, not price risk. This is consistent with the tariff permitting the pass-through of pricing to downstream consumers.

[64] The Consumer Offtake Agreements do not have a financial purpose that makes them derivatives agreements within the meaning contemplated in the *EFC Regulation*. The lack of financial purpose of the Consumer Offtake Agreements distinct from the underlying supply obligation is obvious when the characteristics of the Colombian natural gas market and the terms of the contracts are considered.

b. Commercial Offtake Agreements

[65] The Commercial Offtake Agreements set out in Schedule B to these reasons are take or pay contracts with fixed prices denominated in US dollars. The main difference between the Commercial Offtake Agreements and the Consumer Offtake Agreements is that the end users of the natural gas are large industrial entities in the unregulated market.

[66] The Commercial Offtake Agreements, like the Consumer Offtake Agreements, do not have the hallmarks of derivatives agreements. The pricing is fixed but not indexed or referable to market prices. The penalties for shortfalls in deliveries and early termination are calculated in reference to pricing under the relevant agreement, not on a mark to market basis. There is nothing about the Commercial Offtake Agreements that indicates that they have a purpose other than the physical supply of natural gas.

[67] A fixed price agreement, or even a variable price agreement according to ***Bellatrix QB***, may be an EFC depending on the market context in which it exists. But as discussed above, the Colombian natural gas market is different from the North American natural gas market in that the Colombian market is not characterized by significant trading activity. There is nothing about the Colombian market that suggests that an agreement that appears on its face to be a simple supply agreement may be an EFC when viewed in context.

[68] I do not accept the *ex post facto* claims made by some of the affiants that their Commercial Offtake Agreements formed part of a financial risk management strategy in the absence of contemporaneous corroborating evidence. Had those parties' subjective intentions with respect to the Commercial Offtake Agreements been communicated to the Canacol Group at or before the time of contracting, their claims would have been more persuasive. I find that

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the Commercial Offtake Agreements do not have a distinct financial purpose and, accordingly, are not derivatives agreements within the meaning of the *EFC Regulation*.

c. Dual Category Offtake Agreements

[69] The Dual Category Offtake Agreements set out in Schedule C to these reasons differ from the Consumer Offtake Agreements and the Commercial Offtake Agreements in that they serve both the regulated and unregulated markets. Otherwise, the discussion in the preceding sections concerning the Consumer Offtake Agreements and Commercial Offtake Agreements applies *mutatis mutandis*.

d. Promigas Agreements

[70] The Promigas Agreements provide for the transportation of natural gas on a ship or pay basis. Though I recognize that pipeline capacity could be financialized such that an agreement for pipeline capacity could be an EFC, there is no evidence before the Court to indicate that this is the case in the Colombian natural gas market nor is there any indication in the Promigas Agreements that the parties contemplated such a use of the contracts or the pipeline capacity reserved pursuant to the contracts. The Promigas Agreements are not EFCs.

e. Canaven Agreement

[71] The Canaven Agreement is a long-term LNG logistics services contract. Pursuant to the Canaven Agreement, Canaven trucks LNG from the Canacol Group's gas treatment and liquefaction plant at Jobo to Canaven's facilities in Cúcuta where it is regasified and put into a distribution system. Canacol Group pays Canaven a service per MMBTU of gas delivered into the distribution system. The Canaven Agreement exists to facilitate Canacol Group's performance of certain of the Consumer Offtake Agreements. The Canaven Agreement is not an EFC.

IX. Should the Canacol Group be Permitted to Disclaim the Agreements?

[72] The Respondents submit that disclaimer of the contracts is not necessary for the restructuring of the Canacol Group and that disclaimer of the contracts would cause significant financial hardship to both the Respondents and end users in Colombia. Beyond the questions of utility to the Canacol Group restructuring and financial hardship required to be considered by *CCAA* s 32(4), the Respondents submit that the disclaimer of contracts should not be permitted as it is contrary to both Colombian law and the Colombian constitution.

[73] Chief Justice Morawetz explained the correct approach to *CCAA* s 32(4) in ***Laurentian University of Sudbury***, 2021 ONSC 3272 at para 44:

> A consideration of the s. 32(4) factors requires a balancing of interests. The subsection is silent with respect to the relative importance of any one of the factors to be considered and is not restricted to the listed factors. The test does, however, require the court to balance the benefit of the proposed disclaimer for Laurentian against the detrimental impact on Thorneloe. The disclaimer of a contract must be fair, appropriate and reasonable in all the circumstances. Ultimately, it is a discretionary decision to determine whether the disclaimer should be upheld. This discretion is exercised by weighing the competing

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> interests and prejudice to the parties and assessing whether the disclaimer or resiliation is fair and reasonable.

[74] Though the *CCAA* s 32(4) analysis is mainly a balancing between the benefit to the debtor company and the detriment to the counterparty, I accept that there is room to consider potential downstream impacts of a disclaimer because the factors in *CCAA* s 32(4) are not exhaustive. With that said, the effects on the parties to the contract sought to be disclaimed must be foremost in a court's analysis.

a. Would the Disclaimer Enhance the Prospects of a Viable Compromise or Arrangement Being Made in Respect of the Company?

[75] The power to disclaim executory contracts is an essential part of the restructuring toolkit and has deep roots in the common law. The power to disclaim was codified in *CCAA* s 32 in 2009. Put simply, if insolvent companies could not disclaim unfavourable contracts, restructuring under the *CCAA* and other insolvency statutes would often be impossible. For a useful discussion of the power to disclaim contracts under the *CCAA*, see Nicholas Avis and Maria Konyukhova, "The Art of Undoing the Deal: Disclaiming Contracts Under the CCAA" (2025) 14 Journal of Insolvency in Canada 323.

[76] Both the Canacol Group and the Monitor submit that the identified contracts must be disclaimed to facilitate the Canacol Group's restructuring as a going concern. The Supplement to the Seventh Report of the Monitor states at para 33 that:

> absent renegotiation or disclaimer of the Subject Agreements, the Applicants are projected to have insufficient funds to carry on operations in the short-term, which would result in the cessation of supply of natural gas by the Applicants and material consequences on all of the Canacol Group's stakeholders and on Colombia's power grid reliability and generation output. [emphasis in original]

[77] The Canacol Group's affiant, Mr. Bednar, explained in his tenth affidavit that the Canacol Group's position that the proposed disclaimers are essential for a viable restructuring has been reinforced from feedback from participants in the SISP process. Phase 2 SISP participants have advised the Canacol Group that:

> (a) pricing under the Offtake Agreements serving non-regulated demand is materially below current market pricing;
>
> (b) the Canacol Group has accrued, and will continue to accrue, significant penalties, compensation obligations, ship-or-pay charges, and other monetary claims under the Subject Agreements; and
>
> (c) current production levels are not sufficient to satisfy mandatory delivery volumes under the Offtake Agreements (and resulting penalties accruing after a transaction cannot be sustained) or the fixed transportation obligations under the Promigas Agreements.

[78] The Canacol Group's expectation based on feedback from SISP participants is that unless the various agreements are renegotiated or disclaimed, "there is a real and substantial risk that the SISP will not result in any going concern transaction."

[79] The root cause of the Canacol Group's insolvency is declining production. Because of declining production, the Canacol Group cannot meet its delivery obligations which, in turn, is

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resulting in the accrual of penalties under the various agreements for non-delivery and charges for unutilized transportation capacity. The Canacol Group cannot address its declining production problem without restructuring. Restructuring requires new investment. New investment will not happen without disclaimer or renegotiation of the contracts. I am satisfied that disclaimer of the contracts is necessary for a viable arrangement being made in respect of the Canacol Group.

b. Whether the Disclaimer Would Likely Cause Significant Financial Hardship to a Party to the Agreement?

i. Consumer Offtake Agreements/Regulated Market

[80] Much of the evidence of the Respondents concerning the Consumer Offtake Agreements and the Dual Category Offtake Agreements concerned harm to Colombian vulnerable residential and small business consumers. For example, an affiant for Gases Del Caribe A.A. E.S.P. and Gases De La Guajira S.A. E.S.P. deposed that those entities served approximately 1.5 million residential, commercial, and industrial customers in Colombia which comprises almost 12% of the Colombian natural gas market. Further, approximately 90% of their residential customers are "vulnerable populations residing in lower to lower-middle class residential areas benefiting from CREG regulated/subsidized natural gas rates." The affiant for Surtigas gave similar evidence.

[81] There are three reasons why disclaiming the agreements serving the regulated market will not cause financial hardship to the Respondents. First, the hardship complained of is to end users – *i.e.* the Respondents' customers, not the Respondents. This may seem to be a technical point, but the *CCAA* is clear that the financial hardship must be to the party to the contract that is to be disclaimed, not non-parties downstream of the party to the contract. The financial hardship to downstream customers is relevant but, for reasons that I will explain, the spectre facing regulated customers is not what the Respondents have suggested.

[82] Second, the Canacol Group has made an explicit commitment that, in the event of the disclaimers being approved, that it will maintain existing pricing for those Respondents serving the regulated market. Mr. Bednar deposed that the "[Canacol Group] do not seek to use the Disclaimer Orders to increase regulated consumer pricing. Rather in respect of *regulated* demand, the [Canacol Group] are seeking relief from delivery obligations and accrued or accruing penalties that current production cannot support." [emphasis in original] The proposed Disclaimer Orders shall be amended to reflect this commitment prior to execution by the Court.

[83] Third, the Colombian regulatory regime for allocating shortages of natural gas between essential and non-essential demand described in several affidavits before the Court shows that consumers in the regulated market would be among the last to be denied gas supply in the event of continued reductions in natural gas production. As such, regulated customers will have greater price and supply certainty than most other natural gas consumers in Colombia.

ii. Commercial Offtake Agreements

[84] Before the question of the potential hardship that may be caused by disclaimer of the Commercial Offtake Agreements, it is important to take notice of some basic facts concerning the production of natural gas and the commercial incentives at play.

[85] The idea that the Canacol Group would cease producing natural gas if the Disclaimer Orders are granted is just wrong. First, the Canacol Group must keep producing natural gas because shutting in its wells would jeopardize production. The evidence before the Court is, and

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it is well known in the industry, that shutting in gas wells can negatively affect the ability of wells to produce when they come back online. Second, it is in the Canacol Group's commercial interest to continue production and maximize its income. Indeed, that is one of the premises of the disclaimer application – the Canacol Group wants to keep producing and negotiate new terms. The only real questions if the Disclaimer Orders are granted are to whom will the Canacol Group sell its gas and on what terms.

[86] The realistic scenario where the Disclaimer Orders are granted must be compared to what may occur if the Disclaimer Orders are not granted. There is a possibility that if the Disclaimer Orders are not granted, the Canacol Group will be unable to afford to continue producing gas because of accruing delivery penalties and the cost of unused shipping capacity. The failure to grant the Disclaimer Orders is the only situation in which the disorderly shut down of the Canacol Group's business is probable.

[87] An important point to keep in mind is that a decision to dismiss the disclaimer application would not make the Canacol Group produce more gas. The Canacol Group, even if it continued to produce at current rates despite not obtaining the Disclaimer Orders, would still not be able to meet its contracted demand. Put differently, whether the Disclaimer Orders are granted or not there will be a shortfall of natural gas relative to the Respondents' demand. This means that the real issue is not the existence of hardship because hardship is inevitable, it is how the hardship (*i.e.* shortfall) should be allocated.

[88] The strongest argument for hardship is advanced by CoreX which supplies Cerro Matoso S.A. ("Cerro Matoso"), a ferronickel producer and one of the most significant industrial and mining operations in Colombia. CoreX purchases natural gas from the Canacol Group at a fixed price and sells it to Cerro Matoso for a slightly higher fixed price. Gas is delivered to Cerro Matoso on a dedicated natural gas pipeline owned by Cerro Matoso. The Canacol Group provides approximately 82% of the natural gas used by Cerro Matoso in its operations.

[89] CoreX submits that Cerro Matoso is "critically important to the economic and social welfare of Colombia" because it generates "more than 2,000 direct and indirect jobs in an economically vulnerable and underserved region of Colombia." CoreX notes that Cerro Matoso has contributed to the economic improvement of surrounding communities and contributes to social programming in those communities. Due to the significance of Cerro Matoso, the Superintendency of Public Services for the Government of Colombia announced on May 8, 2026 that it was placing the Canacol Group under special surveillance to ensure its compliance with its natural gas supply obligations to Cerro Matoso.

[90] There is no doubt that Cerro Matoso and those who depend on it will experience hardship if the Canacol Group does not supply it with natural gas. But that is also the case for other industrial users and those who depend on them. The issue is that the allocation of the Canacol Group's natural gas production is a zero-sum game. Filling the full quantity under some contracts means shortfalls for others. And permitting disclaimer of the Commercial Offtake Agreements merely transforms a shortfall in contracted supply into shortfall in uncontracted supply. It is the same problem for industrial users just without the right to claim penalties against the Canacol Group.

[91] If the Disclaimer Orders are granted, the Canacol Group has every incentive to continue to produce as much natural gas as it can to meet demand in Colombia's tight market. The counterparties to the disclaimed Commercial Offtake Agreements would have the opportunity to

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contract for this supply on new terms. To the extent that the allocation of supply by the market under new contracts is at odds with Colombian law or public policy, that is something for Colombian authorities to determine and, if appropriate, address. The allocation of shortfalls in natural gas supply in Colombia is not something for this Court to determine or remedy. The Commercial Offtake Agreements may be disclaimed.

iii. Promigas

[92] Promigas posits that disclaimer of the Promigas Agreements would "cause significant financial hardship on Promigas" and "cause a systemic physical shortage of natural gas in Colombia, causing widespread and sudden increases in the price of natural gas, and imposing potentially catastrophic consequences on the Colombian economy and the well-being of its general public."

[93] The Promigas claim that it will suffer financial hardship if the Promigas Agreements are disclaimed cannot be taken seriously. Indeed, the short and conclusory written argument of Promigas on this point suggests that it does not believe in this position. The physical reality is that the Canacol Group – or whoever will be operating the Canacol Group's fields after the restructuring – must put their gas through the Promigas system. There is no physical alternative. As such, to the extent permitted by the Colombian regulatory regime, Promigas has a choice between having an empty pipe and shipping gas from the Canacol Group fields. The only practical question is the terms on which the gas will be shipped. Rather than accepting Promigas' speculative claims of hardship, it is more reasonable to conclude that the parties will negotiate new economic terms that reflect the reality that the parties need each other.

[94] Promigas' argument that termination of the Promigas Agreements would have a catastrophic effect on Colombian society is premised on Promigas refusing to negotiate new terms with the Canacol Group. That is a choice. And it is not the Court's choice or the Canacol Group's choice. If Promigas refuses to ship the Canacol Group's gas while its pipeline sits half empty and imposes hardship on the Colombian public, it alone will be to blame for that outcome. Of course, the Canacol Group must bargain in good faith, but the negotiation must start with recognition that the old terms are unsustainable considering the Canacol Group's insolvency and declining gas production.

[95] Promigas objects to the proposed form of disclaimer order because it purports to define any Promigas claims arising from the disclaimer as unsecured claims. I agree that such a term is both unnecessary and inappropriate to include in the Disclaimer Orders. The question of priority of any Promigas claims can be determined later with the benefit of a proper evidential record and full argument.

iv. Canaven Agreement

[96] Canaven did not appear in this proceeding. I am unable to identify any hardship apart from the loss of the right to collect contractual penalties in respect of the Canaven Agreement. Because the Canaven Agreement functions to support delivery of natural gas to the Canacol Group's customers under the Offtake Agreements, presumably to the extent that the Canacol Group will be supplying those customers pursuant to new terms, Canaven's services will be required. Canaven, then, will be able to mitigate some of its losses by entering a new contract with the Canacol Group.

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Tab

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CANADA

CONSOLIDATION

CODIFICATION

Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act)

Règlement sur les contrats financiers admissibles (Loi sur les arrangements avec les créanciers des compagnies)

SOR/2007-257

DORS/2007-257

Current to September 21, 2026

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations

(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to September 21, 2026. The last amendments came into force on June 14, 2016. Any amendments that were not in force as of September 21, 2026 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 21 septembre 2026. Les dernières modifications sont entrées en vigueur le 14 juin 2016. Toutes modifications qui n'étaient pas en vigueur au 21 septembre 2026 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act)

TABLE ANALYTIQUE

Règlement sur les contrats financiers admissibles (Loi sur les arrangements avec les créanciers des compagnies)

Registration
SOR/2007-257 November 15, 2007

COMPANIES' CREDITORS ARRANGEMENT ACT

Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act)

P.C. 2007-1732 November 15, 2007

Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to subsection 18(1) of the *Companies' Creditors Arrangement Act*, hereby makes the annexed *Eligible Financial Contract General Rules (Companies' Creditors Arrangement Act)*.

Enregistrement
DORS/2007-257 Le 15 novembre 2007

LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES

Règlement sur les contrats financiers admissibles (Loi sur les arrangements avec les créanciers des compagnies)

C.P. 2007-1732 Le 15 novembre 2007

Sur recommandation du ministre de l'Industrie et en vertu du paragraphe 18(1) de la *Loi sur les arrangements avec les créanciers des compagnies*, Son Excellence la Gouverneure générale en conseil établit les *Règles générales relatives aux contrats financiers admissibles (Loi sur les arrangements avec les créanciers des compagnies)*, ci-après.

Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act)

1 The following definitions apply in these Regulations.

derivatives agreement means a financial agreement whose obligations are derived from, referenced to, or based on, one or more underlying reference items such as interest rates, indices, currencies, commodities, securities or other ownership interests, credit or guarantee obligations, debt securities, climatic variables, bandwidth, freight rates, emission rights, real property indices and inflation or other macroeconomic data and includes

(a) a contract for differences or a swap, including a total return swap, price return swap, default swap or basis swap;

(b) a futures agreement;

(c) a cap, collar, floor or spread;

(d) an option; and

(e) a spot or forward. (*contrat dérivé*)

financial intermediary means

(a) a clearing agency; or

(b) a person, including a broker, bank or trust company, that in the ordinary course of business maintains securities accounts or futures accounts for others. (*intermédiaire financier*)

SOR/2009-223, s. 2; SOR/2016-144, s. 2(F).

2 The following kinds of financial agreements are prescribed for the purpose of the definition ***eligible financial contract*** in subsection 2(1) of the *Companies' Creditors Arrangement Act*:

(a) a derivatives agreement, whether settled by payment or delivery, that

Règlement sur les contrats financiers admissibles (Loi sur les arrangements avec les créanciers des compagnies)

1 Les définitions qui suivent s'appliquent au présent règlement.

contrat dérivé Contrat financier dont les obligations sont dérivées d'un ou de plusieurs éléments de référence sous-jacents — tels que les taux d'intérêt, les indices, les devises, les matières premières, les titres ou autres titres de participation, les obligations de crédit ou de garantie, les titres de créance, les variables climatiques, la bande passante, le tarif pour le fret, les droits d'émission, les indices de bien immobilier et l'inflation ou autres données macroéconomiques — ou qui se rapportent à un ou plusieurs de ces éléments ou en sont fonction, y compris :

a) le contrat pour la différence ou le contrat de swap, notamment le contrat de swap sur le rendement total, sur le rendement des prix, sur défaillance ou de taux de référence;

b) le contrat à terme;

c) le contrat à taux plafond, à fourchette de taux, à taux plancher ou à écart;

d) le contrat d'option;

e) le contrat au comptant ou le contrat à terme hors cote. (*derivatives agreement*)

intermédiaire financier S'entend :

a) soit d'une agence de compensation et de dépôt;

b) soit d'une personne, notamment un courtier, une banque ou une société de fiducie, qui, dans le cours normal de ses activités, tient pour le compte d'autrui des comptes de titres ou de contrats à terme. (*financial intermediary*)

DORS/2009-223, art. 2; DORS/2016-144, art. 2(F).

2 Les contrats financiers ci-après sont des catégories réglementaires pour l'application de la définition de ***contrat financier admissible*** au paragraphe 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies* :

a) le contrat dérivé qui est réglé par paiement ou livraison et qui :

(i) trades on a futures or options exchange or board, or other regulated market, or

(ii) is the subject of recurrent dealings in the derivatives markets or in the over-the-counter securities or commodities markets;

(b) an agreement to

(i) borrow or lend securities or commodities, including an agreement to transfer securities or commodities under which the borrower may repay the loan with other securities or commodities, cash or cash equivalents,

(ii) clear or settle securities, futures, options or derivatives transactions, or

(iii) act as a depository for securities;

(c) a repurchase, reverse repurchase or buy-sellback agreement with respect to securities or commodities;

(d) a margin loan in so far as it is in respect of a securities account or futures account maintained by a financial intermediary;

(e) any combination of agreements referred to in any of paragraphs (a) to (d);

(f) a master agreement in so far as it is in respect of an agreement referred to in any of paragraphs (a) to (e);

(g) a master agreement in so far as it is in respect of a master agreement referred to in paragraph (f);

(h) a guarantee of, or an indemnity or reimbursement obligation with respect to, the liabilities under an agreement referred to in any of paragraphs (a) to (g); and

(i) an agreement relating to financial collateral, including any form of security or security interest in collateral and a title transfer credit support agreement, with respect to an agreement referred to in any of paragraphs (a) to (h).

SOR/2009-223, s. 3.

3 [Repealed, SOR/2009-223, s. 4]

(i) soit se négocie sur un marché ou bourse de contrats d'option ou de contrats à terme ou sur tout autre marché réglementé,

(ii) soit fait l'objet de transactions récurrentes sur les marchés de dérivés ou sur les marchés hors cote de titres ou de matières premières;

b) le contrat :

(i) soit portant sur l'emprunt ou le prêt de titres ou de matières premières, notamment le contrat prévoyant le transfert de titres ou de matières premières en vertu duquel l'emprunteur peut rembourser le prêt au moyen d'autres titres ou matières premières, ou au moyen de sommes en espèces ou d'équivalents de trésorerie,

(ii) soit relatif à la compensation ou au règlement des opérations sur titres ou sur contrat à terme, contrat d'option ou contrat dérivé,

(iii) soit autorisant à agir en tant que dépositaire de titres;

c) le contrat de report, de report inversé ou de rachat-revente relatif aux titres ou aux matières premières;

d) le contrat de prêt sur marge, dans la mesure où celui-ci se rapporte à des comptes de titres, ou de contrats à terme, tenus par un intermédiaire financier;

e) toute combinaison de contrats visés à l'un ou l'autre des alinéas a) à d);

f) tout contrat de base, dans la mesure où celui-ci se rapporte à des contrats visés à l'un ou l'autre des alinéas a) à e);

g) tout contrat de base, dans la mesure où celui-ci se rapporte à un contrat de base visé à l'alinéa f);

h) la garantie, l'indemnité ou l'obligation de remboursement relative aux obligations découlant d'un contrat visé à l'un ou l'autre des alinéas a) à g);

i) le contrat relatif à une garantie financière, notamment l'accord de transfert de titres pour obtention de crédit et toute forme de sûreté portant sur une garantie, à l'égard d'un contrat visé à l'un ou l'autre des alinéas a) à h).

DORS/2009-223, art. 3.

3 [Abrogé, DORS/2009-223, art. 4]

Tab

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CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

L.R.C. (1985), ch. C-36

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Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente

notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

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

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

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

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

Stays, etc. — other than initial application

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

loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut,

(a) a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest;

(b) the consideration paid for any right or interest, including those referred to in paragraph (a); or

(c) any other prescribed right or interest.

2019, c. 29, s. 139.

a) d'une réclamation, d'un contrat financier admissible, d'une option ou d'une hypothèque, d'un gage, d'une charge, d'un nantissement, d'un privilège ou d'un autre droit qui grève le bien;

b) de la contrepartie payée pour l'obtention, notamment, de tout intérêt ou droit visés à l'alinéa a);

c) de tout autre intérêt ou droit prévus par règlement.

2019, ch. 29, art. 139.

Fixing deadlines

12 The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

R.S., 1985, c. C-36, s. 12; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 2004, c. 25, s. 195; 2005, c. 47, s. 130; 2007, c. 36, s. 68.

Échéances

12 Le tribunal peut fixer des échéances aux fins de votation et aux fins de distribution aux termes d'une transaction ou d'un arrangement.

L.R. (1985), ch. C-36, art. 12; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 2004, ch. 25, art. 195; 2005, ch. 47, art. 130; 2007, ch. 36, art. 68.

Leave to appeal

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

R.S., 1985, c. C-36, s. 13; 2002, c. 7, s. 134.

Permission d'en appeler

13 Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards.

L.R. (1985), ch. C-36, art. 13; 2002, ch. 7, art. 134.

Court of appeal

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

Cour d'appel

14 (1) Cet appel doit être porté au tribunal de dernier ressort de la province où la procédure a pris naissance.

Practice

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

R.S., 1985, c. C-36, s. 14; 2002, c. 7, s. 135.

Pratique

(2) Tous ces appels sont régis autant que possible par la pratique suivie dans d'autres causes devant le tribunal saisi de l'appel; toutefois, aucun appel n'est recevable à moins que, dans le délai de vingt et un jours après qu'a été rendue l'ordonnance ou la décision faisant l'objet de l'appel, ou dans le délai additionnel que peut accorder le tribunal dont il est interjeté appel ou, au Yukon, un juge de la Cour suprême du Canada, l'appelant n'y ait pris des procédures pour parfaire son appel, et à moins que, dans ce délai, il n'ait fait un dépôt ou fourni un cautionnement suffisant selon la pratique du tribunal saisi de l'appel pour garantir qu'il poursuivra dûment l'appel et payera les frais qui peuvent être adjugés à l'intimé et se conformera aux conditions relatives au cautionnement ou autres qu'impose le juge donnant la permission d'en appeler.

L.R. (1985), ch. C-36, art. 14; 2002, ch. 7, art. 135.

(d) shall cause a summary of any oral evidence to be made in writing.

Record

(7) The notice referred to in subsection (2) and, if applicable, the summary of oral evidence referred to in paragraph (6)(d), together with any documentary evidence that the Superintendent of Bankruptcy receives in evidence, form the record of the hearing, and that record and the hearing are public unless the Superintendent of Bankruptcy is satisfied that personal or other matters that may be disclosed are of such a nature that the desirability of avoiding public disclosure of those matters, in the interest of a third party or in the public interest, outweighs the desirability of the access by the public to information about those matters.

Dossier et audition

(7) L'audition et le dossier de celle-ci sont publics à moins que le surintendant ne juge que la nature des révélations possibles sur des questions personnelles ou autres est telle que, en l'occurrence, l'intérêt d'un tiers ou l'intérêt public l'emporte sur le droit du public à l'information. Le dossier comprend l'avis prévu au paragraphe (2), le résumé de la preuve orale prévu à l'alinéa (6)d) et la preuve documentaire reçue par le surintendant des faillites.

Decision

(8) The decision of the Superintendent of Bankruptcy after the hearing, together with the reasons for the decision, must be given in writing to the monitor not later than three months after the conclusion of the hearing, and is public.

Décision

(8) La décision du surintendant des faillites est rendue par écrit, motivée et remise au contrôleur dans les trois mois suivant la clôture de l'audition, et elle est publique.

Review by Federal Court

(9) A decision of the Superintendent of Bankruptcy given under subsection (8) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside under the *Federal Courts Act*.

2005, c. 47, s. 131; 2007, c. 36, s. 75.

Examen de la Cour fédérale

(9) La décision du surintendant, rendue et remise conformément au paragraphe (8), est assimilée à celle d'un office fédéral et est soumise au pouvoir d'examen et d'annulation prévu par la *Loi sur les Cours fédérales*.

2005, ch. 47, art. 131; 2007, ch. 36, art. 75.

Delegation

31 (1) The Superintendent of Bankruptcy may, in writing, authorize any person to exercise or perform, subject to any terms and conditions that he or she may specify in the authorization, any of the powers, duties or functions of the Superintendent of Bankruptcy under sections 29 and 30.

Pouvoir de délégation

31 (1) Le surintendant des faillites peut, par écrit, selon les modalités qu'il précise, déléguer les attributions que lui confèrent les articles 29 et 30.

Notification to monitor

(2) If the Superintendent of Bankruptcy delegates in accordance with subsection (1), the Superintendent or the delegate must give notice of the delegation in the prescribed manner to any monitor who may be affected by the delegation.

2005, c. 47, s. 131.

Notification

(2) En cas de délégation, le surintendant des faillites ou le délégué en avise, de la manière réglementaire, tout contrôleur qui pourrait être touché par cette mesure.

2005, ch. 47, art. 131.

Agreements

Contrats et conventions collectives

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the

Résiliation de contrats

32 (1) Sous réserve des paragraphes (2) et (3), la compagnie débitrice peut — sur préavis donné en la forme et de la manière réglementaires aux autres parties au

monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

contrat et au contrôleur et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel elle est partie à la date à laquelle une procédure a été intentée sous le régime de la présente loi.

Contestation

(2) Dans les quinze jours suivant la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), toute partie au contrat peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner que le contrat ne soit pas résilié.

Absence d'acquiescement du contrôleur

(3) Si le contrôleur n'acquiesce pas au projet de résiliation, la compagnie peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner la résiliation du contrat.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de résiliation, le cas échéant;

b) la question de savoir si la résiliation favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

c) le risque que la résiliation puisse vraisemblablement causer de sérieuses difficultés financières à une partie au contrat.

Résiliation

(5) Le contrat est résilié :

a) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), si aucune demande n'est présentée en vertu du paragraphe (2);

b) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1) ou à la date postérieure fixée par le tribunal, si ce dernier rejette la demande présentée en vertu du paragraphe (2);

c) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (3) ou à la date postérieure fixée par le tribunal, si ce dernier ordonne la résiliation du contrat en vertu de ce paragraphe.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

2005, c. 47, s. 131; 2007, c. 29, s. 108, c. 36, ss. 76, 112.

Collective agreements

33 (1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

Application for authorization to serve notice to bargain

(2) A debtor company that is a party to a collective agreement and that is unable to reach a voluntary agreement with the bargaining agent to revise any of the provisions of the collective agreement may, on giving five days notice to the bargaining agent, apply to the court for an

Propriété intellectuelle

(6) Si la compagnie a autorisé par contrat une personne à utiliser un droit de propriété intellectuelle, la résiliation n'empêche pas la personne de l'utiliser ni d'en faire respecter l'utilisation exclusive, à condition qu'elle respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce pour la période prévue au contrat et pour toute période additionnelle dont elle peut et décide de se prévaloir de son propre gré.

Pertes découlant de la résiliation

(7) En cas de résiliation du contrat, toute partie à celui-ci qui subit des pertes découlant de la résiliation est réputée avoir une réclamation prouvable.

Motifs de la résiliation

(8) Dans les cinq jours qui suivent la date à laquelle une partie au contrat le lui demande, la compagnie lui expose par écrit les motifs de son projet de résiliation.

Exceptions

(9) Le présent article ne s'applique pas aux contrats suivants :

a) les contrats financiers admissibles;

b) les conventions collectives;

c) les accords de financement au titre desquels la compagnie est l'emprunteur;

d) les baux d'immeubles ou de biens réels au titre desquels la compagnie est le locateur.

2005, ch. 47, art. 131; 2007, ch. 29, art. 108, ch. 36, art. 76 et 112.

Conventions collectives

33 (1) Si une procédure a été intentée sous le régime de la présente loi à l'égard d'une compagnie débitrice, toute convention collective que celle-ci a conclue à titre d'employeur demeure en vigueur et ne peut être modifiée qu'en conformité avec le présent article ou les règles de droit applicables aux négociations entre les parties.

Demande pour que le tribunal autorise le début de négociations en vue de la révision

(2) Si elle est partie à une convention collective à titre d'employeur et qu'elle ne peut s'entendre librement avec l'agent négociateur sur la révision de celle-ci, la compagnie débitrice peut, après avoir donné un préavis de cinq jours à l'agent négociateur, demander au tribunal de

Tab

4

Business Development Bank of Canada v. Pine Tree Resorts Inc. et al. [Indexed as: Business Development Bank of Canada v. Pine Tree Resorts Inc.]

Ontario Reports

Court of Appeal for Ontario,

Blair J.A. (in Chambers)

April 29, 2013

115 O.R. (3d) 617 | 2013 ONCA 282

2013 ONCA 282 (CanLII)

Case Summary

Bankruptcy and insolvency — Practice and procedure — Appeals — Second mortgagee appealing order granting first mortgagee's application for appointment of receiver over mortgagor's assets — Second mortgagee wishing to exercise its rights under s. 22 of Mortgages Act — Leave to appeal required as appeal did not fall within s. 193(a) or s. 193(c) of Bankruptcy and Insolvency Act ("BIA") — Test for leave to appeal under s. 193(e) of BIA being whether proposed appeal raises issue of general importance to practice in bankruptcy/ insolvency matters or to administration of justice generally, is prima facie meritorious and would not unduly hinder progress of bankruptcy/insolvency proceedings — Proposed appeal not satisfying those criteria — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193 — Mortgages Act, R.S.O. 1990, c. M.40, s. 22.

BDC held security for the money owed to it by Pine Tree by way of a first mortgage and general security agreements. Romspen was the second mortgagee. Both mortgages were in default. Romspen wished to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act* to put BDC's mortgage in good standing and take over the sale of the property. It proposed to pay all arrears of principal and interest, together with BDC's costs, expenses and outstanding realty taxes, but did not propose to repay HST arrears, which constituted a default under the BDC security documents. BDC applied successfully for the appointment of a receiver over the Pine Tree's assets. Pine Tree and Romspen sought to appeal that order. Romspen intended to argue that it was entitled to exercise its [page618] rights under s. 22 of the *Mortgages Act* as the arrears of HST did not jeopardize BDC's security because they were a subsequent encumbrance, and therefore it was not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22.

Held, leave to appeal should be denied.

Leave to appeal under s. 193(*e*) of the *Bankruptcy and Insolvency Act* was required. The appeal did not involve "future rights" within the meaning of s. 193(*a*). Section 193(*c*) did not apply as an order appointing a receiver did not bring into play the value of the property. In determining whether to grant leave to appeal under s. 193(*e*), the court will look to whether the proposed appeal (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency or to the administration of justice as a whole; (b) is *prima facie* meritorious; and (c) would unduly

Arrangement Act, R.S.C. 1985, c. C-36 ("*CCAA*"), although their application has not been confined to those types of cases.

[22] A second approach to the test was adopted by Goodman J.A. in *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48, 77 O.A.C. 395 (C.A., in Chambers), at para. 6. Through this lens, the court is to determine whether the decision from which leave to appeal is sought (a) appears to be contrary to law; (b) amounts to an abuse of judicial power; or [page623] (c) involves an obvious error, causing prejudice for which there is no remedy.

[23] Ontario decisions have traditionally leaned toward the *R.J. Nicol* factors when determining whether to grant leave to appeal under s. 193(*e*) of the *BIA*: see, in addition to *R.J. Nicol*, for example, *Leard (Re)*, [1994] O.J. No. 719, 114 D.L.R. (4th) 135 (C.A., in Chambers); and *Century Services Inc.*

[24] This view has evolved in recent years, however, and three decisions in particular have added nuances to the *R.J. Nicol* approach by considering such factors as whether there is an arguable case for appeal and whether the issues sought to be raised are significant to the bankruptcy practice in general and ought to be addressed by this court: see *Fiber Connections Inc.*, at paras. 16-20; *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (C.A., in Chambers); and *Baker (Re)*, (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580 (C.A., in Chambers). These factors echo the criteria set out in *Power Consolidated.*

[25] In *Baker (Re)*, Osborne J.A. acknowledged the two alternative approaches to determining whether leave to appeal should be granted. He concluded, at p. 381 O.R., that the *R.J. Nicol* criteria were "generally relevant" but observed that all factors need not be given equal weight in every case. For that particular case, he emphasized the factor that the issue sought to be appealed was "a matter of considerable general importance in bankruptcy practice". In *TCT Logistics*, at para. 9, Feldman J.A. listed all of the *R.J. Nicol* and the *Power Consolidated* criteria -- without apparently distinguishing between them -- as matters to be taken into account. She granted leave holding that the issues in that case were significant to the commercial practice regulating bankruptcy and receivership and ought to be considered by this court.

[26] Finally, in *Fiber Connections Inc.*, Armstrong J.A. reviewed all of the foregoing authorities and, at para. 20, granted leave to appeal because he was satisfied in that case that there were arguable grounds of appeal (although it was not necessary for him to determine whether the appeal would succeed) and because the issues raised were significant to bankruptcy practice and ought to be considered by this court.

[27] I take from this brief review of the jurisprudence that, while judges of this court have tended to favour the *R.J. Nicol* test in the past, there has been a movement towards a more expansive and flexible approach more recently -- one that incorporates the *Power Consolidated* notions of overall importance to [page624] the practice area in question or the administration of justice as well as some consideration of the merits.

[28] That being the case, it is perhaps time to attempt to clarify the "confusion" that arises from the co-existence of the two streams of criteria in the jurisprudence. I would adopt the following approach.

[29] Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(*e*) is discretionary and must be exercised in a flexible and contextual way, the

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following are the prevailing considerations in my view. The court will look to whether the proposed appeal

(a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this court should therefore consider and address;

(b) is *prima facie* meritorious, and

(c) would unduly hinder the progress of the bankruptcy/ insolvency proceedings.

[30] It is apparent these considerations bear close resemblance to the *Power Consolidated* factors. One is missing: the question whether the point raised is of significance to the action itself. I would not rule out the application of that consideration altogether. It may be, for example, that in some circumstances the parties will need to have an issue determined on appeal as a step toward dealing with other aspects of the bankruptcy/ insolvency proceeding. However, it seems to me that this particular consideration is likely to be of lesser assistance in the leave to appeal context because most proposed appeals to this court raise issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case.

[31] I have not referred specifically to the three *R.J. Nicol* criteria in the factors mentioned above. That is because those factors are caught by the "*prima facie* meritorious" criterion in one way or another. A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power or (c) involves an obvious error causing prejudice for which there is no remedy will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated* "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to by Osborne J.A. in *Baker* and by Armstrong J.A. in *Fiber Connections*. In my [page625] view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol* factors into the test.

[32] As I have explained above, however, the jurisprudence has evolved to a point where the test for leave to appeal is not simply merit-based. It requires a consideration of all of the factors outlined above.

[33] The *Power Consolidated* criteria are the criteria applied by this court in determining whether leave to appeal should be granted in restructuring cases under the *CCAA*: see *Country Style Food Services (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A., in Chambers), Feldman J.A., at para. 15; and *Blue Range Resources Corp. (Re)*, [1999] A.J. No. 975, 244 A.R. 103 (C.A.). The criteria I propose are quite similar. There is something to be said for having similar tests for leave to appeal in both *CCAA* and *BIA* insolvency proceedings. Proposed appeals in each area often arise from discretionary decisions made by judges attuned to the particular dynamics of the proceeding. Those decisions are entitled to considerable deference. In addition, both types of appeal often involve circumstances where delays inherent in appellate review can have an adverse effect on those proceedings.

Application of the test in the circumstances

2013 ONCA 282 (CanLII)

Tab

5

In the Court of Appeal of Alberta

Citation: Bellatrix Exploration Ltd (Re), 2021 ABCA 85

Date: 20210305
Docket: 2101-0011-AC
Registry: Calgary

2021 ABCA 85 (CanLII)

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

- and -

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

Between:

BP Canada Energy Group ULC

Applicant

- and -

National Bank of Canada

Respondent

- and -

Bellatrix Exploration Ltd.

Respondent

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

Application for Permission to Appeal

2021 ABCA 85 (CanLII)

In an analogical sense, one might therefore characterize this language about the test for leave as amounting to what Courts in the United States of America refer to as the "law of the case" respecting leave to appeal. The parties have accepted the criteria explained by Strekaf JA although they seem to construe their scope differently.

[10] On the subject of deference, there was a brief debate in the oral submissions before me as to whether Romaine J's decision might be entitled to some lower level of deference because the case management judge had been Jones J and thus, so the argument went, he had greater familiarity with the matter. (Jones J had expressly determined that he was not 'seized' with this matter.) Generally, though not inevitably, courts should resist *gradations* of deference because it tends to be an unwieldy element of analysis: compare ***Canada v Vavilov***, 2019 SCC 65 at paras 27-31. 441 DLR (4th) 1. In this case, I note that Romaine J has immense experience in matters of this kind: note paras 40 and 47 of ***Callidus Capital***, above.

[11] True, even experts can be wrong and there is equally no concept of 'hyper-deference' for text book authors: ***Wilson v DePuy International Ltd***, 2019 BCCA 440 at para 38, 31 BCLR (6th) 215, leave denied [2020] SCCA No 36 (QL) (SCC No 39044). Further still, extricable questions of law are reviewed for correctness regardless of expertise: compare (as to class action gatekeeping deference) ***AIC Limited v Fischer***, 2013 SCC 69 at para 65, [2013] 3 SCR 949. Moreover, here there were agreed facts. Nonetheless, where reasonableness is the review standard, Romaine J's expertise is a factor.

[12] Also applicable to this motion is s 14.5(1)(f) of the *Alberta Rules of Court*, AR 124/2010 as amended, which allows for appeals to the Court where permission to appeal is granted on "any decision where permission to appeal is required by an enactment". There is no material difference between "leave" to appeal and "permission" to appeal in this context. The word "permission" is a modern expression lately adopted in the *Alberta Rules* and in provincial legislation as the nomenclature for the gatekeeping functions to be performed by single judges of this Court.

II. Synopsis

[13] The following synopsis does not rehearse all the facts. Instead, I choose to focus on what I think to be the principal points.

[14] At the heart of the matter in this motion are BPC's contentions arising from the terms of a contract involving it and Bellatrix for the supply of natural gas (the "GasEDI Agreement"). The parties appear to have originally entered into this agreement as of March 1, 2010. There were two transaction confirmations as of December 12, 2017. There was a pricing formula based on posted index prices at specific or designated downstream pricing hubs in the US and Ontario, on a month to month basis.

Tab

6

In the Court of Appeal of Alberta

Citation: Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd, 2021 ABCA 66

Date: 20210218
Docket: 2101-0002-AC
2101-0004-AC
Registry: Calgary

2021 ABCA 66 (CanLII)

Docket: 2101-0002-AC

Between:

Athabasca Workforce Solutions Inc.

Applicant

- and -

**Greenfire Oil & Gas Ltd. and
Greenfire Hangingstone Operating Corporation**

Respondents

- and -

**Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of
Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation**

Not a Party to the Application

- and -

Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition Corporation

Respondents on Application

Docket: 2101-0004-AC

Between:

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,

2021 ABCA 66 (CanLII)

[15] In *Bending Lake*, an issue was raised as to whether a transaction ought to be postponed to let shareholders re-finance the company. The court held, and I agree, that such an appeal does not bring into play the value of the debtor's property. Rather, the effect of the SAVO is to generate sale proceeds that stand in place of the assets; it is a means to monetize the estate. As to whether the order results in a gain or loss, an approval and vesting order does not determine the entitlement of any party with an economic interest in the sale proceeds. No interested party has gained or lost as a result of the order.

[16] For these reasons, I conclude that neither s 193(a) nor (c) apply to the proposed appeal, and leave to appeal is therefore required.

Should leave to appeal be granted?

[17] The following factors are considered on an application for leave to appeal under s 193(e) of the BIA:

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 frivolous; and
d) whether the appeal will unduly hinder the progress of the action.

[18] In addition, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy: see *Alternate Fuel Systems* at para 12; *Dykun v Odishaw*, 1998 ABCA 220 at para 4; *West Edmonton Mall Property Inc. v Duncan & Craig*, 2001 ABCA 40 at para 9; *DGDP-BC Holdings Ltd. v Third Eye Capital Corporation*, 2020 ABCA 442 at para 18.

(a) Is the point on appeal significant to the practice?

[19] The applicants submit the orders are novel in that approval of the IFO required the approval of the proposed sale of assets as a condition. Therefore, the SAVO was granted in the absence of a proper sale process being conducted and with inadequate evidence of value. I disagree. The approval of interim financing and sales of assets under sections 50.6 and 65.13 of the BIA are matters of judicial discretion and are highly fact dependent. The BIA includes a list of non-exhaustive factors to inform the exercise of that discretion. The reasons of the supervising judge demonstrate a balancing of interests of all stakeholders, having regard to the precarious financial situation, the already serious damage done to the asset, and the restarting and environmental risks. Having regard to the lack of other viable alternative proposals, the support of key stakeholders, the lack of prejudice to Greenfire's creditors as a result of the interim financing, and the attendant lenders charge, there is no basis on the record to suggest the appeal will have any broad significance to the practice.

(b) Is the point raised of significance to the action?

[20] It would be a rare case where an interested party does not view a proposed appeal to be significant to the action. In most instances the answer to this question will be in the affirmative, and will be balanced against the other criteria. That is the case here.

(c) Is the proposed appeal prima facie meritorious?

[21] The applicants submit that the supervising judge made several errors of law or palpable and overriding errors in his assessment of the facts. While they recognize that the granting of the SAVO and the interim financing orders are discretionary, they submit the conclusions were based on incorrect inferences relating to the parties' positions and upon unwarranted findings. For instance, they submit that the supervising judge erred in concluding: there was no better recovery for the creditors, Greenfire had the confidence of its major creditors, the interim financing enhanced the prospects of a viable proposal, the sale would benefit creditors, and if the interim financing orders were not approved, the most likely outcome would be the transfer of the assets to the Orphan Well Association.

[22] The supervising judge reviewed the criteria that guides discretion under the BIA. He was aware of the leading authorities and principles for the approval of a sale of assets in insolvency proceedings as set forth in *Royal Bank of Canada v Soundair Corp*, 4 OR (3d), 83 DLR (4th) 76 (ONCA). He understood the purposes of the interim financing and appreciated that such financing would not be available absent a priority charge securing same. He considered the process that had been undertaken to secure that financing and that it eventually resulted in the Trafigura offer. He recognized that the granting of the order and charge was critical, failing which the facility faced enormous risk of damage and increased repair and restart costs. The record does not support the conclusion that the chambers judge misdirected himself or misapprehended the evidence when he concluded that the IFO and SAVO warranted his approval.

[23] In addressing the consideration payable under the APA, the supervising judge found it to be fair and reasonable having regard to the *Soundair* principles. He recognized that there had not been a formal auction process, nor is one required or advisable in every case. He commented that Alberta courts have acknowledged that "pre-pack sales" resulting from processes conducted prior to insolvency proceedings can satisfy the *Soundair* requirements. He considered the relevant factors, including the deteriorating financial condition of the debtor; that other options were considered even though the sale would only provide returns to the debtor's primary secured creditors; the prospect of employment and utilization of existing trade creditors and the fairness of the consideration having regard to the price paid by Greenfire to acquire the facility less than three years earlier.

2021 ABCA 66 (CanLII)

Tab

7

In the Court of Appeal of Alberta

Citation: Trican Well Service Ltd v Delphi Energy Corp, 2020 ABCA 363

Date: 20201015
Docket: 2001-0183-AC
Registry: Calgary

2020 ABCA 363 (CanLII)

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

**And in the Matter of a Plan of Compromise or Arrangement of
Delphi Energy Corp. and Delphi Energy (Alberta) Limited**

Between:

Trican Well Service Ltd. and Ensign Drilling Inc.

Applicants

- and -

Delphi Energy Corp. and Delphi Energy (Alberta) Limited

Respondents

- and -

PricewaterhouseCoopers Inc. and Luminus Management LLC

Interested Parties

**Reasons for Decision of
The Honourable Madam Justice Marina Paperny**

Application for Leave to Appeal

b) the chambers judge ought not to have sanctioned a plan that breached the statutory requirement under s 5.1(2) of the *CCAA* because it purports to compromise statutorily protected claims against directors.

[6] In oral argument on the leave application the applicants submitted that, while they did not appeal the original classification order, their classification for the purpose of voting and the fairness of the Plan were important considerations at the sanction hearing, and these circumstances were improperly disregarded by the supervising judge in granting the Sanction Order.

[7] In her reasons for sanctioning the plan the supervising judge noted that the overall indebtedness of Delphi was insurmountable, with total secured claims of $142.3 million and unsecured claims of another $27 million, for a total indebtedness of $170 million. If the Plan is approved, the 104 small creditors comprising the Convenience Class will each receive $5,000; approximately 100 parties will share *pari passu* in an unsecured claims pool of $3 million dollars, or about 2.4% on the dollar recovery. All the secured debt, less the deficiency claim amount, will be converted to equity. The supervising judge stated, "but for some trailing obligations, Delphi, if the plan is sanctioned and closes, will emerge debt free with 38 employees and will continue operating as an energy company headquartered in Alberta".

[8] In concluding that the Plan was fair and reasonable, the supervising judge considered the alternative of liquidation, wherein all unsecured parties would lose and the company would cease to operate. She found that "upon close examination, the unsecured claim class is properly constituted, even if the convenience class are excluded, the vote in favour would still have carried the plan". In concluding there was sufficient commonality of interest among the class, she noted that the balancing of creditors' interests also discloses that the shareholders are compromising substantial claims, the plan sponsor being by far the largest loser.

Considering an application for leave to appeal under the *CCAA*

[9] The test for leave to appeal is set out in s 13 of the *CCAA*:

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

[10] When considering whether to grant leave to appeal the discretionary decision of a supervising judge under the *CCAA*, appellate courts are instructed to consider several factors: whether the point on appeal is of significance to the practice; whether the point raised is of significance to the proceeding itself; whether the appeal is *prima facie* meritorious; and whether the appeal will unduly hinder the progress of the action: *Liberty Oil & Gas Ltd (Re)*, 2003 ABCA 158 at paras 15-16, 44 CBR (4th) 96; *Bellatrix Exploration Ltd v BP Canada Energy Group ULC*, 2020 ABCA 178 at para 16.

2020 ABCA 363 (CanLII)

[11] The standard of review applied to the discretionary decision of a supervising judge is highly deferential, absent an error in law or principle or an exercise of discretion that is clearly unreasonable. As stated by Fruman JA in *Uti Energy Corp v Fracmaster Ltd*, 1999 ABCA 178 at para 3, 244 AR 93:

> [T]his is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

[12] The Supreme Court of Canada recently reiterated the need for caution in the review of a supervising judge's discretionary decisions, noting that "[a]ppellate courts must be careful not to substitute their own discretion in place of the supervising judge's": *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10 at para 53.

[13] Whether a plan is fair and reasonable is a question of mixed law and fact, and as such is entitled to deference. The very nature of a *CCAA* proceeding requires the balancing of a multiplicity of divergent interests and stakeholders with a view to a fair and reasonable compromise in aid of a successful restructuring, if possible. Ascertaining how that can be accomplished with as little pain as possible is a delicate task, requiring a clear understanding of all the interests at stake, the effect of the plan on all stakeholders and, equally importantly, the effect of the alternative to restructuring on those same stakeholders. An appellate court should not lightly intervene in this balancing exercise.

First proposed ground of appeal: The classification of creditors

[14] In assessing whether a plan is fair and reasonable, as required by s 6 of the *CCAA*, the supervising judge must consider the composition of the voting class of unsecured creditors. Section 22 of the *CCAA* empowers the company to divide its creditors into classes for the purpose of a compromise or arrangement. Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest", taking into account the following factors (s 22(2)):

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in above.

2020 ABCA 363 (CanLII)

recovery, and the second lien noteholders with deficiencies will see the conversion of their secured debt to equity.

[18] It is worth nothing that the trade creditors could have opted into the convenience class had they so chosen. Moreover, the second lien noteholders will see the secured portion of their claims converted from debt to equity, but their deficiencies are subject to the same 2.4 cents on the dollar that the trade creditors will receive under the Plan.

[19] A review of the transcript makes clear that the supervising judge understood the situation of the various creditors. She was alive to the fact that, if the trade creditors were given their own class, they could veto the Plan. She understood that if the convenience class was removed, the vote would have passed regardless.

[20] The matter of classification is discretionary, as was the supervising judge's determination that the overall Plan was fair and reasonable in the circumstances. The proposed issue on appeal is clearly of importance to the applicants, as if they were successful on appeal they would be in a position to veto the Plan. However, given the degree of deference that would be paid to the decision of the supervising judge on issues of classification, I am not persuaded that this ground of appeal has a likelihood of success.

Second proposed ground of appeal: Failure to meet the statutory requirements under s. 5.1(2)

[21] The applicants accept that a plan may compromise some claims against directors by capping them to proceeds under insurance policies. However, they submit that statutorily protected claims against directors must be exempted from any compromise in light of s 5.1(2), which excludes claims based on allegations of misrepresentation or wrongful or oppressive conduct. The applicants submit the Sanction Order irrevocably limits such protected claims to the unspecified proceeds of insurance policies which, they say, is statutorily prohibited. The applicants also submit that Delphi failed to put the insurance policies into evidence before the supervising judge.

[22] Delphi submits that the Plan does not compromise the claims against directors, but merely channels financial recovery to available insurance proceeds, and that this is consistent with the practice of *CCAA* courts across Canada, including in Alberta[1].

[23] There is clear authority for Delphi's proposition, although I was not directed to any appellate authority considering the issue. In my view, the merit of this proposed ground of appeal depends on whether Delphi's position, that the claim in this case is not being compromised,

[1] *In the matter of a plan of compromise or arrangement of Connacher Oil and Gas Limited*, 2019 Plan Sanction Order of Justice Dario (16 July 2019) Calgary 1601-06131 (ABQB) at para 31; *In the matter of a plan of compromise or arrangement of Sino-Forest Corporation*, Plan Sanction Order of Justice Morawetz (10 December 2012) Toronto CV-12-9667-00CL (ONSC) at para 37; *Allen Vanguard Corporation (Re)*, 2011 ONSC 5017 at paras 26-27 and 78.

2020 ABCA 363 (CanLII)

Tab

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Her Majesty The Queen in Right of Canada
Appellant

v.

Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. in its capacity as monitor and
Business Development Bank of Canada
Respondents

and

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Sa Majesté la Reine du chef du Canada
Appelante

c.

Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. en sa qualité de contrôleur et
Banque de développement du Canada
Intimées

et

Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation
Intervenants

Indexed as: Canada *v.* Canada North Group Inc.

2021 SCC 30

File No.: 38871.

2020: December 1; 2021: July 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

Répertorié : Canada *c.* Canada North Group Inc.

2021 CSC 30

N° du greffe : 38871.

2020 : 1er décembre; 2021 : 28 juillet.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Bankruptcy and insolvency — Priority — Source deductions — Priming charges — Employee source deductions not remitted to Crown by companies in receivership — Judge supervising restructuring proceedings under Companies' Creditors Arrangement Act ordering priming charges over debtor companies' assets in favour of interim lender, monitor and directors — Order giving priority to priming charges over claims of secured creditors and providing that they are not to be limited or impaired in any way by provisions of any federal or

Faillite et insolvabilité — Priorité — Retenues à la source — Charges super prioritaires — Retenues à la source des employés non versées à la Couronne par les compagnies mises sous séquestre — Juge chargé de surveiller la procédure de restructuration intentée sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ordonnant que les actifs des compagnies soient grevés de charges super prioritaires en faveur du prêteur temporaire, du contrôleur et des administrateurs — Ordonnance accordant aux charges super

2021 SCC 30 (CanLII)

provide the conditions under which the debtor can attempt to reorganize" (para. 60).

[22] On review of a supervising judge's order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

[23] In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company's assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to "order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

[24] As this Court held in *Century Services*, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over orders made under the specific provisions. These include, for example, key employee retention plan charges (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont.

faciliter la survie des entreprises en leur permettant de poursuivre leurs activités, lorsqu'il rend son ordonnance initiale, « [l]e tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation » (par. 60).

[22] Lorsqu'une cour d'appel révise l'ordonnance d'un juge surveillant, elle ne doit pas oublier que ce vaste pouvoir discrétionnaire a été confié aux juges surveillants afin qu'ils assument le rôle difficile de concilier sans cesse des intérêts conflictuels et fluctuants. La cour d'appel doit également reconnaître que les ordonnances ont généralement un caractère temporaire ou provisoire, et que le processus de restructuration évolue constamment. Ces considérations nécessitent non seulement que les juges surveillants soient investis d'un large pouvoir discrétionnaire, mais aussi que les cours d'appel fassent preuve d'une déférence particulière avant de modifier des ordonnances rendues en vertu de ce pouvoir discrétionnaire (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), par. 30-31).

[23] En plus de l'art. 11, on trouve dans certaines des dispositions qui le suivent des pouvoirs plus spécifiques, dont celui d'ordonner une sûreté ou une charge super prioritaire grevant tout ou partie des actifs de la compagnie débitrice en faveur de prêteurs temporaires (art. 11.2), de fournisseurs essentiels (art. 11.4), du contrôleur et des experts — notamment en finance et en droit — (art. 11.52), ou afin d'indemniser les dirigeants ou administrateurs (art. 11.51). Chacune de ces dispositions habilite le tribunal à « préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie » (par. 11.2(2), 11.4(4), 11.51(2) et 11.52(2)).

[24] Ainsi que notre Cour l'a jugé dans l'arrêt *Century Services*, par. 70, la possibilité pour le tribunal de rendre ces ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux employés à l'art. 11. En fait, les tribunaux constituent régulièrement des charges super prioritaires en faveur de personnes qui ne sont pas expressément mentionnées dans les dispositions susmentionnées, y compris au moyen d'ordonnances ayant préséance sur les ordonnances rendues en

2021 SCC 30 (CanLII)

Tab

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COURT OF APPEAL FOR ONTARIO

CITATION: Laurentian University of Sudbury (Re), 2021 ONCA 199
DATE: 20210331
DOCKET: M52287

2021 ONCA 199 (CanLII)

Hoy, Pepall and Zarnett 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 of Compromise or Arrangement
of Laurentian University of Sudbury

Murray Gold and James Harnum, for the moving party the Ontario Confederation of University Faculty Associations

Susan Philpott and Charles Sinclair, for the moving party the Laurentian University Faculty Association

Miriam Martin, for the moving party the Canadian Union of Public Employees

D.J. Miller, Scott McGrath and Derek Harland, for the responding party Laurentian University of Sudbury

Ashley Taylor, Elizabeth Pillon and Zev Smith, for the responding party Ernst & Young Inc., acting as the Monitor

Heard: in writing

Motion for leave to appeal from the order of Chief Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated February 26, 2021.

REASONS FOR DECISION

Leave Test

[19] Section 13 of the CCAA provides that any person dissatisfied with an order or a decision made under the CCAA may appeal from the order or decision with leave. Leave to appeal in CCAA proceedings is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. This cautious approach is a function of several factors.

[20] First, a high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings, who are "steeped in the intricacies of the *CCAA* proceedings they oversee". Appellate intervention is justified only where the "supervising judge erred in principle or exercised their discretion unreasonably": *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, 78 C.B.R. (6th) 1, at paras. 53 to 54.

[21] Second, CCAA proceedings are dynamic. It is often "inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests": *Edgewater Casino Inc. (Re)*, 2009 BCCA 40, 51 C.B.R. (5th) 1, at para 20.

[22] Third, CCAA restructurings can be time sensitive. The existence of, and delay involved in, an appeal can be counterproductive to a successful restructuring.

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Tab

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9354-9186 Québec inc. and 9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

9354-9186 Québec inc. et 9354-9178 Québec inc. *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc., IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation *Intervenants*

- et -

IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

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

[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However,

[3] We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

d'autoriser la vente ou la disposition des actifs d'une compagnie débitrice hors du cours ordinaire de ses affaires[3]. Fait important, lorsque le Comité sénatorial permanent des banques et du commerce a recommandé l'adoption de l'art. 36, il a fait observer que la liquidation n'est pas nécessairement incompatible avec les objectifs réparateurs de la *LACC* et qu'il pourrait s'agir d'un moyen « soit pour obtenir des capitaux [et faciliter la restructuration] ou éviter des pertes plus graves aux créanciers, soit pour se concentrer sur ses activités solvables » (p. 163). D'autres auteurs ont observé que la liquidation peut [TRADUCTION] « être un moyen de restructurer une entreprise » en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 169; voir aussi K. P. McElcheran, *Commercial Insolvency in Canada* (4e éd. 2019), p. 311). D'ailleurs, dans l'arrêt *Indalex*, la compagnie a vendu ses actifs sous le régime de la *LACC* afin de protéger les emplois de son personnel, même si elle ne pouvait demeurer leur employeur (voir par. 51).

[46] En définitive, le poids relatif attribué aux différents objectifs de la *LACC* dans une affaire donnée peut varier en fonction des circonstances factuelles, de l'étape des procédures ou des solutions qui sont présentées à la cour pour approbation. En l'espèce, il est possible d'établir un parallèle avec le contexte de la *LFI*. Dans l'arrêt *Orphan Well Association c. Grant Thornton Ltd.*, 2019 CSC 5, [2019] 1 R.C.S. 150, par. 67, notre Cour a expliqué que, de façon générale, la *LFI* vise deux objectifs : (1) la réhabilitation financière du failli, et (2) le partage équitable des actifs du failli entre les créanciers. Or, dans les cas où

[3] Mentionnons que, bien que l'art. 36 codifie désormais le pouvoir du juge surveillant de rendre une ordonnance de vente et de dévolution, et qu'il énonce les facteurs devant orienter l'exercice de son pouvoir discrétionnaire d'accorder une telle ordonnance, il est muet quant aux circonstances dans lesquelles les tribunaux doivent approuver une liquidation sous le régime de la *LACC* plutôt que d'exiger des parties qu'elles procèdent à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI* (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 167-168; A. Nocilla, « Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36 » (2012) 52 *Rev. can. dr. comm.* 226, p. 243-244 et 247). Cette question demeure ouverte et n'a pas été soumise à la Cour dans *Indalex* non plus que dans les présents pourvois.

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in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

la société débitrice ne s'extirpera jamais de la faillite, seul le dernier objectif est pertinent (voir par. 67). Dans la même veine, sous le régime de la *LACC*, lorsque la restructuration d'une société débitrice qui n'a pas déposé de proposition est impossible, une liquidation visant à protéger sa valeur d'exploitation et à maintenir ses activités courantes peut devenir l'objectif réparateur principal. En outre, lorsque la restructuration ou la liquidation est terminée et que le tribunal doit décider du sort des actifs résiduels, l'objectif de maximiser le recouvrement des créanciers à partir de ces actifs peut passer au premier plan. Comme nous l'expliquerons, la structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs réparateurs.

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

(2) Le rôle du juge surveillant dans les procédures intentées sous le régime de la *LACC*

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

[47] Un des principaux moyens par lesquels la *LACC* atteint ses objectifs réside dans le rôle particulier de surveillance qu'elle réserve aux juges (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 18-19). Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant. En raison de ses rapports continus avec les parties, ce dernier acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure.

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

[48] La *LACC* mise sur la position avantageuse qu'occupe le juge surveillant en lui accordant le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas et de « [s'adapter] aux besoins commerciaux et sociaux contemporains » (*Century Services*, par. 58) en « temps réel » (par. 58, citant R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484). Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11, qui confère au juge le pouvoir de « rendre toute ordonnance qu'il estime indiquée ». Cette disposition a été décrite

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Inc. (Re) (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

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

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

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or

comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la *LACC* n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC*, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l'esprit les trois « considérations de base » (par. 70) qu'il incombe au demandeur de démontrer : (1) que l'ordonnance demandée est indiquée, et (2) qu'il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l'opportunité et la bonne foi, sont largement connues dans le contexte de la *LACC*. Le tribunal « évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi » (par. 70). Par ailleurs, l'exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d'insolvabilité est depuis peu mentionnée de façon expresse à l'art. 18.6 de la *LACC*, qui dispose :

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

(Voir aussi *LFI*, art. 4.2; *Loi nº 1 d'exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu'on s'y attarde. Conformément au régime de la *LACC* en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent

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position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), p. 31). La procédure prévue par la *LACC* se fonde sur les négociations et les transactions entre le débiteur et les intéressés, le tout étant supervisé par le juge surveillant et le contrôleur. Il faut donc nécessairement que, dans la mesure du possible, ceux qui participent au processus soient sur un pied d'égalité et aient une compréhension claire de leurs droits respectifs (voir McElcheran, p. 262). La partie qui, dans le cadre d'une procédure fondée sur la *LACC*, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276 par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie).

[52] Nous soulignons que les juges surveillants s'acquittent de leur rôle de supervision avec l'aide d'un contrôleur qui est nommé par le tribunal et dont les compétences et les attributions sont énoncées dans la *LACC* (voir art. 11.7, 11.8 et 23 à 25). Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] « les yeux et les oreilles du tribunal » tout au long de la procédure (*Essar*, par. 109). Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire (voir *LACC*, al. 23(1)d) et i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 566 et 569).

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(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

(3) Le contrôle en appel de l'exercice du pouvoir discrétionnaire du juge surveillant

[53] Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable (voir *Grant Forest Products Inc. c. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, par. 98; *Bridging Finance Inc. c. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, par. 23). Elles doivent prendre garde de ne pas substituer leur propre pouvoir discrétionnaire à celui du juge surveillant (*New Skeena Forest Products Inc.*, *Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, par. 20).

[54] Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la *LACC* dont il assure la supervision. À cet égard, les observations formulées par le juge Tysoe dans *Canadian Metropolitan Properties Corp. c. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (« *Re Edgewater Casino Inc.* »), par. 20, sont pertinentes :

> [TRADUCTION] . . . une des fonctions principales du juge chargé de la supervision de la procédure fondée sur la *LACC* est d'essayer d'établir un équilibre entre les intérêts des différents intéressés durant le processus de restructuration, et il sera bien souvent inopportun d'examiner une des décisions qu'il aura rendues à cet égard isolément des autres. [. . .] Les procédures intentées sous le régime de la *LACC* sont de nature dynamique et le juge surveillant a une connaissance intime du processus de restructuration. La nature du processus l'oblige souvent à prendre des décisions rapides dans des situations complexes.

[55] En gardant ce qui précède à l'esprit, nous passons maintenant aux questions soulevées par le présent pourvoi.

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such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to

le vote sur le premier plan, voire même plus tôt. Nous ouvrons une parenthèse pour souligner que, peu importe le moment, la tentative d'évaluer ainsi la sûreté aurait pu fort bien échouer. Cela aurait empêché Callidus de voter à titre de créancier non garanti même si elle ne poursuivait pas de but illégitime.

[81] Comme nous l'avons indiqué, les décisions discrétionnaires appellent une norme de contrôle empreinte d'une grande déférence. La déférence commande que l'examen d'une décision discrétionnaire commence par la qualification appropriée du fondement de la décision. Soit dit en tout respect, la Cour d'appel a échoué à cet égard. La Cour d'appel s'est saisie des commentaires quelque peu critiques formulés par le juge surveillant à l'égard de l'objectif de Callidus d'être libérée des réclamations retenues et de la conduite de celle-ci tout au long des procédures pour affirmer qu'il ne s'agissait pas de considérations pouvant donner lieu à une conclusion de but illégitime. Toutefois, comme nous l'avons expliqué, ce ne sont pas ces considérations qui ont amené le juge surveillant à tirer sa conclusion. Sa conclusion reposait nettement sur la tentative de Callidus de manipuler le vote des créanciers pour faire en sorte que son nouveau plan soit retenu alors que son premier plan ne l'avait pas été (voir les motifs du juge surveillant, par. 45-48). Nous ne voyons rien dans les motifs de la Cour d'appel qui s'attaque à cette irrégularité déterminante, qui va beaucoup plus loin que le simple fait pour un créancier d'agir dans son propre intérêt.

[82] En résumé, nous ne voyons rien dans les motifs du juge surveillant sur ce point qui justifie l'intervention d'une cour d'appel. Callidus a été à juste titre empêchée de voter sur le nouveau plan.

[83] Avant de passer au prochain point, soulignons que la Cour d'appel a abordé deux questions supplémentaires : Callidus est-elle « liée » à Bluberi au sens du par. 22(3) de la *LACC*? Si Callidus est autorisée à voter, convient-il de lui ordonner de voter dans une catégorie distincte des autres créanciers de Bluberi (voir la *LACC*, par. 22(1) et (2))? Vu notre conclusion que le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter sur le nouveau plan au motif qu'elle avait agi dans un but illégitime, il n'est

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Tab

11

Paul Housen *Appellant*

v.

Rural Municipality of Shellbrook No. 493 *Respondent*

INDEXED AS: HOUSEN *v.* NIKOLAISEN

Neutral citation: 2002 SCC 33.

File No.: 27826.

2001: October 2; 2002: March 28.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Torts — Motor vehicles — Highways — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Municipal law — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Appeals — Courts — Standard of appellate review — Whether Court of Appeal properly overturning trial judge's finding of negligence — Standard of review for questions of mixed fact and law.

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N

Paul Housen *Appelant*

c.

Municipalité rurale de Shellbrook nº 493 *Intimée*

RÉPERTORIÉ : HOUSEN *c.* NIKOLAISEN

Référence neutre : 2002 CSC 33.

Nº du greffe : 27826.

2001 : 2 octobre; 2002 : 28 mars.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Délits civils — Véhicules automobiles — Routes — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Droit municipal — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Appels — Tribunaux judiciaires — Norme de contrôle applicable en appel — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — Norme de contrôle applicable à l'égard des questions mixtes de fait et de droit.

L'appelant était passager dans le véhicule conduit par N sur une route rurale située sur le territoire de la

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to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. *Standard of Review for Questions of Law*

On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, *supra*, at p. 90.

There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced . . . should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans, *supra*, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

les normes de contrôle se rapportant à chacune des catégories de questions suivantes : (1) les questions de droit; (2) les questions de fait; (3) les inférences de fait; (4) les questions mixtes de fait et de droit.

A. *La norme de contrôle applicable aux questions de droit*

Dans le cas des pures questions de droit, la règle fondamentale applicable en matière de contrôle des conclusions du juge de première instance est que les cours d'appel ont toute latitude pour substituer leur opinion à celle des juges de première instance. La norme de contrôle applicable à une question de droit est donc celle de la décision correcte : Kerans, *op. cit.*, p. 90.

Au moins deux raisons justifient l'application de la norme de la décision correcte aux questions de droit. Premièrement, le principe de l'universalité impose aux cours d'appel le devoir de veiller à ce que les mêmes règles de droit soient appliquées dans des situations similaires. Notre Cour a reconnu l'importance de ce principe dans *Woods Manufacturing Co. c. The King*, [1951] R.C.S. 504, p. 515 :

> [TRADUCTION] Il est fondamental, pour assurer la bonne administration de la justice, que l'autorité des décisions soit scrupuleusement respectée par tous les tribunaux qui sont liées par elles. Sans cette adhésion générale et constante, l'administration de la justice sera désordonnée, le droit deviendra incertain et la confiance dans celui-ci sera ébranlée. Il importe plus que tout que le droit, tel qu'il a été énoncé, [. . .] soit accepté et appliqué comme l'exige notre tradition; et même au risque de nous tromper, tous les juges étant faillibles, nous devons préserver totalement l'intégrité des rapports entre les tribunaux.

Une deuxième raison, connexe, d'appliquer la norme de la décision correcte aux questions de droit tient au rôle qu'on reconnaît aux cours d'appel en matière de création du droit et qu'a souligné Kerans, *op. cit.*, p. 5 :

> [TRADUCTION] Le principe de l'universalité — et le rôle de création du droit qu'il emporte — exige beaucoup du tribunal de révision. Il exige de ce tribunal qu'il fasse preuve d'un certain degré d'expertise dans l'art d'élaborer une règle de droit juste et pratique, expertise qui ne revêt pas une importance aussi cruciale pour le premier tribunal. Dans les affaires où le droit n'est pas fixé, le tribunal de révision élabore des règles de droit applicables tout autant à d'éventuelles affaires qu'à celle dont il est saisi.

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Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. *Standard of Review for Findings of Fact*

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12, at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

11 A fundamental reason for general deference to the trial judge is the presumption of fitness — a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly. Kerans, *supra*, at pp. 10-11, states that:

> If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

12 With respect to findings of fact in particular, in *Gottardo Properties*, *supra*, Laskin J.A. summarized the purposes underlying a deferential stance as follows (at para. 48):

Ainsi, alors que le rôle premier des tribunaux de première instance consiste à résoudre des litiges sur la base des faits dont ils disposent et du droit établi, celui des cours d'appel est de préciser et de raffiner les règles de droit et de veiller à leur application universelle. Pour s'acquitter de ces rôles, les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit.

B. *La norme de contrôle applicable aux questions de fait*

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être infirmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante » : *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Ingles c. Tutkaluk Construction Ltd.*, [2000] 1 R.C.S. 298, 2000 CSC 12, par. 42; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201, par. 57. On cite souvent cette norme, mais rarement les principes justifiant ce degré élevé de retenue. Pour les besoins du présent pourvoi, nous estimons qu'il est utile d'examiner brièvement les diverses considérations de principe qui incitent les cours d'appel à faire preuve d'un degré élevé de retenue à l'égard des conclusions de fait.

L'une des raisons fondamentales de cette retenue générale à l'égard des conclusions des juges de première instance tient à la présomption d'aptitude à juger — présomption selon laquelle les juges de première instance sont tout aussi aptes que les juges d'appel à apporter des solutions justes aux litiges. Kerans, *op. cit.*, dit ceci aux p. 10-11 :

> [TRADUCTION] Si nous nous fions à ces systèmes pour régler les différends, il nous faut présumer que les décisions qu'ils produisent sont justes. La procédure d'appel ne fait en conséquence partie du processus décisionnel que parce que nous reconnaissons que, malgré tous les efforts déployés, des erreurs se produisent. L'appel devrait être l'exception plutôt que la règle, ce qui est d'ailleurs le cas au Canada.

Pour ce qui est des conclusions de fait en particulier, dans *Gottardo Properties*, précité, le juge Laskin de la Cour d'appel de l'Ontario a résumé ainsi les objectifs qui sous-tendent le principe de la retenue judiciaire (au par. 48) :

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forces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

31 Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law. This distinction was pointed out by Cory J. in *Galaske v. O'Donnell*, [1994] 1 S.C.R 670, at pp. 690-91:

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

Galaske, *supra*, is an illustration of the point made in *Southam*, *supra*, of the potential to extricate a purely legal question from what appears to be a question of mixed fact and law. However, in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with.

32 We are supported in our conclusion by the analogy which can be drawn between inferences of fact and questions of mixed fact and law. As stated above, both involve drawing inferences from underlying facts. The difference lies in whether the inference drawn relates to a legal standard or not. Because both processes are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing

fins de contrôle d'une conclusion de négligence tirée par un juge ou un jury consolide les rapports qui doivent exister entre les juridictions d'appel et celles de première instance et respecte la norme de contrôle bien établie qui s'applique aux conclusions de négligence tirées par les jurys.

Toutefois, lorsque le juge du procès conclut erronément à la négligence par suite d'une formulation incorrecte de la norme juridique, cela peut constituer une erreur de droit. Cette distinction a été faite par le juge Cory dans l'arrêt *Galaske c. O'Donnell*, [1994] 1 R.C.S. 670, p. 690-691 :

> La définition de la norme de diligence est une question mixte de droit et de fait. Il incombera habituellement au juge du procès de déterminer, compte tenu des circonstances de l'espèce, ce qui constituerait une conduite raisonnable de la part de la personne raisonnable légendaire placée dans la même situation. Dans certains cas, un simple rappel suffira, tandis que dans d'autres, par exemple lorsqu'un très jeune enfant est passager, le conducteur peut avoir à attacher lui-même la ceinture de sécurité de l'enfant. Cependant, en l'espèce, le conducteur n'a pris aucune mesure pour veiller à ce que l'enfant porte sa ceinture de sécurité. Il s'ensuit que la décision du juge du procès sur la question équivalait à une conclusion qu'aucune obligation n'incombait au conducteur, ce qui constituait une erreur de droit.

L'arrêt *Galaske*, précité, illustre bien l'idée exposée dans l'arrêt *Southam*, précité, selon laquelle il est possible de dégager une pure question de droit de ce qui paraît être une question mixte de fait et de droit. Toutefois, en l'absence d'erreur de droit ou d'une erreur manifeste et dominante, la conclusion de négligence tirée par un juge de première instance ne doit pas être modifiée.

L'analogie qui peut être établie entre les inférences de fait et les questions mixtes de fait et de droit étaye notre conclusion. Comme nous l'avons dit précédemment, dans les deux cas des inférences doivent être tirées des faits à l'origine de l'affaire. La différence dépend de la question de savoir si l'inférence se rapporte à une norme juridique ou non. Parce que le résultat des deux processus est tributaire du poids accordé à la preuve, les diverses considérations de principe justifiant de faire montre de retenue à l'égard des inférences de

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deference to the trial judge's inferences of mixed fact and law.

Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. [Emphasis added.]

A good example of this subtle principle can be found in *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497, at pp. 515-16. In that case the issue was the identification of certain individuals within a corporate structure as directing minds. This is a mixed question of law and fact. However, the erroneous finding of the courts below was easily traceable to an error of law which could be extricated from the mixed question of law and fact. The extricable question of law was the issue of the functions which are required in order to be properly identified as a "directing mind" within a corporate structure (pp. 515-16). In the opinion of Iacobucci J. for the majority of the Court (at p. 526):

> With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an

fait du juge de première instance justifient également, dans une certaine mesure, de faire de même à l'égard de ses inférences mixtes de fait et de droit.

33 Par contre, lorsqu'il peut être établi que la conclusion erronée du juge de première instance découle d'une erreur quant à la norme juridique à appliquer, ce facteur touche au rôle de création du droit de la cour d'appel, et une retenue moins élevée s'impose, conformément à la norme de la décision « correcte ». Notre Cour a apporté cette nuance dans l'arrêt *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, par. 48-49 :

> La question qui consiste « à déterminer si les faits satisfont au critère juridique » est une question mixte de droit et de fait ou, en d'autres termes, « la question de savoir si le défendeur a respecté la norme de diligence appropriée est une question de droit et de fait » (*Southam*, par. 35).
>
> Une fois les faits établis sans erreur manifeste et dominante, cette question doit généralement être révisée suivant la norme de la décision correcte puisque la norme de diligence est normative et constitue une question de droit qui relève de la compétence habituelle des tribunaux de première instance et d'appel. [Nous soulignons.]

34 Un bon exemple de ce principe subtil est l'arrêt *Rhône (Le) c. Peter A.B. Widener (Le)*, [1993] 1 R.C.S. 497, p. 515-516. La question en litige dans cette affaire consistait à déterminer si certaines personnes faisaient partie des âmes dirigeantes d'une société. Il s'agit d'une question mixte de droit et de fait. Toutefois, la conclusion erronée des juridictions inférieures était facilement imputable à une erreur de droit qui pouvait être dégagée de la question mixte de droit et de fait. La question de droit ainsi isolable était celle des fonctions que devait remplir une personne pour qu'on puisse à bon droit la considérer comme une « âme dirigeante » de la société (p. 515-516). Le juge Iacobucci s'est exprimé ainsi au nom des juges de la majorité, à la p. 526 :

> En toute déférence, je crois que les juridictions inférieures ont trop insisté sur l'importance de la subdélégation en l'espèce. Le facteur clé qui permet de distinguer les âmes dirigeantes des employés ordinaires est la capacité d'exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale, plutôt que

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operational basis, whether at head office or across the sea.

35 Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

le simple fait de mettre en œuvre ces politiques dans un cadre opérationnel, que ce soit au siège social ou en mer.

En d'autres termes, les juridictions inférieures ont commis une erreur de droit en concluant que la subdélégation était un facteur permettant de qualifier une personne d'« âme dirigeante » d'une société, alors que le facteur juridique applicable à cet égard est en fait « la capacité d'exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale ». Cette formulation erronée du critère juridique approprié (les conditions juridiques requises pour être une « âme dirigeante ») a entaché ou vicié la conclusion factuelle des juridictions inférieures selon laquelle le capitaine Kelch était une âme dirigeante de la société. Comme cette conclusion erronée était imputable à une erreur de droit, un degré moindre de retenue s'imposait et la norme applicable était celle de la décision correcte.

En résumé, la conclusion de négligence que tire le juge de première instance suppose l'application d'une norme juridique à un ensemble de faits et constitue donc une question mixte de fait et de droit. Les questions mixtes de fait et de droit s'étalent le long d'un spectre. Lorsque, par exemple, la conclusion de négligence est entachée d'une erreur imputable à l'application d'une norme incorrecte, à l'omission de tenir compte d'un élément essentiel d'un critère juridique ou à une autre erreur de principe semblable, une telle erreur peut être qualifiée d'erreur de droit et elle est contrôlée suivant la norme de la décision correcte. Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit », assujettie à une norme de contrôle plus rigoureuse. Selon la règle générale énoncée dans l'arrêt *Jaegli Enterprises*, précité, si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être infirmée en l'absence d'erreur manifeste et dominante.

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In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

III. Application of the Foregoing Principles to this Case: Standard of Care of the Municipality

A. *The Appropriate Standard of Review*

We agree with our colleague that the correct statement of the municipality's standard of care is that found in *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (Sask. C.A.), *per* Martin J.A., at pp. 558-59:

> The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances; "repair" is a relative term, and hence the facts in one case afford no fixed rule

37 À cet égard, nous ne pouvons en toute déférence pas souscrire à l'opinion de notre collègue lorsqu'il affirme, au par. 106, qu'« [u]ne fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée. Dans bien des cas, l'examen des faits à travers le prisme juridique de la norme de diligence implique l'établissement de politiques d'intérêt général ou la création de règles de droit, rôle qui relève autant des cours de première instance que des cours d'appel ». À notre avis, il est bien établi en droit que la question de savoir si le défendeur a respecté la norme de diligence suppose l'application d'une norme juridique à un ensemble de faits, ce qui en fait une question mixte de fait et de droit. Cette question est assujettie à la norme de l'erreur manifeste et dominante, à moins que le juge de première instance n'ait clairement commis une erreur de principe isolable en déterminant la norme applicable ou en appliquant cette norme, auquel cas l'erreur peut constituer une erreur de droit.

III. Application des principes qui précèdent à l'espèce : la norme de diligence applicable à la municipalité

A. *La norme de contrôle appropriée*

38 À l'instar de notre collègue, nous sommes d'avis que la norme de diligence applicable à la municipalité a été convenablement énoncée par le juge Martin dans l'arrêt *Partridge c. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (C.A. Sask.), p. 558-559 :

> [TRADUCTION] L'étendue de l'obligation légale d'entretien qui incombe aux corporations municipales à l'égard des routes qui se trouvent sur leur territoire a été énoncée de diverses façons dans nombre de décisions publiées. Il est toutefois possible de dégager la règle générale suivante de ces décisions : le chemin doit être tenu dans un état raisonnable d'entretien, de façon que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité. La question de savoir en quoi consiste un état raisonnable d'entretien est une question de fait, qui est fonction de toutes

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Tab

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Sattva Capital Corporation (formerly Sattva Capital Inc.) *Appellant*

v.

Creston Moly Corporation (formerly Georgia Ventures Inc.) *Respondent*

and

Attorney General of British Columbia and BCICAC Foundation *Interveners*

Sattva Capital Corporation (anciennement Sattva Capital Inc.) *Appelante*

c.

Creston Moly Corporation (anciennement Georgia Ventures Inc.) *Intimée*

et

Procureur général de la Colombie-Britannique et BCICAC Foundation *Intervenants*

2014 SCC 53 (CanLII)

Indexed as: Sattva Capital Corp. *v.* Creston Moly Corp.

2014 SCC 53

File No.: 35026.

2013: December 12; 2014: August 1.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

Répertorié : Sattva Capital Corp. *c.* Creston Moly Corp.

2014 CSC 53

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1er août.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Arbitration — Appeals — Commercial arbitration awards — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price shares for payment of finder's fee and entering into arbitration — Leave to appeal arbitral award sought pursuant to s. 31(2) of the Arbitration Act — Leave to appeal denied but granted on appeal to Court of Appeal — Appeal of award dismissed but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in granting leave to appeal — What is appropriate standard of review to be applied to commercial arbitral decisions made under Arbitration Act — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31(2).

Contracts — Interpretation — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price the shares for payment of finder's fee and entering into arbitration — Whether arbitrator reasonably construed contract

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Arbitrage — Appels — Sentences arbitrales commerciales — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation et recours à l'arbitrage — Autorisation d'appel de la sentence arbitrale demandée en application de l'art. 31(2) de l'Arbitration Act — Rejet initial de la demande d'autorisation d'appel, qui est accueillie à l'issue d'un appel devant la Cour d'appel — Rejet de l'appel interjeté de la sentence infirmé par la Cour d'appel — La Cour d'appel a-t-elle accordé à tort l'autorisation d'appel? — Quelle est la norme de contrôle applicable aux sentences arbitrales commerciales rendues sous le régime de l'Arbitration Act? — Arbitration Act, R.S.B.C. 1996, ch. 55, art. 31(2).

Contrats — Interprétation — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation

— often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26 and 31-36.

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc.*

souvent le fondement factuel — dans l'interprétation d'un contrat écrit (Hall, p. 13, 21-25 et 127; J. D. McCamus, *The Law of Contracts* (2e éd. 2012), p. 749-751). Le deuxième découle des explications formulées dans les arrêts *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35, et *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26 et 31-36, sur ce qui distingue la question de droit de la question mixte de fait et de droit.

[47] Relativement au premier changement, l'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente » (*Jesuit Fathers of Upper Canada c. Cie d'assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744, par. 27, le juge LeBel; voir aussi *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69, par. 64-65, le juge Cromwell). Pour ce faire, le décideur doit interpréter le contrat dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s'harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat. Par l'examen des circonstances, on reconnaît qu'il peut être difficile de déterminer l'intention contractuelle à partir des seuls mots, car les mots en soi n'ont pas un sens immuable ou absolu :

> [TRADUCTION] Aucun contrat n'est conclu dans l'abstrait : les contrats s'inscrivent toujours dans un contexte. [. . .] Lorsqu'un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d'autre part une connaissance de l'origine de l'opération, de l'historique, du contexte, du marché dans lequel les parties exercent leurs activités.

(*Reardon Smith Line*, p. 574, le lord Wilberforce)

[48] Le sens des mots est souvent déterminé par un certain nombre de facteurs contextuels, y compris l'objet de l'entente et la nature des rapports créés par celle-ci (voir *Moore Realty Inc. c. Manitoba*

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v. Manitoba Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[49] As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam*. Questions of law "are questions about what the correct legal test is" (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

[50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[51] The purpose of the distinction between questions of law and those of mixed fact and law further

Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, par. 15, la juge Hamilton; voir aussi Hall, p. 22; McCamus, p. 749-750). Pour reprendre les propos du lord Hoffmann dans *Investors Compensation Scheme Ltd. c. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.) :

> [TRADUCTION] Le sens d'un document (ou toute autre déclaration) qui est transmis à la personne raisonnable n'équivaut pas au sens des mots qui le composent. Le sens des mots fait intervenir les dictionnaires et les grammaires; le sens du document représente ce qu'il est raisonnable de croire que les parties, en employant ces mots compte tenu du contexte pertinent, ont voulu exprimer. [p. 115]

[49] Relativement au deuxième changement, l'approche historique de l'interprétation contractuelle ne cadre pas bien avec la définition de la pure question de droit formulée dans les arrêts *Housen* et *Southam*. Les questions de droit « concernent la détermination du critère juridique applicable » (*Southam*, par. 35). Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties — un but axé sur les faits — par l'application des principes juridiques d'interprétation. Il me semble que cela se rapproche plutôt de la question mixte de fait et de droit, définie dans l'arrêt *Housen* comme supposant « l'application d'une norme juridique à un ensemble de faits » (par. 26; voir aussi *Southam*, par. 35). Toutefois, certains tribunaux ont émis des doutes sur l'application directe de cette définition, qui avait été établie à l'égard d'une action intentée pour négligence, à des questions d'interprétation contractuelle et laissent entendre que cette dernière est d'abord et avant tout une affaire de droit (voir par exemple *Bell Canada*, par. 25).

[50] Avec tout le respect que je dois aux tenants de l'opinion contraire, à mon avis, il faut rompre avec l'approche historique. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

[51] Cette conclusion est étayée par les raisons qui sous-tendent la distinction établie entre la

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supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

[52] Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

question de droit et la question mixte de fait et de droit. En distinguant ces deux catégories, on visait principalement à restreindre l'intervention de la juridiction d'appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Ainsi, le rôle des cours d'appel, qui consiste à assurer la cohérence du droit, et non à offrir aux parties une nouvelle tribune leur permettant de poursuivre leur litige privé, est préservé. C'est pourquoi la Cour dans l'arrêt *Southam* reconnaît le degré de généralité (ou « la valeur comme précédents ») comme la principale différence entre la question de droit et la question mixte de fait et de droit. Plus la règle est stricte, moins l'intervention de la cour d'appel sera utile :

> Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir. [par. 37]

[52] De même, la Cour dans l'arrêt *Housen* conclut que la retenue à l'égard du juge des faits contribue à réduire le nombre, la durée et le coût des appels tout en favorisant l'autonomie du procès et son intégrité (par. 16-17). Ces principes militent également en faveur de la déférence à l'endroit des décideurs de première instance en matière d'interprétation contractuelle. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère aux tribunaux de première instance appuie la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

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[53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[53] Néanmoins, il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit (*Housen*, par. 31 et 34-35). L'interprétation contractuelle peut occasionner des erreurs de droit, notamment [TRADUCTION] « appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent » (*King*, par. 21). En outre, il est indubitable que nombre d'autres questions se posant en droit des contrats mettent en jeu des règles de droit substantiel : les critères de formation du contrat, la capacité des parties, l'obligation que soient constatés par écrit certains types de contrat, etc.

[54] However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

[54] Le tribunal doit cependant faire preuve de prudence avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. Compte tenu de l'obligation, prévue au par. 31(2) de l'*AA*, que la demande d'autorisation soulève une question de droit, le demandeur et son représentant chercheront à qualifier de question de droit toute erreur qu'ils invoquent. Toutefois, le législateur a pris des mesures visant à limiter ce genre d'appels, et les tribunaux doivent examiner soigneusement le motif d'appel proposé pour déterminer s'il est bien caractérisé. La mise en garde exprimée dans *Housen* qui appelle à la prudence lorsqu'il s'agit d'isoler une question de droit s'applique dans le cas présent :

> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" . . . . [para. 36]

> Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit » . . . [par. 36]

[55] Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of

[55] Certes, cette mise en garde a été formulée dans le contexte d'une action pour négligence, mais elle s'applique également à mon avis à l'interprétation contractuelle. Comme je le mentionne précédemment, le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Le rapport

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contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. En l'absence d'une erreur de droit du genre de celles décrites plus haut, aucun droit d'appel de l'interprétation par un arbitre d'un contrat n'est prévu à l'*AA*.

(b) *The Role and Nature of the "Surrounding Circumstances"*

b) *Le rôle et la nature des « circonstances »*

[56] I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

[56] Abordons le rôle des circonstances dans l'interprétation du contrat et la nature des éléments admis à l'examen. La présente analyse ne traite que de la démarche d'interprétation contractuelle fondée sur la common law; elle ne se veut ni une application ni une modification du droit relatif à l'interprétation contractuelle régi par le *Code civil du Québec*.

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[57] Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (*Hayes Forest Services*, par. 14; Hall, p. 30). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (Hall, p. 15 et 30-32). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (*Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*,

[58] La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (*King*, par. 66 et 70), c'est-à-dire, les renseignements qui

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at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) *Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule*

[59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 341-42, *per* Sopinka J.).

[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts

appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci. Compte tenu de ces exigences et de la règle d'exclusion de la preuve extrinsèque que nous verrons, on entend par « circonstances », pour reprendre les propos du lord Hoffmann [TRADUCTION] « tout ce qui aurait eu une incidence sur la manière dont une personne raisonnable aurait compris les termes du document » (*Investors Compensation Scheme*, p. 114). La question de savoir si quelque chose appartenait ou aurait dû raisonnablement appartenir aux connaissances communes des parties au moment de la signature du contrat est une question de fait.

c) *Tenir compte des circonstances n'est pas contraire à la règle d'exclusion de la preuve extrinsèque*

[59] Quelques mots sur l'examen des circonstances et la règle d'exclusion de la preuve extrinsèque s'imposent. Cette règle empêche l'admission d'éléments de preuve autres que les termes du contrat écrit qui auraient pour effet de modifier ou de contredire un contrat qui a été entièrement consigné par écrit, ou d'y ajouter de nouvelles clauses ou d'en supprimer (*King*, par. 35; Hall, p. 53). À cette fin, la règle interdit notamment les éléments de preuve concernant les intentions subjectives des parties (Hall, p. 64-65; *Eli Lilly & Co. c. Novopharm Ltd.*, [1998] 2 R.C.S. 129, par. 54-59, le juge Iacobucci). La règle vise, premièrement, à donner un caractère définitif et certain aux obligations contractuelles et, deuxièmement, à empêcher qu'une partie puisse utiliser des éléments de preuve fabriqués ou douteux pour attaquer un contrat écrit (*Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 341-342, le juge Sopinka).

[60] La règle d'exclusion de la preuve extrinsèque n'interdit pas au tribunal de tenir compte des circonstances entourant le contrat. Cette preuve est compatible avec les objectifs relatifs au caractère définitif et certain puisqu'elle sert d'outil d'interprétation qui vient éclairer le sens des mots du contrat choisis par les parties, et non le changer ou s'y substituer. Les circonstances sont des faits connus

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Tab
13

Eligible Financial Contracts in Canadian Insolvency Regimes

First Annual Lloyd Houlden Fellowship

Submitted by:
Kelly J. Bourassa

October 1, 2006

Executive Summary

This paper will review the legislative history of the provisions in Canadian insolvency legislation (specifically the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*) affecting what are referred to as eligible financial contracts and consist of various over-the-counter derivatives contracts. The way the legislation has been applied in the three cases (at both the trial and appellate levels) that have considered these provisions will be reviewed as well as the provisions that have received Royal Assent as part of *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 (which will be referred to throughout as "Chapter 47"), but have not yet been proclaimed in force. The similar provisions contained in Chapter 11 of the United States Code (dealing with bankruptcy and insolvency) will be reviewed as well as recent case law applying these provisions.

The form of Master Agreement published by the International Swaps and Derivatives Association, Inc. will be reviewed as this is the form of agreement commonly used to document derivatives transactions. Specifically, the choice of law provisions, default clauses regarding bankruptcy events and the netting and set-off provisions, which are of particular interest and concern in the case of an insolvency, will be analyzed.

Finally, the United States approach will be compared and contrasted to the approach that has been taken in Canada. Areas where change may be appropriate and areas where the current or proposed legislation show cause for concern will be discussed.

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1 Introduction

Agreements that are referred to in Canadian bankruptcy and insolvency legislation as "eligible financial contracts" are risk management tools. They are "investment tools whose value depends on, or is derived from the performance of some underlying asset such as stocks, bonds, commodities, currencies or indices"[1]. It is for this reason that special treatment is afforded to them. One party (the seller) agrees to sell a commodity at a set price sometime in the future (the short position) predicting that the price of the commodity will decline such that on the delivery date, that seller party will sell the commodity at a price greater than the current market price. The purchaser party will take the long position in agreeing to purchase the commodity. The purchaser party assumes the risk of price fluctuations and assumes that the market price for the commodity will increase such that it will purchase the commodity at a future date for a price lower than the market price.

In order to further hedge their risk, parties will enter into various purchase agreements providing for the sale of the commodity at different dates and at different prices. Throughout the term of any of these agreements some of them will be "in the money" (i.e. for the seller this means the contract provides for sale at a price higher than the market price) and others will be "out of the money" (i.e. again from the seller's perspective, the market price is lower than the contract price). Each of these transactions can be netted out or set-off against the others on termination and the purchaser can "calculate the value of all the transactions as of the termination date and … net the

[1] G. Luinenburg and F. Soda, *The Enforceability of Over-the-Counter Derivative Contracts Under Canadian Insolvency Regimes*, (1996) 12 B.F.L.R. 41 at 43.

positive and negative values to determine a lump sum termination amount payable by one party to the other"[2]. Each party attempts, through hedging these various contracts against one another, to profit from the transactions.

As derivatives contracts have become more common and more widespread as a method of managing risk, the importance that they are treated consistently has increased. In 1994, Confederation Treasury Services Ltd. was placed under CCAA protection. In the initial order granted by Justice Houlden, Confederation was given the ability to terminate "out of the money" contracts and to preserve "in the money" contracts. This order was at issue in *Confederation Treasury Services Ltd. (Trustee of)* v. *Hees International Bancorp Inc.*[3], a case looking at whether Confederation had properly terminated certain derivatives contracts. In the decision in that case, Justice Farley took the opportunity to make the following observations with respect to derivatives contracts generally:

> [i]t would seem as a matter of public policy that such a valuable tool which has become a key fundamental for the interlocking financial activities of virtually every major financial and many major non-financial corporations in Canada (and having international links) should not be dealt with in such a manner as to seriously affect its efficiency. Not only is this the situation in non-insolvency situations but as well it is in insolvency situations as Anthony C. Gooch and Linda G. Klein, *A Review of International and U.S. Case Law Affecting Swaps and Related Derivative Products*, August 1, 1992 stated at pp. 38-9:
>
> > If the right to terminate contemplated in the agreement, or the selected measure of damages upon early termination, is not enforceable, the whole structure of risk management for the swaps and other transactions is weakened or may fall apart.

[2] M.E. Grottenhaler and P.J. Henderson, *The Law of Financial Derivatives in Canada*, (Toronto: Carswell, 1999) ("*Financial Derivatives*") at 5-1.
[3] [1997] O.J. No. 351 (Ont. Gen. Div.) (QL).

> …
>
> In swap documentation, the occurrence of bankruptcy, insolvency or a similar event with respect to a party has usually been treated as an event of deault [sic] with respect to that party and, moreover, at least until recently, as an event that led to immediate and automatic termination of that party's swap transactions. There have, however, been serious doubts as to the enforceability of this provision in some jurisdictions, and concerns about the potentially adverse effects that automatic termination could have on a non-defaulting party. In the United States, many of the doubts have now been resolved by legislation[4].

Eligible financial contracts are referred to in the *Winding-Up and Restructuring Act*[5] as well as the *Companies' Creditors Arrangement Act*[6] and Part III of the *Bankruptcy and Insolvency Act*[7] dealing with proposals. Due to the limited applicability of the *Winding-up and Restructuring Act*, only those provisions in the BIA and the CCAA will be discussed in this paper.

2 Legislative History

Prior to 1992, there were no provisions in either the *Companies' Creditors Arrangement Act* or the *Bankruptcy and Insolvency Act* dealing with what are now commonly referred to in Canada as eligible financial contracts ("EFCs"). In 1991, as part of an overhaul of the former *Bankruptcy Act*, the House of Commons Standing Committee on Consumer and Corporate Affairs and Government Operations heard testimony from the Canadian Bankers' Association with respect to recent amendments to the United States Bankruptcy

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[4] *Ibid* at para 48. The initial order of Justice Houlden and the decision of Justice Farley were both after the amendments to the BIA to provide protection for EFCs were in force, but before the similar amendments to the CCAA were made.
[5] R.S.C. 1985, c. W-11, s. 22.1(2).
[6] R.S.C. 1985, c. C-36 (the "CCAA"), s. 11.1.
[7] R.S.C. 1985, c. B-3 (the "BIA"), s. 65.1.

Code that incorporated an exemption from the stay of proceedings for counterparties to certain types of contracts.

Bill C-22 as originally drafted included a provision to prohibit creditors from terminating agreements with debtors from the time a notice of intention to file a proposal is filed and continuing throughout the stay period. The Canadian Bankers' Association submitted that financial hedging agreements be exempt from this stay of proceedings. The following statements from their submissions to the Parliamentary Committee are often cited:

> [a] very important issue relating to commercial insolvencies is the status of financial hedging contracts in these insolvencies. We realize that this may appear to be a fairly technical issue to members of this committee. We want to assure you that this is of vital concern to the financial community as a whole, not just ourselves. …
>
> A recent amendment to Chapter 11 of the US Code does permit counter-parties to terminate or close out hedging contracts during a stay period if one of these parties becomes insolvent. Similar legislation we feel is needed in Canada to ensure the continued competitiveness of Canadian financial markets and their ability to be part of these contracts when the other party is in fact a US entity or a US citizen[8].

The Canadian Bankers' Association described these agreements in its brief to the House of Commons Committee as follows:

> [f]inancial hedging agreements are important tools used by financial managers to reduce a variety of financial risks. They consist of

[8] Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations, September 11, 1991, p. 12:7.

> sophisticated off-balance sheet instruments ranging from foreign exchange contracts to interest rate and currency swaps.
>
> If a counterparty to a financial hedging agreement becomes insolvent, significant uncertainties will exist among other counterparties about the amount of their exposure to the counterparty. Because financial markets can change significantly in a matter of days, or even hours, a party to a financial transaction with an insolvent counterparty could face heavy losses unless the transaction is resolved promptly and with finality[9].

In their oral submissions, the representative for the Canadian Bankers' Association went on to say:

> [t]he contracts being discussed, which we have called eligible financial contracts, are, however important in their limited sphere. They help Canadian and other corporations world wide to manage risks such as changes in interest rates and in currency exchange rates.
>
> In the United States the solution we propose has been adopted, as an exception to their very pro-debtor legislation. It has enabled troubled US debtors, and especially those in the financial community, to continue to be able to access these risk controlling markets at a time when they have needed such protection the most[10].

The effect of the change is not to favour either the debtor or the counterparty to these transactions, but to allow the rights of each party to be calculated (pursuant with the contract) and reduced to a certain amount as of the date of termination. This allows the solvent party to go back into the marketplace to re-hedge its position. The proposals of

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[9] Canadian Bankers' Association, *Insolvency Law Reform in Canada: CBA Comments on Bill C-22*, A Submission to the House of Commons Consumer and Corporate Affairs Committee, September 1991.
[10] Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations, September 11, 1991, p. 12:28.

the Canadian Bankers' Association were accepted by the House of Commons committee and the resulting amendment to Part III of the BIA, dealing with proposals, exempts EFCs from the breadth of the stay of proceedings.

In 1996, Parliament considered changes to the CCAA, which came into effect in 1997, and, as part of this endeavour, imported the BIA protection for EFCs into the CCAA. The main thrust of the legislative intent in making this change was to harmonize the CCAA with the BIA proposal provisions. There is very little discussion of this amendment in the Parliamentary Committee minutes of proceedings. It would appear, based on the fact that no changes were made to the wording of the section prior to its inclusion in the CCAA and that the section in the BIA had not yet been tested in the courts, that the legislators did not have any other purpose in its inclusion. It would also appear that little thought, if any, was given to whether or not there were possible amendments that could be made to the section as it then appeared in the BIA. The relevant provisions in the CCAA read as follows:

> 11.1(1) In this section, "eligible financial contract" means
>
> (a) a currency or interest rate swap agreement,
>
> (b) a basis swap agreement,
>
> (c) a spot, future, forward or other foreign exchange agreement,
>
> (d) a cap, collar or floor transaction,
>
> (e) a commodity swap,
>
> (f) a forward rate agreement,
>
> (g) a repurchase or reverse repurchase agreement,
>
> (h) a spot, future, forward or other commodity contract,
>
> (i) an agreement to buy, sell, borrow or lend securities, to clear or settle securities transactions or to act as a depository for securities,

Tab

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Court of Queen's Bench of Alberta

Citation: Bellatrix Exploration Ltd (Re), 2020 ABQB 809

Date: 20201222
Docket: 1901 13767
Registry: Calgary

2020 ABQB 809 (CanLII)

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

-and-

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I Introduction

[1] The ultimate issue in this application is whether BP Canada Energy Group ULC or the First Lien Lenders to Bellatrix Exploration Ltd. have priority to certain funds held by the Monitor and by Bellatrix pending resolution of disputed claims. These claims include BP's breach of contract claim arising from Bellatrix's purported disclaimer of, and ongoing failure to perform under, a GasEDI agreement between Bellatrix and BP.

[2] Bellatrix has obtained protection from its creditors under the *Companies Creditors' Arrangement Act*, RSC 1985, c. C-36, as amended. It holds approximately US$14.2 million of the funds in issue and approximately US$1.6 million is held by PricewaterhouseCoopers Inc. in its capacity as Court-appointed Monitor of Bellatrix.

II Relevant Facts

[3] Bellatrix and BP were parties to a GasEDI Base contract for the short-term sale and purchase of natural gas and a Special Provisions for GasEDI Base Contract, both dated as of March 1, 2010 (collectively, with transaction confirmations, the "GasEDI Agreement").

[4] Bellatrix and BP entered into two transaction confirmations pursuant to the terms of the GasEDI Agreement, dated as of December 12, 2017.

[32] Other issues include the following:

(a) Is BP entitled to the funds held by the Monitor in respect of the December payment pursuant to a right of set-off?

(b) Is BP entitled to lift the stay to permit it to obtain and enforce a judgment against the sale proceeds?

(c) Is BP entitled to equitable relief?

(d) Has BP proved the amount of its claim for damages?

IV Analysis

A. Does the exception to the debtor's right to disclaim an EFC set out in section 34(7)(a) of the CCAA create an obligation for the debtor to continue to perform the EFC throughout insolvency proceedings?

[33] The stay provision of the CCAA, which prevents termination of an agreement because of a contractual counterparty's insolvency, does not apply to an EFC: section 34(7).

[34] Section 34(8)(a) of the CCAA allows solvent counterparties to EFCs certain "permitted actions" during the stay period if they are allowed to take such actions under the specific EFC agreement, including netting or setting off or compensation of obligations between the company and the other parties to the EFC. However, section 34(10) does not permit enforcement actions to recover net termination values once they are determined. Rather, if net termination values are owed by the company to another party to the EFC, section 34(10) deems the non-insolvent counterparty "to be a creditor of the company with a claim against the company in respect of those net termination values".

[35] As noted by the First Lien Lenders, the purpose of protection for EFCs under the CCAA is to provide stability to financial markets by allowing a non-defaulting counterparty the right to terminate and crystallize claims arising under an EFC.

[36] Like other creditors of the company, the net claims of a non-insolvent counterparty after termination are subject to the stay of proceedings. The Canadian Bankers Association in its submissions in favour of EFC amendments to the *Bankruptcy and Insolvency Act* in 1991 commented that:

> ... it cannot be overemphasized that our proposal is not to benefit either party to an eligible financial contract. ... Any net amount, if owed to the other party, would be fully subject to the proposed stay provisions. What would be achieved is that the rights of both parties would have been reduced to a fixed and certain amount, just like an amount owed under a regular contract at the time of the stay. (emphasis added): as cited in *Re Androscoggin Energy LLC*, [2005] OJ No. 395 at para 3.

[37] The Insolvency Institute of Canada Report of the Task Force on Derivatives dated September 26, 2013 notes at pages 2 and 3 that:

> EFC protection is a significant exception to the stay of proceedings under the CCAA and BIA. There are two main purposes of the EFC safe harbours: (i) to protect non-defaulting counterparties from the risk of increasing exposure to the insolvent counterparty under the EFC and (ii) to reduce systemic risk in Canadian

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> and global financial markets. Non-defaulting counterparties may be at risk because, in certain instances, the amounts under the EFCs are very substantial and the value of the underlying products subject to EFCs are volatile in nature and can change dramatically during an insolvency proceeding. If the solvent counterparty to an EFC is subject to a stay of proceedings and therefore unable to terminate its EFCs with the insolvent counterparty, there is a risk that the value of such EFCs could deteriorate sufficiently (from the insolvent counterparty's perspective) to put the solvent counterparty at risk. Systemic risk may arise where the solvent counterparty is a systemically important institution or where the solvent counterparty has entered into EFCs with one or more other counterparties. In extreme cases, the failure of one counterparty could have a domino effect, where the failure of one counterparty, particularly a derivatives dealer, triggers the failure of a second counterparty who is also a derivatives dealer and the failure of the second counterparty could trigger the failure of others. Multiple insolvencies may cause a lack of liquidity in the financial sector and unavailability of credit to solvent enterprises and, ultimately, systemic risk. The systemic risk could spread to global markets and lead to world-wide financial instability and, in extreme cases, recession.

[38] The protection offered to non-insolvent counterparties to an EFC is the ability to terminate the EFC and crystallize its loss despite the stay provision of the CCAA, a protection not afforded to other creditors. The other protection is allowing set-off if the EFC agreement itself permits it. The exceptions were included in the *Act* for the protection of the derivative market generally from volatile and systemic risk. They do not compel a CCAA debtor to continue to perform an EFC that has not been terminated, nor does the CCAA provide the non-insolvent counterparty with any priority for its claim, apart from the protection of the exemption.

[39] Unless the non-insolvent counterparty to the EFC has a security interest, it is an unsecured creditor, and participates in the CCAA proceedings on the same footing as other creditors: *Re Blue Range Resource Corp.*, 2000 ABCA 239 at para 9.

[40] Therefore, assuming that the GasEDI Agreement is an EFC, BP is allowed to terminate it and crystallize its loss. However, as BP has not done so, its remedy for Bellatrix's breach of the GasEDI Agreement is a claim in the CCAA proceedings as an unsecured creditor unless there are other remedies available to it in the specific circumstances.

[41] BP submits that, unless it is granted the relief it seeks, the practical effect of Bellatrix's conduct would be to render the disclaimer rules of the CCAA meaningless. It notes that a valid disclaimer under section 32(7) of the CCAA results in a "provable claim", unsecured unless otherwise provided for in the disclaimed contract. However, if CCAA debtors are allowed to breach executory contracts at will, the result is identical: the solvent party has a provable claim, unsecured unless otherwise provided for under the contract. BP submits that, if that is true, section 32(7) of the CCAA is without a purpose, as there is no practical difference between contracts that can and cannot be lawfully disclaimed. Either way, if the debtor chooses to breach the contract, the solvent counterparty is left with the same remedy – which in many cases, is no remedy at all.

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Tab

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Enron Capital & Trade Resources Canada Corp. v. Blue Range Resource Corporation, 2000 ABCA 239

Date: 20000831
Docket: 99-18410, 99-18411, 99-18418

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE HUNT
THE HONOURABLE MR. JUSTICE BERGER
THE HONOURABLE MADAM JUSTICE FRUMAN

IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c. C-36, as amended

AND IN THE MATTER OF
BLUE RANGE RESOURCE CORPORATION

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)

- and -

TRANSCANADA ENERGY LTD. and
INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC.

Intervenors

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[15] The chambers judge decided that the agreements were not forward commodity contracts within the meaning of s. 11.1(1)(h). Noting that the term "forward commodity contract" is not defined in the *CCAA,* he considered many different definitions provided by the parties and concluded "[b]ased on these sources one could define these items as almost anything or conclude that almost any contract fits" (AB I at 256). He expressed concern that a broad definition would defeat the object of the stay imposed in *CCAA* proceedings (AB I at 266).

[16] The chambers judge observed that s. 11.1 is entitled "eligible financial contracts", not "eligible contracts" and considered the word "financial" in the title to be "very significant" and to be the "guiding principle" in giving a "purposeful meaning to the section in light of the statute as a whole" (AB I at 259-60). He decided that a distinction should be drawn between contracts whose purpose is to lead to the actual delivery of a commodity, which he called physical contracts, and contracts whose purpose is only financial and is not intended to lead to actual delivery of a commodity, which he called financial contracts. In his view, only the latter could be considered eligible financial contracts and "[t]he question whether contracts are one or the other is to be resolved by the intention of the parties" (AB I 260). Because the preamble to the Enron Master Firm Agreement referred to delivery and receipt of natural gas, he concluded that "the parties were intending this to be a contract which was 'physical' in nature as opposed to 'financial'" (AB I 266) and the agreement was not an eligible financial contract. He reached the same conclusion with respect to the Duke and Engage agreements (AB I 267).

FORWARD COMMODITY CONTRACTS

Hedges and Netting Out

[17] Although "forward commodity contracts" are not defined in the *CCAA,* according to text writers they are merely "contract[s] to buy or sell an asset at a certain price on a future date": M. J. Bienenstock and P.M. Basta, "The Treatment of Derivatives under the Bankruptcy Code" in *Real Estate Workouts and Bankruptcies 1994*, (Practising Law Institute, 1994) 231 at 239. The long term natural gas supply contracts in this appeal fit within this general description. Put simply, they are negotiated contracts between private parties to buy and sell a specified quantity of gas at a certain or determinable price on a certain future date. According to the contracts, on the delivery dates Blue Range or Humble will deliver the gas to the purchaser at a specified delivery point, in exchange for the purchase price. The contracts therefore contemplate eventual physical settlement by the delivery of natural gas.

[18] The agreements also serve an important financial purpose which is unrelated to physical or financial settlement; they are risk management tools, commonly known as "hedges". Blue Range or Humble agree to sell the gas at a predetermined price on a future date and assume the "short position". The buyer agrees to purchase the gas and assumes the "long position". The seller is looking for price certainty and limited downside exposure: Blue Range or Humble, who are

guaranteed a particular purchase price, predict that the market price for gas will decline, and on the delivery date they will sell the gas at a price which is above market value.[5] The buyer assumes the risk of price fluctuations and predicts precisely the opposite: Enron, Duke and Engage gamble that the market price for gas will rise, and on the delivery date they will purchase the gas at a price that is below market value. See Bienenstock and Basta, *supra*, at 241-42.

[19] Generally, no premium is paid when a long term gas purchase and sale contract is entered into, and on that day the contract has a zero value. But the price of gas fluctuates constantly, which in turn affects the value of the contract. Because gas is a commodity that trades on the New York Mercantile Exchange, its price and the value of an agreement providing for a future sale of gas are readily ascertainable at any given time. From the perspective of the purchaser, the contract will be "in the money" when the market value of gas exceeds the purchase price specified in the contract. It will be "out of the money" when the market value is less than the purchase price. The contract is therefore "marked to market" and may take on a positive or negative value, depending on the price of gas.

[20] In order to further hedge their risk, many gas producers enter into a series of agreements with the same gas marketing and risk management companies, providing for the sale of gas at different prices, on different dates and at different points of delivery. Each of these contracts has its own calculable value. At any point in time, some of these will be "in the money", others "out of the money". Termination and netting out or set-off provisions permit the purchaser to terminate all the agreements upon a triggering event. The purchaser may then "calculate the value of all the transactions as of the termination date and ... net the positive and negative values to determine a lump sum termination amount payable by one party to the other": M.E. Grottenhaler and P.J. Henderson, *The Law of Financial Derivatives in Canada* (Toronto: Carswell, 1999) at 5.1.

The Derivatives Market

[21] Contracts to sell things at some future date are not a new creation. Historians suggest forward commodity contracts have been around for some 800 years, since they first appeared at medieval trade fairs in the 12th century. See Richard J. Tweles and Frank J. Jones, *The Futures Game: Who Wins? Who Loses? Why?* (New York: McGraw Hill, 1987). One might wonder then why such basic contracts have taken on new prominence. The answer lies not in the nature of forward commodity contracts, but in the nature of the assets that are the subject of such contracts. It is necessary to consider these assets in the context of this case by reviewing the types of

[5] As one might have guessed, Blue Range's and Humble's predictions were wrong. They overestimated the volume of gas they would produce and underestimated the market price for gas. The companies therefore did not receive market price for the gas they produced and also had to purchase gas in the spot market to honour their contractual commitments. These were significant contributing causes of the insolvency: Affidavit of Jeffrey Tonkin sworn March 2, 1999 (AB II at 4).

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transactions commonly used in the natural gas industry, the manner in which they are actually traded and settled, and the consequences if a non-defaulting party cannot terminate contracts and net out obligations in the event of an insolvency. This analysis assists in understanding the purpose of the eligible financial contract provisions, and interpreting the words used in s. 11.1(1)(h).

[22] Natural gas contracts trade through an exchange or board of trade in what is known as an exchange transaction, or between two negotiating parties in an off-exchange or over-the-counter transaction. There are, in turn, two main types of over-the-counter gas transactions: those which are physically settled by the delivery of gas, and those which are financially settled by cash payment.[6]

[23] These instruments are all part of the global derivatives market. "Derivative products are investment tools whose value depends on, or is derived from, the performance of some underlying asset such as stocks, bonds, commodities, currencies or indices": G. Luinenburg and F. Soda, "The Enforceability of Over-the-Counter Derivative Contracts Under Canadian Insolvency Regimes" (1996) 12 B.&F.L.R. 41 at 43 [footnote omitted]. Forward commodity contracts and other derivatives have a financial value that can readily be calculated; they are commercial hedging contracts that can be used to manage various types of risk, including changes in commodity prices, exchange rates, interest rates and market risks.

[24] Risk management companies, like the appellants, offer a wide range of cash-settled and physically-settled commodity products to customers, who may be producers, end-users or other financial intermediaries in the natural gas market. Natural gas market participants who do not ultimately consume the gas place little emphasis on the distinction between physically- and financially-settled transactions. Just as investors who dabble in the futures market do not anticipate waking up one morning to find a freight-car load of pork bellies on their front lawn, investors who deal in forward gas contracts do not intend to take physical possession of the gas.

---

[6] Enron calls financially settled transactions "derivative contracts" or "gas-based derivative contracts": Affidavit of P. R. Milnthorp dated March 19, 1999 (AB II at 16-17). This terminology is confusing. Forward commodity contracts are themselves considered to be derivatives. See, for example, Luinenburg and Soda, *supra*, at 43: "Well-known derivative products include ... *forwards*" [original emphasis]; Bienenstock and Basta, *supra*, at 239; "Examples of derivatives are forward contracts"; J.C. Hull, *Options, Futures and Other Derivatives* 3rd ed. (Upper Saddle River: Prentice Hall, 1997) at 1-2: "A *forward contract* is a particularly simple derivative .... A key variable determining the value of a forward contract at any given time is the market price of the asset" [original emphasis]; G. L. E. May, "Overview of Financial, Tax and Accounting Principles for Derivative Financial Instruments", Canadian Tax Foundation, 1995 Conference Report 29:1 at 29:3: "Generally, derivative financial instruments are contingent claims that give owners the obligation or right to buy or sell a quantity at a predetermined price in the future...."

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[25] Many of the trades among producers, gas marketers, risk managers and end-users involve buying and selling the right to take physical delivery of natural gas on a future date. Given the liquidity of the natural gas market, purchasers can readily offload their obligation to take delivery of gas under a physical contract by entering into a contract to make delivery of the same quantity of gas at the same point of delivery. These offsetting arrangements can be made with the original seller or a new party. The market operates like an exchange, as parties agree to make or take delivery, but settle their obligations by entering into offsetting contracts: Affidavit of David W. Richardson, sworn November 10, 1999 (Supp. AB II 18).

[26] Although some end-user will eventually claim the gas, trades along the way are not settled by physical delivery. Instead, they are normally settled by "title transfers", using such systems as the NOVA Inventory Transfer System, which plays a role similar to a securities depository and transfer agent in the securities industry: Richardson Affidavit, *supra*, at 16. Participants transfer a nominated volume of gas from their Nova account to another participant's account. The transfer is done by book entry, without actual possession or physical delivery of gas. Like the active trading that takes place in other financial markets, the volume of gas traded on a daily basis far exceeds the amount of natural gas that actually flows through the system.

[27] The appellants argue that an effective and fully functional termination, netting and set-off scheme that applies to all derivative instruments, including forward commodity contracts, is critical to the vitality of the derivatives market. A similar observation was made by Farley J. in ***Confederation Treasury Services Ltd. (Trustee of)*** v. ***Hees International Bancorp Inc.*** (1997), 45 C.B.R. (3d) 204 (Ont. Gen.Div.). He recognized that derivative contracts are a legitimate method of managing risk and as a matter of public policy should not be dealt with in a manner that affects their efficiency either in non-insolvency or insolvency situations. "If the right to terminate contemplated in the agreement ... is not enforceable, the whole structure of risk management for the swaps and other transactions is weakened or may fall apart": at 231 [citation omitted]. The effect of non-enforceability on the derivatives market is worth exploring.

[28] The *CCAA* stay provisions create disparities among market participants. While the non-defaulting party is subject to the stay order and may not terminate its contracts, the debtor company suffers from no similar disability. Subject to the court's supervision, it may terminate and breach contracts with impunity, forcing the non-defaulting party to claim damages as an unsecured creditor in the *CCAA* proceedings. The ability to selectively repudiate contracts is disdainfully known as "cherry picking". The debtor company could, for example, retain "out of the money" transactions, speculating that they might improve in value, but knowing full well that it would not be able to pay if the market moved in the other direction. At the same time it might terminate "in the money" transactions, triggering a cash payment by the non-defaulting party. See Luinenburg and Soda, *supra,* at 65; Brenda Gonzalez-Hermosillo, "The Microstructure of Financial Derivatives Markets: Exchange-Traded versus Over-the-Counter", Technical Report

No. 68 (Bank of Canada, 1994) at 64, online at http://www.bank-banque-canada.ca/english/res/tr68-e.htm.

[29] Without enforceable termination and netting out provisions, the insolvent company maintains complete control and may repudiate a contract at any time without notice. Because the non-defaulting party cannot count on performance, it cannot effectively re-hedge its risk by entering into an offsetting contract incorporating similar terms. Given the volatility of the market, the non-defaulting party is exposed to excessive and unmanageable risk.[7]

[30] Quite apart from the unfairness of cherry picking, other undesirable consequences follow. In order to determine credit availability, risk management companies account for "out of the money" transactions by deducting the value of "in the money" transactions. This practice is only appropriate if termination and netting out provisions are enforceable, and unaffected by an insolvency.[8] If forward gas contracts are not exempt from the *CCAA* stay provisions and no offsetting deductions are permitted, available credit quickly will be gobbled up. As a result, risk management companies will limit the capital they can allocate to this market, or ask cash-strapped gas producers to put up additional security to cover any short-falls. The unfortunate effect will be reduced availability of physical forward gas sales contracts to small producers, who are most in need of hedges to manage price risks. It will also encourage business to migrate to the United States, where physically-settled transactions are protected under United States bankruptcy law,[9]

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[7] Extreme volatility leads to roller coaster profits and losses, making the derivatives market a high stakes game that is not for the passive, the inexperienced or the faint of heart. These features of the market are well-recognized:

> Q: What's the difference between being rich and being poor?
> A: About 15 seconds, some days.

"What's the Difference on Wall Street", January 28, 1999, "Derivatives Humor for 1999 - January to August", Copyright 1996-1999 by The William Margrabe Group, Inc., online at http://www.margrabe.com/Humor/Humor99.html.

[8] In fact this type of accounting will actually be prohibited for some market participants, like banks, that are required by regulation to maintain adequate capital. See for example Guideline A of "Guideline with respect to Capital Adequacy Requirements for Banks", issued by the office of the Superintendent of Financial Institutions. Without an unqualified legal opinion to the effect that termination and close-out netting provisions are effective on insolvency, participants who account for transactions in this fashion will be offside their capital requirements. See Grottenhaler and Henderson, *supra*, at 5.1-5.2.1.

[9] United States bankruptcy law also exempts forward commodity contracts from the stay provisions; however, the exemption is based not only on the nature of the contract, but also on the nature of the market participant. Under the U.S. *Bankruptcy Code*, special protection is available to "forward contract merchants" (defined at 11 U.S.C. s. 101(26)), stockbrokers and financial institutions to terminate, net and set-off "forward

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Restricting the Meaning of "Commodity"

[39] But once the term "forward commodity contract" is interpreted to include physically-settled transactions, it could potentially include every contract to buy or sell on a future date any "thing produced for use or sale ... article of commerce ... [or] object of trade": *Oxford English Dictionary*, 2nd ed., *s.v.* "commodity". Even commercial contracts would not be protected from termination, making it impossible to maintain the status quo while a debtor company reorganized its affairs. Such a broad interpretation would defeat the *CCAA's* predominant purpose: preserving the insolvent company as a viable operation while reorganizing its affairs to benefit both the company and its creditors: ***Meridian Developments Inc.*** v**. *Toronto Dominion Bank***, *supra*, at 155; ***Quintette Coal Ltd.*** v. ***Nippon Steel Corp***., *supra*, at 309. Section 11.1(1) is an exception to a statutory protection which must "be interpreted in light of [the] underlying rationale and not be used to undermine the broad purpose of the legislation ...": Driedger, 3rd ed., at 369-70. See ***National Trustco*** v. ***Mead*** (1990), 71 D.L.R. (4th) 488 at 497-99 (S.C.C.). This dictates a narrower construction of provisions which are excepted from a stay order: ***Re Smith Brothers Contracting Ltd.*** (1998) 53 B.C.L.R. (3d) 264 at 272 (S.C.).

[40] The chambers judge chose to sort the contracts by physical or financial settlement in order to limit the impact of s. 11.1(1)(h). That approach is inconsistent with the words used in the section and Parliament's purpose in enacting the eligible financial contract provisions. If all physically-settled instruments are protected from termination by the non-defaulting party, an important chunk of the derivatives market is vulnerable in an insolvency, weakening the Canadian risk management structure.

[41] The chambers judge based his interpretation on the word "financial" in the term "eligible financial contract". Although a more restrictive interpretation of "forward commodity contract" may be warranted, any boundaries on its meaning must come from the words of the section rather than the label Parliament attached to the species of contracts. "Commodity" is the critical word, and it is not defined in the *CCAA*. The word "commodity" must be examined in the context of the legislation to see whether Parliament intended a broad dictionary meaning -- to include a forward contract to buy or sell practically anything of value -- or something less expansive.

[42] Other statutes provide definitions which are considerably narrower than the dictionary definition. For example, the *Securities Act*, R.S.A. 1980, c. S-6.1 defines "commodity" at s. 1(b.01) to include:

> (i) any good, article, service, right or interest of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit;
>
> (ii) the currency of any jurisdiction;

(iii) any gem, gemstone or other precious stone;

The *Commodity Futures Act*, R.S.O. 1990, c. C.20 defines "commodity" in s. 1:

> "commodity" means ... any agricultural product, forest product, product of the sea, mineral, metal, hydrocarbon fuel, currency or precious stone or other gem ..."

[43] A common feature in these definitions is that the articles are fungible in nature – each unit is interchangeable for another. They have no specific or defining characteristics and may easily be replaced. Grottenhaler and Henderson, *supra*, at 5-8 describe the similarities among the list of items contained in the definition of eligible financial contracts in s. 11.1(1):

> Most of these transactions involve payments flowing between the parties depending on the fluctuation in the price or rate. Importantly, they also, for the most part, involve commodities or rights for which there is an active market. They are fungible in the sense that it is not difficult in most cases to find a replacement transaction and to do so in a relatively short time period.

[44] Unlike leases and ordinary executory contracts whose markets change at a leisurely pace, derivative products are subject to a volatile underlying market: Luinenberg and Soda, *supra*, at 86. "[T]he spot market price for the underlying asset of a successful derivative security must be volatile and unpredictable with a sufficient (trading) volume to ensure convergence to a competitive equilibrium price": Sean M. O'Connor, "The Development of Financial Derivatives Markets: The Canadian Experience", Technical Report No. 62, (Bank of Canada, 1993) at 21.

[45] Like the other items in s. 11.1(1), forward commodity contracts are financial hedges and risk management tools. Interpreting them in the context of the rest of the section requires that they share certain traits. The contracts listed in s. 11.1(1) deal with units that are the equivalent of any other unit. Therefore commodities must be interchangeable, and readily identifiable as fungible commodities capable of being traded on a futures exchange or as the underlying asset of an over-the-counter derivative transaction. Commodities must trade in a volatile market, with a sufficient trading volume to ensure a competitive trading price, in order that forward commodity contracts may be "marked to market" and their value determined. This removes from the ambit of s. 11.1(1)(h) contracts for commercial merchandise and manufactured goods which neither trade on a volatile market nor are completely interchangeable for each other.

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Application

[46] It is clear that natural gas meets this narrower definition of commodity. Unlike consumer goods which vary widely in size, style and quality, one mcf of gas is identical to another mcf of gas. Natural gas trades on a highly liquid and volatile market, and while its price fluctuates from moment to moment, that price is readily ascertainable. Forward gas contracts therefore have a calculable cash equivalent.

[47] Since physically-settled forward commodity contracts are included in the definition of eligible financial contracts, and gas is a commodity, the next issue is whether the agreements in question are forward commodity contracts. As the term is not defined in the *CCAA,* industry and expert definitions provide valuable guidance.

[48] Haedicke and Aronowitz, *supra,* footnote 12, at 88:74-75 define a "forward contract" for the energy industry as:

> A customized contract to buy or sell a commodity for delivery at a certain future time for a certain price. It is customized by individual negotiations between two parties, rather than standardised and traded on a board of trade. The parties to the forward contract usually know each other, and in most cases the contract is settled by actual delivery of the commodity.

[49] James Joyce, a specialist in energy risk assessment who provided an expert report in this case, identified the key elements of a forward commodity contract in the natural gas industry to include:

> a) a buyer of natural gas;
> b) a seller of natural gas;
> c) a defined contract term longer than the next day;
> d) a defined volume of natural gas;
> e) a defined delivery and receipt point (including any transportation requirements, as applicable); and
> f) a defined price or pricing mechanism. (AB VII at 1049.)

[50] Not every contract involving the purchase and sale of natural gas is a forward commodity contract. For example, Joyce's definition would not capture standard gas utility contracts, which do not usually commit a consumer to purchase a specified volume of gas for a specified price. Instead they are demand driven, with consumers purchasing the amount of gas needed from time to time at prices which fluctuate depending on rates set by a regulatory authority.

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[51] The Haedicke and Aronowitz and Joyce definitions reasonably set out the requirements for a forward commodity contract in the natural gas industry. The gas purchase and sale contracts under consideration in this appeal, which are negotiated bilateral contracts as required in the Haedicke and Aronowitz definition, also contain all the elements referred to in the Joyce definition. Therefore the agreements are forward commodity contracts.

[52] The final measure is to test the fairness of this result. A manufacturer of consumer goods selling specified products to particular customers may encounter serious financial obstacles if, in *CCAA* proceedings, customers are permitted to terminate contracts for the purchase of goods. The manufacturer may never find substitute purchasers with the same requirements, impairing its cash flow and ability to stay in business during the restructuring period. This defeats the purpose of the *CCAA*. But the same cannot be said of a gas producer whose long term gas supply contracts are terminated. Blue Range and Humble may readily sell their gas in the spot market, assuring them a source of income. In addition, they may negotiate new long term gas supply contracts, perhaps on more favourable terms.

[53] The appellants are also fairly treated. Through the use of the termination and netting out provisions they may crystallize their losses, deal with their exposure through further hedging transactions and avoid piling on losses that are likely to arise in the volatile gas market. This permits them to continue to offer these risk management tools to small gas producers who are in need of them, and preserves the integrity of these financial instruments in the derivatives market.

SUMMARY

[54] Eligible financial contracts in s. 11.1(1) include both physically-settled and financially-settled transactions. Restricting forward commodity contracts in s. 11.1(1)(h) to cash-settled contracts is contrary to the plain meaning of the section and inconsistent with Parliament's objective of protecting the risk management structure within the derivatives market. Nor is such a restriction necessary to achieve the purpose of the *CCAA.* While forward commodity contracts may be physically settled by the delivery of product, they must be restricted to contracts for fungible commodities which trade in a liquid and volatile market.

[55] Natural gas is such a commodity. Each of the agreements under consideration in this appeal is an eligible financial contract because it is either a forward commodity contract (s. 11.1(1(h)), a master agreement in respect of a forward commodity contract (s. 11.1(1)(k)), or a guarantee of the liabilities under a forward commodity contract (s. 11.1(1)(m)).

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Tab

16

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

INDEXED AS: CENTURY SERVICES INC. *v.* CANADA (ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

RÉPERTORIÉ : CENTURY SERVICES INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

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the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

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Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

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the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

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matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

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stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

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Tab

17

2020 CarswellAlta 350
Alberta Court of Queen's Bench

Bellatrix Exploration Ltd., Re

2020 CarswellAlta 350, [2020] A.W.L.D. 1317, [2020] A.J. No. 329, 316 A.C.W.S. (3d) 411, 77 C.B.R. (6th) 230

IN THE MATTER OF THE COMPANIES' CREDITOR ARRANGEMENTS ACT, R.S.C. 1985, C. C-36, as Amended

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF BELLATRIX EXPLORATION LTD.

Jones J.

Heard: February 4, 2020
Judgment: February 4, 2020
Docket: Calgary 1901-13767

Counsel: R.J. Chadwick, for Bellatrix Exploration Ltd.
G. Benediktsson, for BP Canada Energy Group ULC
J. Reid (Agent for K.J. Bourassa), for First Lien Lenders
J.G. Kruger, Q.C., for PricewaterhouseCoopers

Subject: Contracts; Insolvency

Table of Authorities

Cases considered by *Jones J.*:

Androscoggin Energy LLC, Re (2005), 2005 CarswellOnt 589, 8 C.B.R. (5th) 11, 195 O.A.C. 51, 75 O.R. (3d) 552 (Ont. C.A.) — considered

Blue Range Resource Corp., Re (2000), 2000 ABCA 239, 2000 CarswellAlta 1004, 192 D.L.R. (4th) 281, 20 C.B.R. (4th) 187, 266 A.R. 98, 228 W.A.C. 98, [2001] 2 W.W.R. 454, 87 Alta. L.R. (3d) 329 (Alta. C.A.) — considered

Calpine Canada Energy Ltd., Re (2006), 2006 ABQB 153, 2006 CarswellAlta 446, 19 C.B.R. (5th) 187 (Alta. Q.B.) — considered

Statutes considered:

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

Generally — referred to

s. 11 — considered

s. 32(1) — considered

s. 32(2) — considered

s. 32(4) — considered

s. 32(9) — considered

s. 34(8) — considered

s. 34(9) — considered

Regulations considered:

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

Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act), SOR/2007-257

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> Transaction Confirmations for Immediate Delivery relating to a trade date of December 12, 2017 and for a trade date of February 9, 2018 (the "Transaction Confirmations").

16 In each case, the Transaction Confirmations appear to consist of an original Transaction Confirmation, together with the current applicable Transaction Confirmation, there having been amendments and restatements thereto.

17 I now deal briefly with each of these four components, to the extent their contents are relevant to the issue before the Court.

The Cover Sheet

18 The Cover Sheet consists of two pages. Page one provides details of contract information and financial settlement details. The Cover Sheet is signed by the parties. The introduction to the execution portion reads as follows: (as read)

> In witness whereof, the parties hereto have executed this Base Contract in duplicate.

19 Also, section 2.1 of the Terms and Conditions defines Base Contract to mean: (as read)

> A contract executed by the parties that incorporates these General Terms and Conditions by reference; that specifies the agreed selections of provisions contained herein, and that sets forth other information required herein.

20 The Cover Sheet appears to meet the specifications referred to in this definition and therefore I interpret references to Base Contract in the various documents comprising the Contract to be references to the Cover Sheet.

21 Page 2 of the Cover Sheet stipulates that the Contract incorporates the Terms and Conditions. The Terms and Conditions consist of numbered clauses. Page 2 of the Cover Sheet requires boxes to be checked in respect of concepts or terms referred to in certain of the numbered clauses in the Terms and Conditions. By checking a particular box, the parties reflect a particular understanding of how the Contact is to apply.

22 For example, section 7 of the Terms and Conditions deals with billing, payment and audit. Section 7.2 of the Terms and Conditions provides that the Buyer must pay for natural gas on or before the later of the Payment Date or 10 days after receipt of the invoice by the Buyer. Page 2 of the Cover Sheet contains a box referring to Section 7.2 and indicates that the parties have agreed that the Payment Date is to be the 25th day of the month following the month of delivery.

23 Page 2 of the Cover Sheet also refers to Special Provisions consisting of five attached pages. The Special Provisions modify certain of the Terms and Conditions.

24 In essence, the Cover Sheet might be referred to as "the Contract at a glance". I am advised that the Contract is in a form widely used in the industry. The Cover Sheet would thus serve to inform persons familiar with these types of agreements of certain data they may require to administer the Contract on an ongoing basis.

Terms and Conditions

25 Some provisions of the Terms and Conditions, as modified by the Special Provisions, warrant mention.

26 A "Transaction" is defined to mean any gas sale, purchase or exchange agreement effected pursuant to the Base Contract: section 2.1.

27 The Confirming Party (BP) shall confirm any "Transaction" by sending the other party (Bellatrix) a Transaction Confirmation: section 1.2.a.

28 As modified by the Special Provisions, section 1.2.d. of the Terms and Conditions provides that the entirety of the agreement between the parties consists of (i) an effective Transaction Confirmation, (ii) any oral or electronic agreement between

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the parties, evidenced as prescribed therein (iii) the Base Contract and (iv) the General Terms and Conditions. Section 1.2.d refers to this collection of documents as the "Contract". That is why I have adopted that terminology.

29 An "Event of Default" under the Terms and Conditions, as modified by the Special Provisions, includes, *inter alia*, the filing of a petition or otherwise commencing, authorizing, or acquiescing in the commencement of a proceeding or cause under any bankruptcy or insolvency (however evidenced) or the inability to pay debts as they fall due.

30 Again, as modified by the Special Provisions, an Event of Default also includes a party's failure to deliver natural gas on what is referred to as a "Firm basis". "Firm" is defined in section 2.1 of the Terms and Conditions. The concept of Firm addresses the circumstances in which a party may interrupt its performance of the Contract without liability.

31 It is clear that Bellatrix, by virtue of these CCAA proceedings, has incurred an "Event of Default". Its cessation of delivery of natural gas on November 26, 2019 would also appear to constitute an Event of Default.

32 In this situation, the Cover Page indicates that the parties have agreed to what is referred to as a "Cover Standard". A Cover Standard is relevant to the determination of an appropriate remedy if a party breaches the Contract: section 3.2 of the Terms and Conditions.

33 Section 3.2 of the Terms and Conditions provides, among other things, for a payment by the Seller to the Buyer if the Seller is in breach of the Contract. Very generally, the quantum of that payment, if any, is determined with reference to what is referred to as the Cover Standard for replacement natural gas and what is referred to as the Contract Price. Quantum of required payment also takes into account the difference between the quantity of natural gas the Seller agreed to deliver and the quantity it actually delivered.

34 "Cover Standard" is defined in section 2.1 of the Terms and Conditions. Without descending into the minutae of that definition, it specifies what a Performing Party may do in the event of a default by the other party. At a high level, it contemplates that the Performing Party will take commercially reasonable efforts to either buy or sell natural gas, as the case may be.

35 It is Bellatrix's responsibility to deliver natural gas to "Delivery Point(s): section 4.1 of the Terms and Conditions. "Delivery Point(s) are defined to mean such point(s) as are mutually agreed upon between Seller and Buyer as forth in the Transaction Confirmation: section 2.1. My understanding is that the Delivery of natural gas by Bellatrix under the Contract takes place in Alberta.

36 Subject to certain limitations, the Terms and Conditions provide for netting out all same currency amounts due and owing, as determined by the provisions of the Contract, by one party to the other: section 7.6 of the Terms and Conditions.

37 Upon the occurrence of an Event of Default, the Non-Defaulting Party may, *inter alia*, withhold amounts owed to the Defaulting Party and setoff against such withheld amounts any amounts owed the Non-Defaulting Party: section 10.2 of the Terms and Conditions.

38 Upon the occurrence of an Event of Default, the Non-Defaulting Party may, subject to limitations, terminate and liquidate all Transactions then outstanding or not yet commenced. The Non-Defaulting Party is permitted to designate an Early Termination Date (between 1 and 20 business days after the Event of Default): section 10.3 of the Terms and Conditions.

39 The Non-Defaulting Party which designates an Early Termination Date must calculate the Total Termination Payment and advise the Defaulting Party, providing detailed support for its calculation: section 10.3 of the Terms and Conditions.

40 Section 2.1 of the Terms and Conditions defines "Total Termination Payment" to be the sum of the Termination Payments for all Transactions terminated pursuant to section 10 of the Base Contract. I return to the calculation of Termination Payments below.

41 The Non-Defaulting Party may net the Total Termination Payment against all other amounts between the parties under the Contract. The net amount is referred to as the "Liquidation Amount" and, depending on who has the resulting payment

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obligation, is payable on a prescribed date following the Event of Default. For a Defaulting Party, that prescribed date is within 2 Business Days: section 10.4 of the Terms and Conditions.

42 Section 2.1 of the Terms and Conditions defines Termination Payment for a Transaction, which is the basis for determining Total Termination Payment and, thus, the Liquidation Amount.

43 Termination Payment for a Transaction is defined to be the difference between the Market Value and the Contract Value, adjusted for Costs, as of the Early Termination Date: section 2.1 of the Terms and Conditions.

44 Market Value and Contract Value are both defined in section 2.1 of the Terms and Conditions. Market Value, as modified by the Special Provisions, is the discounted present value of the product of two amounts. The first amount is the quantity of gas remaining under a Transaction. The second amount is a "market price for a similar transaction" considering the remaining Delivery Period, Contract Quantity and Delivery Point.

45 To determine the "market price", for the purpose of determining "Market Value", the Non-Defaulting Party may consider a number of indicia, including any or all of the settlement prices of NYMEX Gas futures contacts, quotations from leading dealers in energy swap contracts or physical gas trading markets, similar sales or purchases and any other bona fide third-party offers, as adjusted.

46 Contract Value of a Transaction is defined as the discounted present value of the product of two amounts. The first amount is the quantity of natural gas remaining to be transacted between the parties under a Transaction. The second amount is the Contract Price.

47 Contact Price, defined in section 2.1 of the Terms and Conditions, is stated to be determined on the basis of whether the Delivery Point is in Canada or in the United States. The Delivery Point is specified in the Transaction Confirmation.

48 Each Transaction Confirmation provides for the specification of a Contract Price. I examine the determination of Contract Price in more detail below.

49 The point here is that, in case of an Event of Default, BP may terminate, but is not required to. A determination of net amounts owing from one party to the other is made. Net amounts owing must be paid within a certain time.

50 In my view, the key point which emerges from the above analysis is that the Contract provides a mechanism by which an amount, if any, is determined to be owing by a Defaulting Party, Bellatrix in this case, and which is made payable within a prescribed time. This is so even though the price for natural gas which would have ultimately been paid if the Transaction had been fully performed cannot have been determined because that reference price was to be determined during the term of the Contract at the time of delivery.

51 The Contact allows for prompt set-off or netting based on the determination of a Liquidation Amount. There is no requirement to wait until the end of a Contract term to perform that calculation.

52 While the Contract may not, itself, be a hedge contract, as that term is normally applied, it contemplates netting or set-off in the event of a default based on market prices prevailing at the date of default. As discussed by the Court of Appeal in *Blue Range Resource Corp., Re*, 2000 ABCA 239 (Alta. C.A.) *(Blue Range)* and in *Calpine Canada Energy Ltd., Re*, 2006 ABQB 153 (Alta. Q.B.), *(Calpine)*, the ability to set-off or net under a contract is one indicia pointing to EFC status.

53 The provisions of the Contract, with its provisions for determining Total Termination Payments and Liquidation Amounts, provide a party with certainty that, in the Event of Default, calculation of monetary damages will be possible. The Contract may not be a hedge contract as that term is generally understood, but in entering into it, Bellatrix nevertheless is betting that the pricing mechanism provided for in the Contract will give it greater financial return than would be the case if it selected the AECO price in Alberta as the Contract Price.

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54 Bellatrix acknowledged before me that Bellatrix enters into hedge contracts. It argued, however, that it is not possible for Bellatrix to hedge or manage its risk under this Contract because the price for the natural gas it sells is a moving target.

55 Bellatrix readily concedes that the Contract seeks to achieve what it refers to as "price diversification", but it is not a hedging contract.

56 Interestingly, the Special Provisions add the following section 10.7: (as read)

> The parties specifically agree that this Contract and all Transactions pursuant hereto constitute an "eligible financial contract" within the meaning of the *Banhuptcy and Insolvency Act (Canada)* and the *Companies' Creditors Arrangements Act (Canada)* and similar Canadian legislation.

57 What, if any, significance may be attached to this provision in light of the purposes of *CCAA?* The decision of the Ontario Court of Appeal in the matter of *Androscoggin Energy LLC, Re* [2005 CarswellOnt 589 (Ont. C.A.)] might suggest not much.

58 In that case, the Court commented on the decision of our Court of Appeal in *Blue Range*. With reference to provisions for termination, set-off and netting found in the agreements in issue in *Blue Range*, the Ontario Court of Appeal noted that: (as read)

> Unlike the contracts found to be EFCs in Blue Range, supra, the contracts in issue here possess none of these hallmarks and cannot be characterized as EFCs. However, the mere pro forma insertion of such terms into a contract will not result in its automatic characterization as an EFC. Regard must be had to the contract as a whole to determine its character.

59 Bellatrix argues that I should ignore the provisions of the Contract affirming EFC status. BP argues that even in *CCAA* a Court should still be mindful of what the parties expressed their intention to be.

60 The contracts in *Androscoggin* did not, to my knowledge, state that they were EFCs. This Contact does state that it is an EFC. As will emerge from the discussion below, I find that statement to be of some, but not overwhelming, significance. The Court's job here is to determine if the Contract should or should not enjoy the special status attributable to EFCs.

61 I do not believe the parties should be permitted to attempt to contract in or out of the application of a statute which otherwise clearly applies or does not apply, unless the statute expressly permits that to happen. I am not aware of any such permissive provision in the *CCAA*.

The Transaction Confirmations

62 Turning finally to the Transaction Confirmations, they complete the Contract. Exhibits "B" and "C" to Hrap Affidavit contain copies of Transaction Confirmations.

63 Clause 28 of the Ulmer Affidavit notes that the Contract Prices specified for purposes of the two Transaction Confirmations before me are, on the one hand, based on a formula expressed as the average of the California (Malin), Midwest Chicago Citygate and Dawn, Ontario, natural gas spot prices, reduced by a fixed transportation fee, per MMBtu and, on the other hand, on a formula expressed as the Midwest Chicago Citygate natural gas spot price, reduced by a fixed transportation fee, per MMBtu.

64 Clause 7 of the Hrap Affidavit confirms this approach to pricing. Hrap asserts at clause 8 of his Affidavit that: (as read)

> The purpose of the Gas EDI Agreement, and other similar contracts that producers and marketers enter into, is to manage price risk by setting a contract price that is based on an index price representing a market other than the delivery point.

65 Bellatrix's brief nicely summarizes the pricing arrangements under the Contract at paragraph 46: (as read)

> The Agreements in issue here do not provide for any fixed prices for the delivered natural gas, but rather are based on fluctuating natural gas spot prices in the referenced downstream market for the month during which natural gas is delivered.

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Discussion

66 Hrap points to Exhibit "D" of his Affidavit. It is a press release issued by Bellatrix on December 14, 2017 ("Press Release"). It states, *inter alia*, that: (as read)

> Bellatrix has recently diversified it natural gas price exposure through physical sales contracts that give the Company access to the Dawn, Chicago and Malin natural gas pricing hubs .... this long-term diversification strategy reduces Bellatrix's exposure to AECO pricing on approximately 26% of the Company's forecast 2018 natural gas volumes. In combination, the market diversification sales and fixed price hedges cover approximately 2/3 of natural gas volumes in 2018.
>
> In aggregate, Bellatrix's hedging program is part of its overall risk management strategy providing reduced commodity price volatility and greater assurance over future revenues and operating funds flow which help drive the capital and reinvestment decisions within our business.

67 It is clear that Bellatrix sought, through the Contract, price diversification. As paragraph 24 of the Ulmer Affidavit notes: (as read)

> Bellatrix entered into the Agreements with BP Canada for exactly this purpose: to have BP Canada transport Bellatrix's natural gas to other markets so that Bellatrix could realize the financial benefit of selling its natural gas in markets outside of Alberta. At the time the Agreements were entered into, AECO prices were significantly lower than the natural gas spot prices available in other North American markets.

68 Part of the explanation for the dilemma Bellatrix finds itself in may be found at paragraph 29 of the Ulmer Affidavit: (as read)

> When the parties negotiated the Delivery Agreements, they calculated transportation fees with reference to the price differential between the AECO spot price, and the downstream market spot prices that formed the basis for the contract price. The applicable transportation fees are well above the actual cost of transportation that is incurred by BP Canada under the Delivery Agreements. As the difference between the AECO spot price and the downstream market spot prices have narrowed since the Delivery Agreements were executed, the transportation fees have become increasingly uneconomical for Bellatrix.

69 Bellatrix was betting that prices for natural gas referenced to these other markets would be more beneficial than contracts which reflected AECO pricing.

70 Bellatrix acknowledges that its expectations regarding AECO pricing in relation to pricing under the Contract were incorrect.

Scheme of the CCAA

71 Borrowing from a description on the Government of Canada's website, Office of the Superintendent of Bankruptcy: (as read)

> The main purpose of the CCAA is to enable financially distressed companies to avoid bankruptcy, foreclosure or the seizure of assets while maximizing returns for their creditors and preserving both jobs and the company's value as a functioning business.

72 A different page from the same website states as follows: (as read)

> The *CCAA* has a broad remedial purpose, allowing a company to continue in business while it seeks to develop and obtain the approval of compromises or arrangements with its creditors. Canadian courts have held that the main purpose of the

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100 Rather, paragraph 52 of *Blue Range* is, in my view, expressing the notion that fairness may enter the analysis of a *CCAA* Court at an earlier stage. That is, at the time the Court is considering if an agreement in question meets the definition of an EFC. That is a different proposition from saying that even though an agreement clearly meets the definition of an EFC it can nevertheless be declared by the Court not to be one. I am not convinced that it is a distinction without a difference.

101 At paragraph 52 of *Blue Range*, Fruman JA refers to the purpose of the *CCAA*. She does so in the context of discussing fairness. Under the auspices of fairness, the inference I would draw from her comments is that the Court has some latitude in deciding the threshold question of whether or not a particular agreement constitutes an EFC if that characterization has implications for the Court's ability to fulfil the objects and purposes of the *CCAA*.

102 In argument before me BP agreed with my analysis, noting that section 11 of the *CCAA* provides that: (as read)

> 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.

103 BP appears to take the position that section 11 gives me the power, as part of an EFC status eligibility analysis, to consider if it would be fair to determine if a particular agreement did or did not qualify as an EFC.

104 Another interpretation of the scope of section 11 is provided by Fruman JA in *Blue Range*.

105 At paragraph 7, citing authority, she notes that: (as read)

> The court's discretionary powers under s. 11 have been interpreted to restrain any conduct "the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period."

106 In fairness, I believe Bellatrix's counsel ultimately acknowledged that any consideration of fairness enters into the analysis at the stage where EFC status is determined.

107 Recognizing that an exception for EFC's to the rule permitting disclaimer should be construed narrowly, in order to facilitate attainment of the, arguably, larger objective of facilitating an insolvent entity's restructuring, a *CCAA* Court should err on the side of restraint and caution in deciding if EFC eligibility is met in any particular case. I think Justice Romaine was making a similar point at paragraph 28 of*Calpine*.

108 In the end, I do not accept the argument that section 11 of the *CCAA* can be considered to have applied "appropriately in the circumstances" if it used to disqualify as an EFC an agreement which the Court concludes otherwise meets the definition in the Regulation. To do otherwise would, in my view, interject an undesirable element of uncertainty into capital markets.

109 It would also appear to have the effect of substantively re-writing the Contract between the parties by ignoring certain provisions that would have otherwise led a reader to conclude that it was an EFC. I think the Court should be cautious about engineering such a result.

110 Lastly, if fairness enters the analysis at the EFC status determination stage, I see no reason why it would be inherently fairer to grant EFC status only to agreements where the settlement price for the commodity was fixed at the outset of the contract. It seems to me that if a fairness analysis involves at least some consideration of the stake which the parties to an agreement have and if, as Bellatrix has acknowledged, the Contract forms part of its price diversification program in conjunction with traditional hedging contracts, then it might be manifestly unfair to disallow EFC status in this case.

111 Suppose the facts were different. Suppose the Contract Price under the Contract was expected to remain sufficiently above the AECO price to make it desirable for the Contract to remain in place. Bellatrix might be happy to see the Contract

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continue. Surely the issue of fairness should not fall to be determined on the basis of which side of a bet on future pricing the insolvent party to an agreement ended up on.

112 I think there is another reason to be sceptical of the Court's power to use section 11 of the *CCAA* to deny EFC status in respect of an agreement that would otherwise appear to meet the requirements for an EFC, by looking through a "fairness lens".

113 In my view, the legislation imposes two impediments to unrestrained disclaimer. The first is section 32(9) which has the effect of removing an EFC from a debtor company's power to disclaim.

114 The second is section 32(4), which directs the Court to consider various factors in deciding whether or not an non-EFC should or should not be disclaimed.

115 In my view, the cumulative effect of these two sections suggests quite the opposite conclusion to that arrived at by Bellatrix. One may argue that imposing two barriers to disclaimer, the first being the outright prohibition arising from EFC status and the second being a requirement to satisfy the Court on the basis of factors such as those found in *CCAA* 32(4), manifest a direction to the Courts from the legislator that, while disclaimer by the insolvent corporation potentially reflects the objectives of a *CCAA* restructuring, the ability to disclaim is not unfettered.

116 To suggest that a Court should be permitted to substitute its view of fairness for that apparently reflected in Parliament's decision to provide an exception to disclaimer for EFCs, is, in my view, problematic. I accept the notion that a *CCAA* Court must be flexible, applying exceptions to the broad policy objective of facilitating restructurings narrowly.

117 At some point, however, that flexibility must not unduly compromise certainty. It seems to me that if there is to be an exception to disclaimer for EFCs, parties to agreements must be able to count on that exception meaning something. Agreements, such as the Contract. negotiated at considerable expense, reflective of industry practice and understanding, which themselves potentially engineer other agreements, such as hedge contracts, and the industry created to support those arrangements, cannot be subject to effective wholescale revision by a *CCAA* Court, such that the parties legitimate expectations are always going to be at risk of a *CCAA* Court finding unfairness.

118 Thought of another way, to allow a *CCAA* Court to find an agreement that otherwise clearly fits within the definition of an EFC to not be an EFC, is to allow a *CCAA* Court to effectively rewrite that agreement. I do not understand a *CCAA* Court to have that authority.

119 A concluding thought on fairness. What of those who have taken the opposite bet to Bellatrix under hedge agreements? What of those whose livelihood or ability to manage capital depends on the certainty of knowing that contracts, such as the Contract, will, even in the event of insolvency, be enforceable in accordance with their terms.

120 Bellatrix and BP agreed in the Contract that it would be an EFC. I think it a reasonable inference that parties to agreements with Bellatrix and BP, who paid money to create arrangements with either Bellatrix or BP, might have based their positions at least to some extent on the fact that the Contract was expressly stated to an EFC for *CCAA* purposes.

Purpose of the Contract

121 To be an EFC, a derivatives agreement must first be a financial agreement.

122 Bellatrix argues that the Contract is not a financial agreement, as that term is used in the Regulation. Rather, it is an agreement for the sale of natural gas, which just happens to allow for price diversification.

123 I note that in *Blue Range*, Fruman JA concluded that agreements for the physical delivery of gas could be forward commodity contracts and, under the legislation prevailing at the time of her decision, EFCs. The notion of a "forward" as an EFC was retained in the Regulation.

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124 I conclude that an agreement for physical delivery of natural gas is not, *a priori*, disqualified as an EFC. The reasoning in *Blue Range* confirms that conclusion.

125 In my view, a financial agreement is one which serves an important financial purpose. In *Blue Range*, the Court of Appeal found that a forward commodity contract did serve an important financial purpose, unrelated to physical settlement, because it is a risk management tool. Indeed, Fruman characterized the forward commodity contracts in that case as "hedges".

126 Of course, Bellatrix argues the Contract is not a hedge, and cannot be a hedge because it does not utilize a fixed price.

127 I think the Contract is a financial agreement because it serves an important financial purpose. What is the important financial purpose here? Bellatrix acknowledges that the Contract seeks to achieve price diversification. In my view, that is a financial purpose.

128 Is price diversification important to Bellatrix? It seems important enough to have been mentioned in the Press Release.

129 In analyzing if the Contract serves a "financial purpose" it makes no sense to me to consider the Contract in isolation from Bellatrix's other actions. The Press Release mentions the Contract in the context of Bellatrix's "long term diversification strategy".

130 Is that strategy one which seeks to avoid the risk of contractually agreeing to deliver gas it cannot produce? No, it notes that this strategy seeks to reduce exposure to AECO pricing.

131 Importantly, in my view, the Press Release refers to the importance of the "combination" of "the market diversification sales and fixed price hedges", which it states, "cover approximately 2/3 of natural gas volumes in 2018".

132 Immediately after these quotations, it goes on to say that: (as read)

> In the aggregate, Bellatrix's hedging program is part of its overall risk management strategy providing reduced commodity price volatility and greater assurance over future revenue and operating funds flow which help to drive the capital and reinvestment decisions within our business.

133 The inescapable conclusion is that the Contract, in conjunction with fixed price hedges, sought what Bellatrix considered to be a pricing arrangement more favourable to its financial risk management, cash flow and capital budgeting objectives.

134 Bellatrix would argue that its fixed price hedging contracts are financial agreements but that they are different from the Contract. The Contract, Bellatrix argues, is simply not a hedging contract.

135 There is no end to the number of definitions of a hedging contract. Having reviewed many of them, a common theme emerges. They seek to manage financial risk.

136 I think Bellatrix's Press Release, when it refers to Bellatrix's "hedging program" is referring to the combination of the Contract and its fixed price hedge contracts. Together, they work to achieve financial risk management. In my view, one would have limited utility in achieving Bellatrix's objectives without considering the impact of the other.

137 The Press Release indicates that the Contract serves to diversify Bellatrix's natural gas price exposure. Surely that is an effort in financial risk management.

138 Bellatrix argues that BP attempts to misconstrue the Press Release, suggesting that it confirms Bellatrix's view that the Contract is financial in nature. Bellatrix argues that the Press Release clearly distinguishes between its hedging arrangements and its efforts to diversify natural gas price through physical sale agreements.

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190 Further, in completely ignoring an expression of intention in a contract negotiated on an arm's length basis and no doubt at some cost to the parties, is the Court effectively rewriting their agreement? If so, to what extent is that a permissible outcome from a *CCAA* court?

191 Lastly, would Bellatrix have been so quick to have me ignore this expression of the parties' intention if the Contract had expressly stated that it was not an EFC?

192 I appreciate that a fundamental objective of the *CCAA* process is to preserve status quo while opportunities for an equitable restructuring may be pursued. I appreciate that the ability to terminate unfavourable contracts is one tool in the status quo toolbox.

193 Consequently, I agree that the exception for EFCs must be construed narrowly. But as was pointed out in*Blue Range*, the ability of a non-insolvent counter party to terminate agreements and net out its position is also considered to be important from a policy perspective. EFC status allows that to happen.

194 BP does not seek that result on these facts. I must assume that, like Bellatrix, BP engages in capital management, cash flow planning and risk management. Are BP, and the other entities whose agreements with BP form part of an integrated risk management undertaking to be left uncertain about their ability to offer various products priced to reflect their assessment of outcomes?

195 How does an entire industry assess likely outcomes when expressions of intention in a contract and explicit definitions in a statute are required to give way to an assessment of fairness which may depend to some extent on the perspective of a particular judge on a particular day?

196 If BP, and many others like it, are not permitted to compel enforcement of an agreement, the elements of which no doubt form a part of their overall risk management, capital planning and cash flow strategies, how do they effectively manage risk?

197 It is easy to say that risk has looked favourably on BP in this situation and the Court need not concern itself with BP's pleas to uphold the contract because it can certainly replace the natural gas Bellatrix agreed to sell it. It did not draw the short straw under the Contract.

198 But why should the Court not conclude that BP is party to other agreements, the efficacy of which in BP's own risk management program depend to some extent on upholding the integrity of the Contract?

199 The EFC exception represents a policy decision. I believe that the art in applying that exception to the Contract requires the Court to take at least take some account of the reasonable expectations of BP and Bellatrix at the time the parties entered into the Contract.

200 Bellatrix and, I assume, BP, entered into other arrangements to manage financial risk. Did they enter into those agreements on the assumption that, in an insolvency, the Contract would be disclaimed, notwithstanding that the Contract was agreed by the parties to be an EFC?

201 Perhaps they did, but Bellatrix's Press Release suggests that agreements, like the Contract, are part of a larger risk management strategy. Bellatrix has offered no evidence to suggest that its risk management strategy, and the agreements entered into in support of it, contemplated an exit from its obligations under the Contract in the event of insolvency.

202 The netting out and set-off provisions of the Contract are a strong indication to me that management of financial risk is a key component and objective of the Contract. What message does a *CCAA* Court send when it allows agreements which form part of that risk management objective to be disclaimed?

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Tab

18

In the Court of Appeal of Alberta

Citation: IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing, 2017 ABCA 157

Date: 20170526
Docket: 1401-0235-AC
Registry: Calgary

Between:

IFP Technologies (Canada) Inc.

Appellant

- and -

**EnCana Midstream and Marketing,
PanCanadian Resources, EnCana Corporation,
EnCana Oil & Gas Developments Ltd.,
Canadian Forest Oil Ltd. and The Wiser Oil Company**

Respondents

**The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Patricia Rowbotham**

**Reasons for Judgment Reserved of The Honourable Chief Justice Fraser
Concurred in by The Honourable Madam Justice Rowbotham
Dissenting Reasons for Judgment of The Honourable Mr. Justice Watson**

Appeal from the Decision by
The Honourable Chief Justice Neil Wittmann,
acting in place of the Trial Judge,
Justice R.G. Stevens, pursuant to Rule 13.1
Dated the 30th day of July, 2014
Filed on the 8th day of September, 2014
(2014 ABQB 470, Docket: 0301-3520)

2017 ABCA 157 (CanLII)

2017 ABCA 157 (CanLII)

A. Goal of Contractual Interpretation

[79] I now turn to a brief overview of the applicable principles of contractual interpretation. The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made through the application of legal principles of interpretation: ***Sattva***, *supra* at para 49. To this end, "the exercise is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix": Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012) at 33 [Hall]. Accordingly, disputed contractual terms must be interpreted, not in isolation, but in light of the contract as a whole: ***Tercon Contractors Ltd. v British Columbia (Transportation and Highways)***, 2010 SCC 4 at para 64, [2010] 1 SCR 69.

1. Requirement to Consider Factual Matrix

[80] One aspect of the current law on contractual interpretation engaged by this appeal relates to the relevance of the factual matrix. In ***Sattva***, the Supreme Court finally clarified that courts ought to "have regard for the surrounding circumstances of the contract – often referred to as the factual matrix – when interpreting a written contract" (para 46). Why? As the Supreme Court noted, "ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning" (para 47).

[81] Considering the surrounding circumstances of a contract does not offend the parol evidence rule. That rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract. However, evidence of surrounding circumstances is not used for this purpose but rather as an *objective* interpretive aid to determine the meaning of the words the parties used: ***Sattva***, *supra* at paras 59-61. Therefore, while the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. The goal is to deepen the trial judge's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. This approach is in keeping with Lord Steyn's famous admonition in ***Regina v Secretary of State for the Home Department, Ex Parte Daly***, [2001] UKHL 26 at para 28 that "[i]n law context is everything".

[82] Thus, in interpreting a contract, a trial judge must consider the relevant surrounding circumstances even in the absence of ambiguity: Hall, *supra* at 24-25; John D. McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 751 [McCamus]; ***Bighorn***, *supra* at para 10; ***Directcash Management Inc. v Seven Oaks Inn Partnership***, 2014 SKCA 106 at para 13, 446 Sask R 89; ***Nexxtep Resources Ltd v Talisman Energy Inc***, 2013 ABCA 40 at para 31, 542 AR 212 [***Nexxtep***], citing ***Dumbrell v The Regional Group of Companies Inc.***, 2007 ONCA 59 at para 54, 85 OR (3d) 616; ***Hi-Tech Group Inc. v Sears Canada Inc.***, 2001 CanLII 24049 at para 23, 52 OR (3d) 97 (CA) [***Hi-Tech***]; ***Eco-Zone Engineering Ltd. v Grand Falls-Windsor (Town)***, 2000 NFCA 21 at para 10, 5 CLR (3d) 55.

2017 ABCA 157 (CanLII)

[83] Determining what constitute properly surrounding circumstances is a question of fact. As to what is meant by surrounding circumstances, this consists of "objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": ***Sattva***, *supra* at para 58. Examples of relevant background facts include: (1) the genesis, aim or purpose of the contract; (2) the nature of the relationship created by the contract; and (3) the nature or custom of the market or industry in which the contract was executed: ***Sattva***, *supra* at paras 47-48; ***Geoffrey L. Moore Realty Inc. v The Manitoba Motor League***, 2003 MBCA 71 at para 15, 173 Man R (2d) 300; ***King v Operating Engineers Training Institute of Manitoba Inc.***, 2011 MBCA 80 at para 72, 270 Man R (2d) 63; ***Ledcor***, *supra* at paras 30, 106. Ultimately, the surrounding circumstances can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": ***Sattva***, *supra* at para 58, citing Lord Hoffman in ***Investors Compensation Scheme Ltd. v West Bromwich Building Society***, [1998] 1 WLR 896 at 913 (UKHL).

[84] All this being so, it will be obvious why the factual matrix, that is surrounding circumstances, of a contract can be critical to understanding the objective intentions of the parties. That is certainly so in interpreting the Contract between PCR and IFP. Of particular relevance on this appeal are the genesis and purpose of the Contract and the relevant background, including the MOU. An antecedent agreement like the MOU, which has been agreed to in writing by both PCR and IFP, falls within the category of objective evidence of background facts.

[85] Negotiations preceding the conclusion of the MOU are also relevant to the extent that they shed light on the factual matrix. It is true that evidence of negotiations is not itself admissible as part of the factual matrix: Hall, *supra* at 29; ***Keephills Aggregate Company Limited v Riverview Properties Inc.***, 2011 ABCA 101 at para 13, 44 Alta LR (5th) 264 [***Keephills***]. Nor generally are prior drafts of an agreement: ***Wesbell Networks Inc. v Bell Canada***, 2015 ONCA 33 at para 13, 248 ACWS (3d) 820. However, evidence of negotiations is relevant insofar as that evidence *shows* the factual matrix, for example by helping to explain the genesis and aim of the contract: Hall, *supra* at 30, 80; ***Nexxtep***, *supra* at para 32. Moreover, written evidence of those negotiations is far more objective evidence of the parties' intentions than after-the-fact evidence from opposing parties about oral statements made during negotiations.

2. Admissibility of Parol Evidence to Resolve Ambiguity

[86] Further, where a contract itself is ambiguous, extrinsic evidence, that is parol evidence, may be admitted to resolve the ambiguity: Hall, *supra* at 59; McCamus, *supra* at 205; ***Paddon Hughes Development v Pancontinental Oil***, 1998 ABCA 333 at para 28, 223 AR 180 [***Paddon Hughes***]; ***Guaranty Properties Limited v Edmonton (City of)***, 2000 ABCA 215 at para 23, 261 AR 376; ***Nexxtep***, *supra* at para 20. In the face of ambiguity, the interpretation promoting business efficacy is to be preferred so long as it is supported by the text: ***Keephills***, *supra* at para 12; Hall, *supra* at 38-47.

Tab
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Court of Queen's Bench of Alberta

Citation: Re Calpine Canada Energy Limited (*Companies' Creditors Arrangements Act*), 2006 ABQB 153

2006 ABQB 153 (CanLII)

Date: 20060224
Docket: 0501 17864
Registry: Calgary

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

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company

Applicants

Reasons for Judgment
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] The issues in this application and cross-application are:

a) whether a Call on Production ("COP") Agreement between Pengrowth Corporation and Calpine Canada Natural Gas Partnership is an "eligible financial contract" within the meaning of Section 11.1 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, and

b) whether the stay imposed with respect to the Calpine Energy Services Canada Partnership by the initial order under the *Companies' Creditors Arrangement Act* should be removed or lifted because this entity is a partnership and not a corporation.

contracts should not be characterized as eligible financial contracts, but on a different basis, stating:

> The contracts in issue before Fruman J.A. served a financial purpose unrelated to the physical settlement of the contracts. The reasons in *Blue Range Resource Corp*. indicate that the contracts Fruman J.A. examined enabled the parties to manage the risk of a commodity that fluctuated in price by allowing the counterparty to terminate the agreement in the event of an assignment in bankruptcy or a CCAA proceeding, to offset or net its obligations under the contracts to determine the value of the amount of the commodity yet to be delivered in the future, and to re-hedge its position. Unlike the contracts found to be EFCs in *Blue Range Resource Corp.*, *supra*, the contracts in issue here possess none of these hallmarks and cannot be characterized as EFCs. However, mere *pro forma* insertion of such terms into a contract will not result in its automatic characterization as an EFC. Regard must be had to the contract as a whole to determine its character. [emphasis added]
> *Androscoggin*, at para. 15.

[18] Analysing the COP Agreement as a whole, it is clear that it lacks the characteristics or hallmarks of an eligible financial contract. It does not fall within the definitions of "forward commodity contracts" cited by Fruman, J.A. in *Blue Range* when the terms "certain price" and "defined price" in those definitions are read as synonymous with "pre-determined" or "fixed" (as I believe is the intent), rather than the broader "able to be determined" meaning submitted by Pengrowth. It is clear that the COP Agreement does not meet the fixed price requirement, but instead depends upon market pricing. In the same vein, the term of the contract is uncertain, not "defined" as required by the Joyce definition, and the volume of gas to be produced, and therefore purchased under the COP Agreement cannot be defined in any real sense. Moreover, although in a sense the COP Agreement gives the CESCA Partnership some certainty of source of supply, Pengrowth is neither obliged to produce, nor obliged to produce at any specific rate.

[19] The COP Agreement, due to its nature, cannot be "marked to market", which is contrary to the characteristic noted at paragraph 46 of *Blue Range* that "(f)orward gas contracts ... have a calculable cash equivalent". The COP Agreement, again due to its nature, has no offsetting or netting provisions. Both the *Blue Range* and *Androscoggin* decisions refer extensively to the importance of such netting-out provisions to the concept of eligible financial contracts: *Blue Range* at paras. 8, 9, 13, 20, 21, 27, 30 and 53; *Androscoggin* at para. 15. Without suggesting that such provisions are necessary in every case before a contract is found to be an eligible financial contract, or that every contract that includes such provisions must be a priori be an eligible financial contract, the importance of such provisions to the determination of whether the contract is truly a derivative or risk management instrument cannot be overemphasized.

[20] The price of gas under the COP Agreement is the current market price as determined by various industry measurements, less toll charges. This is not a predetermined, fixed price that in the normal course could prudently be hedged by an off-setting contract. The respondents did not

2006 ABQB 153 (CanLII)

adduce evidence of any hedging of the COP Agreement. While tey certainly had no obligation to do so, the lack of such evidence tends to support the conclusion that the COP Agreement is not the type of contract that is part of the forward contract trade.

[21] The history or context of the COP Agreement is also note worthy. It was entered into as a condition of the purchase and sale of the lands, an obligation upon Pengrowth that would always be burdensome to it and valuable to the Calpine applicants, given the toll "kicker" in favour of the CCNG Partnership. In that sense, the COP Agreement forms part of the consideration for the sale of the lands, and is not just a stand-alone supply contract.

[22] The COP Agreement in its essential terms is analogous to the type of contract specifically exempted from the category of eligible financial contract by Fruman, J.A. at para. 50 in *Blue Range*, a standard gas utility contract. The demand, price and quantity of gas to be purchased is based solely upon the purchaser's needs from time to time at prices that fluctuate.

[23] Pengrowth and Progress also submit that the COP Agreement can be characterized as a series of spot contracts for the supply of gas, and that since spot contracts are also listed in s. 11.1(1)(h) of the *Act*, the COP Agreement qualifies as an eligible financial contract even if it is not a forward commodity contract. However, in the same way that all forward commodity contracts are not eligible financial contracts given the underlying purpose of the CCAA, neither are all spot contracts. As noted at para. 36, footnote 14 in *Blue Range*, spot contracts contemplate only immediate, physical delivery and have no financial character. While spot contracts because of their nature are unlikely to be an important issue in a CCAA context, their inclusion in the list of types of contracts referred to in s. 11.1(1) highlights the importance of the Ontario Court of Appeal's direction to have regard to the contract as a whole when determining its character.

[24] Given that the CCAA's predominate purpose as a remedial statute dictates a narrower construction of section 11.1(1) than the mere enquiry if a contract could fall within one of its "comprehensive and intimidating" list of categories, (*Blue Range*, at para. 10), and given the ingenuity and innovation of those who deal in the derivatives market, there can be no "bright-line" definition that will determine whether a contract falls within the exception set out in the CCAA. While some contracts clearly will fall within the exception, either by their nature or by reason of existing case law, there are others that do not fit so clearly and that may necessitate a more searching analysis by CCAA parties and the court.

[25] The respondents point out that the COP Agreement contains a provision for termination upon an insolvency of CESCP, Calpine Corporation or any general partner of CESCP. They submit that this is a critical hallmark of a eligible financial contract which was notably missing in *Re Androscoggin*, but is present here. The lack of a termination-upon-insolvency provision in *Re Androscoggin* was a secondary ground for both the chambers and appeal courts to find that the CCAA stay should not be lifted, because the terms of the contracts in that case did not entitle the applicants to terminate except for non-payment. This finding did not make the presence or absence of a termination-upon-insolvency provision a necessary hallmark of an eligible financial

2006 ABQB 153 (CanLII)

Tab

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DATE: 20050218
DOCKET: C43081(M32171 & M32205)

COURT OF APPEAL FOR ONTARIO

2005 CanLII 3581 (ON CA)

WEILER, GOUDGE AND GILLESE 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 ANDROSCOGGIN ENERGY LLC

) Justin R. Fogarty and
) Renée Brosseau
) for Pengrowth Corporation and
) Canadian Forest Oil Ltd., Appellants
)
) Robert Frank
) for AltaGas Ltd., Appellant
)
) Joseph M. Steiner,
) Steven G. Golick and
) Nancy Roberts
) for Androscoggin Energy LLP,
) Respondent
)
) Douglas S. Nishimura
) for Credit Suisse First Boston,
) Respondent
)
) Barbara L. Grossman and
) David W. Mann
) for International Swaps and
) Derivatives Association, Intervenor
)
) David R. Byers
) for KPMG as Information Officer
)
) Heard: February 14, 2005

On appeal from the order of Justice James M. Farley of the Superior Court of Justice, dated January 26, 2005.

> In order to further hedge their risk, many gas producers enter into a series of agreements with the same gas marketing and risk management companies, providing for the sale of gas at different prices, on different dates and at different points of delivery. Each of these contracts has its own calculable value. At any point in time, some of these will be "in the money", others "out of the money". Termination and netting out or set-off provisions permit the purchaser to terminate all the agreements upon a triggering event. The purchaser may then "calculate the value of all the transactions as of the termination date and…net the positive and negative values to determine a lump sum termination amount payable by one party to the other." : M.E. Grottenhaler and P.J. Henderson, The Law of Financial Derivatives in Canada (Toronto: Carswell, 1999) at 5.1.

[15] The appellants submit that their contracts are EFCs within s. 11.1(1) of the CCAA as interpreted by Fruman J.A. in *Blue Range*, *supra.* I disagree. The contracts in issue before Fruman J.A. served a financial purpose unrelated to the physical settlement of the contracts. The reasons in *Blue Range* indicate that the contracts Fruman J.A. examined enabled the parties to manage the risk of a commodity that fluctuated in price by allowing the counterparty to terminate the agreement in the event of an assignment in bankruptcy or a CCAA proceeding, to offset or net its obligations under the contracts to determine the value of the amount of the commodity yet to be delivered in the future, and to re-hedge its position. Unlike the contracts found to be EFCs in *Blue Range*, *supra*, the contracts in issue here possess none of these hallmarks and cannot be characterized as EFCs. However, mere *pro forma* insertion of such terms into a contract will not result in its automatic characterization as an EFC. Regard must be had to the contract as a whole to determine its character.

[16] I now turn to the second basis on which Farley J. dismissed the appellants' motion, namely, that the terms of the contract did not entitle the appellants to terminate them except for non-payment.

[17] The terms of the contracts define an event of default as including a petition to reorganize that is not dismissed within 60 days. Under the terms of the contracts the appellants cannot, however, terminate the contracts for an event of default so long as Androscoggin makes payment of the sums due, something Androscoggin continues to do. The appellants have further compromised their ability to terminate the contracts for insolvency by their consent to assignments to Credit Suisse First Boston, a lender to Androscoggin. Androscoggin submitted that, as a result, this proceeding was moot,

2005 CanLII 3581 (ON CA)

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2024 SCC 43 (CanLII)

SUPREME COURT OF CANADA

CITATION: Quebec (Commission des droits de la personne et des droits de la jeunesse) *v.* Directrice de la protection de la jeunesse du CISSS A, 2024 SCC 43

APPEAL HEARD: March 19, 2024
JUDGMENT RENDERED: December 20, 2024
DOCKET: 40602

BETWEEN:

Commission des droits de la personne et des droits de la jeunesse
Appellant

and

Directrice de la protection de la jeunesse du CISSS A
Respondent

- and -

Attorney General of Quebec, A, B, X,
Canadian Civil Liberties Association and
British Columbia Civil Liberties Association
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 122)
Wagner C.J. (Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)

(Re), [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *La Presse inc. v. Quebec*, 2023 SCC 22, at para. 22).

[24] In this case, it is important to highlight a few principles that guide the interpretation of s. 91 para. 4 of the *YPA*. First, the *YPA* must be given a large and liberal interpretation that will ensure the attainment of its object and the carrying out of its provisions according to their true intent, meaning and spirit (see *Interpretation Act*, CQLR, c. I-16, s. 41; *Protection de la jeunesse – 123979*, at para. 21). However, just as the text must be considered in light of the context and object, the object of a statute and that of a provision must be considered with close attention always being paid to the text of the statute, which remains the anchor of the interpretive exercise. The text specifies, among other things, the means chosen by the legislature to achieve its purposes. These means "may disclose qualifications to primary purposes, and this is why the text remains the focus of interpretation" (M. Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022), 59 *Alta. L. Rev.* 919, at p. 927; see also pp. 930-31). In other words, they may "tell an interpreter just how far a legislature wanted to go in achieving some more abstract goal" (p. 927). As this Court recently noted, an interpreter must "interpret the 'text through which the legislature seeks to achieve [its] objective', because 'the goal of the interpretative exercise is to find harmony between the words of the statute and the intended objective . . .'" (*R. v. Breault*, 2023 SCC 9, at para. 26, quoting *MediaQMI inc. v. Kamel*, 2021 SCC 23,

2024 SCC 43 (CanLII)

[2021] 1 S.C.R. 899, at para. 39; see also *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at para. 10).

[25] Second, every provision of the *YPA* must be interpreted in accordance with the *Charter of human rights and freedoms*, CQLR, c. C-12 ("*Quebec Charter*"), which is a source of fundamental law. It is especially important to bear in mind s. 39 of the *Quebec Charter*, which enshrines the right of every child "to the protection, security and attention that his parents or the persons acting in their stead are capable of providing". While this Court has already stated in *obiter*, in a case that concerned neither the *YPA* nor the normative scope of s. 39, that this provision "do[es] not directly implicate the state at all" (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 89), it is clear that this section applies when the state, through a director of youth protection, exercises attributes of parental authority (see, e.g., *YPA*, s. 91 para. 1*(n)*; *Civil Code of Québec*, arts. 186 and 199). There is also no doubt that this section is relevant in interpreting the *YPA*'s provisions, including provisions like s. 91 para. 4 that may affect the state's rights and obligations. Indeed, since 2022, the legislature has expressly referred to s. 39 of the *Quebec Charter* in the preamble to the *YPA*, which only confirms the interpretive value of this provision in explaining the object and purport of any provision of the *YPA* (see *Interpretation Act*, s. 40 para. 1; *Quebec Charter*, s. 53; *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, [2018] 1 S.C.R. 35, at paras. 32-33, quoting *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789, at para. 20).

2024 SCC 43 (CanLII)

Tab

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Court of Queen's Bench of Alberta

Citation: United Nurses of Alberta v Alberta Health Services, 2019 ABQB 255

Date: 20190411
Docket: 1701 11342
Registry: Calgary

2019 ABQB 255 (CanLII)

Between:

United Nurses of Alberta

Applicant

- and -

Alberta Health Services

Respondent

Reasons for Judgment
of the
Honourable Madam Justice M.H. Hollins

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[1] This is the judicial review of a decision of a labour arbitration board which dismissed the grievance brought by the United Nurses of Alberta ("UNA") on behalf of Jane Daigle.

[2] Ms. Daigle began working as a full-time registered nurse for Alberta Health Services ("AHS") in June of 2011. At her request, she worked a four days on/four days off schedule of varying 12-hour shift work. Her husband also worked a similar schedule, which allowed them to coordinate the care of their twin daughters, born in 2007.

[3] In May of 2013, AHS announced that it would be changing Ms. Daigle's schedule beginning in September of 2013 to a four days on/five days off rotation in order to comply with the Collective Agreement. This had the effect of creating times, including outside business hours, when neither parent was available to care for the children. Ms. Daigle and her husband looked at

> avoid that impact. Thus the Grievor was subjected to an examination regarding her relationship or lack thereof with the biological fathers of her children, her choice of caregivers for her children and even her personal financial circumstances. She had to undergo this examination before the Employer would even consider a request for an accommodation in the form of a shift exchange that she had arranged with another willing employee. The search for accommodation is intended to be a "multi-party inquiry", involving the employer, the union and the complainant; *Central Okanagan School District No. 23 v Renaud*, [1992] SCR 970 at 994, 141 NR 185, cited in the Arbitrator's Decision at para. 69. Converting this multi-party inquiry into a one-sided investigation could certainly deter complainants from pursuing claims for discrimination based on family status, and thus detract from the policy goal of removing discriminatory barriers to full participation in the workforce; para.77

[47] Thus, Justice Ross left no doubt on which side of the *Campbell River* v *Hoyt* debate she stood. Indeed, the majority of the Board recognized this at paragraph 92 of the Board Decision but then said that her comments about self-accommodation were *obiter* and therefore not binding on them; Board Decision para.125.

Stare Decisis and Obiter Dictum

[48] As mentioned, the Board decided that Justice Ross' formulation of the proper test for *prima facie* discrimination in SMS Equipment was *obiter* and that it was "more persuaded" by the *Johnstone* reasoning which expressly included a requirement for the complainant to prove adequate attempts at self-accommodation before *prima facie* discrimination could be found on the basis of family status involving childcare obligations.

[49] Under the system of *stare decisis* which we observe, the *ratio deciendi* of a court's judgment binds lower courts. *Stare decisis* is fundamental to our legal system. Even people with no legal training whatsoever have a deep and inherent sense of "fairness" grounded in what has happened in previous, similar cases. The rationale is to create certainty in the law, which in turn allows citizens to organize and conduct their affairs in accordance with the laws that govern them.

[50] *Stare decisis* only applies when the same issue is before the lower court. If it is not the same issue, then *stare decisis* will not apply. The decision itself - the part of the judgment that binds lower courts - is called the *ratio deciendi*. However, courts may also opine on things related to but not central to the *ratio deciendi*. These ancillary statements are called *obiter dicta*. Master Schulz described *obiter dicta* as:

> statements of law, principle or conclusions, that do not directly relate to the outcome of a court decision. For example, a judge might write a decision that says because of facts A, I conclude B and therefore do C but if the facts had been X, I would have concluded Y and then I would have done Z. The X,Y and Z analysis is obiter. The court did not use that part of the decision to reach its actual conclusion. An obiter component of a judgment is not binding on other courts. It is, however, potentially influential; *Crossroads-DMD Mortgage Investment Corp. v Gauthier*, 2015 ABQB 703 at para.33.

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Tab

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Her Majesty The Queen *Appellant*

v.

David Sullivan *Respondent*

- and -

Her Majesty The Queen
Appellant / Respondent on application for leave to cross-appeal

v.

Thomas Chan *Respondent / Applicant on application for leave to cross-appeal*

and

Attorney General of Canada, Attorney General of Quebec, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, British Columbia Civil Liberties Association, Empowerment Council, Systemic Advocates in Addictions and Mental Health, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, Women's Legal Education and Action Fund Inc. and Advocates for the Rule of Law
Interveners

Sa Majesté la Reine *Appelante*

c.

David Sullivan *Intimé*

- et -

Sa Majesté la Reine
Appelante / Intimée à la demande d'autorisation d'appel incident

c.

Thomas Chan *Intimé / Demandeur à la demande d'autorisation d'appel incident*

et

Procureur général du Canada, procureur général du Québec, procureur général du Manitoba, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, British Columbia Civil Liberties Association, Empowerment Council, Systemic Advocates in Addictions and Mental Health, Criminal Lawyers' Association (Ontario), Association canadienne des libertés civiles, Fonds d'action et d'éducation juridique pour les femmes et Advocates for the Rule of Law *Intervenants*

INDEXED AS: R. *v.* SULLIVAN

2022 SCC 19

File No.: 39270.

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RÉPERTORIÉ : R. *c.* SULLIVAN

2022 CSC 19

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in *Dunn* declaring that s. 33.1 was unconstitutional where the Crown had chosen not to appeal. Spies J. relied specifically on *Ferguson* for this conclusion: "To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books" (*Ferguson*, at para. 65, cited by Spies J. in *McCaw*, at para. 60).

[51] I respectfully disagree.

[52] Understanding the comments of this Court in *Ferguson* requires the reader to recall the context in which that case was rendered. The Court rejected the argument, in connection with the application of mandatory minimum sentences, that individual exemptions be granted by judges from otherwise unconstitutional laws. McLachlin C.J. sought to underscore, in understandably strong language, that a s. 52(1) declaration did not operate on a case-by-case remedial basis as would a constitutional remedy available under s. 24(1) of the *Charter*, but instead that the issuing court's declaration that the law was of no force or effect was applicable *erga omnes*. The impugned legislation was not to be applied, as a matter of course, to some litigants and not others according to judicial discretion (see *Ferguson*, at para. 35).

[53] That said, *Ferguson* does not change the fact that the declaration remains an exercise of judicial power by which a judge determines a question of law. As such, the determination of that question of law is binding *erga omnes* as a matter precedent, according to the ordinary rules of *stare decisis*, and not because that law has been truly removed from the statute books (see H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. I.54). Judges, of course, do not have that latter power. To suggest that, by its use of a figure of speech, this Court lost sight of this is, in my view, a mistaken reading of the case. I note that some scholars have similarly commented upon the formulation of the

la juge Spies dans la décision *McCaw*, qui a décidé qu'elle était liée par la décision *Dunn*, un jugement antérieur de la cour dont elle est membre, où il avait été déclaré que l'art. 33.1 était inconstitutionnel alors que la Couronne avait choisi de ne pas se pourvoir en appel. La juge Spies s'est fondée expressément sur l'arrêt *Ferguson* pour tirer cette conclusion : « Dans la mesure où une disposition législative est inconstitutionnelle, elle n'est pas simplement inapplicable dans l'affaire en cause. Elle est inopérante et, de fait, retirée du corpus législatif » (*Ferguson*, par. 65, cité par la juge Spies dans *McCaw*, par. 60).

[51] Je ne suis pas de cet avis.

[52] Pour comprendre les commentaires formulés par la Cour dans l'arrêt *Ferguson*, le lecteur doit se rappeler le contexte dans lequel cet arrêt a été rendu. Alors qu'elle se penchait sur l'application des peines minimales obligatoires, la Cour a rejeté l'argument selon lequel les juges devraient accorder des exemptions individuelles à l'égard de dispositions législatives par ailleurs inconstitutionnelles. La juge en chef McLachlin a voulu souligner, en des termes à juste titre catégoriques, qu'une déclaration faite en application du par. 52(1) n'avait pas un effet réparateur au cas par cas comme une réparation constitutionnelle pouvant être accordée en vertu du par. 24(1) de la *Charte*, mais plutôt que la déclaration d'inopérabilité s'appliquait *erga omnes*. La disposition contestée ne pouvait pas s'appliquer, bien entendu, à certains plaideurs et non à d'autres à la discrétion du tribunal (voir *Ferguson*, par. 35).

[53] Cela dit, l'arrêt *Ferguson* ne change rien au fait que la déclaration demeure un exercice du pouvoir judiciaire par lequel un juge tranche une question de droit. Ainsi, la décision sur cette question de droit fait autorité *erga omnes* en tant que précédent, selon les règles ordinaires du *stare decisis* et non parce que la disposition a vraiment été retirée du corpus législatif (voir H. Brun, G. Tremblay et E. Brouillet, *Droit constitutionnel* (6e éd. 2014), par. I.54). Évidemment, les juges n'ont pas ce dernier pouvoir. Laisser entendre que, par son emploi d'une figure de style, la Cour a perdu cela de vue me semble une interprétation erronée de l'arrêt. Je note que certains auteurs ont commenté de façon semblable la formulation des remarques dans

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observations in *Ferguson* and like observations made by this Court as to the effect of a s. 52(1) declaration (see, e.g., Marcotte, at pp. 13-14 and 16-17; Pinard, at p. 349). Indeed *Ferguson* points to a plain understanding that the declaration issued under s. 52(1) is the exercise of judicial power that has an *erga omnes* vocation. I read the occasional references to s. 52(1) as judgments *in rem* in the cases (see, e.g., *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181, at para. 27), in the same way. A judgment *in rem* applies beyond the immediate parties but, ultimately, even in the context of a s. 52(1) declaration, it remains a judgment: an exercise of judicial power that determines a question of law (*Coquitlam (City) v. Construction Aggregates Ltd.* (1998), 65 B.C.L.R. (3d) 275 (S.C.), at paras. 11-17, aff'd 2000 BCCA 301, 75 B.C.L.R. (3d) 350, leave to appeal refused, [2001] 1 S.C.R. ix, cited in Marcotte, at p. 14, fn. 64; see also L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 158). It is binding precedent, to be sure, but within the proper limits of the doctrine of *stare decisis*.

[54] I am thus content to read *Ferguson* as a useful figure of speech rather than take what the Court said in literal terms. McLachlin C.J. sought to show, in connection with the dispute as to remedy before the Court in that case, that under s. 52(1), as opposed to s. 24(1) of the *Charter*, the law was unconstitutional *erga omnes* and not on a case-by-case basis. At a technical level, it is true that the explanation for that is rooted in s. 52(1), as other cases have suggested. But ultimately, that effect requires the exercise of judicial power to declare the law to be unconstitutional. And the exercise of that power requires the judge to make a determination of an ordinary question of law: by interpreting the impugned law and the relevant provisions of the Constitution, whether the impugned law is inconsistent with Canada's supreme law. If so, then the law is, of course, of no force or effect for all future cases, insofar as that judicial declaration made under s. 52(1) by a superior court is binding on other courts and within the right confines of the law relating to precedent. Other decisions of this Court that use the language of "striking out" or "striking down"

l'arrêt *Ferguson* et des remarques analogues faites par la Cour quant à l'effet d'une déclaration fondée sur le par. 52(1) (voir, p. ex., Marcotte, p. 13-14 et 16-17; Pinard, p. 349). En effet, l'arrêt *Ferguson* permet de comprendre clairement que la déclaration prononcée en application du par. 52(1) représente l'exercice d'un pouvoir judiciaire à vocation *erga omnes*. J'interprète que les renvois occasionnels au par. 52(1) valent jugements *in rem* dans la jurisprudence (voir, p. ex., *Ravndahl c. Saskatchewan*, 2009 CSC 7, [2009] 1 R.C.S. 181, par. 27), de la même manière. Le jugement *in rem* s'applique au-delà des parties concernées, mais, au bout du compte, même dans le contexte d'une déclaration fondée sur le par. 52(1), il demeure un jugement : l'exercice du pouvoir judiciaire de trancher une question de droit (*Coquitlam (City) c. Construction Aggregates Ltd.* (1998), 65 B.C.L.R. (3d) 275 (C.S.), par. 11-17, conf. par 2000 BCCA 301, 75 B.C.L.R. (3d) 350, autorisation d'appel refusée, [2001] 1 R.C.S. ix, cité dans Marcotte, p. 14, note 64; voir aussi L. Sarna, *The Law of Declaratory Judgments* (4e éd. 2016), p. 158). Il s'agit, à n'en pas douter, d'un précédent qui fait autorité, mais dans les limites prescrites de la règle du *stare decisis*.

[54] Je me contenterai donc de lire les propos de la Cour dans l'arrêt *Ferguson* comme une figure de style utile au lieu de les prendre au pied de la lettre. La juge en chef McLachlin a cherché à démontrer qu'en ce qui a trait au litige en matière de réparation dont était saisie la Cour dans cette affaire, la disposition législative était inconstitutionnelle *erga omnes* et non au cas par cas, et ce, en application du par. 52(1) plutôt que du par. 24(1) de la *Charte*. Sur le plan technique, il est vrai que l'explication de ce résultat trouve sa source au par. 52(1), comme l'ont indiqué d'autres décisions. Mais au bout du compte, cet effet nécessite l'exercice du pouvoir judiciaire de déclarer la disposition inconstitutionnelle, et l'exercice de ce pouvoir oblige le juge à statuer sur une question de droit ordinaire : en interprétant la disposition contestée et les dispositions pertinentes de la Constitution, il doit décider si la disposition contestée est incompatible avec la loi suprême du Canada. Si tel est le cas, alors la disposition législative est, bien entendu, inopérante pour l'avenir, dans la mesure où cette déclaration judiciaire faite

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stare decisis are undermined by standards that enable difference in a single judge's opinion to determine whether precedent should be followed. It is also not the case that a court can decide a question of law afresh where there are conflicting decisions.

[75] The principle of judicial comity — that judges treat fellow judges' decisions with courtesy and consideration — as well as the rule of law principles supporting *stare decisis* mean that prior decisions should be followed unless the *Spruce Mills* criteria are met. Correctly stated and applied, the *Spruce Mills* criteria strike the appropriate balance between the competing demands of certainty, correctness and the even-handed development of the law. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;

2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or

3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

[76] First, a judge need not follow a prior decision where the authority of the prior decision has been undermined by subsequent decisions. This may arise in a situation where a decision has been overruled by, or is necessarily inconsistent with, a decision by a higher court (see Rowe and Katz, at p. 18, citing Kerwin, at p. 542).

[77] Second, a judge can depart from a decision where it was reached without considering a relevant statute or binding authority. In other words, the decision was made *per incuriam*, or by inadvertence, a

entre deux juges n'est pas un motif suffisant pour s'écarter d'un précédent faisant autorité. La cohérence institutionnelle et la prévisibilité qui sous-tendent la règle du *stare decisis* se trouvent minées par des normes qui permettent à un seul juge, en raison d'une divergence d'opinions, de déterminer s'il y a lieu de suivre un précédent. Il est également faux de dire qu'un tribunal peut trancher à nouveau une question de droit en présence de décisions contradictoires.

[75] Le principe de la courtoisie judiciaire — voulant que les juges traitent les décisions de leurs consoeurs et confrères avec courtoisie et considération — et les principes de la primauté du droit qui appuient la règle du *stare decisis* impliquent que les décisions antérieures devraient être suivies, à moins que les critères énoncés dans la décision *Spruce Mills* soient satisfaits. Lorsqu'ils sont correctement formulés et appliqués, les critères de cette décision établissent un rapport juste entre les impératifs concurrents de la certitude, de la justesse et de l'évolution équilibrée du droit. Les tribunaux de première instance ne devraient s'écarter des décisions faisant autorité rendues par un tribunal de juridiction équivalente que dans trois situations précises :

1. La justification d'une décision antérieure a été compromise par des décisions subséquentes de cours d'appel;

2. La décision antérieure a été rendue *per incuriam* (« par imprudence » ou « par inadvertance »); ou

3. La décision antérieure n'a pas été mûrement réfléchie, c.-à-d. qu'elle a été prise dans une situation d'urgence (« *exigent circumstances* »).

[76] Premièrement, le juge n'a pas à suivre une décision antérieure dont l'autorité a été sapée par des décisions subséquentes. Cela peut arriver lorsqu'une décision a été infirmée par un jugement d'une cour de niveau hiérarchiquement supérieur ou lorsqu'elle est nécessairement incompatible avec un tel jugement (voir Rowe et Katz, p. 18, citant Kerwin, p. 542).

[77] Deuxièmement, le juge peut s'écarter d'une décision rendue sans égard à une loi applicable ou à une source faisant autorité. Autrement dit, la décision a été rendue *per incuriam*, ou par inadvertance, situation

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Decaire, *Dunn* was a decision *per incuriam* and did not need to be followed. The trial judge should have then reviewed the substance of *Decaire* to determine whether that decision should be followed based on the *Spruce Mills* criteria. That would have revealed that *Decaire* considered the appropriate statutes and authorities in reaching the conclusion that s. 33.1 infringed ss. 7 and 11(d) of the *Charter* but was upheld under s. 1. There is also no indication that *Decaire* was rendered in exigent circumstances. The trial judge therefore should have followed *Decaire* in the constitutional ruling. Of course, on appeal, the Court of Appeal was not bound to follow *Decaire* or any other first instance superior court decision.

[85] Finally, it bears recalling that *McCaw* was decided shortly after the constitutional ruling in Mr. Chan's case. The court in *McCaw* did not have the benefit of Boswell J.'s reasons in Mr. Chan's case for upholding s. 33.1, as the pre-trial constitutional decision had not yet been published while awaiting possible jury deliberations (Application to Re-Open Constitutional Challenge, at para. 9). In circumstances such as this, where a court had no practical way of knowing that the earlier decision existed, the judgment will not bind a subsequent court, unless it has been brought to the court's attention or the court is otherwise aware of it (see Kerwin, at p. 551).

[86] To summarize, a court is required by the principles of judicial comity and horizontal *stare decisis* to follow a binding prior decision of the same court in the province. A decision may not be binding if it is distinguishable on its facts or the court has no practical way of knowing it existed. If it is binding, a trial court may only depart if one or more of the *Spruce Mills* exceptions apply.

les critères de la décision *Spruce Mills* pour décider s'il était possible de s'écarter de la décision *Decaire*, la décision *Dunn* avait été rendue *per incuriam* et il n'était pas nécessaire de la suivre. Le juge du procès aurait dû ensuite examiner le fond de la décision *Decaire* pour décider s'il y avait lieu de la suivre compte tenu des critères de la décision *Spruce Mills*. Cela aurait révélé que la décision *Decaire* a tenu compte des lois et sources appropriées pour arriver à la conclusion que l'art. 33.1 contrevenait à l'art. 7 et à l'al. 11d) de la *Charte*, mais qu'il était maintenu en application de l'article premier. Rien n'indique non plus que la décision *Decaire* a été rendue dans une situation d'urgence. Le juge du procès aurait donc dû suivre la décision *Decaire* dans la décision en matière constitutionnelle. Bien entendu, en appel, la Cour d'appel n'était pas tenue de suivre la décision *Decaire* ou toute autre décision d'une cour supérieure de première instance.

[85] Enfin, il convient de rappeler que la décision *McCaw* a été rendue peu après la décision en matière constitutionnelle dans le cas de M. Chan. La cour dans l'affaire *McCaw* n'avait pas pu prendre connaissance des motifs pour lesquels le juge Boswell a maintenu l'art. 33.1 dans la décision relative à M. Chan, car sa décision sur la constitutionnalité, préalable au procès, n'avait pas encore été publiée dans l'attente des délibérations possibles du jury (Demande de réexamen de la contestation constitutionnelle, par. 9). Dans un cas comme celui-ci, où le tribunal n'avait aucun moyen pratique de savoir que la décision antérieure existait, le jugement ne liera pas un tribunal, sauf s'il est porté à son attention ou si le tribunal en a connaissance d'une autre manière (voir Kerwin, p. 551).

[86] En résumé, les principes de la courtoisie judiciaire et du *stare decisis* horizontal obligent le tribunal à suivre une décision antérieure faisant autorité, rendue dans la province par le même tribunal. Une décision peut ne pas être contraignante s'il est possible de la distinguer au vu des faits en cause ou si le tribunal n'avait aucun moyen pratique de savoir qu'elle existait. Si la décision fait autorité, une cour de première instance ne peut s'en écarter que si l'une ou plusieurs des exceptions établies dans la décision *Spruce Mills* s'appliquent.

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Tab

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☐ 2. between 2003-04-01 and 2004-12-14 (past)

☐ 1. between 2001-12-18 and 2003-03-31 (past)

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Companies' Creditors Arrangement Act, RSC 1985, c C-36

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Companies' Creditors Arrangement Act

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

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

SHORT TITLE

Short title

1. This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

INTERPRETATION

Definitions

2. In this Act,

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

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

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

Notice of orders

(5) Except as otherwise ordered by the court, the monitor appointed under section 11.7 shall send a copy of any order made under subsection (3), within ten days after the order is made, to every known creditor who has a claim against the company of more than two hundred and fifty dollars.

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

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

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124.

Definitions

11.1 (1) In this section,

"eligible financial contract"
« contrat financier admissible »

"eligible financial contract" means

(*a*) a currency or interest rate swap agreement,

(*b*) a basis swap agreement,

(*c*) a spot, future, forward or other foreign exchange agreement,

(*d*) a cap, collar or floor transaction,

(*e*) a commodity swap,

(*f*) a forward rate agreement,

(*g*) a repurchase or reverse repurchase agreement,

(*h*) a spot, future, forward or other commodity contract,

(*i*) an agreement to buy, sell, borrow or lend securities, to clear or settle securities transactions or to act as a depository for securities,

(*j*) any derivative, combination or option in respect of, or agreement similar to, an agreement or contract referred to in paragraphs (*a*) to (*i*),

(*k*) any master agreement in respect of any agreement or contract referred to in paragraphs (*a*) to (*j*),

(*l*) any master agreement in respect of a master agreement referred to in paragraph (*k*),

(*m*) a guarantee of the liabilities under an agreement or contract referred to in paragraphs (*a*) to (*l*), or

(*n*) any agreement of a kind prescribed;

"net termination value"
« valeurs nettes dues à la date de résiliation »

"net termination value" means the net amount obtained after setting off the mutual obligations between the parties to an eligible financial contract in accordance with its provisions.

No stay, etc., in certain cases

(2) No order may be made under this Act staying or restraining the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association.

Existing eligible financial contracts

(3) For greater certainty, where an eligible financial contract entered into before an order is made under section 11 is terminated on or after the date of the order, the setting off of obligations between the company and the other parties to the eligible financial contract, in accordance with its provisions, is permitted, and if net termination values determined in accordance with the eligible financial contract are owed by the company to another party to the eligible financial contract, that other party shall be deemed to be a creditor of the company with a claim against the company in respect of the net termination values.

1997, c. 12, s. 124; 2001, c. 9, s. 576.

No stay, etc., in certain cases

11.11 No order may be made under this Act staying or restraining

(*a*) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(*b*) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(*c*) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

2001, c. 9, s. 577.

No stay, etc. in certain cases

11.2 No order may be made under section 11 staying or restraining any action, suit or proceeding against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company.

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Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A. and Samsung C&T Corporation *Appellants*

v.

Petrowest Corporation, Petrowest Civil Services LP by its general partner, Petrowest GP Ltd., carrying on business as RBEE Crushing, Petrowest Construction LP by its general partner Petrowest GP Ltd., carrying on business as Quigley Contracting, Petrowest Services Rentals LP by its general partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor Rentals, Petrowest GP Ltd., as general partner of Petrowest Civil Services LP, Petrowest Construction LP and Petrowest Services Rentals LP, Trans Carrier Ltd. And Ernst & Young Inc. in its capacity as court-appointed receiver and manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. and Trans Carrier Ltd. *Respondents*

and

Canadian Commercial Arbitration Center, Arbitration Place, Chartered Institute of Arbitrators (Canada) Inc., Insolvency Institute of Canada and Canadian Federation of Independent Business *Interveners*

Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A. et Samsung C&T Corporation *Appelantes*

c.

Petrowest Corporation, Petrowest Civil Services LP représentée par sa commanditée, Petrowest GP Ltd., faisant affaire sous le nom de RBEE Crushing, Petrowest Construction LP représentée par sa commanditée Petrowest GP Ltd., faisant affaire sous le nom de Quigley Contracting, Petrowest Services Rentals LP représentée par sa commanditée Petrowest GP Ltd., faisant affaire sous le nom de Nu-Northern Tractor Rentals, Petrowest GP Ltd., en sa qualité de commanditée de Petrowest Civil Services LP, Petrowest Construction LP et Petrowest Services Rentals LP, Trans Carrier Ltd. et Ernst & Young Inc. en sa qualité de séquestre et d'administratrice nommée par le tribunal de Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. et Trans Carrier Ltd. *Intimées*

et

Centre canadien d'arbitrage commercial, Arbitration Place, Chartered Institute of Arbitrators (Canada) Inc., Insolvency Institute of Canada et Fédération canadienne de l'entreprise indépendante *Intervenants*

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[75] To guide this exercise, I will briefly summarize the two-part stay framework that is implicit in provincial arbitration legislation like the *Arbitration Act*.

C. *Two-Part Framework for Stays of Proceedings in Favour of Arbitration*

[76] There are two general components to the stay provisions in provincial arbitration legislation across the country. As the framework is similar across jurisdictions, it will be useful to provide a general overview before turning to the interpretation of s. 15 of the *Arbitration Act* itself. The two components are as follows:

(a) the technical prerequisites for a mandatory stay of court proceedings; and

(b) the statutory exceptions to a mandatory stay of court proceedings.

[77] Though interrelated, these two components ought to remain analytically distinct. This distinction is necessary because the burden of proof shifts between the first component and the second.

[78] Under the first component, the applicant for a stay in favour of arbitration must establish the technical prerequisites on the applicable standard of proof (McEwan and Herbst, at § 3:43; *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371, at paras. 29-30 (CanLII)).

[79] If the applicant discharges this burden, then under the second component, the party seeking to avoid arbitration must show that one of the statutory exceptions applies, such that a stay should be refused (McEwan and Herbst, at § 3:43; Casey, at ch. 3.4). Otherwise, the court must grant a stay and cede jurisdiction to the arbitral tribunal.

[80] I will briefly elaborate on each component and its respective standard of proof.

[75] Pour guider cet exercice, je résume brièvement le cadre d'analyse en deux volets applicable aux suspensions d'instance qui est implicite dans les lois provinciales en matière d'arbitrage comme l'*Arbitration Act*.

C. *Cadre d'analyse en deux volets applicable aux suspensions d'instance en faveur de l'arbitrage*

[76] Les dispositions relatives à la suspension d'instance dans les lois provinciales en matière d'arbitrage partout au pays comportent deux volets généraux. Comme le cadre d'analyse est semblable d'une province à l'autre, il est utile de présenter un aperçu général avant de s'attarder à l'interprétation de l'art. 15 de l'*Arbitration Act*. Les deux volets sont :

a) les conditions préliminaires à la suspension obligatoire d'une instance judiciaire; et

b) les exceptions statutaires à la suspension obligatoire d'une instance judiciaire.

[77] Bien qu'ils soient interreliés, ces deux volets doivent demeurer distincts sur le plan analytique. Cette distinction est nécessaire, car il y a inversion du fardeau de la preuve entre le premier et le second volet.

[78] Sous le premier volet, la partie qui requiert la suspension d'une instance en faveur de l'arbitrage doit établir que les conditions préliminaires sont remplies selon la norme de preuve applicable (McEwan et Herbst, § 3:43; *Hosting Metro Inc. c. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371, par. 29-30 (CanLII)).

[79] Si le requérant s'acquitte de ce fardeau, la partie qui cherche à se soustraire à l'arbitrage doit, sous le second volet, démontrer que l'une des exceptions prévues par la loi s'applique, de sorte que la suspension devrait être refusée (McEwan et Herbst, § 3:43; Casey, c. 3.4). Sinon, le tribunal doit suspendre l'instance et laisser la procédure d'arbitrage suivre son cours.

[80] J'examine brièvement chaque volet et la norme de preuve applicable à chacun d'eux.

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more of the statutory exceptions apply. If not, the court *must* grant a stay. The mandatory nature of stay provisions across jurisdictions in Canada reflects the presumptive validity of arbitration clauses and the principle of party autonomy.

[89] It follows that a court should dismiss a stay application on the basis of a statutory exception only in a "clear" case (McEwan and Herbst, at § 3:55; A. J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981), at p. 155). A clear case is, for example, one in which the party seeking to avoid arbitration has established on a balance of probabilities that the arbitration agreement is void, inoperative, or incapable of being performed. Where the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator. Such an approach accords due respect to arbitral jurisdiction, in light of the competence-competence principle, as well as to the parties' intention to refer their disputes to arbitration (McEwan and Herbst, at § 3:55; *Dalimpex Ltd. v. Janicki* (2000), 137 O.A.C. 390 (S.C.J.), at paras. 3-5, aff'd (2003), 228 D.L.R. (4th) 179 (C.A.)).

[90] As I have indicated, the application of the above two-part framework in a particular case must begin with a proper interpretation of the governing stay provision. This brings me to the focal point of this appeal: s. 15 of the *Arbitration Act*.

D. *Section 15 of the Arbitration Act*

[91] The modern approach to statutory interpretation requires us to read the words of s. 15 in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the *Arbitration Act* and the intention of the legislature.

prépondérance des probabilités qu'une ou plusieurs des exceptions prévues par la loi s'appliquent. Dans la négative, le tribunal *doit* suspendre l'instance. Le caractère obligatoire des dispositions relatives à la suspension d'instance dans l'ensemble des provinces et territoires au Canada reflète la présomption de validité des clauses d'arbitrage ainsi que le principe de l'autonomie des parties.

[89] Il s'ensuit que le tribunal ne devrait rejeter une demande de suspension d'instance sur le fondement d'une exception prévue par la loi que dans un cas [TRADUCTION] « manifeste » (McEwan et Herbst, § 3:55; A. J. van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (1981), p. 155). Un cas manifeste est, par exemple, un cas où la partie qui cherche à éviter l'arbitrage a établi selon la prépondérance des probabilités que la convention d'arbitrage est nulle, inopérante ou non susceptible d'être exécutée. Lorsque l'invalidité ou le caractère inexécutoire de la convention d'arbitrage n'est pas manifeste (mais seulement défendable), la question doit être tranchée par l'arbitre. Une telle approche fait preuve de déférence à l'égard de la compétence arbitrale, compte tenu du principe de compétence-compétence et de l'intention des parties de soumettre leurs différends à l'arbitrage (McEwan et Herbst, § 3:55; *Dalimpex Ltd. c. Janicki* (2000), 137 O.A.C. 390 (C.S.J.), par. 3-5, conf. par (2003), 228 D.L.R. (4th) 179 (C.A.)).

[90] Comme je l'ai mentionné, l'application du cadre d'analyse en deux volets décrit précédemment à un cas donné doit commencer par une interprétation appropriée de la disposition applicable relative à la suspension d'instance. J'en viens maintenant au cœur du présent pourvoi : l'art. 15 de l'*Arbitration Act*.

D. *Article 15 de l'Arbitration Act*

[91] Selon la méthode moderne d'interprétation législative, il faut lire les termes de l'art. 15 dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de l'*Arbitration Act*, son objet et l'intention du législateur.

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arbitration agreement is inoperative due to parallel bankruptcy or insolvency proceedings.

(i) The Text, Scheme, and Purposes of the *Arbitration Act* Permit Courts to Find Arbitration Agreements "Inoperative" in the Insolvency Context

[131] When the modern approach to statutory interpretation is applied, it is clear that courts have the power to decline a stay in favour of arbitration under s. 15(2) of the *Arbitration Act* even where all the technical prerequisites in s. 15(1) are met.

[132] Both Peace River and the Receiver agree that, plainly read, s. 15(2) requires a court to assess whether an arbitration agreement is "void, inoperative or incapable of being performed" before granting a stay in favour of arbitration. This language is drawn from the Model Law, art. 8(1) of which states that a court "shall" refer the parties to arbitration unless it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed". Similar language is also found in art. II(3) of the New York Convention. This language is commonly understood as requiring the court to pronounce upon the validity and enforceability of the arbitration agreement before referring the dispute to the arbitrator (McEwan and Herbst, at § 3:55, citing *Heyman v. Darwins, Ld.*, [1942] A.C. 356 (H.L.); *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129 (Alta. C.A.)).

[133] That said, courts must be careful not to overstep their role on a stay application under s. 15. They must bear in mind the competence-competence principle, the intention of the parties to refer their disputes to arbitration, and the legislative purposes underlying the *Arbitration Act*. As I have noted, the text and scheme of s. 15 make it *mandatory* for a court to defer to arbitral jurisdiction where the technical prerequisites in s. 15(1) are met, subject only

exhaustifs devant guider les tribunaux lorsqu'ils sont appelés à décider si une convention d'arbitrage est inopérante en raison d'une procédure de faillite ou d'insolvabilité parallèle.

(i) Le texte, l'économie et les objectifs de l'*Arbitration Act* permettent aux tribunaux de conclure que des conventions d'arbitrage sont « inopérantes » dans le contexte d'une insolvabilité

[131] En appliquant la méthode moderne d'interprétation législative, il est clair que les tribunaux ont le pouvoir de refuser une suspension d'instance en faveur de l'arbitrage en vertu du par. 15(2) de l'*Arbitration Act*, même lorsque toutes les conditions préliminaires prévues au par. 15(1) sont remplies.

[132] Peace River et le Séquestre sont tous deux d'accord pour dire que le libellé du par. 15(2) exige que le tribunal évalue si la convention d'arbitrage est « nulle, inopérante ou non susceptible d'être exécutée » avant de suspendre l'instance en faveur de l'arbitrage. Le libellé du par. 15(2) est tiré de l'art. 8(1) de la Loi type, qui prévoit que le tribunal « renverra » (« *shall refer* » dans la version anglaise) les parties à l'arbitrage à moins de constater que la convention d'arbitrage est « caduque, inopérante ou non susceptible d'être exécutée ». Un libellé semblable se trouve à l'art. II(3) de la Convention de New York. Le libellé en question est généralement interprété de manière à exiger que le tribunal se prononce sur la validité et le caractère exécutoire de la convention d'arbitrage avant de renvoyer le différend à l'arbitre (McEwan et Herbst, § 3:55, citant *Heyman c. Darwins, Ld.*, [1942] A.C. 356 (H.L.); *Kaverit Steel and Crane Ltd. c. Kone Corp.* (1992), 87 D.L.R. (4th) 129 (C.A. Alb.)).

[133] Cela dit, les tribunaux doivent prendre garde de ne pas outrepasser leur rôle dans le cadre d'une demande de suspension d'instance fondée sur l'art. 15. Ils ne doivent pas perdre de vue le principe de compétence-compétence, l'intention des parties de soumettre leurs différends à l'arbitrage et les objectifs législatifs qui sous-tendent l'*Arbitration Act*. Comme je l'ai souligné, le texte et l'économie de l'art. 15 *obligent* le tribunal à faire montre de déférence à l'endroit de

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to the narrow statutory exceptions in s. 15(2). This deferential approach accords with the purposes of the *Arbitration Act*, which were identified by the enacting legislature as follows: (a) providing a "simpler, faster, less expensive and less formal process" for resolving disputes, thereby minimizing costly and time-consuming court procedures; and (b) limiting judicial review in respect of disputes that parties have agreed to resolve by arbitration (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 16, No. 7, 4th Sess., 33rd Parl., April 21, 1986, at p. 7865 (Hon. Brian Smith, Attorney General)).

[134] In the typical case, both legislative objectives will be served by holding the parties to their agreement to arbitrate. Indeed, a narrow interpretation of the words "void, inoperative or incapable of being performed" promotes the enforcement of arbitration agreements, which generally leads to streamlined dispute resolution with minimal judicial intervention (see *Seidel*, at para. 117; S. Kröll, "The 'Incapable of Being Performed' Exception in Article II(3) of the New York Convention", in E. Gaillard, D. Di Pietro and N. Leleu-Knobil, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008), 323, at p. 324).

[135] But when do these narrow statutory exceptions apply? The terms "void", "inoperative", and "incapable of being performed" are not defined in the *Arbitration Act*, nor in the Model Law or the New York Convention from which they originate. It is therefore necessary to briefly define each term.

1. *"Void"*

[136] The meaning of the term "void" is relatively settled. An arbitration agreement will be considered void only in the rare circumstances where it is "intrinsically defective" (and therefore void *ab initio*) according to the usual rules of contract law, including when it is undermined by fraud, undue

la compétence arbitrale lorsque les conditions préliminaires du par. 15(1) sont remplies, sous réserve uniquement des exceptions restreintes prévues au par. 15(2). Cette approche empreinte de déférence s'accorde avec les objectifs visés par l'*Arbitration Act*, lesquels ont ainsi été décrits par la législature qui l'a édictée : a) fournir un [TRADUCTION] « processus plus simple, plus rapide, moins coûteux et moins formel » pour régler les différends, ce qui permet de réduire les procédures judiciaires coûteuses et longues; et b) limiter le contrôle judiciaire à l'égard des différends que les parties ont convenu de régler par voie d'arbitrage (Colombie-Britannique, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 16, nº 7, 4e sess., 33e lég., 21 avril 1986, p. 7865 (l'hon. Brian Smith, procureur général)).

[134] En règle générale, les deux objectifs législatifs seront servis en obligeant les parties à respecter leur convention d'arbitrage. En effet, une interprétation restrictive des termes « nulle, inopérante ou non susceptible d'être exécutée » favorise l'exécution des conventions d'arbitrage, ce qui mène généralement à la résolution simplifiée des différends avec une intervention judiciaire minimale (voir *Seidel*, par. 117; S. Kröll, « The "Incapable of Being Performed" Exception in Article II(3) of the New York Convention », dans E. Gaillard, D. Di Pietro et N. Leleu-Knobil, dir., *Enforcement of Arbitration Agreements and International Arbitral Awards : The New York Convention in Practice* (2008), 323, p. 324).

[135] Mais dans quels cas ces exceptions statutaires restreintes s'appliquent-elles? Les mots « nulle », « inopérante » et « non susceptible d'être exécutée » ne sont pas définis dans l'*Arbitration Act*, ni dans la Loi type ou dans la Convention de New York d'où ils émanent. Il est donc nécessaire de définir brièvement chacun de ces termes.

1. *« Nulle »*

[136] Le sens du terme « nulle » est relativement établi. Une convention d'arbitrage ne sera considérée nulle que dans les rares circonstances où elle est [TRADUCTION] « intrinsèquement défectueuse » (et donc nulle *ab initio*) conformément aux règles habituelles du droit des contrats, notamment lorsqu'elle

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[139] Possible reasons for finding an arbitration agreement inoperative include frustration, discharge by breach, waiver, or a subsequent agreement between the parties. The cases interpreting s. 15(2) of the *Arbitration Act* make it clear that matters such as inconvenience, multiple parties, intertwining of issues with non-arbitrable disputes, possible increased cost, and potential delay generally will not, standing alone, be grounds to find an arbitration agreement inoperative (*Prince George*, at para. 37; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291, at para. 34). Indeed, like all the statutory exceptions, the exception for an inoperative arbitration agreement is to be narrowly interpreted, with the party seeking to avoid arbitration bearing the heavy onus of showing that it applies. This serves "the interests of freedom of contract, international comity and expected efficiency and cost-savings" from enforcing otherwise valid arbitration agreements (McEwan and Herbst, at § 3:57; *MacKinnon*, at para. 36).

[139] Parmi les raisons permettant de conclure qu'une convention d'arbitrage est inopérante, mentionnons l'inexécutabilité, la rupture pour cause d'inexécution, la renonciation ou une entente ultérieure entre les parties. Il ressort clairement de la jurisprudence portant sur l'interprétation du par. 15(2) de l'*Arbitration Act* que les éléments tels que les inconvénients, la multiplicité des parties, l'entrelacement de questions avec des différends non arbitrables, la possibilité de coûts plus élevés et les délais possibles ne constitueront généralement pas, à eux seuls, des motifs permettant de conclure qu'une convention d'arbitrage est inopérante (*Prince George*, par. 37; *MacKinnon c. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291, par. 34). En effet, comme toutes les exceptions prévues par la loi, l'exception relative à une convention d'arbitrage inopérante doit être interprétée de façon restrictive et la partie qui cherche à échapper à l'arbitrage porte le lourd fardeau de démontrer qu'elle s'applique. Cela favorise [TRADUCTION] « l'intérêt de la liberté contractuelle, de la courtoisie internationale, et de l'efficacité et des économies attendues » de l'exécution de conventions d'arbitrage par ailleurs valides (McEwan et Herbst, § 3:57; *MacKinnon*, par. 36).

[140] The application of this exception where the defendant in litigation that has been commenced is subject to bankruptcy or insolvency protection is straightforward. For instance, the making of a winding-up order or a receivership order may be grounds for a court to find an arbitration agreement inoperative (Casey, at ch. 7.18.2; McEwan and Herbst, at § 3:57). Indeed, in either scenario, all proceedings *against* the debtor are stayed under the applicable bankruptcy or insolvency legislation. Accordingly, an agreement to arbitrate ceases, in most circumstances, to have effect for the future and may not be relied upon. It is inoperative, and the matter is left to be resolved in the relevant bankruptcy or insolvency proceedings.

[140] L'application de cette exception est peu controversée lorsque le défendeur dans une poursuite bénéficie de la protection en matière de faillite ou d'insolvabilité. Par exemple, le tribunal peut conclure qu'une convention d'arbitrage est inopérante au motif qu'une ordonnance de mise en liquidation ou de mise sous séquestre a été rendue (Casey, c. 7.18.2; McEwan et Herbst, § 3:57). En effet, dans l'une ou l'autre de ces hypothèses, toutes les procédures engagées *contre* le débiteur sont suspendues en vertu des dispositions législatives applicables en matière de faillite ou d'insolvabilité. Par conséquent, la convention d'arbitrage cesse, dans la plupart des cas, de produire ses effets pour l'avenir et ne peut être invoquée. Elle est inopérante et la question doit être tranchée dans le cadre de la procédure de faillite ou d'insolvabilité.

[141] This is not to say that a court *must* decline a stay in favour of arbitration based on inoperability in these circumstances. As Casey notes, it "may well

[141] Cela ne signifie pas pour autant que le tribunal *doit*, dans ces circonstances, refuser de suspendre l'instance en faveur de l'arbitrage en raison

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(d) *The applicability of a stay of proceedings under bankruptcy or insolvency law*. Bankruptcy or insolvency legislation may impose a stay that precludes any proceedings, including arbitral proceedings, *against* the debtor. If such a stay applies, the debtor cannot rely on an arbitration agreement to avoid the bankruptcy or insolvency; the agreement becomes inoperative.

(e) *Any other factor the court considers material in the circumstances*.

[156] Each of the foregoing factors may carry more or less weight depending on the circumstances of the case. But it bears repeating that the party seeking to avoid arbitration bears a heavy onus to establish a clear case of inoperability or incapacity to perform the impugned arbitration agreement. To discharge this onus, it must prove on a balance of probabilities that one or more of the statutory exceptions set out in s. 15(2) of the *Arbitration Act* apply. Otherwise, the court must grant a stay in favour of arbitration.

(e) *Conclusion on Section 15*

[157] In sum, a proper interpretation of s. 15 of the *Arbitration Act* leads to the following conclusions:

- The chambers judge was correct that undertaking to file a defence without invoking the rules of court is not a "step in the proceedings" within the meaning of s. 15(1);
- The chambers judge was correct that a court-appointed receiver may be a "party" to a debtor's pre-existing arbitration agreement within the meaning of s. 15(1);
- The Court of Appeal erred in holding that a court-appointed receiver may disclaim an arbitration agreement and thereby render it "void, inoperative or incapable of being performed" within the meaning of s. 15(2); and

d) *L'applicabilité d'une suspension d'instance en droit de la faillite ou de l'insolvabilité*. Une loi en matière de faillite ou d'insolvabilité peut imposer une suspension d'instance qui fait obstacle à toute procédure, y compris une procédure arbitrale, *contre* le débiteur. Si une telle suspension s'applique, le débiteur ne peut invoquer une convention d'arbitrage pour éviter la faillite ou l'insolvabilité; cette convention devient inopérante.

e) *Tout autre facteur que le tribunal estime significatif dans les circonstances*.

[156] Chacun des facteurs qui précèdent peut avoir plus ou moins de poids selon les circonstances de l'affaire. Cependant, il convient de répéter que la partie qui cherche à éviter l'arbitrage porte le lourd fardeau d'établir que la convention d'arbitrage contestée est clairement inopérante ou non susceptible d'être exécutée. Pour s'acquitter de ce fardeau, elle doit prouver suivant la prépondérance des probabilités qu'une ou plusieurs des exceptions énoncées au par. 15(2) de l'*Arbitration Act* s'appliquent. Sinon, le tribunal doit suspendre l'instance en faveur de l'arbitrage.

e) *Conclusion sur l'art. 15*

[157] En résumé, une interprétation appropriée de l'art. 15 de l'*Arbitration Act* mène aux conclusions suivantes :

- La juge en chambre avait raison d'affirmer que le fait de s'engager à produire une défense sans invoquer les règles de procédure du tribunal ne revient pas à « agi[r] dans l'instance » au sens du par. 15(1);
- La juge en chambre avait raison de déclarer que le séquestre nommé par le tribunal peut être considéré comme une « partie » à la convention d'arbitrage préexistante du débiteur au sens du par. 15(1);
- La Cour d'appel a commis une erreur en statuant que le séquestre nommé par le tribunal peut renoncer à une convention d'arbitrage et ainsi la rendre « nulle, inopérante ou non susceptible d'être exécutée » au sens du par. 15(2); et

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Tab

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Kimberly Van de Perre *Appellant*

v.

Theodore Edwards and Valerie Cooper Edwards *Respondents*

and

African Canadian Legal Clinic, Association of Black Social Workers and Jamaican Canadian Association *Interveners*

INDEXED AS: VAN DE PERRE *v.* EDWARDS

Neutral citation: 2001 SCC 60.

File No.: 27897.

2001: June 14; 2001: September 28.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Family law — Custody and access — Standard of appellate review — Custody dispute between unmarried Caucasian mother and African-American father over four-year-old child — Mother awarded sole custody at trial — Father and his wife granted custody on appeal — Whether Court of Appeal applied appropriate standard of appellate review — Whether trial judge made material error or ignored relevant evidence — Importance of race in determining custody of child of mixed racial heritage — Family Relations Act, R.S.B.C. 1996, c. 128, s. 24(1).

Civil procedure — Change of parties — Adding party — Whether Court of Appeal erred in adding father's wife as a party and custodial applicant during appeal hearing — British Columbia Supreme Court Rules, B.C. Reg. 221/90, Rule 15(5).

K is a single Caucasian Canadian citizen living in Vancouver. T is an African American and was a professional basketball player. T has been married to V since 1991 and they have twin daughters, born in 1990. K and

Kimberly Van de Perre *Appelante*

c.

Theodore Edwards et Valerie Cooper Edwards *Intimés*

et

African Canadian Legal Clinic, Association of Black Social Workers et Jamaican Canadian Association *Intervenantes*

RÉPERTORIÉ : VAN DE PERRE *c.* EDWARDS

Référence neutre : 2001 CSC 60.

Nº du greffe : 27897.

2001 : 14 juin; 2001 : 28 septembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit de la famille — Garde et accès — Norme d'examen en appel — Litige entre une mère célibataire de race blanche et le père afro-américain au sujet de la garde d'un enfant de quatre ans — La mère a obtenu la garde exclusive au procès — Le père et sa femme ont obtenu la garde en appel — La Cour d'appel a-t-elle appliqué la norme appropriée d'examen en appel? — Le juge de première instance a-t-il commis une erreur importante ou négligé de prendre en considération des preuves importantes? — Importance de la race dans la décision touchant la garde d'un enfant ayant un patrimoine racial mixte — Family Relations Act, R.S.B.C. 1996, ch. 128, art. 24(1).

Procédure civile — Changement de parties — Jonction d'une partie — La Cour d'appel a-t-elle commis une erreur en joignant la femme du père comme partie et corequérante de la garde au cours de l'audition en appel? — British Columbia Supreme Court Rules, B.C. Reg. 221/90, règle 15(5).

K est une Canadienne de race blanche, célibataire, vivant à Vancouver. T est un Afro-américain qui était joueur professionnel de basketball. T est marié avec V depuis 1991 et ils ont des filles jumelles, nées en 1990.

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the conduct only to the extent that the conduct affects a factor set out in subsection (1) or (2).

10 In preparing reasons in custody cases, a trial judge is expected to consider each of these factors in light of the evidence adduced at trial; however, this is not to say that he or she is obligated to discuss every piece of evidence in detail, or at all, when explaining his or her reasons for awarding custody to one person over another. This would indeed be an unreasonable requirement at the end of a 26-day trial. Because of this, trial judges might sometimes appear to stress one factor over another and, in fact, it may be said that this is inevitable in custody cases which are heavily dependant on the particular factual circumstances at issue. This situation does not open the door to a redetermination of the facts by the Court of Appeal.

11 In reviewing the decisions of trial judges in all cases, including family law cases involving custody, it is important that the appellate court remind itself of the narrow scope of appellate review. L'Heureux-Dubé J. stated in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at paras. 10 and 12:

[Trial judges] must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.

. . .

There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the

le tribunal ne prend cette conduite en considération que dans la mesure où elle influe sur un facteur énuméré aux paragraphes (1) ou (2).

Lorsqu'il élabore les motifs de sa décision dans une affaire de garde, le juge est censé prendre en considération chacun de ces facteurs à la lumière de la preuve soumise; cependant, cela ne signifie pas qu'il est tenu d'analyser chaque élément de preuve ou d'analyser chacun en détail lorsqu'il explique les raisons d'accorder la garde à une personne plutôt qu'à une autre. Une telle exigence serait à vrai dire déraisonnable après un procès de 26 jours. C'est pourquoi les juges peuvent parfois sembler privilégier un facteur parmi d'autres et, en fait, cela paraît inévitable dans les affaires de garde car elles dépendent fortement des circonstances factuelles particulières. Cette situation n'ouvre pas la voie à une nouvelle appréciation des faits par la Cour d'appel.

Lorsqu'une cour d'appel examine une décision de première instance, dans tous les domaines, y compris dans les affaires familiales relatives à la garde, il importe qu'elle ne perde pas de vue la portée restreinte du mécanisme de révision. Le juge L'Heureux-Dubé dit ceci dans *Hickey c. Hickey*, [1999] 2 R.C.S. 518, par. 10 et 12 :

[Les juges de première instance] doivent, dans l'appréciation des faits, soupeser les objectifs et les facteurs énoncés dans la *Loi sur le divorce* ou dans les lois provinciales relatives aux ordonnances alimentaires. Il s'agit d'une décision difficile mais importante, qui peut s'avérer cruciale dans la vie des ex-époux et de leurs enfants. Vu sa nature factuelle et discrétionnaire, la décision du juge de première instance doit faire l'objet d'une grande déférence par la cour d'appel appelée à réviser une telle décision.

. . .

Il existe des raisons sérieuses de faire preuve d'une grande retenue envers les décisions rendues par les juges de première instance en matière d'aliments. Cette norme d'examen en appel reconnaît que le juge qui a entendu les parties est le mieux placé pour exercer le pouvoir discrétionnaire qu'implique le prononcé d'une ordonnance alimentaire. On dissuade ainsi les parties d'interjeter appel du jugement et d'engager des frais supplémentaires dans l'espoir que la cour d'appel appréciera différemment les facteurs pertinents et la preuve. Cette

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courts to respond to the spectrum of factors which can both positively and negatively affect a child.

It is clear from this case that it is necessary for this Court to state explicitly that the scope of appellate review does not change because of the type of case on appeal. The Court of Appeal discussed, and the respondents relied heavily on, the decision of McLachlin J. (as she then was) in *Gordon v. Goertz*, [1996] 2 S.C.R. 27. In that case, the Court found that the trial judge had only mentioned one factor to be considered in determining the best interests of the child. As noted by McLachlin J., there was no way of knowing if the trial judge had considered the other applicable factors. Further, the Court noted that the trial judge had stated that he was relying heavily upon the findings of another judge. As a result, McLachlin J. stated, at para. 52: ". . . one may equally infer that the necessary fresh inquiry was not fully undertaken. . . . [I]t seems clear that the trial judge failed to give sufficient weight to all relevant considerations . . . and it is therefore appropriate for this Court to review the decision and, should it find the conclusion unsupported on the evidence, vary the order accordingly". Rather than indicating that appellate review differs when a court must consider the best interests of the child, *Gordon* is consistent with the narrow scope of appellate review discussed later in *Hickey*, *supra*. The case does not suggest that appellate review is appropriate whenever a trial judge has failed to mention a relevant factor or to discuss a relevant factor in depth.

As indicated in both *Gordon* and *Hickey*, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appel-

risent par l'examen cas par cas de la situation propre à chaque enfant. Grâce à ce pouvoir discrétionnaire, le juge de première instance peut procéder à une appréciation pondérée de l'intérêt de l'enfant et prendre en considération l'éventail des facteurs positifs et négatifs pouvant le toucher.

14 La présente affaire fait clairement ressortir la nécessité pour notre Cour d'énoncer explicitement que la portée de l'examen en appel ne varie pas selon le type d'affaire. La Cour d'appel a analysé le jugement du juge McLachlin (maintenant Juge en chef) dans *Gordon c. Goertz*, [1996] 2 R.C.S. 27, sur lequel les intimés se sont fortement appuyés. Notre Cour a conclu dans cet arrêt que le juge de première instance avait mentionné un seul facteur à considérer pour déterminer l'intérêt de l'enfant. Comme le soulignait le juge McLachlin, il n'y avait aucune façon de savoir si le juge de première instance avait aussi examiné les autres facteurs applicables. De plus, la Cour a noté que le juge de première instance disait s'être inspiré fortement de constatations d'un autre juge. Ceci a fait dire au juge McLachlin : « . . . on pourrait tout aussi bien inférer qu'il n'a pas effectué de façon exhaustive la nouvelle analyse requise. [. . .] [I]l semble évident que le juge de première instance n'a pas accordé suffisamment d'importance à toutes les considérations pertinentes [. . .] de sorte qu'il convient que notre Cour révise la décision et, si elle conclut que la preuve n'appuie pas la conclusion, qu'elle modifie l'ordonnance en conséquence » (par. 52). L'arrêt *Gordon* n'indique pas que l'examen en appel diffère lorsqu'il s'agit d'apprécier l'intérêt de l'enfant et cet arrêt est compatible avec la portée restreinte de l'examen dont il est question ultérieurement dans l'arrêt *Hickey*, précité. Cet arrêt n'indique pas que la révision en appel est appropriée dès lors qu'un juge de première instance omet de mentionner ou d'analyser en profondeur un facteur pertinent.

15 Comme l'indiquent les arrêts *Gordon* et *Hickey*, la révision en appel exige l'indication d'une erreur importante. S'il existe une indication que le juge de première instance n'a pas pris en considération des facteurs ou des éléments de preuve pertinents, cela peut vouloir dire qu'il n'a pas dûment appré-

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late court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

cié tous les facteurs. Dans ce cas, la cour d'appel peut revoir la preuve produite au procès pour déterminer si le juge a négligé d'examiner ou mal interprété des éléments pertinents de la preuve. Cela dit, je répète que des omissions dans les motifs ne signifieront pas nécessairement que la cour d'appel a compétence pour examiner la preuve entendue au procès. Comme le dit l'arrêt *Van Mol (Guardian ad Litem of) c. Ashmore* (1999), 168 D.L.R. (4th) 637 (C.A.C.-B.), autorisation d'appel refusée [2000] 1 R.C.S. vi, une omission ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée. Faute d'une telle conviction rationnelle, la cour d'appel ne peut pas réexaminer la preuve.

16 In the present case, the Court of Appeal considered the decision of the trial judge and decided that it was within the scope of review to examine all the evidence and determine whether the trial judge weighed the evidence improperly. It is in reconsidering the evidence that the Court of Appeal determined that the trial judge had made material errors. As discussed above, this is not the proper method of appellate review. If the Court of Appeal had followed the appropriate method, it would not have reconsidered the evidence and found what it described as material errors in Warren J.'s decision. There was no scope for appellate intervention in this case. This can be illustrated by a review of the key difficulties that the Court of Appeal found in the trial decision. These difficulties can be divided into (i) concerns related to s. 24(1)(e) of the Act, (ii) the failure of the trial judge to consider the bonds that exist between Elijah and his paternal family (s. 24(1)(c)), (iii) an emphasis on the attitudes of the parties towards each other and Mr. Edwards' extra-marital affairs, and (iv) the concern that the trial judge based his decision on stereotypical views including the tender years doctrine.

En l'espèce, la Cour d'appel a examiné la décision du juge de première instance et décidé que, dans le cadre de l'examen en appel, il lui revenait d'examiner l'ensemble de la preuve et de déterminer si son appréciation par le juge était inappropriée. C'est en réexaminant la preuve que la Cour d'appel a décidé que le juge de première instance avait commis des erreurs importantes. Comme je l'ai dit précédemment, ce n'est pas la bonne façon de procéder à l'examen en appel. Si la Cour d'appel avait appliqué la bonne méthode, elle n'aurait pas réexaminé la preuve et n'aurait pas trouvé ce qu'elle décrit comme des erreurs importantes dans la décision du juge Warren. Il n'y avait pas lieu à l'intervention de la Cour d'appel en l'espèce, comme en témoigne l'examen des principales difficultés que la Cour d'appel a discernées dans la décision de première instance. Ces difficultés sont de plusieurs ordres : (i) des préoccupations relatives à l'al. 24(1)e) de la Loi; (ii) l'omission du juge de prendre en considération les liens existant entre Elijah et sa famille paternelle (al. 24(1)c)); (iii) l'importance accordée à l'attitude des parties l'une envers l'autre et aux liaisons extra-conjugales de M. Edwards; et (iv) la crainte que le juge ait fondé sa décision sur des conceptions stéréotypées, telle la doctrine relative aux enfants en bas âge.

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Kenneth F. Salomon and Sternthal Katznelson Montigny LLP *Appellants*

v.

Judith Matte-Thompson and 166376 Canada Inc. *Respondents*

Indexed as: Salomon *v.* Matte-Thompson

2019 SCC 14

File No.: 37537.

2018: March 19; 2019: February 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Law of professions — Lawyers — Professional liability — Duty to advise — Duty of loyalty — Lawyer recommending financial advisor to clients — Clients investing millions of dollars with recommended financial advisor's firm — Lawyer repeatedly endorsing advisor and encouraging clients to make and retain investments — Investments made in funds that were parts of Ponzi scheme — Millions lost in fraud — Clients claiming that lawyer and his law firm were professionally negligent — Trial judge dismissing claim — Court of Appeal allowing appeal and ordering that clients be compensated for losses — Whether Court of Appeal erred by employing notion of distorting lens in determining whether trial judge had made palpable and overriding errors — Whether Court of Appeal expanded professional obligations of lawyers who refer clients to independent advisors — Whether Court of Appeal erred by interfering with trial judge's findings relating to faults committed by lawyer and to causation.

In 2003, a lawyer introduced two clients to his financial advisor and personal friend, and recommended that they consult him. In the following four years, the clients ended up investing over $7.5 million with the recommended

Kenneth F. Salomon et Sternthal Katznelson Montigny, s.e.n.c.r.l. *Appelants*

c.

Judith Matte-Thompson et 166376 Canada Inc. *Intimées*

Répertorié : Salomon *c.* Matte-Thompson

2019 CSC 14

N° du greffe : 37537.

2018 : 19 mars; 2019 : 28 février.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit des professions — Avocats — Responsabilité professionnelle — Devoir de conseil — Devoir de loyauté — Recommandation par un avocat d'un conseiller financier à des clientes — Investissement par les clientes de millions de dollars auprès de la société de placements du conseiller financier recommandé — Formulation de façon répétée par l'avocat aux clientes de commentaires favorables au sujet du conseiller et d'encouragements à effectuer et à conserver leurs placements auprès de celui-ci — Placements effectués dans des fonds qui faisaient partie d'un stratagème de type Ponzi — Millions de dollars perdus par suite de la fraude — Prétentions des clientes portant que l'avocat et son cabinet ont fait preuve de négligence professionnelle — Décision de la juge de première instance rejetant l'action — Arrêt de la Cour d'appel accueillant l'appel et ordonnant que les clientes soient dédommagées de leurs pertes — La Cour d'appel a-t-elle commis une erreur en recourant à la notion du prisme déformant pour décider si la juge de première instance a commis des erreurs manifestes et déterminantes? — La Cour d'appel a-t-elle élargi la portée des obligations professionnelles des avocats qui aiguillent leurs clients vers des conseillers indépendants? — La Cour d'appel a-t-elle fait erreur en intervenant à l'égard des conclusions de la juge de première instance relativement aux fautes commises par l'avocat et au lien de causalité?

En 2003, un avocat présente à deux clientes son conseiller financier personnel et ami proche, et leur recommande de le consulter. Au cours des quatre années qui suivent, les clientes finissent par investir plus de 7,5 millions de dollars

so (*P.L. v. Benchetrit*, 2010 QCCA 1505, at para. 24 (CanLII)).

[110] The appellate court must point to a "specific and identifiable error" that amounts to more than a "divergence of opinion" (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 33 (emphasis deleted); see also *Housen*, at paras. 23, 56, 58 and 62). As the majority explained in *Housen*, "a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others" (para. 56). Likewise, it does not suffice to say that the basis of certain findings appears to be "thin" (*South Yukon Forest Corp.*, at para. 53). If the trial judge's findings are reasonably supported by the evidence, an appellate court cannot "reweigh the evidence by substituting . . . an equally — or even more — persuasive inference of its own" (*H.L.*, at para. 74 (emphasis in original); see also *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 38; *Housen*, at paras. 22-23).

[111] I would add that an omission in the reasons does not amount to a palpable and overriding error unless "it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 15, quoted in *Housen*, at para. 72; see also *South Yukon Forest Corp.*, at paras. 50-51). Trial judges are *presumed* to have based their conclusions on a review of the entirety of the evidence (*Housen*, at para. 72).

[112] That being said, how should an appellate court proceed in order to identify a palpable and overriding error? By definition, this should not be a strenuous task. In this respect, like my colleague, I find the metaphor used by Morissette J.A. in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), to be very accurate and relevant: [TRANSLATION] ". . . a palpable and overriding error is in the nature

est « manifeste » ne suffit pas à la rendre telle (*P.L. c. Benchetrit*, 2010 QCCA 1505, [2010] R.J.Q. 1853, par. 24).

[110] La juridiction d'appel doit cibler une « erreur précise et discernable » qui n'équivaut pas simplement à une « divergence d'opinions » (*Schwartz c. Canada*, [1996] 1 R.C.S. 254, par. 33 (soulignement omis); voir également *Housen*, par. 23, 56, 58 et 62). Comme l'expliquent les juges majoritaires dans *Housen*, « on ne saurait conclure qu'un juge de première instance a négligé d'examiner la preuve, l'a mal interprétée ou est arrivé à des conclusions erronées, simplement parce que le tribunal d'appel tire des inférences divergentes de la preuve et décide d'accorder plus d'importance à certains éléments qu'à d'autres » (par. 56). De même, il ne suffit pas d'affirmer que le fondement de certaines conclusions paraît « mince » (*South Yukon Forest Corp.*, par. 53). Si les conclusions du juge du procès sont raisonnablement étayées par la preuve, la juridiction d'appel « ne peut soupeser la preuve à nouveau en substituant [. . .] sa propre inférence tout aussi convaincante, sinon plus » (*H.L.*, par. 74 (souligné dans l'original); voir aussi *Nelson (City) c. Mowatt*, 2017 CSC 8, [2017] 1 R.C.S. 138, par. 38; *Housen*, par. 22-23).

[111] J'ajouterais qu'une omission dans les motifs n'équivaut pas à une erreur manifeste et déterminante, sauf si « elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée » (*Van de Perre c. Edwards*, 2001 CSC 60, [2001] 2 R.C.S. 1014, par. 15, cité dans *Housen*, par. 72; voir aussi *South Yukon Forest Corp.*, par. 50-51). Il est *présumé* que les juges de première instance fondent leurs conclusions sur un examen de l'ensemble de la preuve (*Housen*, par. 72).

[112] Cela dit, comment une juridiction d'appel doit-elle procéder pour déceler une erreur manifeste et déterminante? Par définition, cela ne devrait pas être une tâche ardue. À cet égard, comme mon collègue, je trouve très juste et pertinente la métaphore que le juge Morissette de la Cour d'appel a utilisée dans *J.G. c. Nadeau*, 2016 QCCA 167, par. 77 (CanLII) : « . . . une erreur manifeste et dominante

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CITATION: Laurentian University of Sudbury, 2021 ONSC 3272
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-05-07

SUPERIOR COURT OF JUSTICE - ONTARIO

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell, Andrew Hanrahan and Derek Harland*, for the Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for the Court-appointed Monitor Ernst & Young Inc

Vern W. DaRe, for the Firm Capital Corporation, the DIP Lender

Susan Philpott, Charles Sinclair and David Sworn, Insolvency Counsel for Laurentian University Faculty Association (LUFA)

Tracey Henry and Danielle Stampley, for Laurentian University Staff Union (LUSU)

Aryo Shalviri and Pamela Huff, for the Royal Bank of Canada

Andrew Hatnay, Demetrios Yiokaris and Sydney Edmonds and Eugene Meehan, Q.C., for Thorneloe University

Dylan Chochla and Stuart Brotman, for the Toronto Dominion Bank

André Claude, for the University of Sudbury

Donia Hashem, for the Canada Foundation for Innovation

Virginie Gauthier, for Lakehead University

George Benchetrit, for the Bank of Montreal

Joseph Bellissimo and Natalie Levine, for Huntington University

Gale Rubenstein and Bradley Wiffen, for the Financial Services Regulatory Authority

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> elective courses taken by students enrolled in LU programs as opposed to students enrolled in programs offered through the Federated Universities.
>
> 176. In conducting its review of its academic offerings and operational restructuring model, LU determined that it has the ability and capacity to offer a comprehensive list of programs and courses to LU students from the suite of programs and courses delivered by LU faculty in the absence of continuing the Federated Universities relationship. As a result, LU determined that it could retain the vast majority of the funds transferred to the Federated Universities and continue to support students without incurring those incremental costs.
>
> 177. As a result, LU is of the view that savings estimated in the range of $7.1 to $7.3 million annually can be generated through the disclaimer of the Federated Universities as part of this restructuring.
>
> 178. The Monitor recognizes the potential financial hardship that the Notices of Disclaimer may have for the Federated Universities. However, given the additional savings required for LU to have a reasonable opportunity to put forward a viable plan of compromise or arrangement and effect a successful restructuring, the Monitor is of the view that the disclaimer of the Federated Universities agreements is necessary.

[38] To counter the submissions of Laurentian and the views and recommendations expressed by the Monitor, Thorneloe filed a Report on Financial Impact of Termination of Federated Agreement and Financial Distribution Agreement on Thorneloe University. The Report was prepared by Mr. Allan Nackan, a partner with A. Farber & Partners Inc. Mr. Nackan has been identified as an expert for the purposes of providing his opinion. I am satisfied that Mr. Nackan is an expert in the area of insolvency and restructuring. However, Mr. Nackan acknowledged in cross-examination that he is not an expert in terms of government funding of universities and that he has no prior experience in determining university funding. His lack of industry-specific experience has to be taken into account when considering his report and conclusions.

[39] It is also necessary to acknowledge the expertise of Ernst & Young Inc., the court-appointed Monitor. The Monitor is an officer of the court, with a duty to be neutral and objective: *Bell Canada International Inc. (Re)*, [2003] CarswellOnt No. 4537 (S.C.). The principals of Ernst & Young Inc., including Sharon Hamilton, who signed the Monitor's Third Report, are widely acknowledged as being experts in the field of insolvency and restructuring. Moreover, the Monitor has been involved since the proceedings began and has extensive knowledge of the Applicant's operations and restructuring efforts.

[40] Farber was retained to provide an opinion on whether the termination of the Federated Agreement and the Financial Distribution Notice would result in significant financial hardships to Thorneloe, and whether or not the termination would enhance Laurentian's prospects of a viable compromise or arrangement.

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[41] Farber concludes the termination of the Federated Agreement will cause serious financial hardship to Thorneloe as a consequence of which Thorneloe will have to resort to a formal insolvency process.

[42] Farber also concludes that the termination of the Federated Agreement will have an immaterial impact on overall costs reduction in Laurentian's restructuring process and is unlikely to enhance prospects of Laurentian making a viable plan.

[43] In a supplementary report, Farber concludes that:

- Laurentian is not facing an immediate liquidity crisis on May 1, 2021;
- there is no compelling reason that would necessitate termination of the federated arrangement with Thorneloe on May 1, 2021;
- from a financial perspective, Laurentian and the DIP Lender have not provided information to support the need for a Disclaimer Deadline of May 1, 2021.

[44] A consideration of the s. 32(4) factors requires a balancing of interests. The subsection is silent with respect to the relative importance of any one of the factors to be considered and is not restricted to the listed factors. The test does, however, require the court to balance the benefit of the proposed disclaimer for Laurentian against the detrimental impact on Thorneloe. The disclaimer of a contract must be fair, appropriate and reasonable in all the circumstances. Ultimately, it is a discretionary decision to determine whether the disclaimer should be upheld. This discretion is exercised by weighing the competing interests and prejudice to the parties and assessing whether the disclaimer or resiliation is fair and reasonable.

[45] In my view, the considerations in the Third Report of the Monitor reflect a proper balancing of the competing interests of Laurentian and all stakeholders, including Thorneloe. The Third Report discusses the financial challenges facing Laurentian and proposes solutions that could enhance the prospects of a viable plan of compromise or arrangement, while acknowledging the potential financial hardship on the Federated Universities. The Farber Report and the Supplementary Farber Report focuses of the impact of the disclaimer on Thorneloe and the short term DIP Financing requirements. In narrowing its focus, the Farber Report does not take into account that in order to enhance the prospects of a viable plan of compromise or arrangement, it is often necessary to take into account the potential compromises that will have to be made by all stakeholder groups. For this reason, I have concluded that the Third Report of the Monitor has to be given greater weight than the Farber Report and the Supplementary Farber Report.

[46] Laurentian submits that the Courts have identified guiding principles for the analysis:

(a) the recommendation of the Monitor is afforded significant weight in CCAA proceedings (see *Nortel Network Corp. Re*, 2018 ONSC 6257 at para. 27; *Aralez*

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Pharmaceuticals Inc., Re, 2018 ONSC 6980 at para. 36; and *Aveos Fleet Performance Inc.*, 2012 QCCS 4074 at para. 50(f);

(b) the disclaimer does not need to be essential to the restructuring, it only need be advantageous and beneficial (see *Timminco Ltd., Re*, 2012 ONSC 4471 at para. 54 ("*Timminco*"); see also *Homberg Invest Inc.*, 2011 QCCS 6376 at para. 103);

(c) the threshold to establish "significant financial hardship" in opposing a disclaimer is high. There must be specific evidence of financial hardship. Mere loss or damage is not sufficient, and it must be likely that the hardship is caused by the disclaimer (see *Target Canada Co. Re*, 2015 ONSC 1028 at para. 26);

(d) the test to establish "significant financial hardship" is subjective and depends on an examination of the individual characteristics and circumstances of the counterparty (see *Timminco* at para. 60); and

(e) the Court should take into consideration the effect that the disclaimer will have on the outcome for all other unsecured creditors and be an equitable result that is dictated by the guiding principles of the CCAA (see *Timminco* at para. 62).

[47] There is no doubt that Laurentian has significant financial challenges. There is also no doubt that, if a successful restructuring is to be achieved, it must be done on an expedited basis. If Laurentian is to successfully restructure its affairs, it is essential that it maintain continuity of operations. The spring term commences May 3, 2021 and extends until the latter part of July 2021. The fall term commences at the beginning of September 2021. If the restructuring is to succeed, Laurentian must be in a position to provide assurances to both its students and faculty that it has a viable plan that will ensure continued operations for both the spring term, the fall term and beyond.

[48] Laurentian, with the assistance of the Monitor, identified a number of areas in which a financial restructuring was required. These include a downsizing of the number of programs being offered by Laurentian and also the necessity to arrive at new, sustainable collective agreements with LUFA and LUSU. These requirements and accommodations are set out in the motion to extend the stay of proceedings.

[49] Laurentian also identified, at the outset of the CCAA proceedings, that it would be necessary to have a fundamental readjustment or realignment with the Federated Universities.

[50] Although Thorneloe is of the view that its relationship with Laurentian has only a minor impact on the financial position of Laurentian, it seems to me that this view is far too narrow in scope. Laurentian has identified that if the disclaimers involving Thorneloe and U Sudbury are upheld, together with the revised agreement with Huntington, this will result in $7.7 million of additional funds remaining with Laurentian on an annual basis. This calculation has been identified by the Monitor and, in my view, represents a real source of annual financial relief for Laurentian.

[51] Thorneloe counters by indicating that it is only one of three Federated Universities; the $7.7 million figure cannot be attributed, in total, to Thorneloe. At first glance, this is an attractive

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necessarily mean that the other party has not been acting in good faith. In its Third Report, the Monitor makes specific reference to the bad faith argument being raised by Thorneloe. It is significant that the Monitor makes no statement that would suggest in any way that Laurentian has been acting in bad faith. The Monitor ultimately recommends at paragraph 206 of its Third Report that the court grant the relief sought by the Applicant, which includes the disclaimer and also an extension of the stay of proceedings.

[73] Section 11.02(3) of the CCAA addresses the burden of proof on an application for an extension of the stay of proceedings other than the initial application. This includes a requirement that the applicant satisfy the court that it has acted, and is acting, in good faith and with due diligence. By supporting the application for the extension and upholding the disclaimer, it can be inferred that the Monitor does not support the argument of Thorneloe to the effect that Laurentian has been acting in bad faith.

[74] My summary of the factors set out in s. 32(4) of the CCAA is as follows:

(a) the Monitor approved the proposed disclaimer;

(b) the Disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of Laurentian;

(c) the Notice of Disclaimer will have financial consequences to Thorneloe, but this is not a sufficient reason to disallow the Notice of Disclaimer. Thorneloe was offered an alternative, similar to Huntington, which was not accepted.

[75] In addition, it seems to me that, in the circumstances of this case, it is necessary to consider the broader implication of disallowing the Notice of Disclaimer – namely the potential demise of Laurentian.

[76] The dilemma facing the court is clear. If Thorneloe's motion succeeds, with the result that the Disclaimer is not effective, it could lead to an unraveling of Laurentian's restructuring plan and the collapse of Laurentian. This in turn would have significant impact on all faculty, students and the greater Sudbury community. It would also result in the financial collapse of Thorneloe. Obviously, this is not a desirable outcome.

[77] If the Notices of Disclaimer are upheld, I acknowledge that this could lead to the cessation of operations of Thorneloe. I do not lightly discount the impact on faculty, employees and students at Thorneloe, but the impact is significantly less than if Laurentian and Thorneloe are both forced to suspend or cease operations.

[78] Given these two undesirable options, the better choice or to put it another way, the least undesirable choice, is to uphold the Notices of Disclaimer.

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DISPOSITION

[79] In the result, the motion brought by Thorneloe to invalidate the Notice of Disclaimer is dismissed.



Chief Justice G.B. Morawetz

Date: May 7, 2021

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CITATION: LoyaltyOne, Co. (Re), 2024 ONSC 3866
COURT FILE NO.: CV-23-00696017366651-00CL
DATE: 20240710

2024 ONSC 3866 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: 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 LOYALTYONE, CO.

BEFORE: Conway J.

COUNSEL: *Timothy Pinos, Alan Merskey and Kiyan Jamal*, for LoyaltyOne, Co.

Peter Ruby, Kirby Cohen and Meghan De Snoo, for KSV Restructuring Inc.

Robert W. Staley and Dylan Yegendorf, for the Ad Hoc Group of Term B Lenders

Markus Kremer and Alex Moser, for Bank of America, N.A. as administrative agent and Term Loan A Lenders

Eliot Kolers, Maria Konyukhova, Lesley Mercer and RJ Reid, for Bread Financial Holdings, Inc.

Edward Park, CRA, Department of Justice Canada

HEARD: June 13 and 14, 2024

REASONS FOR DECISION
(RE: TAX MATTERS AGREEMENT)

[1] LoyaltyOne, Co. ("**LoyaltyOne**") operated the AIR MILES loyalty rewards business for three decades. In March 2023, it sought protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**"). In June 2023, Bank of Montreal ("**BMO**") bought the assets of the AIR MILES business as a going concern in the CCAA proceedings.

[2] LoyaltyOne's largest remaining asset is a claim against the Canada Revenue Agency ("**CRA**") for a refund of $96 million with respect to taxes LoyaltyOne paid in 2013 (the "**Tax Refund**"). The trial over the Tax Refund is scheduled to commence in September 2024.

Issue #3 – Should the Disclaimer be Approved

[48] LoyaltyOne delivered the Disclaimer of the TMA pursuant to s. 32(1) of the CCAA. Bread applied to this court under s. 32(2) for an order that the TMA is not to be disclaimed or resiliated.

[49] The factors for the court to consider in upholding or setting aside a disclaimer are set out in s. 32(4):

> **(4)** In deciding whether to make the order, the court is to consider, among other things,
>
> **(a)** whether the monitor approved the proposed disclaimer or resiliation;
>
> **(b)** whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> **(c)** whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[50] The list of factors in s. 32(4) of the CCAA is not exhaustive and courts have added the requirement that the disclaimer be fair, appropriate, and reasonable in all circumstances: *Re Laurentian University of Sudbury*, 2021 ONSC 3272, 89 C.B.R. (6th) 183, at para 44.

[51] The first element of the test is met. The Monitor approved the Disclaimer. It states in its Fifth Report dated November 23, 2023, "the Tax Appeal is a significant remaining source of potential recovery for LoyaltyOne's creditors."

[52] Bread submits that the second element is not met because the business of LoyaltyOne has already been sold to BMO and there is no plan to be filed. I accept this submission.

[53] There are no timing requirements for issuing disclaimers under the CCAA. However, the court's focus is on whether the disclaimer of the contract will enhance the prospects of the debtor making a viable compromise or arrangement. It is clear from the cases that the purpose of the disclaimer is to relieve the debtor from the burden of performing a contract where it would prevent or delay a successful restructuring (*Laurentian*), a sale of the business (*Timminco Ltd. (Re)*, 2012 ONSC 4471, 93 C.B.R. (5th) 326), or an orderly winddown and distribution of assets to creditors (*Target Canada Co. (Re)*, 2015 ONSC 1028, 23 C.B.R. (6th) 303).

[54] Here, the Disclaimer of the TMA will accomplish none of those objectives. There is no restructuring in process. The business has been sold. LoyaltyOne is no longer an operating business. There is no suggestion of a plan to be put to creditors. There is no basis to find that LoyaltyOne's prosecution of the tax proceeding and payment of the Tax Refund to Bread under the TMA will impair or delay a restructuring, sale, or orderly distribution to creditors. Rather, in my view, the Disclaimer by LoyaltyOne is an attempt to secure funds for itself that it was never entitled to retain pursuant to the Spin Transaction.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re),* 2020 BCSC 1883

Date: 20201202
Docket: S200586
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 *SEA TO SKY UNIVERSITY ACT*, S.B.C. 2002, c. 54

- and -

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Sale Approval)

Counsel for the Petitioner:	J.R. Sandrelli V. Cross
Counsel for the Monitor PricewaterhouseCoopers Inc.:	V.L. Tickle
Counsel for Primacorp Ventures Inc.:	P. Rubin G. Umbach
Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.:	K. Jackson G. Nesbitt
Counsel for Southern Star Developments Ltd.:	P. Reardon K. Strong
Counsel for Vanchorverve Foundation:	C.D. Brousson
Counsel for Dana Hospitality LP:	D.V. Bateman

2020 BCSC 1883 (CanLII)

[94] What remains to be addressed is Southern Star's application pursuant to s. 32(2) of the *CCAA*, supported by BMO, for an order disallowing any disclaimer by Quest of the Subleases of the Residences on Lots C-D. Section 32(4) of the *CCAA* lists various non-exhaustive factors that the court is to consider in relation to disputes over disclaimers:

> In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[95] In *League Assets Corp. (Re)*, 2016 BCSC 2262, I discussed the significance of disclaimers in *CCAA* proceedings, both from the point of view of the counterparty and that of the entire stakeholder group:

> [49] These *CCAA* provisions are not inconsequential in the face of this type of proceedings. At this point, the matter is no longer between the debtor company and a counterparty. There are other stakeholders involved and the statutory provisions, and the provisions of court orders such as the Initial Order, are meant to protect the stakeholder group as a whole, while also allowing a certain amount of flexibility for the debtor company. A disclaimer of a contract has consequences not only to the debtor company, but the estate generally. Such an action can substantially increase the debt being faced by the estate or divest the debtor of a substantial benefit that might be realized for the benefit of the creditors. It is in that context that the *CCAA* requires that certain procedures be followed by the debtor company, with the necessary oversight by the Court's officer, the Monitor, as to whether any disclaimer will be approved or not.

[96] The factor under s. 32(4)(b) of the *CCAA* as to enhancing the prospects of a viable restructuring applies equally in respect of disclaimers in the context of a sales process by which the business is to continue as a going concern: *Timminco Ltd. (Re)*, 2012 ONSC 4471 at paras. 51-52 and *Aveos Fleet Performance Inc. (Re)*, 2012 QCCS 6796 at paras. 48-50. In addition, the disclaimer need not be proven as "essential", only "advantageous and beneficial": *Timminco* at para. 54.

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Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances. It was Primacorp, an arms length purchaser, who has imposed this condition.

[103] Further, the Monitor agrees with Quest that the Disclaimers are necessary to enhance the prospects of Quest making a viable compromise or arrangement in these proceedings. There is no reason to question the Monitor's view as it is apparent that the Monitor has considered all relevant matters.

[104] I agree that the Disclaimers will enhance the prospects of Quest making a viable compromise or arrangement. The Monitor overwhelmingly agrees after a consideration of all the circumstances including those particularly faced by Southern Star as a result.

[105] Secondly, Southern Star argues that Quest delivered the Disclaimers simply to secure a bargaining advantage for Quest and Primacorp toward a re-visitation of the rent deferral issue or to attempt to reduce the rent. I agree that there is some indication that Quest and Primacorp had that in mind; however, that is often the reality that arises after a debtor concludes that it is no longer viable to abide by those contractual commitments and that a disclaimer is appropriate. If it were possible to come to an amicable resolution with Southern Star in the context of the Primacorp transaction, I expect Quest would have done so.

[106] Southern Star refers to the statements in *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503 at para. 59, where Justice Veit considered whether certain contracts should be terminated. She was attuned to whether the termination was fair, appropriate and reasonable and whether it arose after good faith negotiations. In this case, there is no evidence to suggest that the parties did not approach the negotiations in good faith. Clearly, it is not my role on this application to assess the reasonableness of the respective positions of Quest, Primacorp and Southern Star in those negotiations. It does appear, however, that Quest and Primacorp have moved toward a middle ground by the withdrawal of the Disclaimers in relation to Lots A-B.

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[107] Thirdly, Southern Star places great emphasis on what it says will be the significant hardship it will suffer if the Disclaimers are upheld. Southern Star says that it has spent approximately $41.7 million to construct the Residences.

[108] The monthly mortgage payments to BMO and Fivestone are approximately $220,000. The outstanding balance of the BMO loan facility is $34.4 million. Mr. Hutchison indicates that, without payment of rent by Quest, Southern Star will not be able to make its mortgage payments to BMO. In that event, BMO will be in a position to foreclose on the Ground Leases. Mr. Hutchison has guaranteed the BMO debt, as has another of Mr. Hutchison's companies.

[109] As noted by Quest, any financial consequences to Southern Star will largely depend on what mitigating measures are undertaken. Those could include a re-letting of the Residences or a sale of its interests under the Ground Leases. At present, with no clear indication as to how those matters might evolve, I am unable to conclude with certainty that any hardship suffered by Southern Star would be "significant".

[110] Regardless of any hardship faced by Southern Star, the reality is that Quest has only one viable means by which to advance the restructuring at this time – the Primacorp transaction. Within the confines of that transaction, Primacorp sees no merit in maintaining the Subleases on these two Residences. Apparently, no other interested party expressed an interest in maintaining the Subleases besides Landrex. In light of Landrex's submissions at the conclusion of this hearing on November 16, 2020, I have considered that the Landrex/CapU transaction may have presented a more palatable resolution of the Subleases given the recent LOI between Landrex and Southern Star. However, I conclude that delaying the Primacorp sale, on the prospect that the Landrex/CapU transaction will come about, is not a viable option for the reasons discussed above.

[111] I agree that this decision will visit hardship, even arguably significant hardship, upon Southern Star. However, it is difficult to see that preventing delivery of the Disclaimers would avoid that result in any event. If the Primacorp transaction

2020 BCSC 1883 (CanLII)

does not proceed, there is no transaction and Quest has no financial means to continue past December 2020. The Interim Lender has indicated that it will not advance funds to Quest beyond that date, and specifically, that it has no interest in funding continued rent payments to Southern Star.

[112] In that event, Southern Star will be in the same position post December 2020, with Quest unable to pay the rent for the Residences at that time: see *Target Canada Co. (Re)*, 2015 ONSC 1028 at paras. 27-28.

[113] As the court noted in *Target Canada* at paras. 24-25, the court must give due consideration to the stakeholder group as a whole in assessing whether the Disclaimers are fair and reasonable: *Doman Industries Ltd. (Re)*, 2004 BCSC 733 at para. 33. The price of setting aside the Disclaimers is that the Primacorp transaction will not proceed and a receivership at the behest of the Interim Lender will likely follow. In my view, this is not in the best interests of that larger stakeholder group which, in my view, has primacy here even in the face of the hardship and prejudice caused to Southern Star.

[114] I dismiss Southern Star's application for order that the Subleases of the Residences on Lots C-D not be disclaimed by Quest.

RVO

[115] At the November 3, 2020 hearing, when Quest originally sought the TAVO, Quest was seeking to uphold the Disclaimers of the Subleases. At that time, Southern Star's evidence and submissions were to the effect that, if the Court upheld the Disclaimers, it would have a substantial unsecured claim against the estate. As indicated above, the amount of any claim that Southern Star might advance in the estate is far from clear, given possible mitigation, although there is potential for a significant claim.

[116] This position did not come as a surprise to Quest; however, it appears that Quest did not appreciate the potential magnitude of Southern Star's claim. More importantly, Quest has not fully appreciated that a very unhappy claimant – Southern

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CITATION: Timminco Limited (Re), 2012 ONSC 4471
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120803

2012 ONSC 4471 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **Maria Konyukhova, for the Applicants**

Robin B. Schwill, for J. Thomas Timmins

Steven J. Weisz, for the Monitor

Debra McPhail, for the Superintendent of Financial Services

Thomas McRae, for B51 Non-Union Employee Pension Committee and B51 Union Employee Pension Committee

Charles Sinclair, for the United Steelworkers

James Harnum, for Mercer Canada

HEARD: **JUNE 4, 2012**

ENDORSEMENT

OVERVIEW

[1] Mr. J. Thomas Timmins, a former Chief Executive Officer ("CEO") of Timminco Limited ("Timminco") moves for an order that Timminco be ordered to comply with its obligations under a consulting agreement between Timminco and Mr. Timmins dated September 19, 1996 (the "1996 Agreement") and to remit to Mr. Timmins the monthly amounts that he claims to be entitled to under the 1996 Agreement.

[58] Counsel to Mr. Timmins also raised the issue that the disclaimer of the 1996 Agreement would objectively result in significant financial hardship to Mr. Timmins.

[59] However, Mr. Timmins did acknowledge that, if the test of whether the disclaimer of an agreement that pays a party $250,000 per year will cause "significant financial hardship to that party" depends on the individual characteristics and circumstances of that party, the disclaimer of the 1996 Agreement will not cause significant financial hardship to Mr. Timmins.

[60] I am in agreement with the submission of the Timminco Entities that the test of whether a disclaimer of an agreement will cause significant financial hardship to the counter party depends and is centered on an examination of the individual characteristics and circumstances of such counter party. Further, an objective test for "significant financial hardship" would make it difficult to debtor companies to disclaim large contracts regardless of the financial ability of the counter parties to absorb the resultant losses. It seems to me that such a result would be contrary to the purpose of principles of the CCAA.

[61] Based on the record, I am unable to conclude that the disclaimer would likely cause significant financial hardship to Mr. Timmins.

[62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

[63] For the foregoing reasons, the alternative relief sought by Mr. Timmins, to the effect that the Agreement is not to be disclaimed, is denied.

[64] The remaining outstanding issue is whether or not the disclaimer of the Agreement should be effective April 30, 2012. Counsel to Mr. Timmins takes the position that the effective date of the disclaimer should be no earlier than the date of the determination of this motion.

[65] On March 30, 2012, counsel for Timminco sent a letter to Mr. Timmins' counsel enclosing a formal notice of disclaimer which was to be effective April 30, 2012. In accordance with section 32 (2) of the CCAA, on April 13, 2012, Mr. Timmins filed his motion objecting to the disclaimer. Counsel to Mr. Timmins sought to have the motion heard in advance of April 30, but on account of scheduling issues, the motion did not proceed until June 4, 2012. Counsel to Mr. Timmins takes the position that given that the CCAA Order prohibits Mr. Timmins from ceasing to comply with his obligations under the 1996 Agreement, it is only fair that payment for such obligations should be made up until the date that the court makes its determination on this motion.

[66] The contrary position put forth by counsel to Timminco is that the Timminco Entities did not deliver a notice of disclaimer until March 30, 2012 because they were of the view that the obligations under the Agreement constitute Timminco's unsecured pre-filing obligations which

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Ehattesaht Holdings Ltd. v. Coulson Forest Products et al.,*** 2006 BCSC 1810

Date: 20061207
DocketS061816
Registry: Vancouver

Between:

Ehattesaht Holdings Ltd.

Petitioner

And

Coulson Forest Products Ltd., Hecate Logging Ltd., Maquinna Aircrane 2000 Ltd., Maquinna Forest Products Ltd.

Respondents

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Petitioner:	William E.J. Skelly, James P. Tate
Counsel for the Respondent, Coulson Forest Products Ltd.:	Frank G. Potts
Counsel for the Respondent, Hecate Logging Ltd., The Receiver, Ernst & Young Inc.:	Mary I.A. Buttery
Date and Place of Hearing:	December 1, 2006 Vancouver, B.C.

2006 BCSC 1810 (CanLII)

[12] The liquidator must act in accordance with provisions of the *BCA*. Among its duties under the *BCA* are those conferred by ss. 330(d) and (l) which provide as follows:

> 330 A liquidator must
>
> ...
>
> (d) subject to this Part, use the liquidator's own discretion in realizing the assets of the company or distributing those assets among the creditors and shareholders of the company;
>
> ...
>
> (l) dispose of the assets of the company, other than assets that are to be distributed in kind to the company's shareholders, and pay or make provision for all of the company's liabilities, ...

[13] It is settled law that a receiver may disclaim a contract in proceedings under the *CCAA*: see *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.* (2003), 13 B.C.L.R. (4th) 236, 2003 BCCA 344. The purpose of the *CCAA* is to permit a company in financial difficulty to be restructured with a view to survival. Courts have grafted large amounts of flesh on to the skeleton provided by the *CCAA*. One of the rights conferred upon the monitor in such cases, is the right to disclaim contracts. Disclaimer has the effect of converting rights under an executory contract to a right to sue for damages flowing from breach of contract. The result is that the holder of rights under an executory contract is relegated to the status of unsecured creditor to share with other unsecured creditors in the financial misfortunes of the insolvent company.

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Ville de Montréal *Appellant*

v.

Deloitte Restructuring Inc. *Respondent*

and

Alaris Royalty Corp.,
Integrated Private Debt Fund V LP,
Thornhill Investments Inc.,
Ville de Laval and
Union des municipalités du Québec
Interveners

Indexed as: Montréal (City) *v.* Deloitte Restructuring Inc.

2021 SCC 53

File No.: 39186.

2021: May 20; 2021: December 10.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Stay of creditors' rights and remedies — Claims that may be dealt with by compromise or arrangement — Compensation between debt arising before and debt arising after initial order — Quebec Voluntary Reimbursement Program — Whether claim arising from agreement entered into under Quebec Voluntary Reimbursement Program is necessarily claim that relates to debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d) of Companies' Creditors Arrangement Act — Whether supervising judge's discretion in restructuring context allows judge to stay right invoked by creditor to effect compensation between debt arising before and debt arising after initial order — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.02, 19(2)(d), 21 — Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, CQLR,

Ville de Montréal *Appelante*

c.

Restructuration Deloitte Inc. *Intimée*

et

Alaris Royalty Corp.,
Integrated Private Debt Fund V LP,
Thornhill Investments Inc.,
Ville de Laval et
Union des municipalités du Québec
Intervenantes

Répertorié : Montréal (Ville) *c.* Restructuration Deloitte Inc.

2021 CSC 53

N° du greffe : 39186.

2021 : 20 mai; 2021 : 10 décembre.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Suspension des droits et recours des créanciers — Réclamations considérées dans le cadre des transactions ou arrangements — Compensation entre une dette née avant et une dette née après l'ordonnance initiale — Programme québécois de remboursement volontaire — Une créance découlant d'une entente conclue dans le cadre du Programme québécois de remboursement volontaire constitue-t-elle nécessairement une réclamation se rapportant à une dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits aux termes de l'al. 19(2)d) de la Loi sur les arrangements avec les créanciers des compagnies? — Le pouvoir discrétionnaire dont dispose le juge surveillant dans le contexte d'une restructuration lui permet-il de suspendre le droit d'opérer compensation entre une dette née avant et une dette née après l'émission d'une ordonnance initiale qu'invoque un créancier? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.02,

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cannot readily be transposed into a context such as the one in the instant case, which instead involves the liquidation of a company's assets and contracts.

A. *Fundamental Differences Between the Two Insolvency Schemes*

[112] It is important to underscore the fundamental differences between the scheme established by the *CCAA* and the one established by the *BIA*, differences that highlight that, under the *CCAA* scheme, the mutuality of debts is maintained and supervising judges have a broad discretion that allows them to authorize pre-post compensation. I do not question the notion that these two schemes must be viewed as "an integrated body of insolvency law" and that legislative efforts to harmonize them have been going on for several decades (*Century Services*, at paras. 19-24 and 78). As I recount below, however, there remain many differences between the two schemes (Wood, at p. 337).

[113] The three principal Canadian statutes dealing with insolvency, the *CCAA*, the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), have the following main objectives: ". . . to treat the claims of creditors fairly and equitably, to protect the public interest, to create a fair, timely and cost-effective process, and to achieve a balance of benefit and cost in deciding whether to restructure or liquidate a business, maximizing enterprise value" (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10, objectives referred to with approval by the Court in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522, at para. 40). More specifically, the *CCAA*'s main objective is the financial and commercial rehabilitation of an insolvent company through the filing of a plan of arrangement with its creditors (Wood, at p. 338; B. Boucher, "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", in *JurisClasseur Québec — Collection*

été rendu dans un contexte de restructuration réelle d'une entreprise en difficultés financières, et il est difficilement transposable dans un contexte comme celui qui nous occupe, où il s'agit plutôt d'une liquidation des actifs et des contrats d'une entreprise.

A. *Les distinctions fondamentales entre les deux régimes d'insolvabilité*

[112] Il importe de souligner les différences fondamentales entre le régime établi par la *LACC* et celui établi par la *LFI*, lesquelles font ressortir, sous le régime de la *LACC*, le maintien de la réciprocité des dettes ainsi que le vaste pouvoir discrétionnaire permettant au juge surveillant d'autoriser la compensation pré-post. Je ne remets pas en doute l'idée que ces deux régimes doivent être perçus comme « un ensemble intégré de règles du droit de l'insolvabilité » et que des efforts législatifs visant à harmoniser les deux régimes ont été déployés depuis plusieurs décennies (*Century Services*, par. 19-24 et 78). Toutefois, comme nous le verrons ci-dessous, de nombreuses différences persistent entre ces deux régimes (Wood, p. 337).

[113] Les trois principales lois canadiennes en matière d'insolvabilité, c'est-à-dire la *LACC*, la *LFI* et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11 (« *LLR* »), ont comme objectifs fondamentaux : [TRADUCTION] « . . . le traitement juste et équitable des réclamations des créanciers, la protection de l'intérêt public, la création d'un processus juste, opportun et efficient, et, lors de la prise de la décision de restructurer ou de liquider une entreprise, l'établissement d'un équilibre coûts-avantages maximisant la valeur de celle-ci » (J. P. Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10, objectifs mentionnés avec approbation par la Cour dans *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522, par. 40). La *LACC* a plus particulièrement comme objectif principal de permettre à une entreprise insolvable de se rétablir financièrement et commercialement par le dépôt d'un plan d'arrangement auprès de ses créanciers (Wood, p. 338; B. Boucher, « Procédures en vertu

2021 SCC 53 (CanLII)

Droit des affaires — Faillite, insolvabilité et restructuration (loose-leaf), by S. Rousseau, ed., fasc. 14, at Nos. 2 and 8). In seeking an initial order, an insolvent company shields itself from its creditors, staying their remedies for a certain period so that all its energy can be channeled into preparing a plan of arrangement for a viable recovery (Boucher, at No. 2).

de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (feuilles mobiles), par S. Rousseau, dir., fasc. 14, nº 2 et 8). En demandant une ordonnance initiale, l'entreprise insolvable se met à l'abri de ses créanciers, suspendant ainsi leurs recours pendant une certaine période, afin de pouvoir concentrer toutes ses énergies sur la confection d'un plan d'arrangement permettant une relance viable (Boucher, nº 2).

[114] For these reasons, the scheme established by the *CCAA* is flexible and allows creative solutions to be put forward to achieve the objective mentioned above, the restructuring of a financially distressed company, in contrast to the *BIA*, which provides a set of pre-established rules (Boucher, at No. 8; Wood, at p. 337). The *CCAA* is therefore characterized as "remedial" legislation (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 500; Boucher, at No. 3).

[114] Pour ces raisons, le régime établi par la *LACC* est flexible et permet de mettre de l'avant des solutions créatives afin d'atteindre l'objectif énoncé précédemment, soit la restructuration d'une entreprise en difficultés financières, par opposition à la *LFI*, qui prévoit un ensemble de règles préétablies (Boucher, nº 8; Wood, p. 337). En tant que telle, la *LACC* est une loi qualifiée de « réparatrice » (Boucher, nº 3; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 500).

[115] The Court has found that the *CCAA*'s provisions must be interpreted expansively to enable its remedial objectives to be achieved, and in particular to allow a company to continue its activities and to avoid the social and economic losses that can result from its liquidation (*Century Services*, at para. 70). Because of the remedial scope of the *CCAA*, a "broad" discretion is also conferred on supervising judges by s. 11 of the *CCAA* (*Callidus*, at para. 48; *Century Services*, at para. 14). This section provides that a supervising judge may make "any order that [the judge] considers appropriate", although it specifies that such an order must be consistent with the restrictions set out in the *CCAA* and must be "appropriate" in light of the circumstances of each case. As this Court noted in *Callidus*, s. 11 is in a sense the "engine" of the *CCAA* (para. 48, quoting *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36). This discretion granted to supervising judges under the *CCAA* allows for the implementation of "creative and effective" solutions (*Century Services*, at para. 21, quoting Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors*

[115] La Cour a reconnu que les dispositions de la *LACC* doivent être interprétées largement afin de permettre la réalisation de ses objectifs réparateurs, notamment permettre la survie des activités de l'entreprise et éviter les pertes sociales et économiques pouvant résulter de la liquidation de cette dernière (*Century Services*, par. 70). En raison de la portée réparatrice de la *LACC*, un « vaste » pouvoir discrétionnaire est également conféré au juge surveillant par l'art. 11 de la *LACC* (*Callidus*, par. 48; *Century Services*, par. 14). Cet article prévoit qu'un juge surveillant peut rendre « toute ordonnance qu'il estime indiquée », mais précise toutefois qu'une telle ordonnance ne peut être contraire aux restrictions prévues par la *LACC* et qu'elle doit être « indiquée » au regard des circonstances de chaque affaire. La Cour a indiqué dans l'arrêt *Callidus* que l'art. 11 est en quelque sorte le « moteur » de la *LACC* (par. 48, citant *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36). Ce pouvoir discrétionnaire conféré au juge surveillant en vertu de la *LACC* permet la mise en place de solutions « créatives et efficaces » (*Century Services*, par. 21, citant Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la*

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Arrangement Act (2002), at p. 41), in recognition of the "positional advantage" gained by supervising judges, who "acquir[e] extensive knowledge and insight into the stakeholder dynamics and the business realities of [*CCAA*] proceedings" (*Callidus*, at paras. 47-48). Examples of "creative" solutions adopted by courts under the *CCAA* include "security for debtor in possession financing or super-priority charges on the debtor's assets" and the release of "claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors" (*Century Services*, at para. 62).

Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies (2002), p. 50), en reconnaissance de la « position avantageuse » du juge surveillant, lequel « acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure [fondée sur la *LACC*] » (*Callidus*, par. 47-48). À titre de solutions « créatives » retenues par les tribunaux sous le régime de la *LACC*, mentionnons la « constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur », ainsi que la libération de « tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents » (*Century Services*, par. 62).

[116] As the Court again recently recognized, the broad discretion conferred on supervising judges by s. 11 of the *CCAA* enables them to propose solutions "that respond to the circumstances of each case and 'meet contemporary business and social needs'" (*Callidus*, at para. 48, quoting *Century Services*, at para. 58). This broad discretion is unique to the *CCAA* and has no equivalent in the *BIA*, which is based instead on pre-established rules designed to apply to a range of situations. This is, therefore, one major difference between the two insolvency schemes.

[116] Comme l'a reconnu la Cour encore récemment, le vaste pouvoir discrétionnaire conféré au juge surveillant par l'art. 11 de la *LACC* permet à ce dernier de mettre de l'avant des solutions « susceptibles de répondre aux circonstances de chaque cas et de "[s'adapter] aux besoins commerciaux et sociaux contemporains" » (*Callidus*, par. 48, citant *Century Services*, par. 58). Ce vaste pouvoir discrétionnaire du juge surveillant est unique à la *LACC* et n'a pas d'équivalent dans la *LFI*, laquelle est plutôt fondée sur des règles préétablies visant à régir une gamme de situations. Il s'agit donc là d'une distinction majeure entre les deux régimes d'insolvabilité.

[117] Another major difference between these two schemes is that the *CCAA* allows a company that has obtained an initial order to continue its business activities during the restructuring or reorganization period (*Callidus*, at para. 41). The continuation of a struggling company's business activities averts "the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70) and "preserves going-concern value" (*Callidus*, at para. 46). Accordingly, when an insolvent company has recourse to the *CCAA*, it is not divested of its property in favour of a third party, unlike with the measures put in place under the *BIA* that vest the bankrupt's property in a trustee (s. 71 of the *BIA*). There is thus no loss of mutuality under

[117] Une autre différence majeure entre ces deux régimes est le fait que la *LACC* permet à une entreprise, après qu'elle a obtenu une ordonnance initiale, de poursuivre ses activités commerciales pendant la période de restructuration ou de réorganisation (*Callidus*, par. 41). La poursuite des activités commerciales de l'entreprise en difficulté évite « les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable » (*Century Services*, par. 70) et permet de « protéger sa valeur d'exploitation » (*Callidus*, par. 46). Ainsi, lorsque l'entreprise insolvable a recours à la *LACC*, elle n'est pas dessaisie de ses biens au profit d'un tiers, contrairement aux mesures mises en place en vertu de la *LFI*, suivant lesquelles le syndic obtient la

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Tab

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CITATION: Nortel Networks Corporation (Re), 2018 ONSC 6257
COURT FILE NO.: CV-09-7950-00CL
DATE: 2018-10-23

2018 ONSC 6257 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED, Applicants

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Christopher Armstrong*, for the Monitor, Ernst & Young Inc.

Scott Bomhof, for the US Debtors, Nortel Networks Inc. et al.

Jeffrey Spiegelman, for Apex Logistics

Paul McCullough, for the Ministry of the Environment, Conservation and Parks

HEARD AND DETERMINED: October 17, 2018

RELEASED: October 23, 2018

ENDORSEMENT

[1] At the conclusion of the hearing on October 17, 2018, I granted the motion with reasons to follow. These are the reasons.

[2] Ernst & Young Inc., in its capacity as monitor (the "Monitor") of the Canadian Debtors brought a motion for:

a. an order (the "MECP Belleville Settlement Order") approving the Belleville Property Settlement Agreement (MECP) dated October 10, 2018 among Her

(ii) The transaction would be beneficial to the debtor and its stakeholders generally; and

(iii) The settlement is consistent with the purpose and spirit of the CCAA (see: *Labourers Pension Fund of Central and Eastern Canada* v. *Sino-Forest Corp.*, 2013 ONSC 1078 at para. 49, leave to appeal to CA refused, 2013 ONCA 456, leave to appeal to SCC refused (2013) SCCA No. 395).

[25] The Monitor submits that both settlements will provide significant benefit to the Canadian Debtors and their stakeholders and assist in advancing these proceedings. In particular, the settlements will provide certainty in respect of the Canadian Debtors environmental liabilities by crystallizing the liabilities of NNL, which in turn will allow for the reduction of related reserves and facilitate a further distribution to creditors.

[26] Counsel to the Monitor points out that, over the past several years, the Canadian Debtors and the Monitor have worked with the MECP and other environmental stakeholders and interested parties in good faith in an attempt to reach a consensual and final resolution in respect of the Director's Orders, the ERT proceedings and the various claims asserted against NNL in the CCAA proceedings. I am satisfied that both settlements have been arrived at following the exchange of significant information in respect of the claim and following an extensive negotiation process among the parties.

[27] I am also satisfied that the Monitor has a thorough understanding of the issues involved and in such circumstances I am prepared to place significant weight on the recommendation of the Monitor in support of the settlement.

[28] The proposed form of orders provide a court ordered release of the "released parties" from any liability to any person in respect of the Belleville Property and the Brockville Property, respectively, save for:

(i) the claims that have been accepted by the Monitor under the MECP Belleville Settlement, the Brockville Settlement and the other settlements; and

(ii) any claim that is not permitted to be released pursuant to s. 5.1(2) of the CCAA or with respect to fraud on the part of any released party.

[29] The "released parties" include the Canadian Debtors, the Monitor (both in its capacity as Monitor and in its personal capacity) and each of their respective counsel and former affiliates, directors, officers, employees, agents, trustees, beneficiaries, lawyers, personal representatives and authorized representatives.

[30] I note that courts have previously approved and granted releases, in favour of third parties, in connection with court approved settlement agreements and specifically, the court has granted a release similar to the requested releases in connection with the approval of the settlement pertaining to the London Property (see *Nortel Networks Corp.,(Re)*, 2010 ONSC

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Tab

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CITATION: Aralez Pharmaceuticals Inc. (Re), 2018 ONSC 6980
COURT FILE NO.: CV-18-603054-00CL
DATE: 20181121

2018 ONSC 6980 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC., Applicants

BEFORE: S.F. Dunphy J.

COUNSEL: *Maria Konyukhova and Kathryn Esaw* for Applicants

Jeffrey Levine, for the Official Committee of Unsecured Creditors

David Bish, for Richter Advisory Group, Monitor

Danish Afroz, for Deerfield Management Company, L.P.

HEARD at Toronto: November 16, 2018

REASONS FOR DECISION

[1] This case raises for determination the always-troubling question of Key Employee Retention Plans (or "KERPs") and Key Employee Incentive Plans (or "KEIPs"). At the conclusion of the hearing. I indicated that I would be approving the proposed KERP involving three employees with reasons to follow and would take under reserve the matter of the proposed KEIP.

[2] For the reasons that follow, I have determined to approve the KEIP as well. My reasons that follow apply to both programs.

Background facts

[3] The applicants Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. brought this application under the *Companies' Creditors Arrangement Act*, R.S.C. 1990, c. C.-36 and an initial order was granted by me on August 10, 2018 with Richter Advisory Group Inc. appointed as Monitor. A number of affiliated entities in the

incentives relative to the objectives of the programs and other historical data. The Monitor's input has resulted in a number of alterations to the proposals as these have evolved. As the programs have emerged from the process, the Monitor's conclusion is that the KERP is comparable to other KERP plans this court has approved and is reasonable in the circumstances. The Monitor has concluded that the KEIP addresses the concerns raised by the Monitor, protects the interest of Canadian stakeholders and these would not be materially prejudiced by approval of the KEIP. Both recommendations are entitled to very significant weight from this court.

[34] The U.S. Trustee raised a number of concerns with the proposed KEIP which have also resulted in revisions.

[35] Finally, Deerfield has been consulted and has indicated that they take no objection to either program as they have emerged from this process. For the reasons discussed above, Deerfield's *imprimatur* carries a particularly significant degree of weight in these circumstances in terms of establishing the arm's length and market-tested nature of the two programs before me.

[36] The business judgment of Deerfield and the Board of Directors of API are entitled to significant weight. The independent and very significant input of the Monitor, A&M and the U.S. Trustee afford significant comfort that objective viewpoints have played a significant role in designing and vetting the proposals. Finally, the recommendation of the Monitor is entitled to significant weight given the unique role the Monitor plays in the Canadian restructuring process.

[37] In summary, the process followed provides a high degree of comfort that a reasonable level of objective business judgment has been brought to bear. Circumstances will not allow every case the luxury of such a thorough process. However, this process was professionally designed thoroughly run. It has appropriately generated a high level of confidence in the integrity of the outcome

(b) Necessity

[38] The design of the two programs demonstrates an appropriate regard for the criterion of necessity. They are not over-broad.

[39] Any analysis of whether a program is over-broad must take into account the nature of the business. In some respects, Aralez may be likened to a virtual pharmaceutical company in that it out-sources many functions of a traditional pharmaceutical company such as manufacturing. It thus has relatively few employees compared to its size.

[40] In designing the programs and assessing which employees to be included, an assessment was undertaken of each prospective beneficiary in terms of the ease with which they might be replaced, the degree to which they are critical to daily operations of

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Tab

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2012 QCCS 4074 (CanLII)

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-042345-120

DATE: August 24, 2012

PRESIDING: THE HONOURABLE LOUIS J. GOUIN, J.S.C.

IN THE MATTER OF THE PROPOSED PLAN OF COMPROMISE AND ARRANGEMENT OF:

AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.
and
AERO TECHNICAL US, INC.
Debtors/Petitioners
and
FTI CONSULTING CANADA INC.
Monitor
and
MTU Aero Engines GMBH
and
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
Contesting Parties
and
LUFTHANSA TECHNIK AG
and
AIR CANADA
and
CRÉDIT SUISSE AG, CAYMAN ISLAND BRANCH, as Fondé de Pouvoir
and
AVEOS HOLDING COMPANY, as Fondé de Pouvoir
and
BREOF/BELMONT BAN L.P.
and

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2012 QCCS 4074 (CanLII)

b. whether the monitor approved the process leading to the proposed sale or disposition;

c. whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors that a sale or disposition under a bankruptcy;

d. the extent to which the creditors were consulted;

e. the effects of the proposed sale or disposition on the creditors and other interested parties; and

f. whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.»

[50] As a reminder and for the purposes hereof, the Court refers to the following principles developed by the case law on this topic :

a. «44 I agree with the submission of counsel on behalf of the Applicant that the list of factors set out in s. 36(3) largely overlaps with the criteria established in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*]. *Soundair* summarized the factors the court should consider when assessing whether to approve a transaction to sell assets:

(a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.»[15]

b. «29 It is now well established in insolvency law in Canada that once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances.»[16]

c. «40 The parties have agreed to go through the bidding process. Once the bidding process is started, then there is no coming back. Or if there is coming back, it is because the process is vitiated by an illegality or non-compliance of proper procedures and not because a bidder has decided

[15] Re Terrace Bay Pulp Inc., 2012 CarswellONT 9470 (OSCJ Commercial List).
[16] Re Grant Forest Products Inc., 2010 ONSC 1846 (OSCJ-Commercial List).

to credit bid in accordance with the bidding procedures previously adopted by the Court.»[17]

d. «[73] Le rôle et l'opinion du Contrôleur et l'approbation du processus proposé par la Débitrice ne peut non plus être écarté à la légère. En l'absence d'une démonstration claire et non-équivoque d'une mauvaise interprétation des faits de sa part, le Tribunal doit faire preuve de grande prudence avant de mettre son opinion et ses conclusions de côté et d'y substituer sa propre décision.»[18]

e . «70 That being so, it is not for this Court to second-guess the commercial and business judgment properly exercised by the Petitioners and the Monitor.

71 A court will not lightly interfere with the exercise of this commercial and business judgment in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. This is certainly not a case where it should.»[19]

f. «59 The balance of interests clearly favours approval. The Monitor supports and recommends the approval sought. The recommendation of the Monitor, a court-appointed officer experienced in the insolvency field, carries great weight with the Court in any approval process. Absent some compelling, exceptional factor to the contrary, a Court should accept an applicant's proposed sale process where it is recommended by the Monitor and supported by the Stakeholders[FN6].»[20]

12. DISCUSSION

[51] Essentially, MTU is asking the Court to confirm that the Divestiture Process provided under the DPO was amended further to the CRO requesting MTU "*to put your best foot forward in the bidding*" by August 7, 2012, thereby eliminating any subsequent bidding phase, namely the Private Auction or, put differently, that August 7, 2012 was the closure of the Private Auction.

[52] The Court is satisfied, after almost two days of hearing, that the Divestiture Process has not been amended and has been followed in accordance with its term and conditions.

[53] The evidence adduced does not support the alleged unfairness in the implementation of the Divestiture Process. MTU has not been treated unfairly.

[17] Re White Birch Paper Holding Co.. 2010 QCCS 4915 (leave to appeal refused 2010 QCCA 1950).
[18] White Birch Paper Holding Company (Arrangements relatif à) 2011 QCCS 7304.
[19] Re AbitibiBowater Inc. et al., 2010 QCCS 1742.
[20] Re AbitibiBowater Inc. et al., 2009 QCCS 6460.

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Tab

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Sun Indalex Finance, LLC *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, 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 Kozierok, 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 Kozierok, 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 Kozierok, 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 Kozierok, 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 Kozierok, 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*

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(b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;

(c) there is no other alternative available to the Applicants for a going concern solution;

(d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;

(e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order . . . ; and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the

b) la marge de manœuvre que le financement DE procurerait aux requérantes aurait l'avantage de leur permettre de trouver une solution préservant la continuité de leur exploitation;

c) les requérantes ne disposent d'aucune autre solution permettant la continuité de l'exploitation;

d) vu le degré d'intégration de l'exploitation d'Indalex Canada et d'Indalex É.-U., une solution indépendante est irréaliste;

e) vu les biens fournis en garantie par Indalex É.-U., le contrôleur juge peu probable qu'il faille réaliser la garantie postérieure au début de l'instance consentie à l'égard des avances supplémentaires aux É.-U. et il est convaincu que les avantages pour les intéressés dépassent de beaucoup le risque associé à cet aspect de la garantie;

f) les avantages du financement DE pour les intéressés et les créanciers l'emportent sur tout préjudice que pourrait causer aux créanciers non garantis l'octroi d'un financement garanti par une superpriorité grevant l'actif des requérantes;

g) l'avocat du contrôleur a examiné la garantie antérieure au début de l'instance, et il appert que la garantie postérieure au début de l'instance ne placera pas les créanciers non garantis des débiteurs canadiens dans une situation pire que celle où ils se trouvaient avant l'introduction de l'instance fondée sur la *LACC*, en raison des restrictions applicables à la garantie canadienne établies dans le projet d'ordonnance initiale modifiée et reformulée . . .

h) la prépondérance des inconvénients favorise l'approbation du financement DE. [par. 9]

[59] Étant donné qu'il n'existait aucune autre solution pour préserver la continuité de l'exploitation, il est difficile d'accepter l'insinuation sans nuance de la Cour d'appel que les prêteurs DE auraient accepté que leur réclamation soit subordonnée à celles fondées sur la fiducie réputée. Rien dans la preuve présentée n'accrédite un tel scénario. Non seulement les conclusions de fait du juge chargé d'appliquer la *LACC* le contredisent, mais il a été démontré maintes et maintes fois que [TRADUCTION] « la priorité accordée au financement DE constitue un élément clé de la capacité du débiteur de tenter de conclure un arrangement » (J. P. Sarra, *Rescue! The Companies' Creditors*

2013 SCC 6 (CanLII)

lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906, at paras. 7-8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

C. *Did Indalex Have Fiduciary Obligations to the Plan Members?*

[61] The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve

Arrangement Act (2007), p. 97). La dure réalité est que l'octroi de prêts est régi par les impératifs commerciaux des prêteurs, et non par les intérêts des participants ou par les considérations de politique générale qui ont incité les législateurs provinciaux à protéger les bénéficiaires de caisses de retraite. Les motifs exposés par le juge Morawetz lorsque, le 12 juin 2009, les participants au régime des cadres ont demandé pour la première fois que leurs droits soient réservés sont révélateurs. Selon lui, toute incertitude quant à savoir si les prêteurs refuseraient de consentir des avances ou s'ils auraient priorité dans le cas où des avances seraient consenties [TRADUCTION] « n'améliorerait pas la situation ». Il a conclu qu'en l'absence de solution de rechange la réparation demandée était « nécessaire et appropriée » (2009 CanLII 37906, par. 7-8).

[60] En l'occurrence, le respect du droit provincial implique nécessairement le non-respect de l'ordonnance rendue en vertu du droit fédéral. D'un côté, le par. 30(7) de la *LSM* exige qu'une partie du produit de la vente lié aux biens décrits dans la loi provinciale soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis. D'un autre côté, l'ordonnance initiale modifiée accorde à la charge DE priorité sur [TRADUCTION] « toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre » (par. 45). Accorder priorité aux prêteurs DE relègue à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

C. *Indalex avait-elle des obligations fiduciaires envers les participants?*

[61] Le fait que la charge DE ait préséance sur la fiducie réputée ou que les intérêts des participants au régime des cadres ne soient pas protégés par la fiducie réputée ne signifient pas que les participants n'ont pas le droit de recevoir un montant prélevé

2013 SCC 6 (CanLII)

Tab

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Court of Queen's Bench of Alberta

Citation: CNOOC Petroleum North America ULC v 801 Seventh Inc, 2021 ABQB 81

Date: 20210202
Docket: 1901 06261
Registry: Calgary

2021 ABQB 81 (CanLII)

Between:

CNOOC Petroleum North America ULC

Plaintiff/Defendant by Counterclaim

- and -

801 Seventh Inc., OPTrust Office Inc., Centurion Holdings Ltd., Quantico Capital Corp., Westhills Development Corporation, Canadian Income Fund Group Inc., and TOKAY Capital Corp.

Defendants/Plaintiffs by Counterclaim

- and -

CNOOC Limited

Defendant by Counterclaim

Decision
of the
Honourable Madam Justice N. Dilts

Introduction

[1] Questioning of the Defendants/Plaintiffs by Counterclaim 801 Seventh Inc. ("801" or "Landlord") and OPTrust Office Inc., Centurion Holdings Ltd., Quantico Capital Corp., Westhills Development Corporation, Canadian Income Fund Group Inc., and TOKAY Capital Corp. (the "Beneficial Owners") by CNOOC Petroleum North America ULC ("CNOOC NA") and CNOOC Limited ("CNOOC Limited") is underway and is being undertaken pursuant to a complex litigation plan. There is a material disagreement between the parties as to the scope of

[50] CNOOC NA seeks the Beneficial Owners' internal records and working papers relating to all valuations obtained regarding the Property, including instructions to appraisers, related correspondence, and internal discussion or analysis. It also seeks to question the Beneficial Owners on how they have used the appraisals to assign value for internal financial and accounting purposes. CNOOC NA says how the Property has been recorded in the financial statements of the Beneficial Owners is a marker for the value of the Property at various points in time and is therefore relevant to the loss of value claim.

[51] I agree with 801 and the Beneficial Owners that the historic appraisals are of limited value, if any, to assist in assessing a loss of value claim. The ***Edmonton Regional Airports*** case is an example of the limited value of appraisals that do not reflect the market conditions at the times relevant to the litigation. As already noted, the value of the Property will be determined in relation to market conditions at the material points in time: the marketability of the property, the demand for commercial real estate, and macro economic and market influences. It will be determined by reference to expert evidence. There is no evidence before me that any expert opinion will be based on or influenced by historic appraisals from as many as six years prior to the date of the alleged breach. I share the concern expressed by 801 and the Beneficial Owners that production of valuations relating to points in time not relevant in this Action will promote unnecessary and unhelpful inquiry.

[52] Moreover, how the Beneficial Owners together or independently used appraisals from 2013 to 2017 to record the value of the Property in their financial or accounting records has no relevance to the question of a loss in value of the Property for the time period in issue in this litigation, being the period immediately prior to the alleged breach in May 2019 and following. CNOOC NA's application as it relates to production and questioning into the area of historic appraisals is denied.

Historic Operating Expenses

[53] The issue of operating expenses arises in two ways in this Action. First, CNOOC NA alleges that it overpaid variable operating expenses after it vacated, partially or wholly, the Property in 2019. Second, 801 and the Beneficial Owners seek to recover the monthly operating expenses payable under the Lease to the end of the term of the Lease. Within this framework, CNOOC NA asks for detailed disclosure of the operating expenses under the Lease from 2013 onward, including the back up data showing the vendors that provided service, the charges for those services and how those charges were apportioned by the Landlord. That information relates to cleaning, repairs and maintenance, utilities, security, insurance, general and administrative expenses, property taxes and management fees relating to the Property. It says this detailed information year by year is needed for an expert to form a factual foundation to express an opinion on future variable operating costs associated with the Property.

[54] 801 and the Beneficial Owners point to the fact that under the Lease, CNOOC NA was provided the opportunity to examine the detail underlying past operating expenses. They say that opportunity was CNOOC NA's exclusive opportunity to challenge those expenses or the allocation of those expenses. They also say that the opportunity to challenge those expenses or allocations closed when CNOOC NA's audit window closed. 801 and the Beneficial Owners maintain that any inquiry into the detail underlying the annual operating expenses for 2013, 2014, 2015, 2016 is now closed. Moreover, they say the pleadings do not challenge the accuracy

2021 ABQB 81 (CanLII)

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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

2020 ABCA 178 (CanLII)

Between:

Bellatrix Exploration Ltd.

Applicant
(Appellant)

- and -

BP Canada Energy Group ULC

Respondent
(Respondent)

- and -

Borden Ladner Gervais LLP

Interested Party
(Monitor)

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

Application for Permission to Appeal

The previous appellate decisions that considered the meaning of "eligible financial contract" did so in the context of prior legislation, which contained different language and referred to "forward commodity contracts": see *Blue Range Resource Corp (Re)*, 2000 ABCA 239*; Re Androscoggin Energy LLC* (2005), 195 OAC 51. The *Calpine* decision that was considered by the *CCAA* judge also predated the 2007 amendments.

[22] Unresolved issues of statutory interpretation are relevant when considering this factor: *Re Kerr Interior Systems Ltd*, 2008 ABCA 291 at para 9; *Blue Range 1999* at para 5.

[23] The disclaimer of contracts can have a significant impact on *CCAA* proceedings and is a significant issue in insolvency practice generally. I note that an identical definition of "eligible financial contracts" appears in the *Bankruptcy and Insolvency Act* and the *Winding-Up and Restructuring Act*, as well as the *CCAA*.

[24] The lack of appellate authority on the interpretation of the provisions introduced in 2007 that identify when contracts may be exempt from disclaimer in *CCAA* proceedings supports granting leave.

2) Significance to the action

[25] This factor involves consideration of whether the appeal is significant both to the parties raising the issue and to the *CCAA* proceedings as a whole: *Gauntlet Energy Corporation (Re)*, 2004 ABCA 20, 49 C.B.R. (4th) 225 at para 11.

[26] The value or cost of the disclaimer, depending upon which party's perspective this is viewed from, is estimated at $14.5 million. This represents approximately 10% of the applicant's annualized revenue. Disclaiming the Contract would reduce the applicant's projected annualized loss by 50%. This could affect the options for compromise or arrangement that are available in the *CCAA* proceeding.

[27] The determination of whether the Contract is an eligible financial contract that can be disclaimed is, accordingly, significant to the *CCAA* proceedings.

3) Merits of the appeal

[28] The applicant must demonstrate that the appeal is sufficiently meritorious "to justify delaying the ultimate disposition of the issue under review": *Mudrick Capital Management LP v Lightstream Resources Ltd.*, 2016 ABCA 401 at para 51. The standard is not onerous; the appeal must be arguable and not frivolous.

[29] I am satisfied that the applicant has met this threshold.

2020 ABCA 178 (CanLII)

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In the Court of Appeal of Alberta

Citation: Bellatrix Exploration Ltd v BP Canada Energy Group ULC, 2021 ABCA 148

Date: 20210429
Docket: 2001-0039AC
Registry: Calgary

2021 ABCA 148 (CanLII)

Between:

Bellatrix Exploration Ltd.

Appellant

- and -

BP Canada Energy Group ULC

Respondent

- and -

PricewaterhouseCoopers Inc. in its capacity as the Court Appointed Monitor of Bellatrix Exploration Ltd.

Respondent
(Monitor)

Corrected judgment: A corrigendum was issued on April 30, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Jo'Anne Strekaf
The Honourable Madam Justice Jolaine Antonio

[6] The *CCAA* judge concluded that the GasEDI Contract qualified as an eligible financial contract that was statutorily exempt from disclaimer for purposes of the *CCAA* proceedings: *Bellatrix Exploration Ltd, Re*, 2020 CarswellAlta 350, [2020] AJ No 329 (Decision).

[7] Bellatrix's application for leave to appeal the Decision to this Court was granted: *Bellatrix Exploration Ltd v BP Canada Energy Group ULC*, 2020 ABCA 178. The appeal was argued in October 2020 and the decision reserved.

[8] In the course of the continuing *CCAA* proceedings, Bellatrix's assets were sold to a third party. An order granted in May 2020 authorized the bulk of the sale proceeds to be distributed to Bellatrix's first secured creditors (First Lien Lenders) in partial satisfaction of their claims. Certain funds were held back, including funds with respect to BP's disputed claim. A judge in the *CCAA* proceedings was asked to determine which parties were entitled to the funds that had been held back - the First Lien Lenders or BP. In a decision rendered on December 22, 2020, she concluded that the First Lien Lenders were entitled to those funds: *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809. Leave to appeal to this Court was denied: *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85.

[9] The practical result of the December 22, 2020 decision is that no distributions will be made to BP in the *CCAA* proceedings. Accordingly, this appeal has been rendered moot.

[10] As was noted by the Supreme Court in the well-known case of *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353, a matter is moot:

> … when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties… This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

[11] A court has discretion to hear a matter that is moot in appropriate circumstances. The factors considered include:

- the presence of an adversarial relationship;
- concerns relating to judicial economy;
- the importance of the question;
- whether the issue is "capable of repetition, yet evasive of review" (*Borowski* at p 345)
- the court's proper law-making function.

2021 ABCA 148 (CanLII)

2021 ABCA 148 (CanLII)

[12] There are two main issues on this appeal. The first issue involves the interpretation of the phrase "eligible financial contract" and, in particular, the phrases "financial agreement", "derivatives agreement", and "the subject of recurrent dealings in the over-the-counter commodities market", as contained in the *Regulations*. This language was introduced in 2007 when the *CCAA* was amended and the *Regulations* passed and has yet to considered by an appellate court. Previous appellate decisions, relied upon by the *CCAA* judge in the Decision, considered the issue in the context of prior legislation, which used different language and referred to "forward commodity contracts": see *Blue Range Resource Corp (Re)*, 2000 ABCA 239; *Re Androscoggin Energy LLC* (2005), 2005 CanLII 3581, 195 OAC 51 (ONCA).

[13] The second issue on this appeal is whether the GasEDI Contract, on the evidence before the court, qualifies as an "eligible financial contract".

[14] While the appeal raises important questions of statutory interpretation as to the meaning of the phrase "eligible financial contract" for the purposes of the *CCAA* and *Regulations*, that issue is not evasive of review. In our view, this issue would benefit from being fully litigated on a fulsome evidentiary record in the context of a live controversy, instead of being determined on the record before us in a matter that has become moot.

Conclusion

[15] The appeal is accordingly dismissed on the basis of mootness.

Appeal heard on October 22, 2020

Memorandum filed at Calgary, Alberta
this 29th day of April, 2021

"Strekaf J.A."

Authorized to sign for: Rowbotham J.A.

"Strekaf J.A."

Strekaf J.A.

"Strekaf J.A."

Authorized to sign for: Antonio J.A.

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Attorney General of Quebec *Appellant*

v.

Nancy Forget *Respondent*

and

Office de la langue française *Mis en cause*

and

Corporation professionnelle des infirmiers et infirmières auxiliaires du Québec *Mis en cause*

INDEXED AS: FORGET v. QUEBEC (ATTORNEY GENERAL)

File No.: 19091.

1987: December 14; 1988: September 1.

Present: Dickson C.J. and Beetz, Estey*, McIntyre, Lamer, Wilson, Le Dain, La Forest and L'Heureux-Dubé JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Appeal — Moot issue — Respondent unable to obtain remedy sought whatever outcome of appeal — Whether issue moot — Whether issue raised sufficiently important for Court to rule on its merits.

Administrative law — Regulations — Discrimination — Subdelegation — Knowledge of French necessary to obtain a permit from a professional corporation — Regulations creating presumption of appropriate knowledge of French for candidates who have taken three years of instruction in French at secondary level or later — Persons unable to benefit from the presumption must pass a French test prepared by a committee — Whether Regulations discriminatory and contrary to s. 10 of the Charter of human rights and freedoms — Whether Regulations discriminatory from an administrative standpoint — Whether Regulations contain unauthorized subdelegation of powers — Charter of the French language, R.S.Q. 1977, c. C-11, ss. 35, 114(d) — Regulation respecting the knowledge of the official language necessary to obtain a permit from a professional corporation, (1977) 109 G.O. II 4627, ss. 2(a), 3.

* Estey J. took no part in the judgment.

Le procureur général du Québec *Appelant*

c.

Nancy Forget *Intimée*

et

L'Office de la langue française *Mis en cause*

et

La Corporation professionnelle des infirmiers et infirmières auxiliaires du Québec *Mise en cause*

RÉPERTORIÉ: FORGET c. QUÉBEC (PROCUREUR GÉNÉRAL)

N° du greffe: 19091.

1987: 14 décembre; 1988: 1 septembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey*, McIntyre, Lamer, Wilson, Le Dain, La Forest et L'Heureux-Dubé.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Appel — Question théorique — Impossibilité pour l'intimée d'obtenir la réparation demandée peu importe l'issue du pourvoi — La question est-elle théorique? — La question soulevée est-elle suffisamment importante pour que la Cour se prononce sur le fond du litige?

Droit administratif — Règlement — Discrimination — Sous-délégation — Connaissance du français nécessaire pour obtenir permis d'un ordre professionnel — Règlement établissant une présomption de connaissance appropriée de la langue française pour les personnes ayant suivi trois années d'enseignement en français à compter du niveau secondaire — Obligation pour les personnes ne pouvant se prévaloir de la présomption de réussir un examen de français préparé par un comité — Le règlement est-il discriminatoire et incompatible avec l'art. 10 de la Charte des droits et libertés de la personne? — Le règlement est-il discriminatoire au sens du droit administratif? — Le règlement comporte-t-il une sous-délégation illégale de pouvoirs — Charte de la langue française, L.R.Q. 1977, chap. C-11, art. 35, 114d) — Règlement relatif à la connaissance de la langue officielle nécessaire pour l'obtention d'un permis d'un ordre professionnel, (1977) 109 G.O. II 4627, art. 2a), 3.

* Le juge Estey n'a pas pris part au jugement.

1988 CanLII 51 (SCC)

Although I am not suggesting that this list is exhaustive, the fact remains that the case before this Court does not in any way fall within the grounds on which this Court could depart from the general rule that, even of its own motion, the Court will refuse to make a ruling when there is no longer any issue and the question is purely academic.

In my opinion a judgment which is of great relevance here is that of the House of Lords in *Sun Life Assurance Co. of Canada v. Jervis*, *supra*, in which Viscount Simon, L.C., said (at pp. 113-14):

My Lords, in my opinion, the House should decline to hear this appeal on the ground that there is no issue before us to be decided between the parties. The difficulty is that the terms put on the appellants by the Court of Appeal are such as to make it a matter of complete indifference to the respondent whether the appellants win or lose. The respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties. What is sometimes called a "friendly action" is not necessarily open to this objection, either in the first court or on appeal, for the respective parties in such an action are arguing for different results and the winner gains something which he would not gain if he lost, but the objection here is that, if the appeal fails, the respondent gains nothing at all from his success.

The appeal has become irrelevant and the question purely academic given the application of these principles to the case at bar and in light of the fact that here, as in the case above, there is no issue before the Court to be decided between the parties. As there is no important point of law to be decided which would be in the general public interest or in

Quoique je ne prétende pas que cette liste soit exhaustive, il n'en reste pas moins que l'affaire dont cette Cour est saisie n'entre aucunement dans le cadre des motifs pouvant inciter cette Cour à écarter la règle générale qui veut que, même *proprio motu*, la Cour refusera de se prononcer lorsque l'enjeu du débat est sans objet et la question purement académique.

À mon avis s'applique ici avec beaucoup d'à propos la décision de la Chambre des lords dans l'arrêt *Sun Life Assurance Co. of Canada v. Jervis*, précité, où le vicomte Simon, lord chancelier, disait (aux pp. 113 et 114):

[TRADUCTION] Vos Seigneuries, j'estime que nous devrions refuser d'entendre cet appel parce qu'il ne nous saisit d'aucune question à trancher en ce qui concerne les parties au litige. La difficulté vient de ce que les conditions imposées aux appelants par la Cour d'appel font qu'il est parfaitement indifférent à l'intimé que les appelants obtiennent gain de cause ou qu'ils soient déboutés. Dans les deux cas, la situation de l'intimé sera exactement la même. Il n'a plus rien à gagner parce qu'il a déjà obtenu tout ce qu'il était possible de lui accorder et, quelle que soit l'issue de l'appel, on ne saurait l'en priver. À mon avis, cette Chambre exercerait mal sa compétence en matière d'appel si, en l'espèce, elle s'attardait sur une question purement théorique dont la réponse ne peut avoir aucun effet sur l'intimé. Si cette Chambre décidait de se prononcer sur cette question, elle ne se trouverait pas à statuer sur un litige en cours entre les parties; elle ne ferait en réalité qu'exprimer son opinion sur une énigme juridique que l'appelante espère voir résolue en sa faveur sans rien changer toutefois à la situation des parties. Or, le type d'action qu'on appelle parfois «action amicale» ne donne pas nécessairement prise à cette objection, que ce soit en première instance ou en appel, car les parties dans ce cas-là visent à obtenir des résultats différents et la partie qui obtient gain de cause reçoit quelque chose qu'elle n'aurait pas eu si elle avait succombé. En l'espèce, par contre, on peut objecter que, au cas où l'appel serait rejeté, le succès de l'intimé ne lui rapporterait absolument rien.

Appliquant ces principes en l'instance, compte tenu qu'ici comme là le débat qu'on nous propose est devenu sans objet et la question purement académique, en l'absence de question de droit importante qu'il faudrait trancher dans l'intérêt public général ou pour la bonne administration de la justice, j'estime qu'il n'y a pas lieu pour cette

1988 CanLII 51 (SCC)

Tab

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Action No. 2501-18462
E-File Name: EVK25CANACOL
Appeal No._____

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

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

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF CANACOL ENERGY LTD., 2654044 ALBERTA LTD., CANACOL ENERGY ULC, 2498003 ALBERTA ULC, et al

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P R O C E E D I N G S

Edmonton, Alberta
December 11, 2025

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

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December 11, 2025	Afternoon Session
The Honourable Justice D. Mah (remote appearance)	Court of King's Bench of Alberta
C.P. Prophet (remote appearance)	For Canacol Energy Ltd., 2654044 Alberta Ltd., Canacol Energy ULC, 2498003 Alberta ULC, Cantana Energy GmbH, CNE Oil & Gas, S.R.L, Canacol Energy Colombia S.A.S., Shona Holding GmbH, CNE Energy S.A.S. and CNE Oil & Gas S.A.S.
S. Gabor (remote appearance)	For Canacol Energy Ltd., 2654044 Alberta Ltd., Canacol Energy ULC, 2498003 Alberta ULC, Cantana Energy GmbH, CNE Oil & Gas, S.R.L, Canacol Energy Colombia S.A.S., Shona Holding GmbH, CNE Energy S.A.S. and CNE Oil & Gas S.A.S.
K. Yurkovich (remote appearance)	For Canacol Energy Ltd., 2654044 Alberta Ltd., Canacol Energy ULC, 2498003 Alberta ULC, Cantana Energy GmbH, CNE Oil & Gas, S.R.L, Canacol Energy Colombia S.A.S., Shona Holding GmbH, CNE Energy S.A.S. and CNE Oil & Gas S.A.S.
C. Brunet (remote appearance)	For Canacol Energy Ltd., 2654044 Alberta Ltd., Canacol Energy ULC, 2498003 Alberta ULC, Cantana Energy GmbH, CNE Oil & Gas, S.R.L, Canacol Energy Colombia S.A.S., Shona Holding GmbH, CNE Energy S.A.S. and CNE Oil & Gas S.A.S.
E.S. Dushenski (remote appearance)	For Citibank, National Association
A.C. Maerov (remote appearance)	For Citibank, National Association
J. Levine (remote appearance)	For Citibank, National Association
J.L. Oliver (remote appearance)	For the Ad Hoc Committee of Senior Noteholders
K.J. Bourassa (remote appearance)	For Agents on the Revolving Credit Facility
J. Willis (remote appearance)	For Agents on the Revolving Credit Facility
G.H. Finlayson (remote appearance)	For the Board of Directors of Canacol Energy Ltd.

M. Cressatti (remote appearance)	For the Board of Directors of Canacol Energy Ltd.
J. Pasquariello (remote appearance)	For Macquarie Bank Ltd.
E. Axell (remote appearance)	For Macquarie Bank Ltd.
R. Chadwick (remote appearance)	For Macquarie Bank Ltd.
R.I. Thornton (remote appearance)	For NG Energy
G.F. Body (remote appearance)	For Justice Canada, Canada Revenue Agency
R.S. Sahni (remote appearance)	For the Monitors, KPMG Inc.
K. Forbes (remote appearance)	For the Monitors, KPMG Inc.
K.J. Meyer (remote appearance)	For the Monitors, KPMG Inc.
E. Buhendwa	Court Clerk
Z. Wong	Court Clerk

THE COURT: Good afternoon, everyone. I just want to cast my eyes over the array here and make sure that everyone that should be here is here. So I see Mr. Prophet, I see Ms. Meyer.

Okay, I am looking for someone from Mr. Pasquariello's firm. Oh I see Mr. Pasquariello there. Okay, great.

Is there someone here from Cassels?

MR. PROPHET: Mr. Oliver's here, Sir.

THE COURT: Mr. Oliver, okay.

MR. PROPHET: Thank you.

THE COURT: That is great. All right, I think we are all here. So I am going to start in a moment. I will just let you know that this will likely go on for about 20 minutes.

MS. MEYER: Justice Mah, it's Kelsey Meyer from Bennett Jones on behalf of the Monitor.

THE COURT: Yes.

MS. MEYER: I did want to just give you an update with respect to the US proceeding which was heard this morning.

THE COURT: Okay.

MS. MEYER: This morning, the US Bankruptcy Court heard the motion for foreign recognition of these proceedings in the US and granted that motion, there being no objections to it, and the Judge held particularly that Canada is the centre of main interest for all of the debtor entities as part of his decision.

THE COURT: Thank you.

MS. MEYER: Thank you.

Decision (Stay Extension and DIP Loan)

THE COURT: Just give me a moment to set up. All right, this decision comes after a rather spirited hearing before me yesterday concerning a stay extension and approval of a DIP loan and charge under the *CCAA*.

The applicant is Canacol Group, an international group of companies engaged in oil and gas exploration and production with a headquarters in Calgary, operations in Columbia and financing through New York. Canacol Energy Ltd. and its associated companies comprise Canacol Group. I will refer to the group as Canacol, the entities under *CCAA* protection in these proceedings, throughout these reasons.

Canacol obtained an initial order from Justice Johnston on November 18th, 2025 and an amended and restated initial order from Justice Bourque on November 8th, 2025. Under the latter, the stay is set to expire on December 18th, 2025. Aside from stay extension to February 6th, 2026, Canacol also seeks approval of a DIP loan in charge with respect to proposed interim financing from what was called the ad hoc bond holder group.

This DIP facility contemplates DIP funding to a maximum of $67 million US comprised of an initial advance, referred to as tranche A, of $15 million US and a subsequent advance, tranche B, of $30 million US. Tranche B contemplates renewal or replacement of certain lapsing letters of credit up to $20 million US. There is also a Tranche C which contemplates new letters of credit up to $2 million.

Any DIP loan order granted by this Court requires confirmation in the US Court and at least with respect to Tranche B, recognition in Columbia. The date for the US application in the Southern District of New York is December 18th, which date has already been procured and I was just updated by Ms. Meyer that the motion for foreign recognition was heard and granted this morning. Tranche A requires a commitment fee payable to the DIP lender of 5 percent of the maximum commitment amount in any event.

Canacol's senior lender, Macquarie Bank, opposes the DIP loan part of the application on several grounds: That the DIP solicitation process was unduly rushed and flawed given that the priming charge, in its view, is contrary to Columbian law. Approval by the Alberta Court would set a negative and far-reaching precedent with implications for international comity. Approval would cause uncertainty in the *CCAA* proceedings. Approval would prejudice Macquarie as senior secured lender and there is something better out there to help Canacol in its current situation.

Macquarie asked for an adjournment of the application so that this -- something different might be worked out, and also to ensure procedural fairness in this application because materials were late breaking and Macquarie Bank has all kinds of factual questions which it says needs to be answered. Macquarie, alternatively, opposes the DIP loan and charge application on its merits. Macquarie is owed $37.5 million more or less and is the first position secured creditor.

The application for DIP loan approval was supported by the ad hoc committee of senior noteholders, the proposed DIP lender, as well as Canacol's Board of Directors, and the RFC lender. The ad hoc committee represents 75 percent of the senior unsecured noteholders who, in aggregate, hold $300 million in unsecured debt, while the other creditor is a syndicate lender holding $200 million in unsecured debt.

All of the application is supported by the Monitor, who of course is a Court appointed officer, and who provided his rationale for support in its second report which was filed with the Court. The application's proponent, Canacol, the Monitor, and the other parties who appeared by counsel and supported the DIP loan, all oppose the adjournment. Counsel for Canacol and the Monitor suggest that Macquarie is engaging in a campaign of disruption motivated only by the desire to get paid before anyone else and soon.

The main question raised by Macquarie is what is the rush? And I need to give some background to the question of how this rush has occurred. First, I should say that this Court was satisified in the person of Justice Johnston that the *CCAA* applied in Canacol's circumstances, and that the initial order should be granted in the first place. Then Justice Bourque ordered the stay extended to December 18th in a comeback hearing that gave rise to the ARIO.

During the hearing before Justice Bourque, the DIP selection process was modified, that is it was extended so that the approval application could be presented before me yesterday. Due to the stay expiry on December 18th, Canacol had first proposed earlier dates in December, December 16th of 17th, as the date for this application. As it turned out, there was no available court time in either Edmonton or Calgary for the rest of the calendar year.

It was because another matter had fallen off yesterday's docket that the hearing date of December 10th was offered and counsel for Canacol seized that date.

Given the short timeframe, filing deadlines for the application were required to be varied. I directed that the applicant's materials be filed on December 5th and response materials by December 8th. Counsel for the Monitor took it upon themselves but did advise me and other parties that its material would be filed thereafter but before the hearing, in accordance with its practice. Canacol also felt behooved to file a late reply affidavit and Amended Notice of application.

When I read Macquarie's materials yesterday, I became concerned that the Court might have put the parties in a difficult position because of unavailability of court time and short filing deadlines. I tried to broker a solution of sorts by offering a date later in the first week of January, at least for the DIP portion of the application. Macquarie's counsel was the only taker for that suggestion. In the result, because I felt the adjournment request and the merits of the DIP fund application were inextricable, I decided to hear both at the same time.

Now I should say that no one ever plans on having a liquidity crisis. I imagine that initiation of *CCAA* proceedings is a last resort measure in the face of dire corporate fortunes that are finally deemed by the company unlikely to change.

In any event, Justice Johnston saw fit to grant the initial order on November 18th and I did not go behind that. Similarly, Justice Bourque saw fit to grant the amended and restated initial order on November 28th, and I do not question that. It did result in the DIP solicitation process following an extremely truncated timeline. Some of the questions that faced me is whether the short length of the timeline is unfair to and prejudices Macquarie.

Argument in the application focussed primarily on the propriety of the DIP fund proposal, particularly with respect to the priming charge. I did not hear much argument on the stay extension itself, although DIP loan approval and stay extension go hand in glove. For reasons that I hope become apparent, I am going to deal with the DIP fund application first and then move to the stay extension, although intuitively it seems like it should go the other way around. As I said, the adjournment application and consideration of the merits of the DIP loan and charge request are dealt with together.

Canacol and the Monitor said that the main reason for the DIP loan is exigency. Canacol contemplates a double track approach within this restructuring, a plan of arrangement, or a sales and investment solicitation process, or some combination. It cannot proceed with either normal operations in the meantime or restructuring efforts without injection of cash flow from a DIP lender.

The Monitor provided an updated cashflow statement for the period November 30, 2025 to February 7th, 2026, which assumes the DIP loan prepared as of December 9th. Canacol is schedule to run out of cash more or less as of January 10th, 2026. The Monitor also provided a brief variance report at appendix G of the second report. I understood from Monitor's counsel that the Monitor became involved only shortly before the initial order itself and Canacol's financial state, from the Monitor's perspective, continues to evolve as more information becomes known and events develop. I accept this explanation.

Canacol and the Monitor both say that without the DIP loan, the margin is virtually eliminated. Therefore, Canacol's stands in danger of what has been described as an orderly wind down in Columbia should the security be enforced, along with, as it was explained to me, sudden supply disruption to customers, basically the Government of Columbia, and subsequent disruption to the electrical grid and for energy end users in that country.

Canacol's counsel says in this case, the most important or at least controversial of the statutory factors governing whether DIP funding should be approved under section 11.2(4) is the existence or not of material prejudice to any creditor. In this case, Macquarie was the only one before the Court alleging such prejudice.

Macquarie's objections, whether contextually as part of an adjournment application or in opposition outright to the merits of the proposed DIP fund, are grouped as follows: Procedural prejudice; substantive prejudice; the unlikelihood of Columbian approval; uncertainty and disfunction within the *CCAA* process; and there is a better way to help Canacol, we just have to find it.

So I will start with the procedural prejudice. It takes two forums. First, the rushed manner in which the DIP solicitation process unfolded, not giving Macquarie enough time to meaningfully respond with its own DIP plan. And second, the compacted timeframe for Court approval of this DIP loan, which means that Macquarie has not had the opportunity to meaningfully question the need for a priming charge for the DIP or the DIP at all.

Details of the DIP selection process were set out in the Monitor's first report which was before Justice Bourque. During or as a result of that hearing, the deadline for responding with a DIP funding proposal was extended to December 5th. The whole of the selection process with updates is described at paragraphs 21 to 39 of the second report.

The Monitor gives an opinion that those parties interested in the process had access to the same information and the same opportunity to generate a compliant proposal. I appreciate that the process was truncated in terms of timeline. However, in the circumstances, there is a limited universe from which a DIP lender might emerge. I suspect that the entire universe was likely represented before the Court yesterday.

I am not satisfied that Macquarie was put to any disadvantage compared to any other person interested in submitting a DIP fund proposal or with the interim lender who is now before the Court. As the Monitor says, everyone had the same information, access to the data room, and the same opportunity. The ad hoc committee submitted an acceptable compliant proposal. Macquarie, after two cracks, did not.

With regard to the other form of procedural prejudice, I accept that there has been scant time for testing the information put forward by the Monitor or questioning on affidavits. Counsel differ about whether such questioning could have taken place. Here, I say the Court must repose a certain degree of confidence in what the Monitor says as a Court appointed officer. Macquarie may have questions. It could have and should have asked those questions while the DIP selection process was underway. There was nothing preventing Macquarie from asking questions between November 28th and December 10th if it needed clarification about some of the financial information.

I accept what counsel say about the nature of *CCAA* proceedings, how opportunities open and close and decisions must sometimes be made on the fly, as it were. This was described by Canacol counsel as insolvency proceedings unfolding in real time. So there are times when the Court must be called upon to choose between competing policy objectives.

One set of such objectives would be that which underlies the *CCAA*, that is avoiding the social and economic cost of large corporate failure and allowing a large, distressed company breathing space to emerge from financial distress with a reasonable plan supervised by the Court.

The competing objective here are the procedural fairness concerns in that, as Macquarie says, it does not have time to question the information presented by Canacol and the Monitor which as a party in this litigation, it says it has a right to do in order to put a better record before the Court for a decision.

I cannot do both here. The reason I cannot do both is because January 10th, 2026, according to the most recent cash flow statement, represents a hard stop. If I adjourn to the latter part of the first week of January, Canacol misses its December 18th date with the Court in the SDNY. It seems unlikely that US Court approval could be achieved in 1 or 2 days after a hearing by this Court during the latter part of the first week of January. It is just too close.

So what I need to consider is really what underlies Macquarie's concern about procedural fairness and its desire to delay so that Macquarie can, for example, conduct questioning or otherwise put the Monitor's figures to the test. I think the Monitor's counsel asked a fair question when she said: (as read)

> An adjournment to what end? What is the purpose of an adjournment? What does Macquarie propose to achieve? Is it going to come up with a better proposal? What is the real objective here?

Canacol's counsel pointed me to paragraph 62 of Mr. Picard's (phonetic) affidavit where he says, I don't mind a defund if it second to Macquarie's security. The Monitor's counsel pointed me to the November 24th, 2025 letter from Macquarie's counsel to Canacol's counsel and the Monitor's counsel which, at the top of page 2, reiterates Macquarie's position that any DIP funding should be secondary to its security.

Macquarie's counsel argued before me that an alternative structure which Macquarie would accept is either having the DIP fund in a junior position or requiring the DIP loan to pay out the Macquarie loan. The upshot of all of this is that Macquarie seeks to be paid out right away and be done with Canacol. That is a completely understandable position. In business and in litigation, the prime motivation is self-interest. There is nothing wrong with that.

However, it is not compatible with the *CCAA* objective of fair treatment for all creditors and stakeholders. Once the *CCAA* is invoked, as it has been here, broader interests come into play. Even the interests of third parties, who may be residents of another country but are end users of Canacol's output, they are part of the equation.

I have been told by counsel for the senior noteholders, who propose to be the DIP lender, that his client will not accept a secondary position. That is also a reasonable position to take and entirely consistent with what I say is the Supreme Court of Canada's view of priming charges for DIP lenders, as expressed in the *Canada North* case where the Court says they, being priming charges, are critical to encourage new investment in the company as it undergoes reorganisation.

In that vein, here the DIP selection process was concluded. One DIP fund proposal was acceptable to Canacol and the Monitor and is now presented. Neither of Macquarie attempts at making a proposal were acceptable, nor compliant, and there is only one proposal before the Court. Further, I do not accept Macquarie's attempt to undermine the legitimacy of the latest cash flow rejection. I do accept both Canacol's and the Monitor's explanation that ongoing capital expenditure is an innate feature of the gas extraction industry.

Therefore, in my view, the slim margins shown in the latest cash flow statement are real and show an actual liquidity crisis in the absence of an injunction of funds. Which leads me to say that there is no procedural prejudice other than a desire to delay so as to take

Canacol to the brink so that Canacol, the Monitor, and the senior noteholders will change their mind about having the DIP fund going second rather than first or paying out Macquarie outright.

So this takes me to the question of substantive prejudice. The substantive prejudice argued also takes two forms. The first is that Macquarie will lose its priority position to the DIP lender. This is where the debate about valuation took place. After reading the transcript, I saw that the same issue was argued before and decided by Justice Bourque on November 28th and was then relitigated before me.

Whatever valuation measure is used, Canacol has sufficient assets to satisfy all priming charges and Macquarie's loan facility and depending on which valuation scenario is accepted, maybe even some or all of the unsecured lenders at present. Further, I accept as best evidence the reserve value found in Exhibit A to Mr. Bednar's December 8th, 2025 affidavit, even if only taking into account the value of proven reserves. But even the book value or the proxy value of current bond price adequately covers Macquarie's position.

Further, Macquarie taking a subordinate position to the priming charge is the result of the DIP lender agreeing to take on the risk of advancing additional and new funding to an enterprise in distress. As I already said, that risk is undertaken for the expressed purpose of advancing the public policy objectives under the *CCAA* and the price of that risk, as recognised by the Supreme Court of Canada, and that price is the granting of the priming charge.

Macquarie says that there is no risk to DIP lender in going second, but that is an argument that cuts both ways. It is equally an argument against Macquarie maintaining first position. That Macquarie does nothing extra to promote Canacol's reorganisation efforts, means that it can and should occupy second position in the *CCAA* proceedings. I was given no reason to do otherwise. I conclude therefore that there is no substantive prejudice in loss of priority that accrues to Macquarie if the DIP loan and charge are approved.

The second form of substantial prejudice falls along the same line as Macquarie's argument about the unlikelihood of Columbian approval of the priming charge for the DIP lender. Macquarie says that it has rights under Columbian law. By approving the DIP loan in charge, Macquarie says I would be stripping Macquarie of its rights to be paid out first or to receive additional security which comes under Columbian law.

Further, given Mr. Valez's (phonetic) opinion, which is uncontradicted, the chances that a priming charge for the second tranche of $30 million is approved in Columbia, Macquarie says, is virtually zero. I have read Mr. Valez's opinion. I agree with Canacol's counsel that Mr. Valez does not say that outright. His discussion of Columbian insolvency law does

leave room for the possibility of a priming charge to a DIP lender.

Moreover, I agree that whether Macquarie's interpretation of Columbia law is correct or not is not a proper question for this Court. In effect, although counsel for Macquarie and I disagree on this point, I would be applying Columbian law because the reason I would be denying approval of the DIP loan is because of Columbian law, and that is something I say is strictly within the purview of the Columbian Court or authority to decide.

Further, I did not consider it improper or back door to get an order in Canada and then apply for recognition in Columbia. In this case, Justice Johnston found that the *CCAA* applies and that means all of the *CCAA*, including section 11.2. As for Macquarie's argument that a priming charge for the DIP lender in a Canadian Court order would be overreach in Columbia, that is a respectfully a decision for the Columbian Court or authority to make. I further do not think that the making of such an order in Canada is so outrageous and unprecedented that it would throw the international order, when it comes to insolvency, into disarray. The order will either be recognised in Columbia or it will not.

So I will take a moment to formally deal with the adjournment request. Adjournments are all about a balancing of rights. Taking a balance of convenience approach, I conclude that the harm inherent in granting an adjournment outweighs any possible prejudice to Macquarie. I also find that Macquarie will not incur any procedural or substantial prejudice by the granting of the order for the DIP loan in charge. So therefore, I deny the adjournment.

With regard to uncertainty and disfunction within the *CCAA* process, it is premised on Macquarie fighting Canacol and the Monitor every step of the way, in every jurisdiction. This much is revealed on the penultimate paragraph of Mr. Picard's affidavit wherein he says: (as read)

> Granting such relief would create significant uncertainty in the *CCAA* proceedings, potentially delay the Canacol Group's restructuring objective and force litigation in the United States and Columbia, diverting focus and resources from the restructuring process to the detriment of the company and all stakeholders including Macquarie.

Macquarie's counsel says in his November 21st, 2025 letter to Canacol's and the Monitor's counsel at the top of page 2: (as read)

> It would be extremely unfortunate, time consuming, and disruptive if Macquarie is jammed and forced to argue about priming and related matters at the come back motion.

This prediction has come true and it lends credence to Canacol's counsel's suggestion that Macquarie seeks to act as a spanner in the works in the hope that it will get paid out and fast.

I agree that a course of litigating hard in every jurisdiction is Macquarie's choice. Macquarie also says that I should not succumb to the lurid scenario of Columbians groping in the dark. Macquarie says the world will not necessarily come to an end. Macquarie says the noteholders have -- or the subordinate creditors have $500 million at risk, somehow they will step up. Well as the counsel for the noteholders says, they've staked their ground, I can't rely on them to come through if this DIP loan and charge application is not granted.

For the sake of Canada's international standing, I do not want to invite a scenario involving Columbians without electricity. It is a matter of considering the interests of downstream stakeholders, even if they live in another country. Approving the DIP loan in charge introduces certainty, rather than diminishes it. It gives Canacol a lifeline until the end of an extended stay period, so as to crystallise its reorganisation efforts. On the other hand, having nothing in place would create uncertainty.

The last point is whether there is a better way and how to find it. There is no obvious better way that presents itself. The only viable proposal before the Court comes from the committee of senior noteholders. The only suggestion for the Court from Macquarie is that Macquarie gets paid from the DIP loan or the DIP loan takes a subordinate position, but that is not the proposal before the Court.

So in looking at the factors in section 11.2(4), I conclude that I should exercise discretion to approve the DIP loan as presented, along with the charge under (2). From the evidence, I infer that the company's management has the confidence of the majority of the creditors at least in terms of dollar value, although I acknowledge that does not include Macquarie whose loan amount is secured but relatively small in comparison to the unsecured creditors. I am of the view that the DIP loan would enhance the prospect of a viable compromise or arrangement being made in respect of the company, and that the nature and value of the company's property justifies the loan.

I have spoken at length about prejudice, both procedural and substantive, and I conclude that Macquarie would not be materially prejudices as a result of the charge. Of course, the Monitor supports the granting of the loan, as do the unsecured creditors holding $5 million in debt.

As for the commitment fees, yes, they are high. But the Monitor's counsel has explained the circumstances and again, there is no acceptable alternative before the Court that will

provide relief to Canacol's liquidity problem at present other than this DIP loan, and so the fees are by no means a dealbreaker. I therefore make the order granting the DIP loan and charge as requested.

I move then to the stay extension. The reason I put the stay extension second is because Macquarie questioned, maybe not in as many words, the good faith and due diligence of Canacol in the DIP selection process and with regard to presenting the DIP application to the Court. The statutory criteria for a stay extension are of course that it is appropriate in the circumstances, and that the applicant has acted in good faith and with due diligence.

At the beginning of the decision, I discussed some of the background giving rise to the need for a DIP loan. Those circumstances provide justification for extending the stay, that is so that Canacol can continue on its path towards restructuring for the benefit of all stakeholders. As I have disposed of Macquarie's main arguments with regard to possible lack of good faith and due diligence, I find that the statutory criteria are met and I grant the stay to February 6th, 2026.

Now I will move onto the ancillary relief, which I do not think is controversial. First, the letters of credit are part of the DIP loan proposal. They accordingly are also approved if specific approval is required. I will just note here again that it is new money being advanced, in some cases, to replace expired letters of credit and would not constitute queue jumping.

With regard to payments to critical venders, I heard no real argument against payment and as I said, it follows the granting of the DIP loan order. I accept the Monitor's recommendations in that regard.

Finally, respecting approval of the Monitor's activities to date. Now that I have disposed of Macquarie's objections, there is no impediment to approving the activities as described in the Monitor's second report which are set out in, I say, a transparent and comprehensive manner and I so approve those activities.

So what that leaves me with, Mr. Prophet, is a discussion of your forms of order and your application for a sealing order.

Discussion

MR. PROPHET: Thank you. Thank you Justice. So the most up-to-date form of the order that you have would've been provided to the Commercial Coordinator at about 11 AM on Wednesday. That reflects some of the letter of credit arrangements that were in discussion between the ad hoc Bondholder participants in the

DIP loan and representatives of the RCF Lending Group as probable providers of at least an interim letter of credit at the time.

So that is the form of the order I would like to speak with you about. There is a slight tweak to that order, but I can do that, if you will on the fly, it's in paragraph 30. So, if you have that, that I think is really our best (INDISCERNIBLE).

THE COURT: Okay. Let me just bring it up.

MR. PROPHET: Mr. Barrick (phonetic) I believe of the Commercial Coordinator's Office would have dealt with that through you.

THE COURT: Yes. Okay. That would have been sent yesterday?

MR. PROPHET: It would have at -- it came from our office to the Commercial Coordinator at 11 AM and again it was just reflective of some --

THE COURT: Okay. So at 11 AM, so I think I have the right one. Let me try to identify it by -- there is some identifying numbers in the lower lefthand corner, can I read those to you, Mr. Prophet?

MR. PROPHET: Possibly, let me just -- or the document itself or the email?

THE COURT: The document itself.

MR. PROPHET: Yes, so you can do that.

THE COURT: Okay.

MR. PROPHET: The document itself -- are you in the Word document or the PDF?

THE COURT: I am in the Word document.

MR. PROPHET: Very good.

THE COURT: So there is a little number in the bottom lefthand corner.

MR. PROPHET: Yes.

THE COURT:` 91710284/5.

MR. PROPHET: That is -- that is the correct -- that is the correct number and that is the correct order with one change --

THE COURT: Okay.

MR. PROPHET: -- which I can take you to.

THE COURT: Okay.

MR. PROPHET: And I can just highlight the evolutionary changes, but let's go to the one change that was made subsequent to that email, it's in paragraph 34, it's semantic only, but it's worth looking it.

If you go to 34 --

THE COURT: Yes, I am there.

MR. PROPHET: So the words after the parenthetical in the second last line of the 34, beginning: (as read)

> Including without limitation as a result of any new parties joining as lenders thereunder …

THE COURT: Right.

MR. PROPHET: That should be moved into the brackets, to be inserted after: (as read)

> Amended and restated from time to time, including without limitation as a result of any new parties joining as lenders thereunder, the commitment letter.

THE COURT: Okay. So just --

MR. PROPHET: It's just a --

THE COURT: -- just moved the closed bracket -- just move the

closed bracket --

MR. PROPHET: Correct.

THE COURT: -- I can do that.

MR. PROPHET: Well move the -- in fact, move that phrase into just before the defined term, so it would read --

THE COURT: Oh I see. Okay.

MR. PROPHET: (as read)

> Amended and restated from time to time, including without limitation as a result of any new parties joining as lenders thereunder, the defined term commitment letter.

THE COURT: Okay. I think I can do that.

MR. PROPHET: I can -- Sir I can --

THE COURT: Or you can just send me one, yes.

MR. PROPHET: Why don't I just send you one and I'll copy the parties, if that's okay with you.

THE COURT: Yes, that is --

MR. PROPHET: Cause I don't need -- shall I go through the Commercial Coordinator? I'm happy to do that, of course.

THE COURT: Yes you can go through the Commercial Coordinator.

MR. PROPHET: We will do that. Apart from that, there are no changes to the order that was sent to you approximately 11 AM yesterday. It contains an update from the SARIO form that was with our December 5 application, but you will have looked at that. I'm happy to go through it with you --

THE COURT: You do not have to go through it with me.

MR. PROPHET: Very good.

THE COURT: Okay.

Submissions by Mr. Prophet (Sealing Order)

MR. PROPHET: Okay. Sir, on the sealing order, the most convenient place to stop on that is my amended application on page 10. It's in paragraph 33. So, as your finding that --

THE COURT: Okay, I am there, yes.

MR. PROPHET: So what we are addressing by way of sealing are two confidential appendices to the Monitor's 2nd Report. These contain the signature blocks and commitment amounts for the participates in the ad hoc DIP lenders DIP commitment. There's also a second confidential appendix if just an amendment to the DIP loan commitment that arose, I believe over the weekend, it's a small technical amendment, not much turns on it. It's in the -- I think it's in the Monitor's Report, the actual -- the amendment, we can go to it, but I think everyone's at ad idem that it's an appropriate amendment.

In any event, the rationale for the sealing has to make the *Sierra Club* and *Sherman Estate* test that we're all familiar with in circumstances like this and that is that while the principle of Court openness is an important value of our Courts, where the prejudice that may be caused by observing the principle, at least in the immediate term outweighs the public interest then in that, then sealing is appropriate. And an important commercial interest or interests, has been often identified as a rationale to implement a sealing order in the sense that the damage of such an important commercial interest is prejudice set out that in the appropriate case will outweigh the public interest in open court proceedings.

The important commercial interest here is as follows: the -- it's twofold in essence. It is the case and counsel for the ad hoc group of Bondholders can confirm this, that the participants in the DIP loan do not know each of them what their commitments are. You Sir, do know, the Monitor knows and the company obviously knows, but none of the individual participants know what each other's commitment is. Part of the rationale for the that, as I understand it, is to provide for more equitable, if you will, governance within the DIP loan group.

And so, in order to preserve that balance and not provide for domination for the group by one or the other of the participants, it is described by the ad hoc Bondholder Group as an important commercial interest that none of the commitments be made public and none of

the names of the people providing those commitments.

Now, further on the later point, the people providing the commitments are significant financial players, but their identity may influence the way that bonds currently trade and so, it is the view of the ad hoc group of Bondholders and the Monitor supports this as does the company, that disclosure of the identities of these DIP participants may have an influence on continued trading in the market. Certainly it will be made public to the market that a DIP loan with the terms that you've approved has been made, and so the market will know that and that's relevant information, but speculation based on the identity of the individuals in the DIP loan seems to be an unwarranted interference in the functioning of the public market for these bonds that continue to trade.

So that -- I guess the evenness of that market is another reason, commercial interest that would be prejudiced by disclosure. So on that basis --

THE COURT: Okay. Can I ask you this, sir -- Mr. Prophet.

MR. PROPHET: Yes.

THE COURT: What I haven't heard yet is some kind of limitation on scope and duration.

MR. PROPHET: Yes, there is, yes. It's important. The limitation sought is 1 year after the termination of the *CCAA* proceedings and of course, that's a critical principle. And that length of time is chosen as a reasonable period of time after which the business circumstances no matter what happens in these proceedings, pertaining to the Canacol Group, will have stabilised to the point that it will be irrelevant to know who participated by that time.

THE COURT: All right.

MR. PROPHET: Those are my submissions in support of the sealing order. I did provide it, through the Commercial Coordinator to your office, I hope it's got to you, the Monitor may have further submissions on that, I invite the Monitor's counsel to address that if you wish, Sir.

THE COURT: Ms. Meyer, anything?

Submissions by Ms. Meyer (Sealing Order)

MS. MEYER: No, Justice Mah. Thank you. I will just mention

that the Monitor's understanding of this is set out at paragraphs 43 and 44 of the 2nd Report and the Monitor is supportive of the sealing order sought.

THE COURT: All right.

MS. MEYER: Subject to any questions you may have.

THE COURT: No questions.

MR. PROPHET: I guess I should just -- sorry Sir.

THE COURT: Go ahead.

MR. PROPHET: I was just going to say I should end that the Monitor and the finance people at the Monitor firm are aware of the identity of these people and these are serious players and are -- their covenants are good in the Monitor's view.

THE COURT: Any other counsel wish to make submissions with regard to the sealing order, the application for the sealing order? Yes, Mr. Pasquariello?

Submissions by Mr. Pasquariello (Sealing Order)

MR. PASQUARIELLO: Now, I'm prepared to reply, Sir, if there are any others that would make submissions in support, I just wanted to let you know that I will be replying.

THE COURT: Okay. I do not think there is anyone else, Mr. Pasquariello, so go ahead.

MR. PASQUARIELLO: Okay. Thank you. Sorry. So, Sir, as I mentioned in my opposition, Macquarie is of the view that the identities and the holdings of the DIP lenders should be disclosed to this Court.

Those parties are benefitting from the *CCAA* proceedings. They're benefiting now by way of a court order charge in those proceedings, these proceedings are open and the commercial interest that my friend described is not a general commercial interest. It's a commercial interest as amongst that particular group and the governance of that group, as compared to the disclosure in these proceedings and the stakeholders in this proceeding.

It would be, in my respectful submission, extremely prejudicial and unfair for Macquarie

not to even know who it is that the Court is approving to prime its position, which it has now done by way of your order and not heard a substantive reason why not to do so.

Secondly, my friend is also seeking what he's described as a technical amendment to the DIP that not much turns on it. And if that's in fact the case, I see no reason why that amendment should not be made part of the record, so that the entire agreement that the Court is approving is disclosed.

Again, in my respectful submission, fairness and balance, in respect of both of these issues would result in disclosure and therefore, Your Honour, Macquarie would suggest that the sealing order not be granted in respect of these two issues.

THE COURT: Can I ask you this, counsel? Does your client currently know who the bondholders are? I mean not the specific individuals or the subscribers to the DIP loan, but in general who they are? Is there someplace where you can see a list?

MR. PASQUARIELLO: I don't think that's the case as unsecure holders, Sir, but this is, in my respectful submission, completely different where the parties are now being elevated to the position not as bondholders, but as DIP lenders in an approved order by the *CCAA* Court, they're wearing a different hat in respect of their ask of you.

They are not wearing that hat and they're not asking that they be -- that the confidence be provided in respect of them as bondholders, they're not all participating bondholders, they're only some of the group in any event, and they are now DIP lenders not bondholders. So, I would submit that that's a material difference, Sir.

THE COURT: Okay. And what do you say about the second ground that counsel advanced and that was that there could be some effect on the market, in general, just by knowing whose a player and who is not?

MR. PASQUARIELLO: I don't know if I'm following that, Sir, the bonds don't trade on the basis of who a player is, the bonds trade on parties underlying view of the enterprise value of the company, not who happens to own them. So, again, my friend is giving evidence and I don't think he's an expert in bond trading, but in any event, I'll reply as I did. I'm also not an expert, but since you've asked me, that's the reply. The burden doesn't lie with us, it lies with the company, Sir.

THE COURT: Okay.

Any other counsel?

Submissions by Mr. Prophet (Sealing Order) (Reply)

MR. PROPHET: Sir, just brief reply on that. The amendment that I referred to is Exhibit D to the Monitor's 2nd Report and it's just about clarifying the effectiveness of the agreement. So there's no -- there's no issue about that.

My only point was the signature -- we address that just in the context of the request for a sealing order, because the signature pages to this agreement are confidential appendix too, so that's the only reason for mentioning it, but it is there and it is (INDISCERNIBLE).

THE COURT: Okay. Do you have any, Mr. Prophet, response to your friend's point that this is really about the dealings of this group of investors as among themselves, that there is not really a public interest, it is more of a private interest?

MR. PROPHET: I think there is a general interest here on both supports or both grounds for the sealing order and the general interest in each -- in each branch of the grounds is as follows.

The general interest and I'm not holding myself out as a bond trading expert, but it does matter whose supporting the company. It doesn't matter -- maybe it doesn't matter who holds the bonds, but the names of who've chosen to support the company, that matters. The bonds keep trading now. So that is interesting information, the fact of the DIP is even information that all that will have, but who, in particular, is supporting the company could have an effect on future trading. That's my simple observation

If I was supporting it myself, that wouldn't have much of an effect, but I'm not one of the signatory bondholders. That's all I'd say about that and it's a general interest to safeguard market exchange on a level playing field in that sense.

So that's my first that it's not just a private, but a general commercial interest. My second point about why the -- not knowing who has committed what within the bondholder DIP participant group, why that's a general commercial interest, is to the extent that that anonymity or the failure to know who else -- how much the other parties have in the bond -- in the DIP group, facilitates the governance of that group and we're told that it does and makes it more fair and more even. To the extent that that is the case, then that's a general commercial interest because in future cases, it will be understood that you won't know exactly who the dominant player is.

It's kind of another species of my general commercial interest in keeping confidential the identity of the people who are now supporting the company. How much they're supporting

it and how much inter-say they're supporting it will tend to make these groups more easily governed in the future if that's the expectation. So, I say those are the two general, not private commercial interests.

I also just want to correct one thing. My friend said that the identities of these bondholder participants in the DIP loan aren't before the Court, they're before you Justice, you know exactly who they are and so there's no lack of transparency to this Court, none would ever be attempted on that score. It's important that you know who they are and that the Monitor provide you with comfort on that subject in terms of the bonafide Monitor has done as an expert in finance.

So those are my comments in reply, Sir.

THE COURT: Okay.

MS. MEYER: Justice Mah?

THE COURT: Yes.

Submissions by Ms. Meyer (Sealing Order) (Reply)

MS. MEYER: Sorry, I didn't want to interrupt you, but I did want to note that I do have a few other comments to add in reply, if I might.

THE COURT: Okay. Go ahead.

MS. MEYER: Thank you. My friend, Mr. Pasquariello has indicated it would be -- as he said, extremely prejudicial and unfair for Macquarie not to know the identities of the DIP lenders and the amounts of their commitments, but he hasn't said why. And I'm not aware of any such prejudice nor is there any evidence of that.

The additional point I wanted to note is some case law that I think may be helpful. I agree with Mr. Prophet's submissions that this is, as is always the case, governed by the *Sierra Club* and *Sherman Estate v. Donovan* test. But more explicitly and I apologise, I don't have these cases before you, but I can give you the cites, certainly in the *Sierra Club* and *Sherman Estate* decision, the Supreme Court of Canada has explicitly recognised that a party's legitimate commercial interest constitute an important public interest for purposes of that test. That's in *Sierra Club* at paragraphs 55 and 60 to 61 and *Sherman Estate* at paragraph 41. If you like I can give you those exact citations. It's *Sierra Club* is 2002 SCC 41, paragraphs 55 and 60 to 61. *Sherman Estate* is 2021 SCC 25 at paragraph 41.

Those cases also set out that an important commercial interest includes preserving information that is intended to be confidential and where disclosure would frustrate the promotion and protection of competition. That is in the *Dow Chemical Canada ULC v. Nova Chemicals Corporation* decision of this Court 2015 ABQB 81 at paragraphs 50 to 51 and paragraph 54. And also *Lewis v. Uber Canada Inc.,*2023 ONSC 5134. Also the *Dow Chemical* case that I have just mentioned also says at paragraph 36 that whether a sealing order should be granted is ultimately a matter of judicial discretion.

Now, of course, those cases that I've just mentioned or at least *Dow Chemical* once pre-dates the *Sherman Estate* case, but specifically with respect to that there is a finding by this Court that an important commercial interest includes preserving information that is intended to be confidential and where disclosure would frustrate the promotion and protection of competition. I think -- I submit that that case is perhaps helpful to this Court with respect to considering whether a sealing order should be granted.

In that, I submit that the information that is sought to be sealed here, is important and confidential financial information of the participants here and particularly considering the influence that the disclosure of that information may have on trading of bonds, that that is relevant to the consideration here.

As I mentioned at the outset, the Monitor is supportive of the sealing order request. Those are my submissions, subject to any questions. Thank you.

THE COURT: All right. Thank you. Mr. Oliver?

Submissions by Mr. Oliver (Sealing Order)

MR. OLIVER: Thank you very much, Sir. On behalf of the interim lender, I just wish to voice our support for the submissions of Mr. Prophet and Ms. Meyer. From the interim lenders' perspective, this is commercially sensitive information. It's disclosure would be highly prejudicial if it was made public at this time.

Of course, your job, Sir, is to balance a number of competing interests in considering this issue. In that regard, I do wish to note as my friends have that both you and the Monitor have seen the underlying information, the sealing that is requested is time limited and as narrow as reasonably possible.

As a result we support the application for the limited time sealing order. Thank you.

THE COURT: Okay. Mr. Pasquariello, is there something else you want to say?

Submissions by Mr. Pasquariello (Sealing Order) (Reply)

MR. PASQUARIELLO: Yes with respect, Sir, I specifically indicated I was going to speak after others in support and I've had -- Ms. Meyer confirmed she had nothing further. Mr. Oliver didn't speak up. I've spoken and now my friends come forward, Ms. Meyer with case law, on top of it having said she had nothing to add and Mr. Prophet not referencing anything.

Sir, this continues the unfortunate procedure unfairness that has continued throughout. I just will leave it at that. It's just extremely disappointing, Sir.

THE COURT: All right. Well, that is why I came back to you at the end, counsel.

Submissions by Ms. Meyer (Sealing Order) (Reply)

MS. MEYER: Sir, if I might just say very briefly on behalf of the Monitor, my submissions just now are made in reply. I had no notice whatsoever that Mr. Pasquariello was going to oppose the Sealing Order application. If he did mention that yesterday during his submission, my apologies in that I missed it. But in any event, I do submit that it is proper for reply. Thank you.

MR. PASQUARIELLO: It was in our brief.

Decision (Sealing Order)

THE COURT: All right. Thanks counsel. The request for restricted access order or a sealing order does compromise the open courts principle and whether or not one should be granted is of course governed by the authority that counsel refers to which we all know about, that being the *Sierra Club* case decided by the Supreme Court of Canada and as modified in *Sherman Estate*. The applicant must show on a balance of probabilities that court openness presents a serious risk to an important interest, that the order is necessary to prevent the risk because alternative measures are not adequate and that as a matter of proportionality, the risk -- the benefits outweigh the negative effects.

In Alberta and I imagine elsewhere in Canada, commercial interest have been found to be an important interest deserving of protection, particularly in the context of Court supervised insolvency proceedings. The risk here as explained to me by counsel is really twofold. First that the proportion of ownership of the DIP participation, if know, would adversely affect the internal governance. Counsel for Macquarie, who objects to the granting of the sealing

order says, well that is a private matter among a group of people or entities and does not concern anyone else.

I do see merit in Canacol's position because this *CCAA* proceeding is not concluded. I do not know if there is going to be further applications for increased advances, I do not know whether it will be the same or different DIP lender. The possibility is present that it is the same lender and therefore it is important for the *CCAA* proceeding that the governance of this Group operate in an appropriate fashion. So I recognise the risk there.

Secondly, with regard to the operation of the bond market, Macquarie objects to the sealing order on the basis that that is simply a speculative concern, no one here is an expert in bond trading, no one can say. I agree that no one here at least has identified themselves as an expert in bond trading, certainly I am not, but I think I accept as a matter of logic and common sense that with regard to this body of bonds, the identity of the owners and proportion of ownership in this loan, could influence the market one way or another.

So, the conclusion I reach is that there is a important public interest here and that is sensitive commercial information that could affect an ongoing *CCAA* proceeding or the operation of the bond market itself.

I do not know and it was not suggested to me, how any sort of lesser measure might be put in place to alleviate that risk apart from a sealing order. It is also part of my duty to make sure that whatever means is imposed to safeguard this information, it is the least intrusive as possible. So that is usually achieved through limitation in the period of time that the order would be in effect.

So my conclusion here is that test in *Sierra Club* and *Sherman Estate* is met. That the means that have been suggested are the least intrusive in that it is specific in time. I cannot think of nor has it been proposed to me, that some other way is going to achieve what is sought here and so I grant the sealing order.

Okay. Counsel, I see that my next group has arrived for my 2:00 matter. So I am going to invite those counsel on the previous matter to leave if they wish and I am going to move onto the other matter.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Zoe Wong, certify that this record is the record made of the proceedings of the evidence in the proceedings in the Court of King's Bench, held in courtroom 516, virtual courtroom 86, at Edmonton, Alberta, on the 11th day of December, 2025, and that I and Esther Budendwa, were the court officials in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Tanner Zaherie, certify that

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

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

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Order Number: TDS-1099676
Dated: December 15, 2025

Tab

43

Action No.: 2501-18462
E-File Name: CVK26CANACOL
Appeal No.: _____

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF CANACOL ENERGY LTD., 2654044 ALBERTA LTD.,
CANACOL ENERGY ULC, 2498003 ALBERTA ULC, et al

P R O C E E D I N G S

Calgary, Alberta
March 5, 2026

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You will see in the affidavit material that in Colombia with what's called the BVC -- I will probably mispronounce this, but it's the Bolsa de Valores de Colombia. That is the stock exchange here. Effectively, Canacol Energy has ceased trading but not delisted to use Canadian parlance --

THE COURT: M-hm.

MR. PROPHET: -- because it is not delisted, the Colombian superintendent of finance, not of corporations -- they're different I'm told by Colombian counsel, says that it has no choice and this is how they phrase it, It's not that they want to, but it has no choice but to continue seeking reporting and filing requirements. So that is problematic from -- from, (1) a resource point of view, and (2) one of the requirements is audited financial statements. Those are a practical impossibility for this insolvent company currently. An auditor won't provide that as a general matter. So --

THE COURT: M-hm.

MR. PROPHET: -- what we're looking for is an amendment to paragraphs 50 and 51 of the SARIO to extend the exemption to the Colombian regulators and in -- of securities and the exemption we're looking for would, of course, require recognition in Colombia and --

THE COURT: Okay.

MR. PROPHET: -- they will not be fettering or curtailing the superintendent of corporations -- superintendency of the corporations' ability to decide whether that's appropriate and the Colombian regulator's opportunity to take a view that it isn't appropriate. So --

THE COURT: Okay.

MR. PROPHET: -- I think that it's --

THE COURT: Yeah. No, I was just curious about the jurisdiction -- my jurisdiction to tell someone in Colombia to do that and I'm getting your drift.

MR. PROPHET: Yeah. In effect, it's analogous to the provisioning for prioritization of the DIP charge, for example, with regard to the registry of personal property down in Colombia, the event without recognition that that wasn't

working and through contesting hearings, that was recognized. I'll say, parenthetically, we may not get a lot of opposition. I can't tell you for sure, but there was a tenor to our interactions with the superintendency of finance of -- of financier, I think it is. I can't say that properly. There was a bit of a tenor to that that it was something they might maybe need assistance with insofar as they felt they had no regulatory discretion or ability to get out of the problem.

So that -- that is just by way of (INDISCERNIBLE), but what I am asking you to do is to only direct this with regard to it's effectiveness in Colombia to the extent that the superintendency of companies recognizes it and gives it effect and in -- in practice, orders that the superintendency of finance may exempt Canacol and it's officers from these filing obligations.

THE COURT: Okay.

MR. PROPHET: So that's -- that's how I'm going --

THE COURT: Okay.

MR. PROPHET: -- at that.

THE COURT: Right. And so, just to close the loop on that for me, this is just relief that I'm granting under the general provision, not the regulatory provision and then what happens in Colombia, happens in Colombia.

MR. PROPHET: That -- that's entirely correct. You're not --

THE COURT: Yeah. Okay.

MR. PROPHET: -- (INDISCERNIBLE) rule on -- on Colombian law and the position will be by the applicants in Colombia that at a general level, this is appropriate and it should be recognized unless it's contrary to Colombian public policy or otherwise not in accordance with --

THE COURT: Sure.

MR. PROPHET: -- their (INDISCERNIBLE) obligations.

THE COURT: Okay.

MR. PROPHET: So that's --

THE COURT: Understood. Thank you.

MR. PROPHET: -- that's the position in Colombia.

THE COURT: (INDISCERNIBLE)

MR. PROPHET: So I can go to the evidence and the law on this and then there were four other things do not directly relate to relief but that are mentioned in the Monitor's reports and in -- and in the affidavit of Mr. Bednar, which I made the Court aware of, but I'm happy to address the -- the law, mostly from my brief on the relief that's -- that's sought if you wanted to look at page 9 of my brief -- or not.

THE COURT: Sure.

MR. PROPHET: I'm also happy if you're satisfied.

THE COURT: There was nothing that really concerned me. The only question that I had that came to mind was with respect to the sales advisor charge, why we didn't deal with it back in January and like why it has cropped up now?

MR. PROPHET: It cropped up almost as soon as we got approval of the Moelis engagement letter but not quite that day in court.

THE COURT: Yeah.

MR. PROPHET: What -- what it is, is this. Moelis has been in constant contact with the company and with company counsel saying that, Look, it is effectively, it is a -- it is a condition of us wanting to do this, continuing to do this work that we have downside protection. There's no work fee in the Moelis engagement letter, so all of their -- they've got one expense -- they've got an expense reimbursement, but all of their com (phonetic) comes from the -- a transaction. Hopefully --

THE COURT: Yeah.

MR. PROPHET: -- the minute -- hopefully, there'll be no issue with the minimum fee, but if there is, depending on certain values, a charge may be -- a charge would be necessary in --

THE COURT: Okay.

MR. PROPHET: -- a number of circumstances. And what it is for the company is we need Moelis to finish this. Their right -- I should say, they've -- we've extended it because it was a discretion in the SISP that you ordered, Justice, we've extended by 7 days -- so the 16th of March, I believe, unless somebody corrects me -- we've extended the time for indicative offers. The data room is quite active. There's, I think, 16 people signed NDAs. There are others that maybe already come in since the Monitor's report was prepared. So Moelis is working very hard, but they don't -- they do have a termination right.

They, I think, reasonably say to the company, Look, this is probably going to work out very well and there won't be any issue with us collecting our minimum fee. If it's -- if we're above our minimum fee, we assume nobody's going to have any difficulties, but if we're down in our minimum fee, there may be people who have difficulties with our compensation and that isn't fair to us, we would say.

THE COURT: Okay.

MR. PROPHET: Given -- particularly, given that they have no work fee on a -- just from an economic point of view.

THE COURT: Yeah. No, I understand. I understand. I just wanted to make sure that there wasn't anything that sort of had unravelled that was causing this, but if it's -- it just sounds like the commercial sense.

MR. PROPHET: It is, and they've -- Moelis has been constructive about it, but somewhat insistent. They -- they haven't -- there's been no threats or anything, but (INDISCERNIBLE) --

THE COURT: Okay.

MR. PROPHET: -- active, right? They're uncomfortable.

THE COURT: Okay. Understood. That's fine.

MR. PROPHET: Thank you, Justice. So --

THE COURT: Okay.

MR. PROPHET: -- then I guess in my brief, I will go very quickly through the 11.5 factors as they pertain to the sales advisor charge and to the increase by the Canadian equivalent of 1.5 million added to the administrative charge and the factors

are set out in -- at page 11, paragraph 36 of my brief --

THE COURT: M-hm.

MR. PROPHET: -- and they are the 11.5(2) factors and they've been articulated in the *Canwest* decision, as well, and so we considered these factors when we were before you on the -- on the -- on the ARIO, Justice, when we were first --

THE COURT: M-hm.

MR. PROPHET: -- establishing the administrative charge. So as it pertains to Moelis -- and then I'll go back through as it pertains to the admin charge increase, in paragraph 36, using the *Canwest* factors would then weaken -- hand on heart, say this is a large and, even to a greater extent, complex business. So the necessity for a charge, given -- given various outcomes for some of the people who are the beneficiaries is, I think, enhanced because of those complexities, including where the companies are and where the assets are and how it all works.

The proposed role of the beneficiaries, in the case of Moelis, they are critical at present. They are actually work -- devoting very significant resources and, as I say, the SISP, it's in the Monitor's report, is rolling along with significant interest. There's no duplication of roles. They are the only sales advisor. They're doing so on behalf of and in consultation with the company, but they are running the process in -- in consultation with the Monitor. So they are -- they are the commercial player. They've established the data room with the company's strong support in terms of information. They are managing that. They are dealing with NDAs, they do -- again, with the company's support, but all of that is not duplicate.

The quantum is based on their minimum fee, as I've said, not on -- it doesn't seek to secure their -- better results based on percentage of proceeds. So it seems to be fair and reasonable and the Monitor is of that view. The position of the secured creditors likely to be affected. I don't understand Macquarie to be objecting to this charge. I think that they -- Macquarie has said formally that they are in support of the SISP generally, and by that, I take to mean Moelis.

So in the absence of any (INDISCERNIBLE) objection, I haven't heard from anyone else. They have a view it's -- in addition, my view -- and I think this has been now affirmed by Justice Mah and by the Court of Appeal to the extent of a prima facie case, lack determination that the value here based on the evidence that's before this Court, is adequate that there won't be prejudice has been the finding of all of the Courts that have considered this matter.

THE COURT: M-hm.

MR. PROPHET: The Monitor supports the granting of the Moelis charge largely on the basis of the things we've just talked about. Similarly, the -- increasing the administrative charge is supported by an analysis of these -- these six factors from *Canwest* and by the terms of 11.5 of the CCAA. I would note that there are -- I think if you include the Monitor and its counsel in all jurisdictions and the company and its counsel, I believe the Bednar affidavit would indicate there are -- there are eight sets of professionals that it's just a fact with a company of this type.

There has been significant litigation in Colombia and in Canada and -- on this matter and there are significant complexities to this matter that have engaged the involvement of the professional advisors, particularly the lawyers, but also the Monitor at a much more intense level than was originally envisaged and there is -- fees are being paid, but there is -- there are times when they're not fully caught up and the only protection for the -- for the professionals that are trying to run this case is a charge.

So I'm not aware of any opposition to the charge. The Monitor is of the view that its quantum is fair and reasonable having seen and analyzed the payables as they come in for the professional fees. There's certainly no duplication of roles. I don't practice in Colombia and my colleagues don't practice here, by way of example, so we are necessary, in that sense.

So my comments on the effect on secured creditors, I would echo them --

THE COURT: Okay.

MR. PROPHET: -- in the circumstances of the increase to the administrative charge. So those are my submissions on the law on those first few heads of substantive relief. The change to the DNO, the indemnity paragraph in paragraph 22 of the SARIO, I take to be uncontroversial. It's more by way of clarification. I don't really have hard submissions on that. It's 11 --

THE COURT: I don't think --

MR. PROPHET: -- (INDISCERNIBLE) --

THE COURT: -- it's necessary.

MR. PROPHET: Very good. These common securities law, I

think we -- I went into that in some detail in the -- in the prologue --

THE COURT: M-hm.

MR. PROPHET: -- so to speak and I would just refer you back to the brief we had before you -- before when we were here for the ARIO which referred to the general jurisdiction to exempt because of the burden on an insolvent company from securities law generally. I'm only asking you to do that again and then to invite Colombia to recognize your decision as being necessary for this insolvent company. So I would refer you, if you need that brief for references, it's -- I can provide it to you. It's -- it cited a number of examples in Alberta of this sort of exception.

THE COURT: I'm good.

MR. PROPHET: Very good. And lastly, the -- in terms of relief, we've also sought approval of the fourth report. The fourth report is necessarily very detailed and I think significantly diligent and reflective of the diligence of the Monitor. It's -- the Monitor has played a critical role through January and February in dealing with the company and helping the company and supporting it with its stakeholders, and so I think in view of that, the approval of the report is appropriate. So that's it for the relief, unless you have questions on the relief. I now have four matters --

THE COURT: I don't.

MR. PROPHET: -- are relevant or they are at least matters that need -- should be addressed, but they're not directly relevant to any relief that any party is seeking today.

THE COURT: Okay.

MR. PROPHET: So you will see in the Bednar affidavit and then -- and I think the best place to look at it -- and you'll hear from Ms. Meyer on this, the best place to look at the -- this -- this last point is probably the Monitor's fourth report, but you'll -- and I'll just give you the references because I think Ms. Meyer will probably take you through this. We're -- if I go to the report -- let me just get to this. Here we go.

The first matter not directly related to the relief that we're seeking, but that we have provided evidence on and reported on, pertains to pre-filing payments. So if you go to the paragraph 52 of the fourth report, it's on page 22 of the report, you'll see where this discourse starts and --

THE COURT: Yes.

MR. PROPHET: -- Mr. Bednar's affidavit is to similar effect. When he swore his affidavit back in early January -- January 8th I think it was -- it was his view that there -- we had $15.5 million of pre-filing payment authorized and a $5.5 million of pre-filing payments to critical -- to critical vendors had been made. Subsequently, he became aware and immediately reported it to the Monitor -- and this was about the 23rd of January -- that, in fact, some payments that had previously been viewed as post-filing because the invoices were received post-filing, although they related to pre-filing services, had been paid. So he reported that immediately to the Monitor and the Monitor undertook a detailed inquiry concerning the -- the payment of these amounts that were actually pre -- pre-filing amounts.

Because they were thought to be post-filing amounts, approval from the Monitor was -- wasn't sought for the payments and what Mr. Bednar and the Monitor and his team did is they did -- ran an analysis to see what had been paid, who had been paid and what had happened. In paragraph 256 of the Monitor's report, you'll see that $9.6 million of the approximately $11 million of these misclassified payments, they were to critical vendors and they had to be paid --

THE COURT: Yeah.

MR. PROPHET: -- and if you add that to the amounts that were disclosed to the Monitor and approved, at the end of the day, to -- to February 21, the company was paying crucial vendors their pre-filing amounts underneath the $5.5 million authorized. It was 5.1 and change that had -- had been paid up to the 21st of February.

That leaves $1.4 million of these misclassified payments that did not go to critical vendors and what the company has done after the detailed analysis that it performed, is that it has sent letters to these suppliers saying that these payments were inadvertently in error and that they would be deducted from ongoing invoicing. The company is hopeful that it will recoup a good -- most of a good portion of things this way.

So that is the remedial steps along with, as evidenced in the Monitor's report and Mr. Bednar's affidavit, significant additional internal controls to ensure this doesn't happen again and the Monitor is actively engaged to supervise and oversee Mr. Bednar and his team as this happens. So I wanted to report on that. Ms. Meyer may have a few further comments on that, that it's important that we disclose that to the Court and what we're doing to ensure that that doesn't happen any -- again.

I wanted to then move forward on other matters that -- to mention. I've mentioned the

SISP status -- oh, sorry. Let's go back for -- before we get to that. Let's go back to Mr. Bednar's affidavit, if we could. All right. I'd like just to take you -- I'm sure you've noted it, but on page 8 under the heading effectively, leadership change, it's to be --

THE COURT: Yeah.

MR. PROPHET: -- noted that Mr. Gamba (phonetic) has departed from his role and Mr. Sharma, the existing chief operating officer, and Mr. Bednar have been appointed by the board of directors on resolution as interim co-chief CEOs and there's been an addition to the board of directors, Mr. Laurinaitis -- Peter Laurinaitis has been appointed as an independent director. So I wanted to (INDISCERNIBLE) that that's been press released and the stakeholders are aware of it. The DIP lender supports these changes and I -- but I wanted to make the Court aware that these things have happened.

THE COURT: M-hm.

MR. PROPHET: SISP status is reported on in considerable detail in the Monitor's report. As I say, as of the day of the report there were 16 NDAs signed -- I think there may have been even some more, so there's robust interest and there's been requests for a slight extension to the 8, 4 indicative office -- offers. With the support of the DIP lender, that has been extended and the -- we're hope -- we continue to be hopeful about that.

DIP advance. You will see in the Monitor's report that based on -- particularly based on negative variances, but based on other matters, there has been -- and I think including a milestone default with regard to the key -- key employee incentive plan being put in place and a couple other matters, there are defaults in the DIP loan agreement. Active, constructive and caressing (phonetic) discussions are ongoing to have those defaults addressed in an amendment to the DIP commitment letter.

The company -- and the Monitor will echo this because they are privy to all these discussions, is hopeful that we'll have an amendment and we'll get a subsequent advance under the DIP loan in the very, very near term. I can say that an amended version of the DIP loan agreement has been circulated and we're working hard on that. It is essential to the company that a subsequent advance be made. That is critical to the company's liquidity. The company is suffering significant liquidity strains right now.

The company needs to ensure that post-file -- post-filing obligations are met and the company requires a subsequent advance to do that. It hasn't had a subsequent advance yet, but as I say, there -- there is every expectation that that will happen shortly. We have to finish that though and we have to ensure that the defaults have been addressed and that an

agreement on them has been reached. A new budget will be produced addressing some of the changes in the way in which the company's been performing. Once that has been finalized -- and, again, active discussions are ongoing and significantly progressed, that will, I think, likely be the gating item and without wanting to go into forecasting, we do believe that addressing these issues and concluding on them is quite imminent and that's -- that's what I can tell you without --

THE COURT: Okay.

MR. PROPHET: -- going further. So I did want to report on the -- the DIP advance issue.

Finally, I would say this. Counsel for Macquarie engaged with -- with both the Monitor and -- and our firm concerning a request for some information sharing. We, with the Monitor and with the cooperative approach of counsel for Macquarie and good will on all sides, we've reached an arrangement by which there'll be sharing of cashflows and variance reporting and the opportunity to dialogue and ask questions of the Monitor and to the extent necessary, the company, concerning cashflows and variance reporting and it will be the cashflow and variance reporting that is provided to the DIP lender.

We -- that will be provided by the Monitor and -- and the company to Macquarie going forward so that they can see that information and they can dialogue with the Monitor about that. There is a small tax that's been agreed by the Monitor, by Macquarie and by the company that addresses that, in fact, specific information sharing going forward. So that -- I wanted to advise the Court of that. We think that that should be -- hopefully, that will be helpful to the parties as this matter moves forward.

So I don't believe -- I just had to look at my notes. I don't believe I have anything more by way of submissions in support of the relief or anything more to report on. Of course, the Monitor will have a say on that. So that's submissions in support --

THE COURT: Okay.

MR. PROPHET: -- of the application, Justice. Thank you.

THE COURT: Okay. Thank you, Mr. Prophet. Mr. Oliver?

Submissions by Mr. Oliver

MR. OLIVER: Thank you, Sir. For the record, Oliver, first initial J., on behalf of the interim lenders. Our clients support the application this morning.

As my friend, Mr. Prophet, and the Monitor's report have indicated, the interim financing facility is currently in default. Some of those defaults are noted in the report of the Monitor. We are working with the company to address those and a path forward. Thank you very much.

THE COURT: Okay. Thank you. Before we go to Ms. Meyer, anybody else? Seeing no cameras turn on, Ms. Meyer, the floor is yours.

Submissions by Ms. Meyers

MS. MEYER: Thank you, Justice Bourque. And just for the record, Kelsey Meyer. With me are Raj Sahni and Chyna Brown of Bennett Jones on behalf of the Monitor, KPMG Inc. There are also representatives of KPMG Inc. here in the virtual courtroom.

The Monitor's fourth report was delivered on Friday, February 27th and served upon the service list at that time, and the Monitor is supportive of the relief sought by the applicants. You'll see on page 81 of the PDF of the fourth report that the Monitor is of the view that the relief sought is reasonable and appropriate and that the applicants are acting in good faith and with due diligence and that the granting of the relief will provide the applicants with the best opportunity available in the circumstances to solicit interest in and seek approval of a transaction pursuant to the CCAA.

With respect to the increased administration charge, that is addressed at page 32 of the PDF of the report, beginning at paragraph 87 and there, it sets out that there's been an increased scope and intensity of the work of the professionals, especially as a result of the contested relief and appellate steps, additional court materials associated with that and enhanced cross-border coordination.

Paragraph 88 of the report sets out the Monitor's view that the increased administration charge is reasonable and appropriate in consideration of the work completed to date, managing the impact of lower gas production on liquidity and DIP financing, the -- what I'll call, the misclassified payments review undertaken by the Monitor, the recognition proceedings and significant opposition by Macquarie's Colombian counsel in relation to those, which are addressed in the report, the expertise, knowledge and continued participation of the insolvency professionals being essential, and that the size of the increased administration charge has been calculating consultation between the company and the Monitor, considering all of the 8 teams of insolvency professionals involved.

With respect to the proposed sale advisory charge, on behalf -- or to the benefit of Moelis, that is addressed on page 33 of the Monitor's report and the Monitor's view is that the sale

advisor's fees are commercially reasonable considering the size and complexity of a potential transaction pursuant to the SISP, and as Mr. Prophet has said, that the sale advisor is critical. The Monitor's view is that the priority ranking that is proposed will not prejudice any creditor and the DIP lenders, as you've heard, consent to -- as well to that.

With respect to the directors and officers' indemnity and the inclusion of the legal fees of the directors' counsel in that, I did want to note that at paragraph 94 of the fourth report, the unpaid fees to date on that are about $56,000, so not a significant amount and the Monitor's view, again, is that there is no prejudice to stakeholders as a result of the proposed extension of the scope of the directors' charge to cover the Canacol boards' legal counsel.

With respect to the point on relief from the Colombian securities filings, that's addressed on page 34 of the fourth report. There, I'd -- in addition to Mr. Prophets submissions, I note that there are potential fines for non-compliance with Colombian securities reporting requirements and that that could extend to directors and officers of the company and, again, the Monitor's view, as set out in the report, is that there is no prejudice to any stakeholders in the circumstances where all pertinent information has been and will continue to be posted to the Monitor's website and publicly available in that respect.

With respect to the updated cashflow forecasts and DIP financing, you'll see in the Monitor's report that, in any case, that upon an updated cashflow forecast being reached, it will provide a supplemental report and I echo my friend, Mr. Prophet's, comments that -- our understanding and then certainly with the involvement of the Monitor, that various budgets and proposals are being actively worked on as between the DIP lenders, the Monitor and the company to allow for a subsequent advance to be made which our understanding is consistent with that -- and Mr. Prophet, that that will be imminent.

With respect to that, once an updated cashflow forecast is finalized, the Monitor does intend to file a supplemental report. I'll perhaps pause there and ask if you have any questions about --

THE COURT: I don't.

MS. MEYER: -- this or anything else I've said so far. Okay. Thank you.

THE COURT: No, no.

MS. MEYER: All right. With respect to the status of the sale process, just to confirm, pursuant to an email from company counsel to the service list on

Monday of this week, March 2nd, the phase 1 bid deadline has been extended to March 16th and the phase 2 bid deadline has been extended to April 13th.

Turning to the misclassified payments issue, this starts on page 23 of the fourth report, beginning at paragraph 52. And Mr. Prophet has gone through with you the figures with respect to the 11 million, 9.6 of which was actually to critical vendors but not with advanced authorization by the Monitor or the DIP lenders, 1.4 million of which were not paid to critical vendors. We refer to those in the fourth report as the non-critical vendor payments. That's at paragraph 56(c) and as Mr. Prophet has said, Canacol is addressing those by issuing letters to the recipients of those payments saying that those payments must be either returned or considered advanced payments against its invoices for goods and services provided after the November 18th filing date, and so that is at paragraph 58 of the fourth report.

My friend, Mr. Prophet, has addressed the requests by Macquarie for additional reporting. I'll just read to you the agreement that has now been reached between the Monitor, the company and Macquarie to address that request. What has been agreed to, to quote, is: (as read)

> On behalf of the Monitor, we confirm that Macquarie Bank Ltd. will be provided with the same cashflow forecasts and variance reports, which is collectively referred to as the financial reporting, as provided to the interim lender on the same date as the delivery thereof to the interim lender. The Monitor will also facilitate and assist in organizing calls with Macquarie if requested by Macquarie, including with Canacol, if required, to discuss any questions Macquarie may have with respect to the financial reporting or other matters in the CCAA proceedings. All such information shall be received by Macquarie pursuant to the confidentiality provisions included in the credit agreement entered into between the applicants and Macquarie dated September 3rd, 2024.

And we have received email confirmation that both the company and counsel for Macquarie are in agreement with that wording. And so I believe that's dispositive of that issue.

Otherwise, moving to approval of the fourth report of the Monitor. The activities of the Monitor are summarized at paragraph 16 of the report, at page 11, and the Monitor submits that they are reasonable and appropriate, the Monitor having acted honestly, in good faith and in accordance with its court ordered and statutory duties. Some of the other matters

reflected in the report include the leadership and board changes. Nothing further to add there beyond what Mr. Prophet has said. You'll see the report includes a very detailed summary of the Colombian proceedings to date and also an update on the dismissal of the Macquarie application for permission to appeal the SARIO, and specifically, the DIP financing and DIP charge.

I don't believe I had anything further to address in my submissions, Sir, subject to any questions you may have.

THE COURT: I don't have any questions. Thank you, Ms. Meyer.

MS. MEYER: Thank you.

Submissions by Mr. Prophet (Reply)

MR. PROPHET: Justice, perhaps we could then turn to the order which is appended to our application, if you had questions about that. It -- it is -- we decided not to try and do a carry or a third amended and restated initial order and instead, just to make amendments that didn't change the existing paragraph numbering of the SARIO. I can walk you through those, if you wish. I've checked them against the SARIO and believe they work in terms of --

THE COURT: Okay. Just --

MR. PROPHET: -- (INDISCERNIBLE), and mechanical.

THE COURT: Yeah. Give me a sec to find that.

MR. PROPHET: It's on page 14 -- sorry, it begins on page 12 of the PDF of my application.

THE COURT: Okay.

MR. PROPHET: We will, of course --

THE COURT: Okay.

MR. PROPHET: -- clean -- clean up the bullets now that we have the date for the fourth report and the affidavit --

THE COURT: For sure.

MR. PROPHET: -- of service of Ms. Tano.

THE COURT: For sure. Was there anything in particular you wanted to draw my attention to?

MR. PROPHET: No. It's purely implementing what I -- what we said. If you were interested in the -- we -- we've spelled out the -- as amended validity of the charges in 39 of the SARIO, so that's a convenient way to look at the consequences of the increase to the administrative charge and the granting of the sale advisor charge. There's nothing else, really. I do note we had a -- there was an error in the internal paragraph numbering of the SARIO. The -- and if you go to paragraph 3 of this approval and amending order, page 4 of the order--

THE COURT: M-hm.

MR. PROPHET: -- page 14 of the PDF, we just corrected so that we're refer -- when we talk about the priority for the court ordered charges, we're actually referring 3 or 2 -- the right paragraphs. So I just wanted to --

THE COURT: Okay.

MR. PROPHET: -- that's just a strict correction that was our error. The only other thing, I guess, would be the amendment to paragraph 50 and 51 of the securities exempting paragraphs of the SARIO. The -- the amendment really just operates as an extension to encompass the requirements of the superintendency financier out of Colombia and the Bolsa de Valores de Colombia and those are the requirements that are set out in Mr. Bednar's affidavit, so.

THE COURT: Good.

MR. PROPHET: Otherwise, the exempting paragraphs stay the same as they were with regard to the Canadian securities authorities.

THE COURT: Okay. Perfect. (INDISCERNIBLE) --

MR. PROPHET: I don't have anything else --

THE COURT: Oh.

MR. PROPHET: -- Justice. No, I don't have anything else.

Decision

THE COURT: Okay. No. Awesome. So, obviously, the application is granted. The relief sought is both appropriate and reasonable and thank you very much for your concise and thoughtful submissions, both you, Ms. Meyer, and others, and also for the good work in advancing the proceedings.

MR. PROPHET: Thank you very much, Justice. We'll provide you with our cleaned-up order direct through the trial coordinator, if that is okay.

THE COURT: Okay. And then in terms of next steps, do you have time scheduled for anything -- and I'm only raising it --

MR. PROPHET: I --

THE COURT: -- again, it's a bit of a public service announcement is, you know, the lists are -- you know, this Court has been quite busy and I don't think there's a lot of time until the end of April. I know I'm sitting in Edmonton end of April. There's some time there.

MR. PROPHET: We have the 14th of April booked.

THE COURT: Okay.

MR. PROPHET: We were looking for something in March. We're trying to -- to the extent we're -- we're looking for key employee -- key employee incentive plan, key employee retention plan approval. This is a very -- this has become a very significant and important issue.

THE COURT: Yeah.

MR. PROPHET: We had written to Justices Simard and Mah to see what could be --

THE COURT: Okay.

MR. PROPHET: -- accommodated in March.

THE COURT: Okay.

MR. PROPHET: We have the 14th of April. We will definitely be using that date if we can't --

THE COURT: Okay.

MR. PROPHET: -- do anything better.

THE COURT: Okay. There may be some other time that gets freed up. I think the powers that be are aware of the crunch on the commercial list and are trying to free up some judges to perhaps add some additional time. So for this matter, other matters, just a reminder, if you do need time and there's no time available, to write to the Justices Simard and Mah.

MR. PROPHET: Thank you, Justice, and we will probably be back do -- taking up that activity shortly.

THE COURT: Yeah. Okay. Super.

MR. PROPHET: I would just say one other thing I forgot to mention and that I was accompanied today. With me are my great colleagues, Mr. Gabor and Ms. Yurkovich, as usual. So I should have mentioned that.

THE COURT: Okay. Yes. Okay. Thank you very much. Okay. Thank you very much, everyone, and we're adjourned.

MR. PROPHET: Thank you.

PROCEEDINGS ADJOURNED UNTIL APRIL 14, 2026

Certificate of Record

I, Katie Girvin, hereby certify that this recording is a record made of the evidence in the proceedings in King's Bench Court, held in courtroom 1702, at Calgary, Alberta, on the 5th day of March, 2026, and I was the court official in charge of the sound -- sound-recording machine during the proceedings.

Certificate of Transcript

I, Krystalle Darnel, certify that

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

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

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