Bennett Jones

Bennett Jones LLP
4500 Bankers Hall East, 855 - 2nd Street SW
Calgary, Alberta, Canada T2P 4K7
Tel: 403.298.3100 Fax: 403.265.7219

**Chris Simard**
Direct Line: 403.298.4485
e-mail: simardc@bennettjones.com
Our File No.: 44609.111

August 27, 2020

Court of Appeal of Alberta
27th Floor TransCanada Pipelines Tower
450 1st St SW
Calgary AB T2P 5H1

Dear Sir/Madam:

**Re: Wilks Brothers, LLC v. 12178711 Canada Inc., et al.**
**Leave to Appeal Application Scheduled for 9:30 a.m. on Tuesday, September 1, 2020**
**Court of Appeal Action No. 20010-0151AC**

We represent the Calfrac respondents in the above-noted appeal action. We are writing to advise that pursuant to Rule 14.41(b), other than our Reply Memorandum, which is being filed and served today, no further materials will be filed by the Calfrac respondents.

Yours truly,

**BENNETT JONES LLP**

Chris Simard

CS:/dmk
cc: Service List

Registrar's Stamp

**COURT OF APPEAL OF ALBERTA**

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|---|---|
| COURT OF APPEAL FILE NUMBER: | 20010-0151AC |
| TRIAL COURT FILE NUMBER: | 2001-08434 |
| REGISTRY OFFICE: | CALGARY |
| APPLICANTS: | 12178711 CANADA INC., CALFRAC WELL SERVICES LTD., CALFRAC (CANADA) INC., CALFRAC WELL SERVICES CORP. and CALFRAC HOLDINGS LP, by its General Partner CALFRAC (CANADA) INC. |
| STATUS ON APPEAL: | RESPONDENTS |
| STATUS ON APPLICATION: | RESPONDENTS |
| RESPONDENT: | WILKS BROTHERS, LLC |
| STATUS ON APPEAL: | APPLICANT |
| STATUS ON APPLICATION: | APPLICANT |
| DOCUMENT: | **MEMORANDUM OF ARGUMENT** |


ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

BENNETT JONES LLP
Barristers and Solicitors
4500, 855 – 2nd Street S.W.
Calgary, Alberta T2P 4K7

Attention: Chris Simard
Kevin Zych
Michael Shakra

Telephone: 403.298.4485
416.777.5738
416.777.6236

Facsimile: 403-260-7024 / 416-862-6666

Email: simardc@bennettjones.com
zychk@bennettjones.com
shakram@bennettjones.com

CONTACT INFORMATION FOR ALLOTHER PARTIES:

**CASSELS BROCK & BLACKWELL LLP**
Suite 3810 Bankers Hall West
888 – 3rd Street SW
Calgary, AB T2P 5C5
Attention: Jeffrey Oliver / Lara Jackson
Tel: 403-351-2921 / 416-860-2907
Fax: 403-648-1151 / 416-640-3108
joliver@cassels.com
ljackson@cassels.com

**DENTONS CANADA LLP**
77 King Street West, Suite 400
Toronto, ON M5K 0A1
Attention: John Salmas / Sara-Ann Van Allen
Tel: 416-863-4737 / 416-863-4402
Fax: 416-863-4592
john.salmas@dentons.com
sara.vanallen@dentons.com

**GOODMANS LLP**
Bay Adelaide Centre – West Tower
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
Attention: Robert Chadwick
Tel: 416-597-4285
Fax: 416-979-1234
rchadwick@goodmans.ca

**LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**
130 Adelaide Street West
Suite 2600
Toronto, ON M5H 3P5
Attention: Peter Griffin / Larry Thacker
Tel: 416-865-2921 / 416-865-3097
Fax: 416-275-3632 / 647-297-6446
pgriffin@litigate.com
lthacker@litigate.com

**BORDEN LADNER GERVAIS**
Centennial Place, East Tower, 1900
520 – 3rd Avenue SW
Calgary AB T2P 0R3
Attention: Josef G.A. Kruger, Q.C.
Tel: 403-232-9563
Fax: 403-266-1395
JKruger@blg.com

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## I. INTRODUCTION

1. Wilks Brothers, LLC ("**Wilks**") seeks leave to appeal a procedural stay of proceedings order granted by the supervising chambers justice in an ongoing proceeding under the *Canada Business Corporations Act,* RSC 1985, c. C-44 (the "**CBCA**"). Despite Wilks' attempt to characterize the order as "novel" and going "further than any other CBCA restructuring decision before it", the order was: (i) similar to numerous prior orders granted by Canadian courts in CBCA proceedings; (ii) one which the court had unquestionable authority to grant; (iii) an exercise of discretion by the judge who has heard and will hear all applications in the proceeding, and who is therefore entitled to significant deference; and (iv) purely procedural, with no impact on any party's (including Wilks') substantive rights.

2. 12178711 Canada Inc., Calfrac Well Services Ltd., Calfrac (Canada) Inc., Calfrac Well Services Corp. and Calfrac Holdings LP (collectively, the "**Calfrac Entities**" and part of the "**Calfrac Group**") commenced the CBCA proceedings and are advancing a plan of arrangement (the "**Arrangement**") under section 192 of the CBCA. In furtherance thereof, the Calfrac Entities obtained an Order granted by Mr. Justice D.B. Nixon on July 13, 2020 (the "**Preliminary Interim Order**") which contains a stay of proceedings (the "**Stay Provision**").

3. Wilks brought an application seeking to vary the Stay Provision to exclude its application to the Second Lien Noteholders (a creditor class which includes the Wilks), but not challenging any other aspect of the Preliminary Interim Order. Wilks' application was heard on July 23, 2020 and on July 27, 2020, Nixon J. issued oral reasons for judgment dismissing Wilks' application, maintaining the Stay Provision, and awarding costs to the Calfrac Entities (the "**Decision**"). Wilks now seeks leave to appeal the Decision.

4. As a procedural and discretionary order that does not permanently impact any substantive rights, the threshold for leave to appeal the Decision is very high, and Wilks has failed to meet the four-part test for leave to appeal.

5. ***The Decision is not of significance to the practice.*** The Stay Provision is not novel or unprecedented. In numerous CBCA proceedings, Canadian courts have granted stay orders with similar language, and similar effect, to the Stay Provision. Wilks (correctly) does not suggest that

Nixon J. did not have the jurisdiction to grant the Stay Provision; therefore, the Decision was purely an exercise of judicial discretion on the unique facts of this case, which is not a point of significance to the practice.

6. ***The Decision is not of significance to the action itself.*** The Stay Provision was described by Justice Nixon as a temporary procedural stay, and all of Wilks' substantive rights are expressly preserved and may be advanced by Wilks at the Calfrac Entities' September 30 hearing before Nixon J. for a Final Order approving the Arrangement. Nixon J. stated that in the Decision, and has reiterated it in his August 7, 2020 reasons for judgment, approving the Calfrac Entities' application for an Interim Order with respect to the Arrangement. At the September 30 hearing, Nixon J. will assess, among other things, whether the Arrangement and the Final Order are fair and reasonable. All substantive issues Wilks wishes to raise will be heard at that time, as the Final Order application is unquestionably the correct forum for substantive relief.[1] Therefore, Wilks' objections to the Decision are not of significance to the action.

7. ***The proposed appeal is not prima facie meritorious.*** In order to satisfy this threshold, "on first impression, there must appear to be an error in principle of law or a palpable and overriding error of fact."[2] Neither of the two alleged errors meet this threshold:

(a) Wilks submits that Nixon J. erred in applying the anti-deprivation rule. Recent, binding authority from this Court confirms that the anti-deprivation rule is part of the common law in Alberta.[3] Exercising discretion to apply existing common law based on the unique facts of a case cannot be an "error in principle of law". Moreover, Nixon J. expressly stated that the anti-deprivation rule was only "*another reason*" for his conclusion.[4] Therefore, even if the anti-deprivation had not been applied, the Decision would remain; and

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[1] *Tervita Corporation (Re)*, 2016 ABQB 662 [*Tervita*] at para 20 [**Tab 1**]; *8440522 Canada Inc (Re)*, 2013 ONSC 2509 [*Mobilicity*] at paras 40-41 [**Tab 2**].

[2] *Resurgence Asset Management LLC v Canadian Airlines Corporation*, 2000 ABCA 149 [*Resurgence*] at para 35 [**Tab 3**], Tab 5 of Wilks' Memorandum of Argument [Wilks' Memorandum].

[3] *Capital Steel Inc v Chandos Construction Ltd*, 2019 ABCA 32 [*Chandos*] at paras 18-22 [**Tab 4**], Tab 14 of Wilks' Memorandum.

[4] Transcript of Proceedings in the Court of Queen's Bench of Alberta, July 27, 2020, by the Honourable Mr. Justice Nixon [*Decision*] at 14 [**Tab 5**].

(b) Wilks submits that Nixon J. erred in his interpretation of the Stay Provision. Nixon J. found that the Stay Provision was intended to, and did, maintain the *status quo ante,* which is the very purpose of a stay of proceedings. Wilks' assertions that Nixon J. ought to have had regard to New York law are misplaced and inappropriate; New York law is not applicable to the Stay Provision, being a procedural order made under the CBCA.[5]

8. ***The proposed appeal could unduly hinder the action.*** The Calfrac Group's efforts are focused on the Arrangement and the upcoming Final Order application. Diverting time and resources to a meritless appeal is to the detriment of all of the Calfrac Entities' stakeholders. As correctly noted by Nixon J., in the discretionary balancing exercise he conducted, the interests of all of the Calfrac Entities' stakeholders, not just Wilks, must be taken into consideration:

> …it is important that the rights of opposing parties in a *CBCA* proceeding be balanced with the interest of all stakeholders in a complex reorganization. As stated by this Court in other *CBCA* proceedings, the Court must be careful not to cater to the special needs of one particular group, but must strive to be fair to all involved in the transaction, depending on the circumstances that exist. In addition, as has been recognized in *CCAA* proceeding, a creditor should not be allowed to forestall an application, or try to neutralize the Court's exercise of its statutory jurisdiction, at a preliminary stage, even if it is insisting that it will oppose any final plan. Rather, the interests of all stakeholders must be considered.[6]

9. On the other side of the balancing exercise, Wilks utterly failed to articulate or prove[7] any prejudice that it will suffer while the Stay Provision is in effect. In these circumstances, the application for leave to appeal should be dismissed.

## II. FACTS

10. In recent years, the impacts of industry, geopolitical, commodity price challenges and oversupply of oilfield services equipment have resulted in a capital structure and liquidity position that is no longer sustainable for the Calfrac Entities, a situation only exacerbated by COVID-19. As a result, the Calfrac Group, with the assistance of its financial and legal advisors, proactively

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[5] In addition, no expert evidence of New York law was presented to Justice Nixon, so Wilks utterly failed to prove, or even try to prove, the alleged propositions of New York law that it asserted before Nixon J. (and which it continues to try to assert before this Court, without any proof).

[6] *Decision*, *supra* note 4 at 15 **[Tab 5]**.

[7] Wilks lead absolutely no evidence of any prejudice. The only evidence it filed in support of its application was hearsay evidence of a legal assistant, attaching public documents such as press releases and court transcripts.

undertook a financial structure review process, in consultation with certain key stakeholders, with a view to improving the Calfrac Group's capital structure and access to liquidity, strengthening its financial position and maximizing value for its stakeholders.

11. This has resulted in the Arrangement, which will have the effect of reducing the Calfrac Group's total debt by approximately $572.0 million CAD and reducing its annual cash interest payments by approximately CA$52.6 million CAD (as calculated on July 30, 2020) resulting in the emergence of a solvent and viable business group.

12. On July 13, 2020, the Calfrac Entities sought and obtained the Preliminary Interim Order, to begin to set the wheels in motion for the Arrangement. The Stay Provision in the Preliminary Interim Order reads:

> From 12:01 a.m. (Calgary time) on the date of this Preliminary Interim Order and until further order of the Court (the "**Stay Period**"), no right, remedy or proceeding, including, without limitation, any right to terminate, demand, accelerate, set off, amend, declare in default or take any other action under or in connection with any loan, note, commitment, contract or other agreement, at law or under contract, may be exercised, commenced or proceeded with by: (i) the Second Lien Noteholders… or (iv) any person…that is party to or a beneficiary of any other loan, note, commitment, contract or other agreement with one or more of the Calfrac Entities, against or in respect of any of the Calfrac Entities, or any of the present or future property, assets, rights or undertakings of any of the Calfrac Entities, of any nature in any location, whether held directly or indirectly by any of the Calfrac Entities, by reason or as a result of:
>
> (a) the Applicants having made an application to this Court pursuant to Section 192 of the CBCA;
>
> …

13. Wilks, an indirect competitor of the Calfrac Group as a result of its 100% ownership of ProFrac Services, LLC, not only objected to the Stay Provision but also, as noted by Nixon J., expressly advised the U.S Bankruptcy Court (when objecting to recognition of the CBCA proceedings before the U.S. Court): "We really believe this should have been commenced in a

Chapter 11 before this Court."[8] In other words, Wilks wants to push Calfrac into an insolvency proceeding.

14. On July 27, 2020, Nixon J. upheld the Stay Provision, refusing Wilks' application to exclude the Second Lien Noteholders (who will be unaffected by the Arrangement) from the Stay Provision. The Calfrac Group has continued to advance the Arrangement in the best interests of its stakeholders. On August 7, 2020, the Calfrac Entities obtained an Interim Order that among other things, authorizes stakeholder meetings on September 17, 2020 to vote on the Arrangement, and authorizes the Calfrac Entities to apply before Nixon J. on September 30, 2020 for a Final Order approving the Arrangement.

15. There is significant support for the Arrangement among the unsecured noteholders and common shareholders, who are the only securityholders who are being affected by the Arrangement. As of July 30, 2020, Calfrac had entered into support agreements with holders of approximately: (i) 70.8% of the unsecured noteholders; (ii) 23% of the common shareholders.[9]

## III. LAW AND ARGUMENT

### A. Test for Leave to Appeal

16. Procedural rulings in general, *i.e.* rulings that do not finally determine substantive rights, are subject to a very high threshold for appeal in Alberta. Leave is only "granted if the appeal raises a serious question of general importance and has a reasonable chance of success."[10]

17. Despite Wilks' assertions that principles applicable to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") should not have been applied by Justice Nixon in these CBCA proceedings, Wilks submits that the test for leave to appeal under the CCAA is applicable to this CBCA appeal, with which the Calfrac Entities agree. As such, there is a four-part test that must be met by Wilks:

(a) the point on appeal is significant to the practice;

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[8] *Decision*, *supra* note 4 at 5 [**Tab 5**].
[9] Affidavit No. 2 of Ronald P. Mathison sworn July 30, 2020 at paras 37, 39 [**Tab 6**].
[10] *Autoweld Systems Limited v CRC-Evans Pipeline International Inc*, 2011 ABCA 243 at paras 8-9 [**Tab 7**].

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

(c) the appeal is *prima facie* meritorious; and

(d) the appeal will not unduly hinder the progress of the action.[11]

## B. The Point on Appeal is Not Significant to the Practice

18. The Decision, being an exercise of discretion based on the facts of this case with which Nixon J. has the most familiarity, is not of significance to the practice. Wilks attempts to paint the Decision as raising novel issues under the CBCA. However, in granting the Decision, Nixon J. had before him five CBCA precedent orders granting the same relief as the Stay Provision (and numerous others with similar relief): *Essar Steel Canada* (2014, Ontario); *RGL Reservoir Management Inc.* (2017, Ontario); *Tervita* (2016, Alberta); *Lightstream* (2016, Alberta); and *Concordia* (2017, Ontario).[12] The Stay Provision granted by Nixon J. was not novel in any way.

19. Nixon J. expressly referenced these precedents, and concluded: "I find that this Court has jurisdiction and has exercised its discretion to grant orders similar to the Stay Provision in prior *CBCA* proceedings"; "Courts have approved the stay of proceedings against a broad spectrum of

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[11] Wilks' Memorandum, *supra* note 2 at para 12, and the cases cited therein (*Alberta (Director of Law Enforcement) v McPike*, 2019 ABCA 330 at para 45-50 [**Tab 8**]; *Resurgence*, supra note 2 at paras 6-7 [**Tab 3**]; *Bellatrix Exploration Ltd v BP Canada Energy Group ULC*, 2020 ABCA 178 at paras 16-17 [**Tab 9**]). Note Bellatrix further guides at para 17 that, "An appellate court should exercise its power sparingly, when asked to intervene in CCAA proceedings.": Duke Energy Marketing Limited Partnership.

[12] *Essar Steel Canada Inc (Re)*, 2014 ONSC 4285 [*Essar Algoma*] at paras 46-48 [**Tab 10**] (see also Amended and Restated Preliminary Order of the Honourable Regional Senior Justice Morawetz of the Ontario Superior Court of Justice [Commercial List] granted July 16, 2014, In the Matter of a Proposed Arrangement of Essar Steel Canada Inc. et al, Court File No. CV-14-10629-00CL, as extended in the Interim Order of the Honourable Regional Senior Justice Morawetz of the Ontario Superior Court of Justice [Commercial List] granted August 8, 2014, In the Matter of a Proposed Arrangement of Essar Steel Canada Inc. et al, Court File No. CV-14-10629-00CL [**Tab 11**]); *RGL Reservoir Management Inc (Re)*, 2017 ONSC 7302 at para 50 [**Tab 12**]; Preliminary Interim Order of the Honourable Justice Romaine of the Court of Queen's Bench of Alberta granted September 14, 2016, In the Matter of a Proposed Arrangement In Respect of Tervita Corporation et al, Court File No. 1601-12176 at para 3[**Tab 13**]; Preliminary Interim Order of the Honourable Justice G.C. Hawco of the Court of Queen's Bench of Alberta granted July 13, 2016, In the Matter of a Proposed Arrangement Involving Lightstream Resources Ltd. and 9817158 Canada Ltd., Court File No. 1601-08725 at para 3, as extended in the Amended Interim Order of the Honourable Justice B.E.C. Romaine of the Court of Queen's Bench of Alberta granted August 29, 2016, In the Matter of a Proposed Arrangement Involving Lightstream Resources Ltd. and 9817158 Canada Ltd., Court File No. 1601-08725 at para 58 [**Tab 14**]; Preliminary Interim Order of the Honourable Regional Senior Justice Morawetz of the Ontario Superior Court of Justice [Commercial List] granted October 20, 2017, In the Matter of a Proposed Arrangement of Concordia International Corp. et al, Court File No. CV-17-584836-00CL at para 2[**Tab 15**]; *Concordia (Re)*, 2017 ONSC 6357 at paras 44-45, 50 [**Tab 16**].

'third parties'"; and "…interim orders that prevent creditors from calling defaults under credit agreements have been granted in a number of *CBCA* Plan of Arrangement cases".[13]

20. While Wilks tries to make issue with the fact that certain CBCA stays of proceedings were granted in unopposed applications,[14] as noted by Nixon J., consent does not create the Court's jurisdiction. A court either has jurisdiction or it doesn't, and Wilks is not contesting that Nixon J. had the jurisdiction to grant the Stay Provision. The Decision was solely an exercise of judicial discretion, based on the unique facts of this case, and is therefore not an issue of significance to the practice.

### C. The Point on Appeal is Not Significant to the Action Itself

21. Part of the reason why the bar to be met for leave to appeal a procedural order is so high, is that procedural orders generally do not impact substantive rights. Nixon J. expressly confirmed that the Stay Provision is only a "temporary procedural stay"[15] within these CBCA proceedings. No substantive rights have been affected, and the sole purpose of the Stay Provision is to maintain and preserve the *status quo ante* as it existed immediately prior to the Calfrac Entities' application under the CBCA. In fact, as found by Nixon J., it was the relief being sought by Wilks that would have altered substantive rights detrimentally to the Calfrac Entities and its other stakeholders:[16]

> …the preservation of the Stay Provision in its current form is necessary to preserve the *status quo ante*. To find otherwise would shift the substantive rights to, and for the benefit of, the Wilks Brothers. That would be to the detriment of both the Calfrac Entities and their other stakeholders.[17]

22. The Calfrac Entities are subject to the ongoing supervision of the Court during these CBCA proceedings and will be required to satisfy the Court that the terms of the Final Order should be

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[13] *Decision*, *supra* note 4 at 8-9 **[Tab 6]**.

[14] The suggestion that all CBCA proceedings, with the exception of this one, have been entirely consensual or unopposed is also not true: See e.g. *9171665 Canada Ltd (Re)*, 2015 ABQB 633 [*Connacher*] **[Tab 17]**, where the interim order was granted despite significant opposition; *Trizec Corp (Re)*, [1994] 10 WWR 127, 1994 CarswellAlta 171 **[Tab 18]**; *Run of River Power Inc (Re)*, 2014 BCSC 1397 **[Tab 19]**, where there was an opposed arrangement of an energy sector entity pursuant to the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57.; *Tervita*, *supra* note 1 **[Tab 1]**.

[15] *Decision*, *supra* note 4 at 15 **[Tab 6]**.

[16] Substantive issues, including fairness and reasonableness, are matters solely for the final order hearing: see *Tervita*, *supra* note 1 **[Tab 1]**; *Mobilicity*, *supra* note 1 **[Tab 2]**.

[17] *Decision*, *supra* note 4 at 12 **[Tab 6]**.

granted before any substantive rights are impacted. Any substantive issues that Wilks wishes to raise will be appropriately heard at that time,[18] and accordingly there is no prejudice to the Wilks (or any other party) to have the Stay Provision remain in place until then.

## D. The Proposed Appeal is Not *Prima Facie* Meritorious

23. In one of the cases cited by Wilks, this Court expressly described this element of the leave test as follows:

> In the plain ordinary meaning of the words of this element, on first impression, there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "prima facie" meritorious.[19]

24. The Decision was an exercise of judicial discretion. Therefore, so long as it was exercised judicially, it is not a matter for interference by an appellate court. To meet the *prima facie* meritorious standard, Wilks must establish that, on first impression, the Decision was "an error in principle of law or a palpable and overriding error of fact". Wilks has failed to do so.

### 1. The Anti-Deprivation Rule

25. The first error alleged by Wilks is that Nixon J. "erred in law by applying the Anti-Deprivation Rule to his analysis of the impact of the Stay Provision…"[20] Not only was this not an error of law, it was not the sole basis for the Decision, and so cannot form a ground for an appeal.

26. Wilks notes that the anti-deprivation rule is currently the subject of a reserved decision of the Supreme Court of Canada (*Capital Steel Inc v Chandos Construction Ltd*, 2019). This was expressly acknowledged by Nixon J. in his Decision.[21] However, at the time of the Decision, and currently, the binding law from this Court (being the majority decision in *Chandos*, dissented in by

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[18] Nixon J. reiterated this point in his Reasons approving the Interim Order: Transcript of Proceedings in the Court of Queen's Bench of Alberta, August 7, 2020, by the Honourable Mr. Justice Nixon at 11: 23 - 39 **[Tab 20]**.
[19] *Resurgence*, *supra* note 2 at para 35 **[Tab 3]**, Tab 5 of Wilks' Memorandum.
[20] Wilks' Memorandum, *supra* note 2 at para 22.
[21] *Decision*, *supra* note 4 at 13 **[Tab 5]**, expressly noting that the judgment was under reserve.

Wakeling JA) is that the anti-deprivation rule is part of the common law.[22] The fact that the Supreme Court appeal is under reserve does not mean the existing law has been overturned. There can be no error in simply applying the common law to the facts of this case.

27. Moreover, the consideration of the anti-deprivation rule was not the sole basis for the Decision. Nixon J. expressly stated that the anti-deprivation rule was "*another reason* why the Stay Provision should be maintained in its present form."[23] Therefore, even if reliance on that rule was an error (which it clearly was not), there exists an independent basis for Decision, which would still stand. As such, this alleged error cannot form the basis for a *prima facie* meritorious appeal.

### 2. Interpretation of the Stay Provision

28. The second error alleged is that Nixon J. "erred in finding that the Stay Provision impacted the automatic acceleration of the Second Lien Notes". Importantly, the relief sought by Wilks was a request to be carved out of the Stay Provision, not a declaratory statement on automatic acceleration under an indenture governed by New York law.

29. Nixon J. did no more than find that the Stay Provision, which, by its express terms, became effective at 12:01am on July 13, 2020, and preserved the *status quo ante* existing at that time (and at that time, none of the acts that Wilks alleged would have triggered the automatic acceleration under New York law, had occurred). Nixon J. found this preservation of rights to be entirely appropriate because the Stay Provision thereby "provides protection to all parties and preserves a level playing field for all parties" and prevents "any positioning maneuvers amongst the creditors during the interim period that would give the aggressive creditor an advantage".[24] Maintaining the *status quo ante* is the very purpose of a CBCA stay of proceedings.[25]

30. Nixon J. did not purport to interpret or determine any issues of New York law, nor was he required to do so, given the relief sought by Wilks. The Indenture is governed by New York law and was not directly in issue.[26] Further, the granting of a Stay Provision pursuant to the CBCA does

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[22] *Chandos*, *supra* note 3 at paras 18-22 **[Tab 4]**, Tab 14 of Wilks' Memorandum.
[23] *Decision*, *supra* note 4 at 14 **[Tab 5]**.
[24] *Ibid* at 11 **[Tab 5]**.
[25] *Essar Algoma, supra* note 12 at paras 46-49 **[Tab 10]**.
[26] In addition, the Wilks did not put forward any expert evidence with respect to New York law before Nixon J.; foreign law must be proved by the testimony of a properly qualified expert: Jean-Gabriel Castel & Janet Walker,

not, and cannot, engage any issues of New York law. Issues of procedure are governed by the law of the *lex fori* – in this case, Alberta.[27] A procedural stay granted under the authority of a Canadian federal statute only engages issues of Canadian law.

31. Wilks' assertion that Nixon J. ought to have had regard to (unproven) New York law in considering the Stay Provision is misplaced. If a Court was required to analyze the substantive law applicable to each and every contract that may be impacted by a Canadian stay of proceedings, applications for such relief would become unworkable and could result in differential and inequitable treatment of stakeholders,[28] something that stays of proceedings is intended to avoid. *All* parties are stayed equally, as the *status quo ante* is maintained, in the best interests of stakeholders and to allow the restructuring to proceed.

### E. The Appeal May Unduly Hinder the Progress of the Action

32. The Calfrac Group, along with their legal and financial advisors, are fully engaged in the implementation of the Arrangement and the terms of the Interim Order. The unnecessary distraction of appealing a temporary procedural stay will only serve to divert limited resources, and significantly increase costs, to the detriment of the Calfrac Group's stakeholders, who are eager to see the Calfrac Group emerge as a viable entity from these CBCA proceedings.

33. On the other hand, the Stay Provision creates no prejudice to Wilks. The only prejudice that Wilks alleged in its application was the right to deliver a notice to commence a 180 day standstill period. However, the Arrangement will be completed before the 180 day period expires, and will leave the Second Lien Noteholders, including Wilks, unaffected. Therefore, as found by Nixon J., there is *no* prejudice to Wilks by having the Stay Provision remain intact.[29]

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*Canadian Conflict of Laws*, 6th ed (Markham, Ont: Lexis Nexis-Butterworths, 2005), ch 7 [**Tab 21**]; *Luan v ADP Canada Co*, 2020 ABQB 387 at paras 168-172 [**Tab 22**]; *Royal Bank of Canada v Neher*, [1985] 5 WWR 667 at paras 13-14 [**Tab 23**].

[27] *Sigurdson v Farrow* (1981), 121 DLR (3d) 183 at paras 2-3 [**Tab 24**]; *Somers v Fournier* (2002), 60 OR (3d) 225 at para 12 [**Tab 25**]; *Walter Energy Canada Holdings, Inc (Re)*, 2017 BCSC 709 at 96 [**Tab 26**].

[28] See *JP Capital Corp (Trustee of) v Perez*, 1995 CarswellOnt 934 (Ct J) [**Tab 27**], citing from Castel at para 25: "This is an application of the rule that matters of procedure are governed by the lex fori…. Foreign creditors are in the same position as Canadian creditors."

[29] *Decision*, *supra* note 4 at 14 [**Tab 6**].

## IV. RELIEF SOUGHT

34. This leave to appeal application should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Calgary, Alberta
August 27, 2020

BENNETT JONES LLP

Per: 

Estimated Time for
Argument: 20 minutes

Chris Simard
Counsel for the Respondents

## Table of Authorities

**TAB**

15. Preliminary Interim Order of the Honourable Regional Senior Justice Morawetz of the Ontario Superior Court of Justice [Commercial List] granted October 20, 2017, In the Matter of a Proposed Arrangement of Concordia International Corp. et al, Court File No. CV-17-584836-00CL

16. *Concordia (Re)*, 2017 ONSC 6357

17. *9171665 Canada Ltd (Re)*, 2015 ABQB 633

18. *Trizec Corp (Re)*, [1994] 10 WWR 127, 1994 CarswellAlta 171

19. *Run of River Power Inc (Re)*, 2014 BCSC 1397

20. Transcript of Proceedings in the Court of Queen's Bench of Alberta, August 7, 2020, by the Honourable Mr. Justice Nixon

21. Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, 6th ed (Markham, Ont: Lexis Nexis-Butterworths, 2005), ch 7

22. *Luan v ADP Canada Co*, 2020 ABQB 387

23. *Royal Bank of Canada v Neher*, [1985] 5 WWR 667, 39 Alta LR (2d) 173

24. *Sigurdson v Farrow* (1981), 121 DLR (3d) 183, 1981 CarswellAlta 21

25. *Somers v Fournier* (2002), 60 OR (3d) 225, 2002 CarswellOnt 2119

26. *Walter Energy Canada Holdings, Inc (Re)*, 2017 BCSC 709

27. *JP Capital Corp (Trustee of) v Perez*, 1995 CarswellOnt 934

# TAB 1

# Court of Queen's Bench of Alberta

**Citation: Tervita Corporation (Re), 2016 ABQB 662**



**Date:** 20161129
**Docket:** 1601 12176
**Registry:** Calgary

Between:

**In the Matter of Section 192 of The *Canada Business Corporation Act*, RSC 1985, Cc-44, as amended**

- and -

**In the Matter of a Proposed Arrangement in respect of Tervita Corporation, 9894942 Canada Ltd., Red Sky Holdings 1 Inc., Red Sky Holdings 2 Inc., Red Sky Holdings 3 Inc., CCS Canada (Canadian Holdings) Inc., CCS International Holdings Inc., Hazco Industrial Services Ltd., Tervita Equipment Rentals Ltd., Tervita Environmental Services Ltd., Tervita Metal Services Ltd., Tervita Production Services Ltd., Tervita Waste Processing Ltd., and Arkla Disposal Services Inc.**

**Corrected judgment:** A corrigendum was issued on January 30, 2017; the corrections have been made to the text and the corrigendum is appended to this judgment.

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**Reasons for Decisions**
**of the**
**Honourable Madam Justice B. E. Romaine**

---

m) new debt in amount of $475 million on terms acceptable to Tervita and the Plan Sponsors will be issued;

[17] The revolving credit facilities will be unaffected; however, the revolving credit agreement must be either reinstated or replaced on terms acceptable to Tervita and the majority of the initial supporting parties. Certain debt held by Finance LP will be transferred to a subsidiary of Tervita for nominal consideration.

[18] Trade debt will not be affected by the proposed arrangement, and the Tervita group will continue to operate, with total debt reduced by approximately $2 billion and annual cash interest expense reduced by approximately $200 million.

[19] If Tervita is obligated to pay an early redemption premium on the secured notes, such a premium would be 102% on the USD secured notes and 102.25% on the CAD secured notes, assuming that the notes were repaid between November 15, 2016 and November 14, 2017. These additional amounts would be approximately USD $13 million and CAD $4.5 million, less amounts that would be due to the Plan Sponsors.

## IV. Analysis

### A. Interim Order

[20] It is important to note that this was an application for an interim order under the arrangement provisions of the *CBCA*, to "set the wheels in motion" for the approval process relating to the arrangement, "including the calling of meetings of affected creditors and perhaps equity holders and to set out certain procedural matters": *45133541 Canada Inc (Arrangement relatif à)* [2009] QCCS 6444 at para 22. Unavoidably, the parties delved into the question of whether the Court would be satisfied at the time of the hearing of the final order that the arrangement is "fair and reasonable", but that is not the issue at this stage.

[21] It can be argued that an application for an interim order is a matter of prudence rather than statutory requirement, although the Director of the *CBCA* endorses the practice. The interim order ordinarily only addresses procedural matters. However, as noted in *Re: First Marathon Inc.*, [1999] OJ No 2805 at para 9, interested parties are entitled to raise legitimate concerns and disputes at this stage.

[22] The Court must be satisfied at the interim order stage that the arrangement is put forward in good faith and that the statutory requirements of the *CBCA* have been complied with: *Re Essar Steel Canada Inc*, 2014 ONSC 4285 at para 25; *Re 8440522 Canada Inc*, 2013 ONSC 2509 ("*Mobilicity*"); *45133541*, *supra* at para 53.

[23] There was no dispute among the parties that the arrangement constitutes an "arrangement" within the meaning of subsection 192(1) of the *CBCA;* that the solvency requirement of subsection 192(2) has been satisfied currently and will be satisfied upon completion of the arrangement; and that it is not practicable for Tervita to effect the fundamental changes set out in the plan of arrangement under any other provision of the *CBCA*. Proper notice was given to the Director as required by subsection 192(5).

[24] The issue was whether the application for an interim order was brought in good faith and for no improper purpose.

# TAB 2

**CITATION:** 8440522 Canada Inc. (Re), 2013 ONSC 2509
**COURT FILE NO.:** CV-13-10080-00CL
**COURT FILE NO.:** CV-13-10081-00CL
**DATE:** 2013-05-01



**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED AND RULES 14.05(2) AND 14.05(3) OF THE RULES OF CIVIL PROCEDURE

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 8440522 CANADA INC. AND INVOLVING DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., AND DATA & AUDIO-VISUAL ENTERPRISES LEASING INC.

**BEFORE:** Mr. Justice H.J. Wilton-Siegel J.

**COUNSEL:** *Orestes Pasparakis* and *Marc Kestenberg*, for the Applicant 8440522 Canada Inc.

*Robert J. Chadwick*, *Fred Myers* and *Brendan O'Neill*, for the Ad Hoc Committee of Noteholders

*David C. Moore* and *K. Jones*, for The Catalyst Capital Group Inc.

*Janice Wright*, for Equity Financial Trust Co.

**HEARD:** April 26, 2013

## ENDORSEMENT

[1] The Applicant, 8440522 Canada Inc. (the "Applicant"), moves in separate applications pursuant to section 192 of the *Canada Business Corporations Act*, R.B.C. 1985, c. C-44 (the "CBCA") for two interim orders with respect to two plans of arrangement (the "Plans of Arrangement") involving Data & Audio-Visual Enterprises Holdings Inc. ("Holdings"), Data & Audio-Visual Enterprises Wireless Inc. ("Wireless") and Data & Audio-Visual Enterprises Leasing Inc. ("Leasing", and collectively with the Applicant, the "Mobilicity Group" or "Mobilicity").

[2] On April 26, 2013, I granted the two interim orders sought, subject to certain modifications described below (as so amended, the "Interim Orders"), indicating that written reasons would follow shortly. These are the reasons for that decision.

and should therefore be excluded from the class of holders of First Lien Notes and treated as a separate class.

[36] Third, Catalyst objects to certain provisions of the interim orders which require that a stipulated majority of the holders of First Lien Notes who currently support the Plans must consent to any amendments to the Plans or meeting materials. It suggests this constitutes an offensive delegation of powers to these parties.

[37] Fourth, Catalyst suggests that the provisions of the interim orders respecting the Recapitalization Plan dealing with the Senior Noteholder Payment Election are contrary to the terms of the First Lien Note Trust Indenture and therefore constitute an unauthorized amendment. As I indicated in chambers, I do not agree with this interpretation. However, in any event, the Interim Orders now include language in the "paramountcy" paragraph, to which Catalyst also objects as having an uncertain consequence, indicating that nothing in the Interim Orders is intended to affect the substantive rights of any holders of First Lien Notes. This provision is understood to apply, among other things, in respect of the operation of the Senior Noteholder Payment Election.

[38] Fifth, Catalyst objects to the "no-default" provision in the Interim Orders saying, correctly, that this affects substantive rights and argues that the Court ought not to be involved in making such an order.

[39] Sixth, Catalyst suggests that there is no reason at this time for the provision in the Interim Orders dealing with the counting of votes in the event Mobilicity decides to implement an Alternative CCAA Plan under the CCAA.

**Applicable Law**

[40] The purpose of Interim Orders such as those requested is "to set the wheels in motion for the application process relating to the arrangement and to establish the parameters for the holding of shareholder meetings to consider approval of the arrangement in accordance with the statute": see *Re First Marathon Inc*., [1999] O.J. No 2805 at para. 9, (Ont. S.C.J.), Blair J. (as he then was) [*First Marathon*]. I note that in *First Marathon*, Blair J. was asked to consider the adequacy of the disclosure in the management information circular that was to be distributed to the security holders for its sufficiency, which is not an issue on these applications.

[41] In *Re 45133541 Canada inc*., [2009] Q.J. No. 18337 (Qc. Sup. Ct.) [*45133541*], Gascon, J.C.S. (as he then was) commented that, for the purposes of an interim order of the nature sought on these applications, the Court's analysis is limited to a consideration of whether the proposed plan of arrangement is put forward in good faith and whether the proposed plan complies with the statutory requirements of the CBCA. I agree with this conclusion, which necessarily remits determination of whether the proposed plan of arrangement is "fair and reasonable" to the hearing on the final order. This is particularly appropriate in the present case where it remains to be determined which Plan of Arrangement will be put to the Voting Securityholders for approval.

# TAB 3

*Indexed as:*

# Resurgence Asset Management LLC v. Canadian Airlines Corp.

**IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended;**
**AND IN THE MATTER OF The Business Corporations Act (Alberta) S.A. 1981, c.B-15., as amended, Section 185**
**AND IN THE MATTER OF Canadian Airlines Corporation and Canadian Airlines International Ltd.**
**Between**
**Resurgence Asset Management LLC, applicant, and Canadian Airlines Corporation and Canadian Airlines International Ltd., respondents**

[2000] A.J. No. 610

2000 ABCA 149

80 Alta. L.R. (3d) 213

2000 CarswellAlta 503

261 A.R. 120

19 C.B.R. (4th) 33

97 A.C.W.S. (3d) 844

Docket: 00-18816

Alberta Court of Appeal
Calgary, Alberta

**Wittmann J.A.**
**(In Chambers)**

Heard: May 18, 2000.
Judgment: filed May 29, 2000.

(47 paras.)

Application for leave to appeal the order of Paperny J. Dated the 12th day of May, 2000.

**Counsel:**

D. Haigh, Q.C. and D. Nishimura, for the applicant.
A.L. Friend, Q.C. and H.M. Kay, for the respondents.
S. Dunphy, for Air Canada.
A.J. McConnell, for Bank of Nova Scotia Trust Company of New York, Montreal Trust Co. of Canada.
P.T. McCarthy, Q.C., for Price Waterhouse Coopers.

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[Quicklaw note: Errata were filed by the Court June 5, 2000. The corrections have been made to the text and the Errata are appended to this document.]

MEMORANDUM OF DECISION

WITTMANN J.A.:--

INTRODUCTION

**1** This is an application for leave to appeal the decision of Paperny, J. made on May 12, 2000, pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (CCAA). The applicant, Resurgence Asset Management LLC (Resurgence), is an unsecured creditor by virtue of its holding 58.2 per cent of U.S. $100,000,000.00 unsecured notes issued by Canadian Airlines Corporation (CAC)

**2** CAC and Canadian Airlines International Ltd. (CAIL) (collectively Canadian) commenced proceedings under the CCAA on March 24, 2000.

**3** A proposed Plan of Compromise and Arrangement (the Plan) has been filed in this matter regarding CAC and CAIL, pursuant to the CCAA.

**4** The decision of Paperny, J. May 12, 2000 (the Decision) ordered, among other things, that the classification of creditors not be fragmented to exclude Air Canada as a separate class from Resurgence in terms of the unsecured creditors; that Air Canada should be entitled to vote on the Plan pursuant to s. 6 of the CCAA at the creditors' meeting to be held May 26, 2000; that there be no separation of unsecured creditors of CAC from unsecured creditors of CAIL for voting purposes; and that votes in respect of claims assigned to Air Canada, be recorded and tabulated separately, for

the purpose of consideration in the application for court approval of the Plan (the Fairness Hearing).

LEAVE TO APPEAL UNDER THE CCAA

**5** The section of the CCAA governing appeals to this Court is as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge 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.

**6** The criterion to be applied in an application for leave to appeal pursuant to the CCAA is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: Re Multitech Warehouse District (1995), 32 Alta. L.R. (3d) 62 at 63 (C.A.); Luscar Ltd. v. Smoky River Coal Ltd., [1999] A.J. No. 185 at para. 22 (C.A.); Re Blue Range Resource Corporation, [1999] A.J. No. 975; Re Blue Range Resource Corporation, [2000] A.J. No. 4;Re Blue Range Resource Corporation, [2000] A.J. No. 31.

**7** Subsumed in the general criterion are four applicable elements which originated in Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) at 396 (B.C.C.A.), and were adopted in Med Finance Company S.A. v. Bank of Montreal (1993), 22 C.B.R. (3d) 279 (B.C.C.A.). McLachlin, J.A. (as she then was) set forth the elements in Power Consolidated as follows at p.397:

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

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

FACTS

**8** On or about October 19, 1999, Air Canada announced its intention to make a bid for CAC and to proceed to complete a merger subject to a restructuring of Canadian's debt. On or about November 5, 1999, following a ruling by the Quebec Superior Court, a competing offer by Airline Industry Revitalization Co. Inc. was withdrawn and Air Canada indicated that it would proceed with its offer for CAC.

**9** On or about November 11, 1999, Air Canada caused the incorporation of 853350 Alberta Ltd. (853350), for the sole purpose of acquiring the majority of the shares of CAC. At the time of

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

CLASSES OF CREDITORS

**31** It is apparent from a review of the foregoing sections that division into classes of creditors within the unsecured and secured categories may, in any given case, materially affect the outcome of the vote referenced in section 6. Compliance with section 6 triggers the ability of the court to approve or sanction the Plan and to bind the parties referenced in s. 6(a) and 6(b) of the CCAA. In argument before me, it was conceded by the applicant that Resurgence would not have the ability to ensure approval of the Plan by casting its vote if Air Canada were to be excised from the unsecured creditor category into a separate class. Conversely, counsel for Resurgence candidly admitted that Resurgence would effectively have a veto of the Plan if Air Canada were segregated into a separate class of unsecured creditor.

APPLICATION OF THE CRITERIA FOR LEAVE TO APPEAL

**32** The four elements of the general criterion are set out in paragraph [7]. The first and second elements are satisfied in this case. The points raised on appeal are of significance to the action. If Resurgence succeeds, it obtains a veto. If it does not succeed, and it votes as a member of the unsecured creditors class with Air Canada, Air Canada can control the vote of the unsecured creditors.

**33** In terms of the points on appeal being of significance to the practice, it may be that an appellate court's views in this province on the classification of unsecured creditors issue is desirable, there being no appellate authority from this Court on this issue. Although I have doubt as to the significance of this element of the general criterion in the context of the facts of this case, I am prepared for the purposes of this application to treat this element as having being satisfied.

**34** The third element is whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous. In my view, the proper interpretation of this element is not a mutually exclusive application of an appeal being either meritorious or frivolous. Rather, the appeal must be prima facie meritorious; if it is not prima facie meritorious, this element is not satisfied.

**35** I find that the appeal on the points raised from the Decision is not prima facie meritorious. In

> the plain ordinary meaning of the words of this element, on first impression, there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "prima facie" meritorious.

**36** I have carefully reviewed all of the cases referred to by the supervising chambers judge and the principles she derived from them. In my view, she made no error in law.

**37** In the exercise of her discretion, she decided neither to allow the applicant's motion to excise Air Canada from the unsecured creditors class nor to prohibit Air Canada from voting. She also declined, on the facts established before her, to separate creditors of CAC from creditors of CAIL for voting purposes. She did, however, order that Air Canada's vote be recorded and tabulated and indicated that this will be considered at the Fairness Hearing.

**38** It was strenuously argued before me by the applicant, that deferring classification and voting issues to the Fairness Hearing was an error of law or principle in and of itself.

**39** The argument was put in terms that if, on a proper classification of unsecured creditors, Air Canada was removed from the unsecured class, and Resurgence vetoed the Plan, the matter of a Fairness Hearing would never arise. While that may be true, it does not follow that there is any error in law in what the supervising judge did. She concluded that the separate tabulation of the votes will allow the voice of the unsecured creditors to be heard, while, at the same time, permit, rather than rule out the possibility, that the Plan might proceed. This approach is consistent with the purpose of the CCAA as articulated in many of the authorities in this country.

**40** The supervising chambers judge also refused to exclude Air Canada from voting on the basis that the legal rights attached to the notes held by Air Canada were valid. Resurgence argued that because Air Canada had other interests in the outcome of the Plan, it should be excluded from voting as an unsegregated secured creditor. Paperny, J. held that this was an issue of fairness, as was the fact that Air Canada was really voting on its own reorganization. She did not err in principle. She expressly acknowledged the authorities that, on different facts, either allowed different classes or excluded a vote. See, for example, Re Woodward's Ltd. (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.); Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 166 (B.C.S.C.); Re NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1 (N.S.S.C.T.D.).

**41** The fourth element of the general criterion is whether the appeal will unduly hinder the progress of the action. In other words, will the delay involved in prosecuting, hearing and deciding the appeal be of such length so as to unduly impede the ultimate resolution of the matter by a vote or court sanction? The approach of the supervising judge to the issues raised by the applicant is that its concerns will be seriously addressed at the Fairness Hearing scheduled for June 5, 2000, pursuant to s. 6 of the CCAA, provided the creditors vote to adopt the Plan.

# TAB 4

# In the Court of Appeal of Alberta

**Citation: Capital Steel Inc v Chandos Construction Ltd, 2019 ABCA 32**

**Date:** 20190129
**Docket:** 1703-0085-AC
**Registry:** Edmonton



**Between:**

**Deloitte Restructuring Inc. in its Capacity as Trustee in Bankruptcy of Capital Steel Inc., a Bankrupt**

Appellant
(Plaintiff/Applicant)

- and -

**Chandos Construction Ltd.**

Respondent
(Defendant/Respondent)

---

**The Court:**

**The Honourable Madam Justice Patricia Rowbotham**
**The Honourable Madam Justice Barbara Lea Veldhuis**
**The Honourable Mr. Justice Thomas W. Wakeling**

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**Reasons for Judgment Reserved of The Honourable Madam Justice Rowbotham**
**Concurred in by The Honourable Madam Justice Veldhuis**

**Dissenting Reasons for Judgment Reserved of The Honourable Mr. Justice Wakeling**

Appeal from the Order by
The Honourable Mr. Justice K.G. Nielsen
Dated the 17th day of March, 2017
Filed on the 27th day of March, 2017
(Docket: BK03 2169632)

[12] The chambers judge recognized that the common law anti-deprivation rule prevents parties from contracting out of bankruptcy laws. He stated that if clause VII Q(d) were a liquidated damages provision rather than a penalty, it would not violate the rule.

[13] The chambers judge ultimately found that the clause was a genuine pre-estimate of damages, which imposed liquidated damages and not a penalty. He also held that clause VII Q(d) represented a *bona fide* commercial transaction that did not have as its predominant purpose the deprivation of Capital Steel's property. Consequently, the chambers judge concluded that Chandos could enforce clause VII Q(d) against Deloitte.

## IV. Grounds of Appeal and Standard of Review

[14] Deloitte's appeal raises two issues:

1. Does clause VII Q(d) violate the common law anti-deprivation rule?

2. Does clause VII Q(d) impose liquidated damages or a penalty?

[15] The content of the common law anti-deprivation rule and the proper test for invalidating penalty provisions are pure questions of law reviewable for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para 8, [2002] 2 SCR 235. Absent an extricable legal error, the chambers judge's application of the proper tests is reviewable on a standard of palpable and overriding error: *Housen* at para 36.

## V. Analysis

[16] The common law anti-deprivation rule and the rule against penalties are two distinct concepts that must be assessed separately. Clause VII Q(d) may be found unenforceable under either of the two rules. I conclude that clause VII Q(d) conflicts with the anti-deprivation rule, and it is therefore unnecessary for me to consider whether clause VII Q(d) imposes liquidated damages or a penalty.

### A. The Common Law Anti-Deprivation Rule

[17] The anti-deprivation rule forms a part of what is referred to as the "fraud on the bankruptcy law" principle. The essence of the fraud on the bankruptcy principle is that parties cannot arrange their affairs through contract in a way that conflicts with the operation of bankruptcy laws: Roderick J Wood, "Direct Payment Clauses and the Fraud Upon the Bankruptcy Law Principle: Re Horizon Earthworks Ltd. (Bankrupt)" (2014) 52:1 Alta LR 171 [Wood, "Fraud Upon the Bankruptcy"]; Anthony Duggan et al, *Canadian Bankruptcy and Insolvency Law*, 3rd ed (Toronto: Emond, 2015) at 297.

[18] The chambers judge commented that there was some debate about whether the anti-deprivation rule applied in Canada and the extent of its application. He ultimately concluded

that it was clear that there was a common law rule, based on public policy, that prevented parties from contracting out of bankruptcy law and that given the rule, he would determine whether clause VII (Q)(d) was an attempt to contract out of bankruptcy law. Deloitte submits that Canadian jurisprudence recognizes the common law anti-deprivation rule. Chandos does not deny the existence of the rule, but contends it has not enjoyed significant application in Canada. My colleague, Wakeling JA, goes further and concludes that the common law anti-deprivation rule is not part of Canadian law. I disagree with his conclusion.

[19] The fraud on the bankruptcy law principle traces its origins from England; by the 19th century, the principle's adoption was certain enough to warrant commentary that "the law is too clearly settled to admit of a shadow of doubt" about its application: *Whitmore v Mason* (1861), 70 ER 1031 at 1034, 2 J & H 204.

[20] The fraud on the bankruptcy law principle can be divided into two distinct sub-rules: Roderick J Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin, 2015) at 88 [Wood, "Bankruptcy and Insolvency"]. The first is the *pari passu* rule. This rule invalidates contractual provisions that, if enforced during bankruptcy proceedings, would alter the bankruptcy scheme of distribution. Provisions that offend the *pari passu* rule do not affect the size of the total pot of assets available to creditors but allow certain creditors to receive more than their fair share: Duggan et al at 444; Wood, "Fraud Upon the Bankruptcy" at 177. Under the *pari passu* rule, it is irrelevant whether the contractual provision is triggered by insolvency; arrangements that would have been enforceable against the debtor outside of bankruptcy proceedings, but would alter the scheme of distribution after proceedings begin, are unenforceable against the trustee: Wood, "Fraud Upon the Bankruptcy" at 177.

[21] The second rule of the fraud on the bankruptcy law principle is the anti-deprivation rule. The anti-deprivation rule prevents parties from agreeing to remove property from a bankrupt's estate in the event of insolvency that would have otherwise vested in the trustee: Duggan et al at 297; Wood, "Fraud Upon the Bankruptcy" at 176. Provisions that offend the anti-deprivation rule reduce the total pot of assets available to the bankrupt's creditors. As stated in *Whitmore* at 1034:

> [N]o person possessed of property can reserve that property to himself until he shall become bankrupt, and then provide that, in the event of his becoming bankrupt, it shall pass to another and not to his creditors.

[22] In my view, the fraud on the bankruptcy law principle, including the anti-deprivation rule, has a clear jurisprudential and policy basis that supports its application. The anti-deprivation rule was adopted from England and continues to apply in Canada.

[23] There is no doubt that the *pari passu* rule applies in Canada. In *AN Bail Co v Gingras et al*, [1982] 2 SCR 475, 54 NR 280, the Supreme Court dealt with a direct payment clause in a construction contract. The clause allowed the property owner to pay any amounts owing to the general contractor directly to subcontractors to satisfy the general contractor's obligations. When

# TAB 5

Action No.: 2001-08434
E-File Name.: CVQ2012178711CANADA
Appeal No.: _____

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

IN THE MATTER OF SECTION 192 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, C. C-44, AS AMENDED

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 12178711 CANADA INC., CALFRAC WELL SERVICES LTD., CALFRAC (CANADA) INC., CALFRAC WELL SERVICES CORP. and CALFRAC HOLDINGS LP, by its General Partner CALFRAC (CANADA) INC.

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# P R O C E E D I N G S

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Calgary, Alberta
July 27, 2020

Transcript Management Services
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403)297-7392
Email: TMS.Calgary@csadm.just.gov.ab.ca

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| C.D. Simard (remote appearance) | For 12178711 Canada Inc., Calfrac Well Services Ltd., Calfrac (Canada) Inc., Calfrac Well Services Corp. And Calfrac Holdings LP, by its General Partner Calfrac (Canada) Inc. |
| B. Kraus (remote appearance) | For 12178711 Canada Inc., Calfrac Well Services Ltd., Calfrac (Canada) Inc., Calfrac Well Services Corp. And Calfrac Holdings LP, by its General Partner Calfrac (Canada) Inc. |
| D. Brunsdon (remote appearance) | For 12178711 Canada Inc., Calfrac Well Services Ltd., Calfrac (Canada) Inc., Calfrac Well Services Corp. And Calfrac Holdings LP,by its General Partner Calfrac (Canada) Inc. |
| K. Lynch (remote appearance) | For 12178711 Canada Inc., Calfrac Well Services Ltd., Calfrac (Canada) Inc., Calfrac Well Services Corp. And Calfrac Holdings LP, by its General Partner Calfrac (Canada) Inc. |
| M. Shakra (remote appearance) | For 12178711 Canada Inc., Calfrac Well Services Ltd., Calfrac (Canada) Inc., Calfrac Well Services Corp. And Calfrac Holdings LP, by its |

| | |
|---|---|
| | General Partner Calfrac (Canada) Inc. |
| J.G. Kruger, QC (remote appearance) | For HSBC, Agent for the First Lien Lenders |
| J. Oliver (remote appearance) | For Wilks Brothers |
| L. Jackson (remote appearance) | For Wilks Brothers |
| J.J. Salmas (remote appearance) | For Wilmington Trust National Association |
| S. Van Allen (remote appearance) | For Wilmington Trust National Association |
| S.J. Alberts (remote appearance) | For Wilmington Trust National Association |
| P. Griffin (remote appearance) | For G2S2 Capital Inc. |
| L. Thacker (remote appearance) | For G2S2 Capital Inc. |
| P. Calce (remote appearance) | For G2S2 Capital Inc. |
| R.J. Chadwick (remote appearance) | For Ad Hoc Committee of Senior Unsecured Noteholders |
| B. Wiffen (remote appearance) | For Ad Hoc Committee of Senior Unsecured Noteholders |
| N. Arevalo | Court Clerk |

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**Reasons for Judgment**

THE COURT: Good afternoon everyone. Before I begin I just would like to apologize from the Court's perspective there was a downfall in allocation of duties amongst the clerks. That was entirely the fault of the Court. Again, my apologies for the delay.

**Decision**

This is in respect of the application by the Wilks Brothers LLC and the Calfra Group or Calfrac Entities, as I will refer to them as. This is a Comeback Application.

These are oral reasons for judgment of myself, Justice Blair Nixon.

Insofar as this is an oral judgment I retain the right to review the transcript and to add case names and citations. I may issue a written decision on this, although I have not yet made a final decision in that regard.

In oral judgments it is not my practice to cite the legislation, jurisprudence, or the *Rules of*

*Court* in detail notwithstanding that they have all been considered.

Before I turn to the introduction I would just also like to acknowledge the number of submissions that I received. They were all appreciated.

## I. Introduction

This is a Comeback Application (the "Comeback Application"). The Comeback Application is being filed by the Wilks Brothers LLC, (the "Wilks Brothers").

The Wilks Brothers seek an order to vary or amend paragraph 7 of the Preliminary Interim Order granted on July 13th, 2020 (the "Preliminary Interim Order").

The Preliminary Interim Order created a stay of proceedings as against, among others, holders of the Second Lien Secured Notes of Calfrac Holdings LP. (I will refer to that Stay, as the "Stay Provision"; and I will also refer to the "Second Lien Noteholders" and the "Second Lien Notes", where appropriate).

The Wilks Brothers argue that the Stay Provision does not apply to the Second Lien Noteholders.

## II. The Issue

Does the Stay Provision apply to the Second Lien Noteholders?

## III. The Facts

On July 13th, 2020, this Court granted the Preliminary Interim Order to 12178711 Canada Inc., Calfrac Well Services Ltd, Calfrac (Canada) Inc, Calfrac Well Services Corp, and Calfrac Holdings LP, by its general partner, Calfrac (Canada) Inc. (I will refer to those entities collectively as the "Calfrac Entities".)

The Calfrac Entities sought the Preliminary Interim Order pursuant to Section 192 of the *Business Corporations Act*, (the *"CBCA")* in connection with a plan of arrangement under the *CBCA* (the "Plan of Arrangement").

The Preliminary Interim Order was obtained by the Calfrac Entities on an *ex parte* basis. The focus of the Comeback Application is on paragraph 7 of the Preliminary Interim Order, which establishes the Stay Provision.

The relevant portions of paragraph 7 of the Preliminary Interim Order read as follows: (as

read)

> From 12:01 AM, (Calgary time) on the date of this Preliminary Interim Order and until further order of the Court (the "Stay Period"), no right, remedy, or proceeding, including, without limitation, any right to terminate, demand, accelerate, set off, amend, declare in default or take any other action under or in connection with any loan, note, commitment, contract or other agreement, at law or under contract, may be exercised, commenced or proceeded with by: (i) the Second Lien Noteholders;...or (iv) any person (other than HSBC in its capacity as Agent under, and the lenders party to, the Credit Agreement, who are expressly not subject to the stay of proceedings herein) that is party to or a beneficiary of any other loan, note, commitment, contract or other agreement with one or more of the Calfrac Entities, against or in respect of the Calfrac Entities, or any of the present or future property, assets, rights or undertakings of any of the Calfrac Entities, of any nature in any location, whether held directly or indirectly by any of the Calfrac Entities, by reason or as a result of:
> (a) the Applicants having made an application to this Court pursuant to Section 192 of the *CBCA*;
> (b) any of the Calfrac Entities being a party to or involved in these proceedings or the Arrangement;
> (c) any of the Calfrac Entities taking any step contemplated by or related to these proceeding or the Arrangement including but not limited to the commencement or prosecution of any foreign proceedings for the recognition of these proceedings or the Arrangement;
> (d) the non-payment of principal, interest and any other amounts due and payable in respect of any of the Senior Unsecured Notes, or any related documents, or the expiry of any applicable grace periods hereunder, or
> (e) any default or cross-default under or in connection with any of the Second Lien Notes, the Senior Unsecured Notes or any related documents, in each case except with the prior consent of the Applicants or leave of this Court.

On July 14th, 2020 the request for relief by the Calfrac Entities was heard by the U.S. Bankruptcy Court for the Southern District of Texas, located in Houston, Texas (the "U.S. Bankruptcy Court"). The U. S. Bankruptcy Court granted an Order Granting Emergency Provisional Relief pursuant to Chapter 15 of the *Code* (the "U.S. Order").

The Wilks Brothers appeared at the U.S. Bankruptcy Court hearing on July 14th, 2020 to object to the relief being sought, but was unsuccessful (the "July 2020 U.S. Bankruptcy

Court Hearing"). At the July 2020 U.S. Bankruptcy Court Hearing, the Wilks Brothers stated, "We really believe this should have been commenced in a Chapter 11 before this Court".

The Calfrac Entities have also taken steps to apply for recognition that the *CBCA* proceedings are a "foreign main proceeding". The U. S. Bankruptcy Court is scheduled to hear that application on August 25th, 2020.

The Calfrac Entities have garnered significant support for the Plan of Arrangement among the affected security holders, including the unsecured noteholders and the common shareholders (collectively, the "Affected Securityholders".)

## IV. Analysis

### A. The Onus

The Calfrac Entities have the onus of demonstrating the appropriateness of the Stay Provision on the Comeback Application.

The Wilks Brothers assert that the Calfrac Entities have a higher standard to satisfy to justify interfering with the bargained for legal rights of the Second Lien Noteholders. I disagree.

The standard of proof in all civil claims is the balance of probabilities. Contrary to the suggestion made by counsel for the Wilks Brothers, there is no higher burden to satisfy concerning the alleged interference with the bargained rights of the Second Lien Noteholders: *FH v McDougall*, 2008 SCC 53 at paras 39, 40 and 49. The *Supreme Court of Canada* has stated the following in the context of this issue: (as read)

> I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities.

### B. Plans of Arrangement using the *CBCA*

The use of Plans of Arrangement to implement corporate restructurings under federal and provincial *Business Corporations Act* has become more common over the past few decades. The scope within which Plans of Arrangement have been permitted to operate has expanded during this period.

Plans of Arrangement legislation is being used by bodies corporate in a number of

circumstances, including when the underlying businesses are financially challenged. The difficulty for all participants is to determine the appropriate boundaries within which the arrangement should be permitted to apply. As gatekeepers, the judiciary is on the front lines of this challenge.

## C. *CBCA* Framework

The policy underlying the *CBCA* is to allow a corporation to manage its own affairs, subject to the caveat that minority stakeholders must be protected: See *Proposals for a New Alberta Business Corporations Act*, Report No 36, vol 1 and 2 (Edmonton: Institute of Law Research and Reform, 1980) at 52 ["**Alberta Law Institute Report.**"]. This management policy extends to Plans of Arrangement. *FH v McDougall*, 2008 SCC 53 at paras 39, 40, 49.

From the inception of the *CBCA*, the policy thrust was to allow a corporation to make an application for an arrangement including "...a compromise involving creditors and anything else that comes within the term 'arrangement' as interpreted by the courts": Alberta Law Institute Report at 53, although it is discussing the ABCA proposal in this context. The thread embedded in this legislative scheme is flexibility, and the Courts were granted the discretion to deal with matters as they saw fit.

As a result of this legislative policy and the resulting jurisprudence, the Plans of Arrangement framework has gained popularity. The attractiveness of Plans of Arrangement has developed because the Courts have been persuaded of the benefits of the speed and flexibility provided by that legislative framework.

This judicial endorsement of arrangements is supported by policy statements issued through the Executive Branch of the federal government. In particular, the Director appointed under the *CBCA* has stated that the arrangement provisions of that statute are intended to be facilitative and should not be construed narrowly: Innovation, Science and Economic Development Canada, "Policy on arrangements - Canada Business Corporations Act, section 192" (1 August 2014) Government of Canada, online: <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs01073.html> para 1.02 ["**CBCA Policy**"]. That endorsement by the Executive Branch of the federal government goes on to state that any proposed arrangement transaction must satisfy the requirements of procedural and substantive fairness.

Notwithstanding the endorsements by the judiciary and the Executive Branch of the federal government, I acknowledge that the statutory framework which provides for Plans of Arrangement is not comprehensive. The absence of a comprehensive framework has caused a number of tensions to evolve concerning the use of arrangements. These

tensions include the role of the stay of proceedings in facilitating arrangements.

**D. Wilks Brothers' Focus - Second Lien Notes and The Stay Provision**

The focus of the Comeback Application is on paragraph 7 of the Preliminary Interim Order. The Wilks Brothers seek an Order to vary or amend paragraph 7 of the Preliminary Interim Order. They seek to remove the Second Lien Parties from the Stay Provision.

Section 7 is the only provision of the Preliminary Interim Order that has been challenged on this application.

The Calfrac Entities obtained the Preliminary Interim Order in the context of advising the Court that they were developing a proposed Plan of Arrangement under the *CBCA*.

The Wilks Brothers assert the Second Lien Notes have automatically accelerated by its terms and by operation of law. As such, the Wilks Brothers assert the second lien notes are now fully due and payable. Consistent with this position, the Wilks Brothers assert that the Stay Provision has no impact on the automatic acceleration of the Second Lien Notes under the Second Lien Indenture.

**E. Does the Court have Jurisdiction to Grant Stay Provisions?**

In reviewing matters for the Preliminary Interim Order, I found in the requirements for relief under Section 192 were satisfied. This conclusion was not challenged by the Wilks Brothers, and does not form any part of its objection on the Comeback Application.

Concerning the Preliminary Interim Order granted in this case, the only question is whether it is appropriate for this Court to exercise its discretion to grant the Stay Provision in the form previously granted on July 13th, 2020. I turn to review the issues relating to this question.

**1. Does the Court require the consent of the Wilks Brothers in order to have jurisdiction**?

The Wilks Brothers assert that the precedents relied on by the Calfrac Entities are of limited assistance because the orders obtained were consensual or unopposed. I disagree.

The Court either has jurisdiction or it does not. A party's consent is immaterial to that determination.

Based on my review of the jurisprudence, I find that this Court has jurisdiction and has exercised its discretion to grant orders similar to the Stay Provision in prior *CBCA* proceedings.

Given that precedent and my review of the law, I find that I have the jurisdiction to issue the Stay Provision. I do not need the consent of the Wilks Brothers as a prerequisite to decide the matter.

Given my jurisdiction, my obligation is to determine whether it is appropriate in each case to exercise that discretion. I exercise my discretion based on the facts and circumstances before me.

Given the facts and analysis, I find I have the jurisdiction to issue the Stay Provision, and that I do not need the consent of the Wilks Brothers.

**2. Does the Court have the jurisdiction to grant the Stay Provision when it applies to third parties?**

The Wilks Brothers assert it is a "third party" to the Plan of Arrangement. Notwithstanding my jurisdiction, the assertion advanced by the Wilks Brothers raises the question as to whether the Stay Provision applies to third parties.

The fundamental purpose of a stay proceeding is to preserve the *status quo* that existed prior to the filing. To give effect to that fundamental purpose, third parties are often subject to a temporal procedural stay of their contractual rights during a restructuring under the *CBCA*.

Based on my review of the law, I find that the Courts have approved the stay of proceedings against a broad spectrum of "third parties": ***Essar Steel Canada Inc***, 2014 ONSC 4285 at paras 46-48; ***RGL Reservoir Management Inc (Re)***, 2017 ONSC 7302 at para 50; see also Tervita Preliminary Interim Order at para 3; Lighstream Preliminary Interim Order at para 3; Concordia Preliminary Interim Order at para 2; ***Concordia (Re)***, 2017 ONSC 6357 [Concordia] at paras 44-45 & 50.

Given the facts and analysis, I find that I have the jurisdiction to grant the Stay Provision when it applies to third parties including the Wilks Brothers.

**3. Does the Court have the jurisdiction to grant orders that interfere with contractual rights?**

Courts exercising jurisdiction under the *CBCA* have made orders which prevent creditors

from calling defaults under credit agreements where they would otherwise be entitled to do so. (I refer to those as "No Default Orders".) The purpose for doing so is the same as a stay of proceeding: To maintain the *status quo* that existed prior to the filing, pending consideration of the arrangement: ***8440522 Canada Inc***, 2013 ONSC 2509 [***Mobilicity]*** at paras 69-71.

When considering whether to grant a No Default Order, the Courts have held that the words of section 192(4) of the *CBCA* "not only suggest a large discretion for the Court, but also one that should be reasonably exercised in furtherance of the object of the provision. Namely, to facilitate an arrangement and, at the very least, to allow for it to be subject to a meaningful approval process": ***45133541 Canada Inc***, 2009 QCCS 6444 [***Abitibi***] at para 105, as cited in ***Mobilicity***.

In this respect, the Courts have found that their powers under the *CBCA* can be exercised to restrain rights that are normally enjoyed by secure creditors, and include "the power to restrain enforcement of security and thus attempt to preserve the *status quo* pending consideration of the arrangement": ***In the Matter of a Plan of Arrangment proposed by Trizec Corporation Ltd*** (April 6, 1994), Calgary (Alta QB), unreported [***Trizec***], as cited in ***Mobilicity*** at para 69.

In keeping with these judicial guidelines, interim orders that prevent creditors from calling defaults under credit agreements have been granted in a number of *CBCA* Plan of Arrangement cases: ***In Abitibi*** at para 108.

Similarly, under the *CCAA*, the jurisdiction to impose a stay during the restructuring period to prevent a creditor relying on an event of default has been found to apply "equally to the creditor of the debtor company in circumstances where the debtor company has chosen not to compromise the indebtedness owed to it.": ***Re, Doman Industries Ltd (Trustee of)***, 2003 BCSC 376 [***Doman***] at paras 15-16. The case law under the *CCAA* has been accepted as instructive in these circumstances. Justice Morawetz, as he then was, made it clear in ***Concordia*** when he stated that: ***In the Matter of a Proposed Arrangement of Concordia International Corp. et al***, Court File No. CV-17-584836-00CL [***Concordia Preliminary Interim Order***]; and ***Concordia*** at para 49. (as read)

> Where there is an expectation of debt compromise, the parties should not hesitate to incorporate structures or processes that are found in the *CCAA* and the *Bankruptcy and Insolvency Act*.

Given the facts and analysis, I find that the Court has the jurisdiction to grant orders that interfere with contractual rights. This is supported by the jurisprudence which has

established that under both the *CBCA* and the *CCAA*, the fact that a creditor is legally unaffected by an arrangement does not impact the jurisdiction of the Court or the appropriateness of the stay of proceedings applying to that creditor. Further, I find the Stay Provision is not an order that would be impermissible under all of the insolvency legislation in Canada, including proceedings under the *CBCA*.

**F. Does the Stay Provision preserve the *status quo* for the Calfrac Entities?**

The jurisdiction of the Court under Section 192 of the *CBCA* is routinely exercised to grant broad stays of proceedings to facilitate arrangement proceedings under that statute. These discretionary orders are made with the purpose of preserving the *status quo* and avoiding any disruption of business during the essential arrangement process.

For judicial authority on this point, I need look no further than earlier comments by this Court. In the ***Trizec*** case this Court stated: ***Trizec***, cited in ***Abitibi*** at para 106 and ***Mobilicity*** at para 69; see also discussions in ***Abitibi*** at paras 92-122, ***Mobilicity*** at paras 66-73, and ***Essar*** at paras 46-48. (as read)

> The power to restrain enforcement of security and thus attempt to preserve the *status quo* ending consideration of arrangement by parties affected can be found in the broad general language of section 192(4).

Other Superior Courts within Canada have also made similar supportive comments. In the course of considering Stay Provisions in orders analogous to the Stay Provision, the Courts have commented that "[t]he aim of such clauses is to maintain the *status quo* while the proposed arrangements are considered and implemented": ***Essar*** at para 47.

In a similar context, the Courts have stated that the discretion under Section 192(4) ought to be exercised in a manner that furthered the purpose of the provision, namely, to facilitate an arrangement and, at the very least, to allow for it to be subject to a meaningful approval process.

When I speak of maintaining the *status quo* in the context of the Stay Provision in the Preliminary Interim Order, I mean the *status quo* ante. In other words, the state of the facts as they existed before the commencement of the relevant proceedings. This point has been emphasized by other superior courts which have framed the point as follows: ***In the Matter of the Companies' Creditors Arrangement Act and in the Matter of JTI-Macdonald Corp***, 2019 ONSC 222 at para 29. (as read)

> In accepting that the orders proposed by Imperial ought to go in all three applications I am convinced that this would best preserve the *status quo*

> as it existed at the time of the filings and provide for a level playing field needed to attempt a resolution of all claims.

The concept of *status quo ante* is well-understood in law, and refers to a state of facts before the intervention of an act or acts being considered by the Court.

In this case, the *status quo ante* to be preserved by the Stay Provision as expressly set out at paragraph 7 of the Preliminary Interim Order is the state of facts that existed prior to 12:01 AM on July 13th, 2020. That pinpointed time is before the Calfrac Entities had filed pleadings or made an application for the Preliminary Interim Order.

As at 12:01 AM time on July 13th, 2020, the Calfrac Entities: (i) had filed no court documents; (ii) had made no court application; and (iii) were still within the grace period for the periodic interest payment due under the Unsecured Note Indenture.

In considering the position being advanced by the Wilks Brothers, I also reviewed the words in Article 4.06 and Article 6.01(a)(9) of the Second Lien Indenture in the context of the particular facts of this case. Based on that review, I find that prior to 12:01 AM on July 13, 2020 none of the Calfrac Entities had:

> (i) insisted upon, pleaded, claimed, or taken advantage of any stay, extension or usury law; and
> (ii) commenced a voluntary case.

In summary, I accept the interpretation of paragraph 7 of the Stay Provision as argued by the Calfrac Entities during the comeback hearing.

Given the facts and analysis, I find the *status quo ante* is preserved by the Stay Provision.

Preserving the *status quo ante* is also consistent with the approach of the Canadian courts.

While the Calfrac Entities finalized the Plan of Arrangement and bring it forward in these *CBCA* proceedings, all parties are procedurally stayed from maneuvering, relying on, or exercising any rights or remedies. All substantive rights are preserved in the same state they existed prior to 12:01 AM on July 13, 2020.

In effect, the Stay Provision provides protection to all parties and preserves a level playing field for all parties. The intention in these circumstances is to prevent any positioning maneuvers amongst the creditors during the interim period that would give the aggressive creditor an advantage. The policy objective in these circumstances is to make sure that other creditors are not prejudiced because they are less aggressive or

assertive. Any such maneuvering would undermine the financial position of an operation such as the Calfrac Entities making it less likely that the eventual arrangement would succeed: ***Meridian Developments Inc v Toronto-Dominion Bank*** (1984), 11 DLR (4th) 576, [1984] 5 WWR 215 at para 23.

Given the facts and analysis, I find the preservation of the Stay Provision in its current form is entirely appropriate. Further, the preservation of the Stay Provision in its current form is necessary to preserve the *status quo ante*. To find otherwise would shift the substantive rights to, and for the benefit of, the Wilks Brothers. That would be to the detriment of both the Calfrac Entities and their other stakeholders. Importantly, that would be contrary to the whole purpose and intent that underlies restructuring in an insolvency context.

In addition to my above comments, Canadian courts prohibit the kind of "automatic" or "deemed" acceleration relied on by the Wilks Brothers in this case. I turn to review that law.

**G. Does the Anti Deprivation Rule apply in this case?**

On this Comeback Application the Wilks Brothers highlight two provisions under the Second Lien Indenture.

First, Article 4.06, which provides that the parties, to the extent they may lawfully do so, shall not take the benefit of a stay; and

Second, Article 6.02 which provides for the immediate acceleration of the Second Lien Notes upon the occurrence of certain events of default.

In my view, the law is clear. Parties cannot contract out of the jurisdiction of the Court.

If a party was able to agree not to seek relief in the form of a stay of proceedings, such a provision would be inserted into every agreement with a borrower to the detriment of all of its other stakeholders. Based on my review of the law, the Court has a jurisdiction under the *CBCA* to temporarily stay the contractual rights of a third party, including automatic acceleration provisions.

The *CCAA* and the *BIA* contain express statutory provisions prohibiting the termination of an agreement or the acceleration of payment obligations purely by reason that proceedings are commenced under the respective statutes and expressly provide that such contractual provisions are void.

The provisions in these respective statutes are commonly referred to as a Rule against *"ipso facto"* clauses. They prohibit counterparties from relying on contracts that purport to automatically result in consequences or deem things to have happened upon the commencement of a debtors' restructuring proceedings.

These statutory provisions in the *CCAA* and the *BIA* are codifications in part of the common law. In particular, these codifications on the "Fraud on Bankruptcy Principle". That principle has two elements: (i) the *Pari-Passu* Rule, which invalidates contractual provisions that would alter the bankruptcy scheme of distribution; and (ii) the Anti-Deprivation Rule, which invalidates contractual provisions that purport to remove property from a bankrupt's estate in the event of an insolvency.

Prior to the codification of, for example, section 34 of the *CCAA*, orders consistent with the fraud on bankruptcy principle were made under the general jurisdiction of the *CCAA* Court. That is akin to the general jurisdiction of the Court under Section 192(4) of the *CBCA*.

The Anti-Deprivation Rule was originally adopted from English law, and continues to apply in Canada. Its common law application was endorsed in 2019 by a majority of the Alberta Court of Appeal: ***Capital Steel v Chandos Construction Ltd***, 2019 ABCA 32 [***Chandos***] at paras 20-21; on appeal to the Supreme Court of Canada, judgment reserved. The Rule applies to all provisions that have a prejudicial impact on stakeholders stipulating that: ***Chandos*** at para 32.

> Contracting parties cannot rely on provisions that are engaged by a debtor's insolvency and remove value from the debtor's estate to the prejudice of creditors.

I acknowledge that these *CBCA* proceedings are not strictly insolvency proceedings. However, recent guidance from the Ontario Superior Court has expressly stated that in a *CBCA* Plan of Arrangement where there is an expectation of debt compromise, the parties should not hesitate to incorporate structures or processes that are found in the *CCAA* and *Bankruptcy and Insolvency Act*: see again, ***Concordia*** at para 49, which is a comment of Justice Morawetz (as he then was).

Given that judicial guideline, I find the *CCAA* and the *BIA* provide me with guidance as to the determination I can make in these proceedings in respect of the Wilks Brothers and the Calfrac Entities.

In particular, I find that the underlying principles and policy informing the Anti-Deprivation Rule are applicable in this case. Those principles and policies guide me

in the exercise of my discretion to stay the remedies within the Second Lien Indenture.

The Plan of Arrangement is intended to restructure the Calfrac Entities businesses and avoid insolvency. That plan is for the benefit of all stakeholders.

Based on my review of the underlying facts and evidence, I infer that the Wilks Brothers are attempting to rely on a contractual provision that it submits is engaged by the very fact of the commencement of this restructuring proceeding, to the prejudice of all other stakeholders.

Given the facts and analysis, I find the policy rationale justifying the application of the Anti-Deprivation Rule is thus present in this case. This is another reason why the Stay Provision should be maintained in its present form. In particular, I find that the present form of a Stay Provision will prevent the Wilks Brothers from altering the substantive rights of the parties by way of an "automatic" acceleration clause in the Second Lien Indenture, to the detriment of all other stakeholders.

**H. Does the Stay Provision prejudice the Wilks Brothers?**

The Wilks Brothers submit that the potential prejudice that may be caused by the Stay Provision outweighs the benefits that may be achieved for all stakeholders. In support of this submission, the Wilks Brothers state that the Stay Provision interferes with its contractual rights under the Second Lien Note Indenture.

The "serious prejudice" articulated by the Wilks Brothers is that the Stay Provision would prevent the Second Lien Noteholders from exercising their contractual and bargained for rights to deliver a notice to commence the 180 day "standstill period" as required under the Intercreditor Agreement. Given these particulars, I find the Wilks Brothers is not actually prevented from taking any meaningful procedural enforcement steps, as it would be subject to a standstill period in any event.

The Calfrac Entities anticipate that the Plan of Arrangement is to be completed within 180 days and will leave the Second Lien Noteholders substantially unaffected. Therefore, there should be no prejudice to the Wilks Brothers.

If for some reason the Plan of Arrangement does not succeed, and a decision is made to terminate the Stay Provision, the Court at that time would have the authority and discretion to grant appropriate relief to the Wilks Brothers to alleviate any timing prejudice that it claims it may have suffered as a result of the Stay Provision.

On the other hand, the prejudice to the Calfrac Entities, and all other stakeholders, has the

potential of derailing a heavily negotiated restructuring. The Plan of Arrangement provides the Calfrac Entities with a path forward, sustaining business operations and creating value for all interested parties.

Without the Stay Provision, the Calfrac Entities may be forced to file insolvency proceedings. That could result in, among other things, an automatic and permanent destruction of all value for the shareholders and a significant additional expense of the restructuring or sale process under insolvency legislation. The Plan of Arrangement and Stay Provisions provide a way to avoid that outcome.

Given the facts and analysis, I find the prejudice to the Wilks Brothers of a temporary procedural stay does not outweigh the significant benefits to all stakeholders provided by the Stay Provision in its present form.

In my view, it is important that the rights of opposing parties in a *CBCA* proceeding be balanced with the interest of all stakeholders in a complex reorganization. As stated by this Court in other *CBCA* proceedings, the Court must be careful not to cater to the special needs of one particular group, but must strive to be fair to all involved in the transaction, depending on the circumstances that exist. In addition, as has been recognized in *CCAA* proceeding, a creditor should not be allowed to forestall an application, or try to neutralize the Court's exercise of its statutory jurisdiction, at a preliminary stage, even if it is insisting that it will oppose any final plan. Rather, the interests of all stakeholders must be considered.

I find the Preliminary Interim Order is necessary to support the Plan of Arrangement. I make this finding because the capital structure and liquidity position of the Calfrac Entities is no longer sustainable.

Based on the evidence before me, I find the Calfrac Entities are seeking to advance the Plan of Arrangement that will save their business in the best interests of all stakeholders. I further find that the Preliminary Interim Order, including the Stay Provision, is the first step in that process.

**Conclusion**

Given the evidence and analysis, I find: (i) the Calfrac Entities have met their evidentiary burden; and (ii) the Stay Provision applies to the Second Lien Noteholders.

Based on this finding, the Comeback Application by the Wilks Brothers to vary or amend paragraph 7 of the Preliminary Interim Order to remove the Second Lien Noteholders from the Stay Provision is dismissed.

Concerning costs, the parties may speak to costs in due course if they cannot otherwise agree.

Is there any other business that we need to address today?

MR. SIMARD: My Lord, it is Mr. Simard. I don't think there is any other business we need to address because, of course, you granted the order in its present form on July 13th and so we don't need you to sign an order as a result of today's hearing. I will speak with my friends on behalf of Wilks Brothers about costs and we will see if we can agree on it.

THE COURT: Okay. Thank you Mr. Simard. Hearing from no other parties, I will ask madam clerk to adjourn court. Thank you again. Madam clerk, if we could adjourn?

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PROCEEDINGS CONCLUDED

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**Certificate of Record**

I, unknown, certify that this recording is the record made of the evidence held in courtroom 1602 at Calgary, Alberta, on the 27th day of July, 2020, and that Nancy Arevalo and myself were the court officials in charge of the sound-recording machine during the proceedings.

**Certificate of Transcript**

I, Laurie Stenberg, certify that

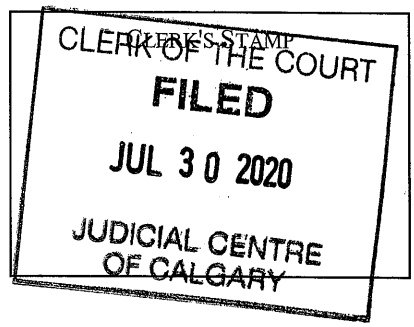
(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

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

Laurie Stenberg, Transcriber
Order Number: AL-JO-1005-7059
Dated: July 28, 2020

# TAB 6

FORM 49
[RULE 13.19]

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| COURT FILE NUMBER | 2001 - |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, as amended<br><br>AND IN THE MATTER OF THE PROPOSED ARRANGEMENT OF 12178711 CANADA INC., CALFRAC WELL SERVICES LTD., CALFRAC (CANADA) INC., CALFRAC WELL SERVICES CORP. and CALFRAC HOLDINGS LP, by its General Partner CALFRAC (CANADA) INC. |
| APPLICANTS | 12178711 CANADA INC., CALFRAC WELL SERVICES LTD., CALFRAC (CANADA) INC., CALFRAC WELL SERVICES CORP. and CALFRAC HOLDINGS LP, by its General Partner CALFRAC (CANADA) INC. |
| DOCUMENT | **AFFIDAVIT** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | BENNETT JONES LLP<br>Barristers and Solicitors<br>4500, 855 – 2nd Street S.W.<br>Calgary, Alberta T2P 4K7<br><br>Attention: Chris Simard/Kevin Zych/Michael Shakra<br>Tel No.: 403-298-4485/416-777-5238/ 416-777-6236<br>Fax No.: 403-265-7219/416-862-6666<br>Client File No. 44609.111 |

**AFFIDAVIT NO. 2 OF RONALD P. MATHISON**

Sworn/Affirmed on July 30, 2020

I, Ronald P. Mathison, of Calgary, Alberta, SWEAR AND SAY THAT:

1. I am a co-founder, the Executive Chairman and a director of Calfrac Well Services Ltd. ("**Calfrac**"), a Director and Chairman of Calfrac (Canada) Inc. ("**CCI**") and a director of 12178711 Canada Inc. ("**Calfrac Arrangeco**"), and as such I have personal knowledge of the matters hereinafter deposed to, save where stated to be based on information and belief, in which case I do believe such information to be true. I am authorized to swear this Affidavit on behalf of Calfrac, CCI, Calfrac Well Services Corp, and Calfrac Holdings LP, by its General Partner, CCI (together, the "**Applicants**" or the "**Calfrac Entities**").

2. All dollar figures stated herein are in Canadian dollars unless otherwise indicated, and all conversions from US dollars to Canadian dollars were made at the official Bank of Canada exchange rate for July 10, 2020.

3. On July 13, 2020, I swore an Affidavit in these proceedings ("**Mathison Affidavit No. 1**"). For ease of reference, a copy of the Mathison Affidavit No. 1, without Exhibits, is attached as **Exhibit "1"**.

4. I swear this Affidavit as a supplement to the Mathison Affidavit No. 1, to update the Court and the parties on developments that have occurred since I swore the Mathison Affidavit No. 1. Any capitalized terms used herein are intended to bear their meanings as defined in the Mathison Affidavit No. 1 or otherwise will have the meaning given to them in the Circular or the CBCA Plan (each as defined below), as applicable.

5. I also swear this Affidavit in support of the Calfrac Entities' application for an Interim Order under Section 192(4) of the CBCA substantially in the form attached as Schedule "A" to the application being filed concurrently with this Affidavit, authorizing the Applicants to convene meetings of the Affected Securityholders (defined below) to consider and vote on the plan of arrangement of the Applicants (the "**CBCA Plan**"), as explained in more detail below.

36. As at July 22, 2020, the Calfrac Entities announced they had the support of approximately 66% of Calfrac's Senior Unsecured Noteholders. This information is included in the press release attached as **Exhibit "9"**.

37. As of today's date, the Calfrac Entities have the support of approximately 70.8% of Calfrac's Senior Unsecured Noteholders.

38. The Supporting Noteholders have entered into support agreements with Calfrac and have agreed to vote in favour of and support the Recapitalization Transaction and Arrangement.

39. To the best of my knowledge, the Recapitalization Transaction is currently supported by holders of 23% of Common Shares.

40. In addition, the Recapitalization Transaction is conditional on there being an amending agreement to the First Lien Credit Agreement whereby the First Lien Lenders, among other things and subject to the terms thereof, are expected to agree to waive any potential defaults under the terms and conditions of the First Lien Credit Agreement that may result from the commencement of proceedings under the CBCA and the implementation of the Arrangement and Recapitalization Transaction.

41. Further, there will also be a new Intercreditor Agreement. On the Effective Date, Calfrac will enter into a new Intercreditor Agreement with Calfrac LP and Calfrac Well Services Corp., as creditors, the New 1.5 Lien Notes Trustee, as trustee and collateral agent for the holders of the New 1.5 Lien Notes and the First Lien Credit Agent, as agent under the First Lien Credit Agreement.

## IV. CONDITIONS PRECEDENT FOR THE ARRANGEMENT

42. The Recapitalization Transaction and the Arrangement are subject to certain other conditions precedent to be satisfied, completed or waived pursuant to the terms of the Noteholder Support Agreement, the Commitment Letter and the CBCA Plan in connection with the implementation of the Recapitalization Transaction, including, among others, the following key matters:

# TAB 7

2011 ABCA 243
Alberta Court of Appeal

Autoweld Systems Ltd. v. CRC-Evans Pipeline International Inc.

2011 CarswellAlta 1355, 2011 ABCA 243, [2012] A.W.L.D. 25, [2012] A.W.L.D. 4, 204 A.C.W.S. (3d) 749, 515 A.R. 6, 532 W.A.C. 6, 57 Alta. L.R. (5th) 429

# Autoweld Systems Limited, Applicant/Appellant (Plaintiff) and CRC-Evans Pipeline International, Inc., CRC-Evans Automatic Welding, Inc., Malcom Timothy Carey and Richard Lee Jones, Respondents/Respondents (Defendants)

Brian O'Ferrall J.A.

Heard: July 19, 2011
Judgment: August 8, 2011
Docket: Calgary Appeal 1101-0132-AC

Proceedings: refusing leave to appeal *Autoweld Systems Ltd. v. CRC-Evans Pipeline International Inc.* (2011), [2011] A.J. No. 460, 2011 CarswellAlta 679, 2011 ABQB 265 (Alta. Q.B.)

Counsel: G.N. Stapon, Q.C. for Applicant / Appellant
J.E. Redmond, Q.C., D.J. Williams for Respondents

***Brian O'Ferrall J.A.*:**

**Introduction**

1 This is an application by the corporate plaintiff ("applicant") for leave to appeal a security for costs order made by the case management judge in *Autoweld Systems Ltd. v. CRC-Evans Pipeline International Inc.*, 2011 ABQB 265 (Alta. Q.B.). The basis for seeking leave to appeal is that the applicant says the order unduly prejudices its ability to prosecute its claim.

**Facts**

2 The order for which leave to appeal is sought fixed security for costs in the amount of $250,000 through to the completion of oral questioning. The case management judge who made the order assumed 20 days of pre-trial questioning. The respondents estimated 40 days of pre-trial questioning and sought security for costs in the amount of $605,975. The applicant suggested that a mere five days of questioning would suffice. The case management judge found the respondent's estimate too high, the applicant's estimate too low and based his security for costs award on a middle ground estimate.

3 The applicant is a body corporate. Its registered office is in England, and it has no assets or business operations in Alberta.

4 The applicant's net worth is modest. Financial statements fix its net assets as of March 31, 2009 at £23,827. A July 12, 2010 Dun & Bradstreet Report suggests it has a greater than average risk of business failure and recommends the maximum credit which should be extended to it be no more than £47,000.

5 The applicant's suit is against two companies and two individuals for roughly $11 million. The applicant is suing for rescission of a certain settlement which it made with the respondents resolving a prior lawsuit brought by the latter for wrongful use of its proprietary welding technology. The applicant now says it was duped and seeks damages for breach of warranty, deceit, and fraudulent or negligent misrepresentation.

6 After a number of unsuccessful motions to stay the action, the respondents sought security for costs. As indicated, the case management judge ordered security for costs to the end of questioning. He also ruled that the security could be revisited after questioning was completed.

**Practice Direction and Tests for Leave to Appeal**

7 Pursuant to section 3(a)(iv) of Part J of the Practice Directions of the Court of Appeal, leave must be obtained to appeal a security for costs order.

8 Counsel agreed that obtaining leave to appeal a procedural ruling (i.e., one which does not finally determine substantive rights in a lawsuit, such as an order for security for costs) is subject to a high threshold. That is, it will only be granted if the appeal raises a serious question of general importance and has a reasonable chance of success. Whether or not a procedural appeal has a reasonable chance of success is assessed by determining whether the chambers judge erred in law, unreasonably exercised a discretion, or misapprehended an important fact.

9 An indication of how high the threshold for leave to appeal procedural rulings in general, and security for costs orders in particular, may be found in *Grabowski v. Bodnar*, 2007 ABCA 280 (Alta. C.A.) at para 7, (2007), 429 A.R. 1 (Alta. C.A.), where Costigan J.A. stated, "Leave to appeal a security for costs order is subject to a high threshold and should be rarely granted".

**Relevant Legislation and Regulation**

10 The Alberta Legislature has empowered the Court of Queen's Bench to require corporate plaintiffs to furnish security for costs on any terms that court thinks fit if it appears that they will be unable to pay the costs of a successful defendant. Section 254 of the Alberta *Business Corporations Act*, RSA 2000, c B-9 states:

> In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.

11 Rule 4.22 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*), which came into effect November 1, 2010, set forth considerations a court must take into account in deciding whether it considers such an order just and reasonable:

> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other material the court considers appropriate.

12 In my view, the foregoing considerations must be read in light of the legislated consideration in section 254 of the *Business Corporations Act*, namely, an apparent inability on the part of a plaintiff to pay the costs of a successful defendant. That legislated consideration has been held to be founded in a concern that a limited company with few assets can enjoy the proceeds of its lawsuit if it wins, and walk away if it loses. Mr. Justice Côté in *Sprung Enviroponics Ltd. v. Calgary (City)* (1990), 72 Alta. L.R. (2d) 237 (Alta. C.A.), at 245, (1990), 103 A.R. 131 (Alta. C.A.) held:

> The owners of a limited liability company with few assets other than a cause of action are in a very fortunate position. They can make the company sue; if it wins, they take the proceeds as shareholders. If it loses, they can walk away from the company and the suit. That is why the legislatures passed these sections in Business Corporations Acts: see *Smith Bus*

# TAB 8

# In the Court of Appeal of Alberta

**Citation: Alberta (Director of Law Enforcement) v McPike, 2019 ABCA 330**

**Date:** 20190913
**Docket:** 1903-0211-AC
**Registry:** Edmonton



**Between:**

**The Director of Law Enforcement**

Respondent
(Respondent)

- and -

**Darren McPike**

Applicant
(Appellant)

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**Reasons for Decision of**
**The Honourable Mr. Justice Kevin Feehan**

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Applications for Extension of Time, Permission to Appeal, and Stay Pending Appeal

[39] The remaining proposed questions of law are at best questions of mixed fact and law, going to weight and the exercise of discretion.

[40] What then is a "reasonable chance of success"?

[41] A "reasonable chance of success" on an application for extension of time (and as we will see below, for an application for permission to appeal) is a low standard. It is enough if the applicant's position is arguable. A position is arguable if it is not hopeless or frivolous: ***Alberta Treasury Branches v Conserve Oil 1st Corp***, 2016 ABCA 87, para 6, 35 CBR (6th) 6; ***City of Edmonton v Grewal***, 2016 ABCA 129, para 57, 49 MPLR (5th) 2011; ***Bergstrom v Town of Beaumont***, 2016 ABCA 221, para 55, 53 MPLR (5th) 28; ***St Paul-Butler v Leduc (SDAB)***, 2018 ABCA 3, paras 3, 12, 71 and 72, 70 MPLR (5th) 1; ***Pe Ben Oilfield Services v WCB***, 2018 ABCA 139, para 17; ***Warren v Warren***, 2019 ABCA 20, para 9; ***Slawsky v Edmonton (City)***, 2019 ABCA 302, para 33.

[42] On the issues of sufficiency of reasons and proper admission of evidence, it is appropriate to conclude that there is a reasonable chance of success on appeal, in the sense that an appeal on those points is arguable as being neither hopeless nor frivolous. Mr McPike has therefore met the fourth branch of the ***Cairns*** test on these issues.

[43] As Mr McPike has met all four branches of the ***Cairns*** test for extension of time to seek permission to appeal on the issues of sufficiency of reasons and proper admission of evidence, the extension is granted and he may seek permission to appeal on those issues.

[44] I find that the remaining proposed questions are not questions of law that are arguable and are either hopeless or frivolous.

**V. Application for permission to appeal**

[45] Counsel advised that this application is the first for permission to appeal pursuant to the *Safer Communities and Neighbourhoods Act* and therefore there is no set test to meet the requirements of s 23(1) of the *Act*. Reference must therefore be had to Alberta or federal Acts with similar tests.

[46] The *Municipal Government Act*, RSA 2000, c M-26, s 688, provides for an appeal of a decision of the Subdivision and Development Appeal Board or the Municipal Government Board. On an application for receiving permission to appeal: "the judge may grant permission to appeal if the judge is of the opinion that the appeal involves a question of law of sufficient importance to merit a further appeal and has a reasonable chance of success."

[47] Permission to appeal under the *Municipal Government Act* may be granted if there is: 1) a reasonably arguable point of law or jurisdiction which could affect the result, 2) a question of sufficient importance to merit appeal, and 3) a reasonable chance of success: ***Rendle v Edmonton***

***(Development Appeal Board)***, 1995 ABCA 499, para 2, [1995] AJ No 1169; ***Seabolt Watershed Association v Yellowhead County (Subdivision and Development Appeal Board)***, 2001 ABCA 24, para 5, 277 AR 61.

[48] The *Metis Settlements Act*, RSA 2000, c M-14, s 204(1), provides that an appeal from a decision of the Metis Settlement Appeal Tribunal may be had on a question of law or jurisdiction after permission to appeal has been obtained. The question of law or jurisdiction must be one "which could reasonably affect the result" or "be of interest or use to the [8 Metis Settlements, the Metis Settlements Appeal Tribunal] or the public in the future and could reasonably affect the result": ***Kikino Metis Settlement v Husky Oil Operations Ltd***, 2016 ABCA 228, para 10, 2 LCR (2d) 289; ***Kikino Metis Settlement v Metis Settlements Appeal Tribunal (Membership Panel)***, 2016 ABCA 260, paras 6-9, 409 DLR (4th) 608; ***Johnson v Fishing Lake Metis Settlement***, 2019 ABCA 310, para 4.

[49] Leave to appeal from the decision of a summary conviction appeal judge, pursuant to the *Criminal Code*, RSC 1985, c C-46, s 839(1), may be granted if the proposed appeal raises a question of law alone, is a reasonably arguable case of substance, and is of sufficient importance to merit the attention of the full court: ***R v Caswell***, 2015 ABCA 97, para 17, 28 Alta LR (6th) 86; ***R v Adolphe***, 2019 ABCA 148, para 2; ***R v Sirman***, 2019 ABCA 183, para 9.

[50] Similar tests for permission to appeal are set out in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 193(e) (***Alternative Fuel Systems Inc v EDO (Canada) Ltd (Trustee of)***, 1997 ABCA 273, para 12, 206 AR 295; ***Dykun v Odishaw***, 1998 ABCA 220, para 5, 7 CBR (4th) 151; ***Kimberley Management Ltd v Klammer***, 2000 ABCA 271, para 4, 281 AR 158; ***Simonelli v Mackin***, 2003 ABCA 47, para 28, 320 AR 330; ***Smith v Pricewaterhousecoopers Inc***, 2013 ABCA 288, para 11, 556 AR 245); the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ss 13 and 14 (***Resurgence Asset Management LLC v Canadian Airlines Corp***, 2000 ABCA 149, paras 6-7, 261 AR 120 and 2000 ABCA 238, para 19, 266 AR 131; ***Liberty Oil & Gas Ltd (Re)***, 2003 ABCA 158, paras 15-16, 44 CBR (4th) 96); the *Arbitration Act*, RSA 2000, c A-43, s 48 (***Nilsson v Alberta***, 1999 ABCA 340, para 4, 250 AR 85; ***UCANU Manufacturing Corp v Jardeg Construction Services Ltd***, 2015 ABCA 371, paras 21-22); and the *Natural Resources Conservation Act*, RSA 2000, c N-3, s 31 (***Bengston v Alberta (Natural Resources Conservation Board)***, 2003 ABCA 173, paras 12-14, 330 AR 81; ***Committee for Lone Pine v Natural Resources Conservation Board***, 2003 ABCA 180, para 2; ***JH Drilling Inc v Alberta (Natural Resources Conservation Board),*** 2014 ABCA 378, para 10.

[51] The test to be considered in granting permission may be subject to additional factors, but given the marked similarity of tests arising from all of the above legislation, in this case I determine that the appropriate test for leave to appeal under s 23 of the *Safer Communities and Neighbourhoods Act* is that permission to appeal may be granted on a question of law alone of sufficient importance to the parties and to the public to merit the full attention of the court, with a reasonable chance of success, and that could reasonably affect the result.

# TAB 9

# In the Court of Appeal of Alberta

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

**Date:** 20200501
**Docket:** 2001-0039-AC
**Registry:** Calgary



**Between:**

**Bellatrix Exploration Ltd.**

Applicant
(Appellant)

- and -

**BP Canada Energy Group ULC**

Respondent
(Respondent)

- and -

**Borden Ladner Gervais LLP**

Interested Party
(Monitor)

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

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Application for Permission to Appeal

**Test for Leave**

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

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

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

**Positions of the parties**

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

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

**Analysis**

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

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

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

# TAB 10

**CITATION:** Essar Steel Canada Inc. (Re), 2014 ONSC 4285
**COURT FILE NO.:** 14-CV-10629-00CL
**DATE:** 2014-07-16

**SUPERIOR COURT OF JUSTICE - ONTARIO**

IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED

AND IN THE MATTER OF RULES 14.05(2) AND 14.05(3) OF THE *RULES OF CIVIL PROCEDURE*

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF ESSAR STEEL CANADA INC., ESSAR STEEL ALGOMA INC., ALGOMA HOLDINGS B.V., CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC.

**BEFORE:** Regional Senior Justice Morawetz

**COUNSEL:** *A.J. Taylor* and *K. Esaw*, for the Applicants

*K. Zych* and *S. Zweig*, for the Secured Noteholders

*H. Meredith*, for Essar Global Fund Limited

*M. De Lellis*, for Deutsche Bank Trust Company

*L.J. Latham* and *R.J. Chadwick*, for the Ad Hoc Committee of Unsecured Noteholders

**HEARD:** July 16, 2014

## ENDORSEMENT

[1] Essar Steel Algoma Inc. ("Algoma"), one of Canada's largest integrated steel manufacturers, has undertaken several restructuring activities over the past few years. Algoma now seeks approval of a refinancing of its debt obligations through an arrangement under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, (the "CBCA"). Algoma and Essar Steel Algoma Canada Inc. ("Essar Canada") and, together with Algoma, Algoma Holdings B.V., Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA, (the "Applicants"), have brought this application under s. 192 of the CBCA.

[2] On the return of this application, the Court will be asked to issue a final order approving a plan of arrangement involving Algoma and Essar Canada (the "Arrangement") and the plan (the "Plan of Arrangement").

[38] In my view, both of these requirements are satisfied in the application.

[39] Moreover, the Applicants and each of its members will be solvent after the Arrangement is implemented.

[40] Section 192(3) of the CBCA requires that it not be "practicable" for the corporation to effect a fundamental change in the nature of an arrangement under any other provision of the CBCA. Counsel submits that this issue is addressed in *Mobilicity* where Wilton-Siegel J. stated:

> The impracticability test is interpreted broadly and considered from a practical business point of view. Courts have confirmed that the threshold of impracticability is relatively low. What is required is that the proposed arrangement be difficult to put into practice under other provisions of the CBCA.

[41] In my view, having reviewed the record, I conclude it is impracticable for the steps and transactions contemplated in the Arrangement to be completed outside of a plan of arrangement under section 192 of the CBCA. There is simply no other convenient method under the CBCA for the Applicants to coordinate and execute the wholesale, instant and irrevocable exchange of all the Unsecured Notes for cash and new securities.

[42] In this case, the Applicants have given the required notice of this application to the CBCA Director. Counsel to the Applicants has advised that "the staff of the [CBCA] Director has determined that the [CBCA] Director does not have standing to review or take a position on this application as there is no Arrangement to be reviewed at this time".

[43] I am also satisfied that the Applicants motion has been brought in good faith.

[44] Turning now to the form of preliminary order, the Applicants seek relief that will give the Applicants the time and stability necessary to finish negotiating and drafting, with affected Stakeholders, the definitive documentation required to implement the proposed Arrangement and Recapitalization.

[45] Section 192(4) of the CBCA authorizes the court to "make any interim or final order it thinks fit". In *Mobilicity* and *Abitibi*, the Ontario Superior Court and the Quebec Superior Court (respectively) found they had the power under section 192(4) to impose a stay in connection with a proposed arrangement. This point was recently reaffirmed in *Mobilicity*.

**Stay**

[46] The Applicants seek a Stay Provision is that will have the effect of prohibiting, among others, the lenders from terminating, accelerating, amending, declaring in default or taking any other enforcement steps against the Applicants due to the commencement of these proceedings.

[47] Similar stay provisions have been approved by courts in Ontario and elsewhere in Canada. The aim of such clauses is to maintain the status quo while the proposed arrangements

are considered and implemented. Counsel confirmed that the stay is not intended to unduly restrict the rights of unsecured trade creditors. In this respect, the stay is limited.

[48] I accept the submission that the Stay Provision is substantially similar to existing case law. It seeks to maintain the status quo while the Applicants and their affected Stakeholders negotiate and finalize the terms the proposed Arrangement and the Recapitalization.

[49] I am also satisfied that the potential prejudice that may be caused by the Stay Provision outweighs the benefits that will be achieved for all Stakeholders. In my view, the scope of the Stay Provision is limited to only what is necessary for the success of the Applicants' restructuring efforts. Further, it will be necessary for the Applicants to revisit this issue as the Stay Provision automatically expires on August 15, 2014, unless extended or terminated earlier by further court order.

[50] I am also satisfied that Algoma should be authorized and empowered to act as foreign representative in recognition proceedings before the United States Bankruptcy Court under Chapter 15.

[51] In the result, I am satisfied that it is appropriate to grant the motion. The Preliminary Order has been signed in the form submitted, as amended.

Morawetz, R.S.J.

**Date:** July 16, 2014

# TAB 11

Court File No. CV-14-10629-00CL

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

| | | |
|---|---|---|
| THE HONOURABLE REGIONAL | ) | WEDNESDAY, THE 16TH |
| SENIOR JUSTICE MORAWETZ | ) | DAY OF JULY, 2014 |

**IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED**

**AND IN THE MATTER OF RULES 14.05(2) AND 14.05(3) OF THE *RULES OF CIVIL PROCEDURE***

**AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF ESSAR STEEL CANADA INC., ESSAR STEEL ALGOMA INC., ALGOMA HOLDINGS B.V., CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA**

Applicants

**AMENDED AND RESTATED PRELIMINARY ORDER**

**THIS MOTION** made by Essar Steel Canada Inc. ("**Essar Canada**"), Essar Steel Algoma Inc. ("**Algoma**"), Algoma Holdings B.V. ("**Holdings**"), Cannelton Iron Ore Company ("**Cannelton**") and Essar Steel Algoma Inc. USA ("**Essar USA**" and, together with Essar Canada, Algoma, Holdings and Cannelton, the "**Applicants**"), for an interim order in connection with an arrangement pursuant to section 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended (the "**CBCA**"), including a stay of proceedings, was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the Notice of Application issued on July 16, 2014, the Notice of Motion, and the affidavit of Rajat Marwah sworn July 16, 2014 and the exhibits attached thereto, including a proposed transactional term sheet (the "**Term Sheet**");

**ON HEARING** submissions of counsel for the Applicants, counsel to the *ad hoc* committee of Unsecured Noteholders (as defined below), counsel to Deutsche Bank (as defined below), counsel to an *ad hoc* committee of Secured Noteholders (as defined below), and on being advised that the Director appointed under the CBCA (the "**CBCA Director**") has determined that it does not have standing to review or take a position on the within Application as there is no arrangement to be reviewed at this time;

**ON HEARING** that the Applicants intend to put forth a plan of arrangement under section 192(4) of the CBCA (the "**Arrangement**") to this Honourable Court on or before August 15, 2014 and that, during the interim period, if any proceedings are taken to enforce security or otherwise interfere with the Applicants' ordinary business operations, the Applicants' ability to present and effect the Arrangement may be jeopardized:

**COMEBACK MOTION**

1. **THIS COURT ORDERS** that the Applicants are authorized to apply to this Honourable Court on or before August 15, 2014 for an interim order permitting the Applicants to call, hold and conduct a special meeting (the "**Noteholder Meeting**") of the holders of the 9⅞% senior unsecured notes (the "**Unsecured Notes**" and the holders, the "**Unsecured Noteholders**") issued by Algoma pursuant to an indenture dated June 20, 2007, as supplemented to consider the Arrangement and related relief.

**STAY OF PROCEEDINGS**

2. **THIS COURT ORDERS** that from and including the date of this Preliminary Order until and including August 15, 2014 (the "**Stay Period**"), no person, including without limitation: (a) the lenders under the credit agreement (the "**ABL Credit Agreement**" and the credit facility created thereunder, the "**ABL Facility**") among Algoma, Holdings, Deutsche Bank Trust Company Americas, as administrative agent and as collateral agent ("**Deutsche Bank**"), and the lenders party thereto from time to time (the "**ABL Lenders**"); (b) the lenders under the credit agreement (the "**Avenue Credit Agreement**") dated as of December 6, 2013, as amended, among Algoma, Holdings, Avenue Capital Management II, L.P., as documentation agent ("**Avenue**"), and the lenders party thereto from time to time; (c) the holders of the 9.375% senior secured notes (the "**Secured Noteholders**") issued by Algoma pursuant to an indenture dated as of December 14, 2009, as supplemented (the "**Secured Notes Indenture**"); (d) the Unsecured Noteholders; (e) Avenue Special Opportunities Fund I, L.P., ("the "**Subordinated Secured Lender**") as assignee of the loan agreement dated as of May 6, 2013, as amended, between Algoma and Essar Steel Limited; or (f) any administrative agent, collateral agent, indenture trustee or similar person, shall have any right to terminate, accelerate, amend or declare in default or take any other enforcement steps under any contract or other agreement to which any of the Applicants is a party, including any contract or agreement to which any of the Applicants are borrower or guarantor, due to:

(a) any of the Applicants having made an application to this Honourable Court pursuant to section 192 of the CBCA;

(b) any of the Applicants being a party to this proceeding or being a party to the Arrangement;

(c) any default or cross-default resulting from the failure to make the interest payment under the Unsecured Notes due on June 15, 2014 and the expiry of the related grace period;

(d) any default or cross-default resulting from the issuance by Algoma of financial statements containing a going-concern statement; or

(e) any of the Applicants taking any step contemplated by or related to the Arrangement,

without further order of this Honourable Court.

3. **THIS COURT ORDERS** that, subject to further order of this Court, during these proceedings, the Applicants shall:

(a) Pay the actual, reasonable and documented fees and expenses of (i) White & Case LLP and Osler, Hoskin & Harcourt LLP, each in connection with serving as legal counsel to Deutsche Bank, and (ii) Pillsbury Winthrop Shaw Pittman LLP, Dentons Canada LLP and Morris, Nichols, Arsht & Tunnell LLP in connection with serving as legal counsel to Wilmington Trust Company, as trustee for the Secured Notes Indenture (in such capacity, the "**Secured Note Trustee**"), and the Collateral Trustee (as defined below), in each case of (i) and (ii) in connection with the within Application and any proceedings taken under chapter 15 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532;

(b) unless otherwise agreed, comply with the "Borrowing Base" (as such term is defined in the ABL Credit Agreement), (provided, however, if such is otherwise

agreed, the Applicants will provide notice to the Secured Note Trustee and the ad hoc group of senior secured noteholders);

(c) deliver the Budget (as such term is defined in the Term Sheet) to Deutsche Bank, the Secured Note Trustee and Wilmington Trust, National Association, as collateral trustee under the Secured Notes Indenture and Avenue Credit Agreement (in such capacity, the "**Collateral Trustee**"), provided that Deutsche Bank, the Secured Note Trustee and the Collateral Trustee may deliver such Budget to the lenders under the ABL Facility and the Avenue Credit Agreement and the holders under the Secured Notes Indenture so long as such lenders and holders have executed a non-disclosure agreement satisfactory to the Applicants; and

(d) pay any unpaid interest accrued and owing under the ABL Facility, the Secured Notes Indenture, and the Avenue Credit Agreement as and when due under the applicable credit documents; provided that such interest will be paid at the non-default rate set forth in such credit documents.

4. **THIS COURT ORDERS** that, subject to further order of this Honourable Court, the only persons entitled to notice of and to appear and be heard at subsequent motions within these proceedings shall be:

(a) the Applicants and their counsel;

(b) counsel to each of the *ad hoc* committee of Unsecured Noteholders, Deutsche Bank, Avenue, the Secured Note Trustee, the *ad hoc* committee of Secured Noteholders, and the Subordinated Secured Lender;

(c) the CBCA Director;

(d) the directors of Essar Canada and Algoma; and

(e) any person who has filed a Notice of Appearance herein in accordance with the Notice of Application, this Preliminary Order and the *Rules of Civil Procedure*.

5. **THIS COURT ORDERS** that any Notice of Appearance served in these proceedings shall be served on the solicitors for the Applicants and the *ad hoc* committee of Unsecured Noteholders as soon as reasonably practicable at the following address, respectively:

**Stikeman Elliott LLP**
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Attention: Ashley Taylor and John Ciardullo

**Goodmans LLP**
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Attention: Robert Chadwick and Joe Latham

6. **THIS COURT ORDERS** that any materials to be served and filed by the Applicants in support of any subsequent motion in these proceedings may be served and filed three business days prior to the motion.

**FOREIGN PROCEEDINGS**

7. **THIS COURT ORDERS** that Algoma is hereby authorized and empowered, but not required, to act as the foreign representative (the "**Foreign Representative**") in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside of Canada.

8. **THIS COURT ORDERS** that the Foreign Representative is hereby authorized to apply for foreign recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including in the United States pursuant to chapter 15 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532.

**E-SERVICE PROTOCOL**

9. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<www.donlinrecano.com/essarsteelcanada>'.

10. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed

to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

**AID AND RECOGNITION**

11. **THIS COURT** seeks and requests the aid and recognition of any court or any judicial, regulatory or administrative body in any province of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province and any court or any judicial, regulatory or administrative body of the United States or other country to act in aid of and to assist this Honourable Court in carrying out the terms of this Preliminary Order.

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ON / BOOK NO:
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IN THE MATTER OF AN APPLICATION UNDER 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED

AND IN THE MATTER OF RULES 14.05(2) and 14.05(3) OF THE *RULES OF CIVIL PROCEDURE*

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF THE APPLICANTS

Court File No. CV-14-10629-00CL

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**
Proceeding Commenced at Toronto

**AMENDED AND RESTATED PRELIMINARY ORDER**


**STIKEMAN ELLIOTT LLP**
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

**Ashley John Taylor** LSUC#: 39932E
Tel: (416) 869-5236
E-mail: ataylor@stikeman.com

**Kathryn Esaw** LSUC#: 58264F
Tel: (416) 869-5230
E-mail: kesaw@stikeman.com

**Yannick Katirai** LSUC#: 62234K
Tel: (416) 869-5556
E-mail: ykatirai@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicants

# TAB 12

**CITATION:** RGL Reservoir Management Inc. (Re), 2017 ONSC 7302
**COURT FILE NO.:** CV-17-587401-00CL
**DATE:** 2017-12-07

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE: IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED, AND RULES 14.05(2) AND 14.05(3) OF THE *RULES OF CIVIL PROCEDURE***

**AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF RGL RESERVOIR MANAGEMENT INC. AND 10504360 CANADA INC. AND INVOLVING RGL RESERVOIR MANAGEMENT GROUP INC., RGL RESERVOIR HOLDINGS INC. AND PACIFIC PERFORATING, INC.**

**RGL RESERVOIR MANAGEMENT INC. AND 10504360 CANADA INC.**

Applicants

**BEFORE:** Regional Senior Justice Morawetz

**COUNSEL:** *Robert Chadwick, Brendan O'Neill* and *Ryan Baulke* for the Applicants

*Jane Dietrich*, for certain Secured Debtholders

*Andrea Lockhart*, for the Existing First Lien Agents

**HEARD and ENDORSED:** November 29, 2017

**REASONS DELIVERED:** December 7, 2017

## ENDORSEMENT

[1] On November 29, 2017, this motion was granted with reasons to follow. These are the reasons.

[2] This is an application brought pursuant to section 192(3) of the *Canada Business Corporations Act* ("CBCA") for approval of a plan of arrangement (the "Plan of Arrangement") proposed by RGL Reservoir Management Inc. ("RGL Management") and 10504360 Canada Inc. ("RGL NewCo", and together with RGL Management, the "Applicants").

[3] In connection with the within application, RGL brings this motion pursuant to subsection 192(4) of the CBCA for an interim order (the "Interim Order") that, if granted: (i) approves certain procedural matters regarding the calling, holding and conduct of the Secured Debtholders' Meeting and the Shareholders' Meeting (collectively, the "Meetings") to vote on

Agent, or any other person party to a contract with any of the Applicants, against or in respect of RGL, or any of the present or future property, assets, rights or undertakings of RGL, in connection with matters relating to these proceedings, the proposed Arrangement, or any defaults under the Secured Debt Documents.

[46] I am satisfied that the Court has the jurisdiction under subsection 192(4) of the CBCA as well as under its inherent jurisdiction to grant a stay of proceedings in order to prevent the disruption of and to facilitate RGL's ongoing business.

[47] Turning now to the specifics of the interim order, counsel submits that the Proposed Interim Order establishes a fair and reasonable process for approval of the Arrangement and that the Proposed Interim Order will enable meetings of the Secured Debentureholders and the Existing Shareholders to be called, held and conducted in a procedurally fair manner. Counsel specifically referenced the requirement of an affirmative vote of at least 66 2/3% of the votes cast (i) by the Secured Debentureholders and (ii) by the Existing Shareholders, in each case present in person or represented by Proxy and entitled to vote at the applicable meeting. I accept this submission.

[48] Counsel also submits that the Proposed Interim Order is consistent with previous orders that have been issued in respect of other statutory plans of arrangement, including *Tembec Arrangement Inc. et al*, Court File No. 08-CL-7367; *Sherritt International Corporation*, Court File No.: CV-16-11426-00CL; and *9171665 Canada Ltd. and Conacher Oil and Gas Limited*, Court File No.: 1501-00574. I accept this submission.

[49] In *Abitibi-Consolidated*, the Court found that the wording of section 192(4) of the CBCA provides the Court with a broad discretion to exercise its powers and that this discretion ought to be exercised in furtherance the provision's purpose "[t]o facilitate an arrangement and, at the very least, to allow for it to be subject to a meaningful approval process."

[50] It seems to me that the proposed stay of proceedings during the pendency of this application is a limited stay and is necessary in order to prevent the Secured Debtholders and parties to RGL's other contracts from taking any steps during these proceedings, by reason of or as result of these proceedings, the proposed Arrangement or any defaults under the Secured Debt Documents, that may jeopardize RGL's efforts to complete the Recapitalization Transaction for the benefit of its stakeholders. The proposed stay of proceedings does not otherwise affect the payment of amounts owing or satisfaction of obligations outstanding to trade creditors, customers, employees or governmental authorities, all of which will continue to be paid or satisfied in the ordinary course during the course of these proceedings.

[51] The motion is granted and the Interim Order shall issue in the form attached to Tab 3 of the Motion Record.

Regional Senior Justice Morawetz

**Date:** December 7, 2017

# TAB 13

| | |
|---|---|
| COURT FILE NUMBER | 1601- 12176 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| MATTER | IN THE MATTER OF SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, C. C-44, AS AMENDED<br><br>AND IN THE MATTER OF A PROPOSED ARRANGEMENT IN RESPECT OF TERVITA CORPORATION, 9894942 CANADA LTD., RED SKY HOLDINGS 1 INC., RED SKY HOLDINGS 2 INC., RED SKY HOLDINGS 3 INC., CCS CANADA (CANADIAN HOLDINGS) INC., CCS INTERNATIONAL HOLDINGS INC., HAZCO INDUSTRIAL SERVICES LTD., TERVITA EQUIPMENT RENTALS LTD., TERVITA ENVIRONMENTAL SERVICES LTD., TERVITA METAL SERVICES LTD., TERVITA PRODUCTION SERVICES LTD., AND TERVITA WASTE PROCESSING LTD. |
| APPLICANTS | 9894942 CANADA LTD. AND TERVITA CORPORATION |
| RESPONDENT | Not Applicable |
| DOCUMENT | **PRELIMINARY INTERIM ORDER** |

Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
FILED
SEP 14 2016
OF THE COURT

ORBCA meeting
Hold
ORSTP-X
michael

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

**OSLER, HOSKIN & HARCOURT LLP**
Suite 2500, TransCanada Tower
450 – 1st Street SW
Calgary, AB T2P 5H1

Solicitor: Colin Feasby / Marc Wasserman / Michael De Lellis
Telephone: (403) 260-7067 / (416) 862-4908 / (416) 862-5997
Facsimile: (403) 260-7024 / (416) 862-6666
Email: cfeasby@osler.com / mwasserman@osler.com / mdelellis@osler.com
File Number: 1172771

**FASKEN MARTINEAU DUMOULIN LLP**
First Canadian Centre
350 7th Avenue SW, Suite 3400
Calgary, AB T2P 3N9

Solicitor: John Grieve / Travis Lysak
Telephone: 403-261-5350
Facsimile: 403-261-5351
Email: jgrieve@fasken.com / tlysak@fasken.com
File Number: 285302.00311

I hereby certify this to be a true copy of the original order dated this 14 day of Sept 2016
for Clerk of the Court

lenders from time to time party thereto and the Term Loan Administrative Agent, as amended, modified, restated or supplemented from time to time;

(v) "**Term Loan Facility Lenders**" means "Lenders" under and as defined in the Term Loan Credit Agreement;

(w) "**Tervita Group**" means Tervita and its affiliates and subsidiaries listed on Schedule "A" hereto;

(x) "**Unsecured Noteholders**" means holders of Unsecured Notes; and

(y) "**Unsecured Notes**" means, collectively, (i) the 9.75% Unsecured Notes; and (ii) 10.875% Unsecured Notes.

**IT IS HEREBY ORDERED AND DECLARED THAT:**

**SERVICE**

1. The time for service of the Originating Application for this Preliminary Interim Order is hereby abridged and deemed good and sufficient and this Originating Application is properly returnable today.

**INTERIM ORDER HEARING**

2. The Applicants are authorized to apply to this Honourable Court on or before the Interim Order Hearing Date for an interim order (the "**Interim Order**") permitting the Applicants to, among others things, (i) call, hold and conduct special meetings of Unsecured Noteholders and Subordinated Noteholders to consider the Arrangement and related relief and (ii) providing directions relating to the approval of the Arrangement by shareholders.

**STAY OF PROCEEDINGS**

3. From and including the date of this Preliminary Interim Order until and including October 14, 2016 (the "**Stay Period**"), no person, including, without limitation, the Noteholders, the trustees under the Indentures, the Term Loan Administrative Agent, the Term Loan Facility Lenders or any other administrative agent, collateral agent, indenture trustee or similar person, (i) shall have any right to terminate, accelerate, amend or declare a default or event of default or make any demand or take any step to enforce any guarantee or any security interest granted by any member of the Tervita Group in respect of the Notes, the Term Loan Facility, or any contract or other agreement to which any member of the Tervita Group is a party, borrower or guarantor, and (ii) may refer to, rely on or otherwise claim any rights against any member of the Tervita Group under any contract, debt

instrument or any other agreement with any member of the Tervita Group in respect of any alleged breach, default or event of default under the Notes, the Term Loan Facility or any contract or other agreement to which any member of the Tervita Group is a party, borrower or guarantor; in each case, by reason of: (A) the Applicants having commenced this proceeding, (B) any member of the Tervita Group taking any steps in furtherance thereof, (C) any of member of the Tervita Group being a party to these proceedings or being party to an Arrangement, or (D) any default or cross-default arising under any of the Notes or the Term Loan Credit Agreement, without further order of this Honourable Court.

4. Subject to the terms of the Accommodation Agreement, the Revolving Credit Facility Lenders shall be treated as unaffected in any plan of arrangement filed by the Applicants in the within proceedings and shall not be subject to any stay of proceedings in the within proceedings, and nothing in this Preliminary Interim Order shall prevent the filing of any registration to preserve or perfect any security interest.

**NOTICE AND SERVICE**

5. Unless otherwise ordered by this Honourable Court, the only persons entitled to notice of and to appear and to be heard at subsequent applications within these proceedings, including the application for the Interim Order, shall be:

(a) the Tervita Group and their counsel;

(b) counsel to the Revolver Administrative Agent;

(c) counsel to the ad hoc group of Unsecured Noteholders;

(d) counsel to any holder of equity of any member of the Tervita Group who has delivered counsel to the Applicants with a written request to be provided with notice in the proceedings;

(e) any collateral agent, indenture trustee or similar person in respect of any of the Notes, and counsel thereto;

(f) the Director; and

(g) any interested person who has delivered counsel to the Applicants with a written request to be provided with notice in the proceedings.

# TAB 14

| | |
|---|---|
| Court File Number | 1601 - 08725 |
| Court | COURT OF QUEEN'S BENCH OF ALBERTA |
| Judicial Centre | CALGARY |
| Matter | IN THE MATTER OF SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, RSC 1985, c C-44, AS AMENDED<br><br>AND IN THE MATTER OF A PROPOSED ARRANGEMENT INVOLVING LIGHTSTREAM RESOURCES LTD. AND 9817158 CANADA LTD. |
| Applicants | Lightstream Resources Ltd. and 9817158 Canada Ltd. |
| Respondent | Not Applicable |
| Document | PRELIMINARY INTERIM ORDER |
| Address for Service and Contact Information of Party Filing this Document | **BLAKE, CASSELS & GRAYDON LLP**<br>Barristers and Solicitors<br>3500 Bankers Hall East<br>855 – 2nd Street SW<br>Calgary, Alberta T2P 4J8<br><br>Attention: Kelly Bourassa / Milly Chow<br>Telephone No.: 403-260-9697<br>Email: kelly.bourassa@blakes.com/milly.chow@blakes.com<br>Fax No.: 403-260-9700 |

Clerk's stamp

JUDICIAL CENTRE OF CALGARY
FILED
JUL 13 2016
CLERK OF THE COURT

I hereby certify this to be a true copy of the original ORDER
Dated this 13 day of July 2016
for Clerk of the Court

| | |
|---|---|
| **DATE ON WHICH ORDER WAS PRONOUNCED:** | July 13, 2016 |
| **NAME OF JUDGE WHO MADE THIS ORDER:** | The Honourable Justice G.C. Hawco |
| **LOCATION OF HEARING:** | Calgary, Alberta |

**UPON** the Originating Application (the "**Originating Application**") of Lightstream Resources Ltd. ("**LTS**") and 9817158 Canada Ltd. ("**ArrangeCo**", and together with LTS, the "**Applicants**") for an Order (the "**Preliminary Interim Order**") pursuant to Section 192(4) of the *Canada Business Corporations Act*, RSC 1985, c. C-44, as

unsecured notes maturing on February 1, 2020 and all references to "**Second Lien Noteholders**" used herein mean holders of Second Lien Notes; and

(d) All references to "**Common Shares**" used herein mean the common shares of LTS and all references to "**Shareholders**" used herein mean holders of Common Shares.

**IT IS HEREBY ORDERED AND DECLARED THAT:**

**Service**

1. The time for service of the notice of Originating Application for this Preliminary Interim Order is hereby abridged and deemed good and sufficient and this Originating Application is properly returnable today.

**Interim Order Hearing**

2. The Applicants are authorized to apply to this Honourable Court on or before the Interim Order Hearing Date for an interim order (the "**Interim Order**") permitting the Applicants to, among others things, call, hold and conduct (i) special meetings of Second Lien Noteholders and Unsecured Noteholders to consider the Arrangement and related relief, and (ii) a special meeting of Shareholders to consider the Arrangement and related relief.

**Stay of Proceedings**

3. From and including the date of this Preliminary Interim Order until and including August 12, 2016 (the "**Stay Period**"), no person (other than the Administrative Agent) including, without limitation, (i) the Second Lien Noteholders, (ii) Unsecured Noteholders, or (iii) any administrative agent, collateral agent, indenture trustee or similar person, shall have any right to terminate, make any demand, accelerate, amend or declare in default or take any enforcement steps under any contract or other agreement to which any of the Applicants are a party, borrower or guarantor, and no default or event of default

shall have occurred or be deemed to have occurred under any such contract or agreement, by reason of:

(a) any of the Applicants having made an application to this Honourable Court pursuant to Section 192 of the CBCA;

(b) any of the Applicants being a party to these proceedings or being a party to the Arrangement;

(c) any default or cross-default arising from the failure to make (i) any interest payment(s) under the Second Lien Notes and/or the Unsecured Notes, or (ii) any payment(s) under LTS' credit facility ; or

(d) any of the Applicants taking any step contemplated by or related to the Arrangement,

without further order of this Honourable Court.

4. The lenders under LTS's credit facility shall be treated as unaffected in any plan of arrangement filed by LTS in the within proceedings and shall not be subject to any stay of proceedings in the within proceedings, and nothing in this Preliminary Interim Order shall prevent the filing of any registration to preserve or perfect a security interest in respect of the Second Lien Notes.

**Notice and Service**

5. Unless ordered otherwise by this Honourable Court, the only persons entitled to notice of and to appear and to be heard at subsequent applications within these proceedings, including the application for the Interim Order, shall be:

(a) the Applicants and their counsel;

(b) counsel to the Administrative Agent;

(c) counsel to the *ad hoc* committee of Second Lien Lenders;

| | |
|---|---|
| COURT FILE NUMBER | 1601 - 08725 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| MATTER | IN THE MATTER OF SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, RSC 1985, c C-44, AS AMENDED<br><br>AND IN THE MATTER OF A PROPOSED ARRANGEMENT INVOLVING LIGHTSTREAM RESOURCES LTD. AND 9817158 CANADA LTD. |
| APPLICANTS | Lightstream Resources Ltd. and 9817158 Canada Ltd. |
| RESPONDENT | Not Applicable |
| DOCUMENT | AMENDED INTERIM ORDER |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **BLAKE, CASSELS & GRAYDON LLP**<br>Barristers and Solicitors<br>3500 Bankers Hall East<br>855 – 2nd Street SW<br>Calgary, Alberta T2P 4J8<br><br>Attention: Kelly Bourassa / Milly Chow<br>Telephone No.: 403-260-9697<br>Email: kelly.bourassa@blakes.com / milly.chow@blakes.com<br>Fax No.: 403-260-9700 |

**DATE ON WHICH ORDER WAS PRONOUNCED:** August 29, 2016

**NAME OF JUDGE WHO MADE THIS ORDER:** The Honourable Justice B.E.C. Romaine

**LOCATION OF HEARING:** Calgary, Alberta

**UPON** the application (the "**Application**") of Lightstream Resources Ltd. ("**LTS**") and 9817158 Canada Ltd. ("**ArrangeCo**", and together with LTS, the "**Applicants**") for an Order (the "**Interim Order**") pursuant to Section 192 of the *Canada Business Corporations Act,* RSC 1985, c C-44, as amended (the "**CBCA**") in connection with a proposed arrangement under Section 192 involving the Applicants;

**Stay of Proceedings**

58. The Stay Period (as defined in paragraph 3 of the Preliminary Interim Order of Justice G.C. Hawco dated July 13, 2016) is hereby extended until and including ^October 15, 2016.

59. The lenders under LTS' credit facility (the "**First Lien Lenders**") shall be treated as unaffected by the Arrangement and the Final Order in the within proceedings and shall not be subject to any stay of proceedings in the within proceedings, and nothing in this Interim Order shall prevent the filing of any registration to preserve or perfect a security interest in respect of the Secured Notes.

**General**

60. To the extent of any inconsistency or discrepancy with respect to the matters determined in the Interim Order, between the Interim Order and the terms of any instrument creating or governing or collateral to the Secured Notes or to which the Secured Notes are collateral, the terms of any instrument creating or governing the Unsecured Notes or to the articles and/or by-laws or other constating documents of the Applicants, this Interim Order shall govern.

61. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Interim Order and to assist the Applicants and their agents in carrying out the terms of this Interim Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants as may be necessary or desirable to give effect to this Interim Order.

# TAB 15

2017 BLRMotionO 27560

View Motion Document Collection - 2017 CarsMotionW 72714

**Order**

Date: 20 OCTOBER, 2017

Court document related to:
*Concordia (Re)*, 2017 CarswellOnt 17120, 53 C.B.R. (6th) 46, 75 B.L.R. (5th) 280 Ontario



**ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, C. C-44, AS AMENDED, AND RULES 14.05(2) AND 14.05(3) OF THE *RULES OF CIVIL PROCEDURE***

**AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF CONCORDIA INTERNATIONAL CORP. AND CONCORDIA HEALTHCARE (CANADA) LIMITED AND INVOLVING CONCORDIA LABORATORIES INC., S.A.R.L., CONCORDIA PHARMACEUTICALS INC., S.A.R.L., CONCORDIA INVESTMENTS (JERSEY) LIMITED, CONCORDIA FINANCING (JERSEY) LIMITED, AMDIPHARM HOLDINGS S.A.R.L., AMDIPHARM AG, AMDIPHARM B.V., AMDIPHARM LIMITED, AMDIPHARM MERCURY HOLDCO UK LIMITED, AMDIPHARM MERCURY UK LTD., CONCORDIA HOLDINGS (JERSEY) LIMITED, AMDIPHARM MERCURY INTERNATIONAL LIMITED, CONCORDIA INVESTMENT HOLDINGS (UK) LIMITED, MERCURY PHARMA GROUP LIMITED, CONCORDIA INTERNATIONAL RX (UK) LIMITED, ABCUR AB, MERCURY PHARMACEUTICALS LIMITED, FOCUS PHARMA HOLDINGS LIMITED, FOCUS PHARMACEUTICALS LIMITED, MERCURY PHARMA (GENERICS) LIMITED, MERCURY PHARMACEUTICALS (IRELAND) LIMITED, AND MERCURY PHARMA INTERNATIONAL LIMITED**

GOODMANS LLP

Barristers & Solicitors

333 Bay Street, Suite 3400

Toronto, Canada

M5H 2S7

Robert J. Chadwick

LSUC#: 35165K

rchadwick@goodmans.ca

Brendan O'Neill

LSUC#: 43331J

boneill@goodmans.ca

  

Caroline Descours

LSUC#: 58251A

cdescours@goodmans.ca

Ryan Baulke

LSUC#: 66189O

rbaulke@goodmans.ca

Tel: (416) 979-2211

Fax: (416) 979-1234

Lawyers for the Applicants

PRELIMINARY INTERIM ORDER

**THIS MOTION** made by Concordia International Corp. (**"CIC"**) and Concordia Healthcare (Canada) Limited (together with CIC, the **"Applicants"**), for a preliminary interim order in connection with an arrangement (the **"Arrangement"**) pursuant to section 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, (the **"CBCA"**), including a stay of proceedings, was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the Notice of Motion, the Notice of Application issued on October 20, 2017, and the affidavit of David Price sworn October 19, 2017, together with the exhibits attached thereto, and on hearing the submissions of counsel for the Applicants.

Definitions

1. **THIS COURT ORDERS** that for the purposes of this Order capitalized terms used herein but not defined have the meanings set forth in Schedule A.

Stay of Proceedings

2. **THIS COURT ORDERS** that, subject to paragraph 3 of this Order, from 12:01 a.m. (Toronto time) on the date of this Order and until further order of the Court, no right, remedy or proceeding, including, without limitation, any right to terminate, demand, accelerate, set off, amend, declare in default or take any other action under or in connection with any loan, note, commitment, contract or other agreement, at law or under contract, may be exercised, commenced or proceeded with by: (i) any of the Secured Debtholders; (ii) any of the Unsecured Debtholders; (iii) any administrative agent, collateral agent, indenture trustee or similar person in respect of the Secured Debt and/or Unsecured Debt; or (iv) any person that is party to or a beneficiary of any other loan, note, commitment, contract or other agreement with one or more of the Concordia Entities, against or in respect of any of the Concordia Entities, or any of the present or future property, assets, rights or undertakings of any of the Concordia Entities, of any nature in any location, whether held directly or indirectly by any of the Concordia Entities, by reason or as a result of:

a) any of the Applicants having made an application to this Court pursuant to Section 192 of the CBCA;

b) any of the Applicants or Subsidiary Guarantors being a party to or involved in these proceedings or the Arrangement;

c) any of the Applicants or Subsidiary Guarantors taking any step contemplated by or related to these proceedings or the Arrangement;

d) the non-payment of principal, interest and any other amounts due and payable in respect of any of the Unsecured Debt, or the expiry of any applicable grace periods in respect of any of the Unsecured Debt; or

  

e) any default or cross-default under any of the Secured Debt (except in respect of any non-payment of scheduled payments of interest (at non-default rates) or amortization, as applicable, under the Secured Debt, for certainty, without giving effect to any acceleration under the Secured Debt) or the Unsecured Debt,

in each case except with the prior consent of the Applicants or leave of this Court.

3. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order, no person shall be prohibited from taking any actions on the same basis as is permitted under section 34(8) of the CCAA.

Notice of Proceedings

4. **THIS COURT ORDERS** that, subject to further order of this Court, the only persons entitled to notice of and to appear and be heard at subsequent motions within these proceedings shall be:

a) the Applicants and the other Concordia Entities and their counsel;
b) counsel to each of the Secured Debtholder Committee and the Unsecured Debtholder Committee;
c) the Agent and the Trustee and their respective legal counsel;
d) the CBCA Director; and
e) any interested person who has served and filed a Notice of Appearance in accordance with this Order and the *Rules of Civil Procedures*.

5. **THIS COURT ORDERS** that any Notice of Appearance served in these proceedings shall be served on the solicitors for the Applicants as soon as reasonably practicable at the following address:

Goodmans LLP

333 Bay Street, Suite 3400

Toronto, ON M5H 2S7
Attention: Robert J. Chadwick, Brendan O'Neill and Caroline Descours

Email: rchadwick@goodmans.ca / boneill@goodmans.ca /cdescours@goodmans.ca

6. **THIS COURT ORDERS** that the requirement for service of the Notice of Motion is hereby dispensed with and that this Motion is properly returnable today.

Comeback Hearing

7. **THIS COURT ORDERS** that any interested party that wishes to amend or vary this Order shall be entitled bring a motion before this Court on seven business days' notice to the Applicants and any other party or parties likely to be affected by the order to be sought by such interested party.

E-Service Protocol

8. **THIS COURT ORDERS** that the E-Service Guide of the Commercial List (the **"Guide"**) is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at http://www.ontariocourts.ca/sci/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission.

9. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Guide is not practicable, the Applicants are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to interested parties at their respective addresses as last shown on the records of the Applicants and that any such

  

# TAB 16

**CITATION:** Concordia (Re), 2017 ONSC 6357
**COURT FILE NO.:** CV-17-584836-00CL
**DATE:** 2017-10-27

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**RE: IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED, AND RULES 14.05(2) AND 14.05(3) OF THE *RULES OF CIVIL PROCEDURE***

**AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF CONCORDIA INTERNATIONAL CORP. AND CONCORDIA HEALTHCARE (CANADA) LIMITED AND INVOLVING CONCORDIA LABORATORIES INC., S.A.R.L., CONCORDIA PHARMACEUTICALS INC., S.A.R.L., CONCORDIA INVESTMENTS (JERSEY) LIMITED, CONCORDIA FINANCING (JERSEY) LIMITED, AMDIPHARM HOLDINGS S.A.R.L., AMDIPHARM AG, AMDIPHARM B.V., AMDIPHARM LIMITED, AMDIPHARM MERCURY HOLDCO UK LIMITED, AMDIPHARM MERCURY UK LTD., CONCORDIA HOLDINGS (JERSEY) LIMITED, AMDIPHARM MERCURY INTERNATIONAL LIMITED, CONCORDIA INVESTMENT HOLDINGS (UK) LIMITED, MERCURY PHARMA GROUP LIMITED, CONCORDIA INTERNATIONAL RX (UK) LIMITED, ABCUR AB, MERCURY PHARMACEUTICALS LIMITED, FOCUS PHARMA HOLDINGS LIMITED, FOCUS PHARMACEUTICALS LIMITED, MERCURY PHARMA (GENERICS) LIMITED, MERCURY PHARMACEUTICALS (IRELAND) LIMITED, AND MERCURY PHARMA INTERNATIONAL LIMITED**

**CONCORDIA INTERNATIONAL CORP. AND CONCORDIA HEALTHCARE (CANADA) LIMITED**

Applicants

**BEFORE:** REGIONAL SENIOR JUSTICE G.B. MORAWETZ

**COUNSEL:** *Robert J. Chadwick*, *Brendan O'Neill* and *Caroline Descours* for the Applicants

*Marc Wasserman* and *Michael De Lellis*, for *Ad Hoc* Group of Secured Holders

*Kevin Zych*, for *Ad Hoc* Group of Crossover Holders

**HEARD and DETERMINED:** October 20, 2017

**REASONS:** October 27, 2017

[40] I am also satisfied that the Applicants have brought this application in good faith and for no improper purpose. There is evidence that the Applicant are proceeding with the Arrangement for a valid business purpose, specifically a reduction of more than $2 billion of debt in order to put the Company in a sound financial footing.

[41] I do note that the proposed Arrangement does affect the interest of non-CBCA entities, including Subsidiary Guarantors. The Applicants point out that while the Subsidiary Guarantors are not CBCA corporations, they are all wholly-owned direct or indirect subsidiaries of CIC and will be consenting participants to the Recapitalization Transaction.

[42] In support of its argument that the CBCA Arrangement can affect the interests of non-CBCA entities, counsel submits that Canadian courts have previously approved arrangements involving non-CBCA corporations, including *Mega Brands; Aurcana; Banro Corporation et al.*, Court File No. CV-17-11700-00CL (February 22, 2017) and *Mood Media Corporation*, Court File No. CV-17-11809-00CL (May 18, 2017). I accept this position.

**Disposition**

[43] I am satisfied that this motion should be granted.

[44] Turning now to the specifics of the preliminary interim order, counsel submits that the CBCA permits the granting of an interim order such as the proposed preliminary interim order to facilitate an arrangement. Further, the courts have granted orders which have stayed any enforcement steps under agreements to which the Applicants or related entities were a party.

[45] In support of the submission, counsel referenced preliminary orders in *Re Essar Steel, Lightstream Resources Ltd., et al.* Court File No. 1601-08725; *Tervita Corporation, et al.* Court File No. 1601-12176 (September 14, 2006) (Alberta) and *Post Media Network Inc., et al,* Interim Order Granted August 5, 2016).

[46] I also note that the proposed interim order provides full comeback rights, permitting any party who objects to the stay of proceedings to return before the court on seven business days' notice to the Applicants.

[47] The draft order provides for "full pivot" rights. This clause makes it clear that, if circumstances arise, these proceedings can be continued under the *Companies' Creditors Arrangement Act* ("CCAA").

[48] There is also a provision in the draft order with respect to a swap obligation. The provision allows for a closing-out of this obligation, on the same basis that swaps can be closed out pursuant to the CCAA.

[49] Finally, in my view, where there is an expectation of debt compromise, the parties should not hesitate to incorporate structures or processes that are found in the CCAA and the *Bankruptcy and Insolvency Act* (the "BIA"). The CCAA and the BIA can provide guidance to the Applicants as to appropriate procedures to be followed in dealing with affected parties.

[50] I am satisfied that the draft preliminary interim order is appropriate in these circumstances and that it will assist the Company working to advance and finalize the terms of the Recapitalization Structure and to return to court for an Interim Order and to ultimately seek approval of a proposed Arrangement.

[51] The motion is granted and the Preliminary Interim Order shall issue in the form attached to Tab 3 of the Motion Record.

_____

Regional Senior Justice G.B. Morawetz

**Date:** October 27, 2017

# TAB 17

# Court of Queen's Bench of Alberta

**Citation: 9171665 Canada Ltd (Re), 2015 ABQB 633**

**Date:** 20151008
**Docket:** 1501 00574
**Registry:** Calgary



**In the Matter of 9171665 Canada Ltd. And Connacher Oil and Gas Limited**

**Corrected judgment:** A corrigendum was issued on October 8, 2015; the corrections have been made to the text and the corrigendum is appended to this judgment.

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**Memorandum of Oral Decision of the Honourable Mr. Justice C.M. Jones**

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[1] The Applicants, 9171665 Canada Ltd. and Connacher Oil and Gas Limited, made application before me on February 19, 2015 for an interim order and, subsequently, a final order pursuant to section 192 of the *Canada Business Corporations Act* ("*CBCA*") approving an Arrangement Agreement between the Applicants and a Plan of Arrangement to be finalized.

[2] I granted the request for the interim order. The Applicants come back before me now seeking a final order.

[3] I would like to turn first to the Arrangement itself.

## The Arrangement

[4] The Arrangement, if approved, would result, among other things, in the various outcomes described at paragraph 4 of the Application filed February 17, 2015, which I propose to summarize as follows:

a. consolidation of Connacher's existing common shares;
b. termination and cancellation of Connacher's shareholders' rights plan and any rights issued pursuant thereto, together with cancellation and extinguishment of various rights incidental to ownership of common shares of Connacher;
c. conversion or exchange *pro rata*, based on face amount, of two classes of notes into common shares of Connacher (post-consolidation). The two classes are U.S. $550 million aggregate principal amount 8½% notes due August 1, 2019 and Canadian $350 million aggregate principal amount 8¾% notes due August 1, 2018. I refer to

these two classes of notes collectively in the balance of my decision as the second secured lien notes;

d. settlement of all accrued and unpaid interest on the second secured lien notes;
e. issuance of new second lien 12% convertible notes in the principal amount of U.S. $35 million;
f. at Connacher's option, a new $30 million First Lien Term Facility to replace its existing Revolving Credit facility; and
g. amalgamation of Arrange Co. and Connacher.

[5] If implemented, the Arrangement would, among other things, allow U.S. holders of second secured lien notes to exchange them for common shares of Connacher pursuant to an exemption from registration requirements of the *United States Securities Act* of 1933.

[6] The Application sought a direction that if the Applicants were unable to effect the desired restructuring by way of a Plan of Arrangement under the *CBCA*, they would be permitted to apply to the Court for an order converting these proceedings to a proceeding under the *Companies' Creditors Arrangement Act*.

[7] I turn now to the February 19th hearing.

## The February 19th Hearing

[8] The Application before me on February 19th for an interim order was supported by the second secured lien noteholders and opposed by Credit Suisse, administrative agent for first secured lien noteholders. The lender under the $30 million Revolving Credit Facility appeared by counsel and took no position with respect to the Application before me.

[9] After a lengthy hearing that day, I granted an interim order. I turn now to the interim order.

## The Interim Order

[10] In summary form, the interim order provided for:

a. the calling of meetings of shareholders and the second secured lien noteholders; the conduct of those meetings; required majorities to pass resolutions; procedures for amending the information circular or Plan of Arrangement; and directions modifying Connacher's obligations to provide its shareholders with certain financial statements;
b. that votes cast by the second secured lien noteholders in favour of the Arrangement under the *CBCA* may be counted as votes by the second secured lien noteholders in favour of proceedings under the *Companies' Creditors Arrangement Act*;
c. specifying who may appear and be heard at subsequent Applications; and
d. a request of other courts, tribunals, or applicable bodies in Canada, or otherwise, to aid in giving effect to the interim order.

## The Shareholders and Noteholders Meetings

[11] Turning now to the shareholders' and noteholders' meetings. Those meetings took place on March 30, 2015. In both cases, the required quorums were present and the Arrangement was

approved in the manner and by the required majority provided for in the interim order and the Plan of Arrangement. Votes were as follows:

1) shareholders - 26.88 % of the holders of outstanding common shares were represented at the meeting. 96.46% of them voted in favour of the Arrangement.
2) second secured lien noteholders - 87.41% of the issued and outstanding principal amount and accrued and unpaid interest on the second secured lien notes were represented at the meeting. 97.21% of them voted in favour of the Arrangement.

**The Final Order**

[12] I would like to discuss the proposed final order. The final order is lengthy. It seeks the following:

1. deeming service of notice of the Application, notice of the noteholders' and shareholders' meetings good and sufficient;
2. confirmation that the Applicants have complied with the requirements of the interim order and the documents or acts contemplated therein, the Plan of Arrangement, the *CBCA* and applicable notice provisions;
3. confirmation that shareholders' and noteholders' meetings took place in compliance with the interim order;
4. confirmation that the Plan of Arrangement has been approved by at least 2/3 of the votes cast at the shareholders' and noteholders' meetings;
5. that the shareholders' meeting complied with the requirements of the interim order and complied with the requirements of the *ABCA* and *CBCA* for an annual meeting of shareholders;
6. that the Arrangement, as described in the Plan of Arrangement, be approved pursuant to s. 192 of the *CBCA*;
7. that the Arrangement and the procedures relating thereto are fair and reasonable to the noteholders, existing shareholders and other affected persons, both from a substantive and procedural perspective;
8. the order originally sought confirmation that the Arrangement, and the steps and actions undertaken by Connacher in its implementation, constitute a permitted second lien notes restructuring under the terms of the first lien term loan agreement. The Applicants have abandoned that request;
9. that the Arrangement will, upon filing of articles of arrangement under the *CBCA*, be effective under the *CBCA* in accordance with its terms and be binding upon the Applicants, the second secured lien noteholders, existing shareholders, the existing Indenture Trustees and all other persons affected by the Plan of Arrangement on and after the effective date, as defined in the Arrangement agreement;
10. that various affected persons are authorized and directed to take steps necessary to implement the Arrangement and transactions contemplated thereby, including steps necessary to carry out the terms of the Recapitalization, including steps relating to the replacement of the current Revolving Credit Facility with the New First Lien Facility;
11. a broad release of various parties and participants, their advisors, employees, agents and others from liabilities arising by virtue of acts, omissions, transactions, dealings, or other occurrences existing or taking place on or prior to the Implementation Date relating to, arising out of, or in connection with the Notes, the Note Indenture, the

Arrangement, the Backstop Agreement, the Support Agreement, and the Plan of Arrangement.

12. directing Connacher to indemnify and save harmless the Existing Indenture Trustees and persons connected with the Existing Indenture Trustees from liability arising out of, or in connection with, the Notes, the Note Indenture, the Arrangement, the Backstop Agreement, the Support Agreement and the Plan of Arrangement;
13. releasing and discharging all claims under the second secured lien notes, principal and interest, including interest that was due on February 2, 2015, as well as related costs, except to the extent provided for under the Plan of Arrangement;
14. permitting Connacher to incur indebtedness under the New First Lien Facility, designating it "first out debt" under the terms of the First Lien Term Loan, provided the amounts outstanding do not exceed Cdn. $30 million. Confirming that the New First Lien Facility shall have the benefit of the terms of the existing intercreditor agreement between the Existing Revolving Agent and the Term Loan Agent with rights of enforcement under that agreement granted to the New First Lien Agent;
15. from and after the Implementation Date, the order seeks my direction deeming all persons to have waived all then existing or previously committed defaults of the Applicants, whether arising by the provisions of the Plan of Arrangement or steps contemplated therein, or non-compliance with any other obligation which the Applicants may have to any person, howsoever arising, and any notice of default or demand for payment shall be deemed rescinded and of no effect; provided the Applicants shall perform their obligations under the Plan of Arrangement;
16. relieving the Plan of Arrangement, and payments or distributions made in contemplation thereof, and the Recapitalization from being set aside, declared void, or voidable under applicable legislation, and relieving them from being fraudulent, undervalued or reviewable transactions;
17. granting the Applicants the right to seek leave to vary the final order; and
18. requesting the aid and recognition of courts, regulatory or administrative bodies, in or out of Canada, in carrying out the final order.

**The New York Action**

[13] I would like to turn briefly to the New York action. On March 17, 2015, after I issued the interim order, Credit Suisse, on behalf of the first secured lien noteholders, commenced an action in the Supreme Court of the State of New York claiming, among other things:

1. judgment against Connacher for the principal amounts now claimed to be owing under the first secured lien notes (in excess of U.S. $128 million);
2. the applicable premium on that amount; and
3. accrued interest, any unpaid fees, other liabilities under the first secured lien note agreement, including attorneys' fees.

[14] The Applicants and the Consenting Noteholders assert, among other things, that Connacher is not in default under the first secured lien note agreement and that even if it is, I have the ability to exercise my jurisdiction under the *CBCA* to relieve Connacher of any such default.

[15] I would now like to turn to Connacher's arguments in support of their Application.

**Connacher's Arguments in Support of the Application**

[16] Connacher argues as follows:

1. the restructuring contemplated by the Plan of Arrangement was known to Credit Suisse, agent for the first secured lien noteholders, as part of information provided to potential investors and then stakeholders in connection with the proposed first secured lien note financing in April of 2014, and again in May of 2014 as part of representations made by Credit Suisse that Connacher might be exploring a restructuring of the second secured lien note holder debt. The information makes it clear that, at the time the first secured lien note debt was arranged, the possibility of restructuring the second secured lien note debt was on the table.
2. in October of 2014, Credit Suisse sought to become Connacher's financial advisor. Credit Suisse's presentation to Connacher included submissions on *CBCA* or *CCAA* restructuring of the second secured lien notes. Connacher ultimately engaged a different financial advisor.
3. nothing in Credit Suisse's submissions, proposals, or communications during this earlier period implied any limits on Connacher's ability to compromise all interest due on the second secured lien notes. Nothing suggested that a permitted second lien note restructuring, permitted under the documents relating to the first secured lien notes, had to be done between interest payment dates applicable to the second secured lien notes so that a permitted second lien note restructuring would not need to address an outstanding undischarged interest obligation under the second secured lien notes, which arose on February 2, 2015, when Connacher did not make the interest payment then due under the second secured lien notes.
4. based on a BMO Capital Markets fairness opinion and advice from Connacher's legal counsel, the Plan of Arrangement is fair to Connacher and in its best interests. Counsel points out that Connacher's board of directors has resolved to recommend approval by the second secured lien noteholders and Connacher's shareholders and that approval has been given.
5. Connacher will emerge from the Plan of Arrangement solvent.
6. on January 30, 2015, approximately 70% of the second secured lien noteholders agreed to support the Plan of Arrangement.
7. Connacher did not make the interest payment due under the second secured lien notes on February 2, 2015, even though it had the cash to make it, because pursuant to a Support Agreement negotiated with approximately 70% of the second secured lien noteholders, the parties agreed to add that interest to the second secured lien notes to be restructured.
8. the Plan of Arrangement does not affect the first secured lien noteholders.
9. under the first secured lien note agreement, Connacher is entitled to complete a permitted second lien note restructuring. A permitted second lien note restructuring is excluded under the first secured lien note agreement as an "event of default".
10. under the first secured lien note agreement, Connacher is permitted to substitute the New First Lien Facility for the current Revolving Credit Facility. In other words, Connacher is permitted to incur "first out debt" of up to $30 million Cdn.
11. the Plan of Arrangement will lead to a reduction of Connacher's debt by approximately $1 billion and eliminate its annual interest costs on the second secured lien notes by about $80 million.

12. by the time of the final order, Connacher anticipates having nearly unanimous support for the Plan of Arrangement.
13. Credit Suisse, on behalf of the first secured lien noteholders, is the lone opponent to the Plan of Arrangement. The Plan of Arrangement does not affect the amount of their indebtedness nor their priority. Connacher acknowledges that the first secured lien noteholders take the position that they are affected by virtue of acceleration of debt owing to them, or claimed to be owing to them, arising from an alleged event of default under the first secured lien note agreement.
14. Credit Suisse should not, having attorned to the jurisdiction of our Courts for purposes of the Application for the interim order, seek to delay the action before this Court by starting an action in a foreign jurisdiction.
15. I was satisfied that I could grant the interim order because one of the Applicants, Arrange Co., was solvent at the time of the application for that interim order.
16. Connacher will emerge from the Plan of Arrangement solvent. Mr. Bloomer stated at questioning that Connacher could satisfy its ongoing unaccelerated obligations.
17. if the restructuring contemplated by the Plan of Arrangement does not proceed, Connacher will be required to shut down its operations.
18. the Application is made in good faith to address liquidity issues and to avoid a shutdown.
19. the Plan of Arrangement is fair and reasonable because from a "valid business purpose perspective":
    a) it has a valid business purpose because it furthers the interests of Connacher as a going concern and is necessary for the corporation's continued existence;
    b) the U.S. $35 million of new convertible notes, together with the substitution of the $30 million New First Lien Facility for the Revolving Credit Facility will improve Connacher's financial strength; and
    c) the "Consenting Noteholders", which I understand are in excess of 75% of the second secured lien noteholders, have approved the Plan of Arrangement.

    Connacher goes on to argue that the objections of the first secured lien noteholders have been resolved in a fair and balanced manner as follows:

    a) the tests in *Re BCE Inc*, 2008 SCC 69 *("BCE")* are satisfied, in particular the presence of fair negotiations, the presence of a fairness opinion, board approval, transparency of the information circular, and a majority of security holders have voted in favour of the Plan of Arrangement;
    b) the Plan of Arrangement is the result of an exhaustive investigation and thorough decision making process;
    c) the board of directors recommends the Plan of Arrangement;
    d) it is in Connacher's best interests; and
    e) the Plan of Arrangement was approved by in excess of 2/3 of the second secured lien noteholders and the current shareholders.

20. Connacher is not in default to the first secured lien noteholders issued under the first secured lien note agreement. The failure to pay interest on February 2, 2015 was part of a permitted second lien note restructuring. A permitted second lien note restructuring under the first secured lien note agreement means:

> Any steps, actions or proceedings undertaken or participated in by the borrower to convert all or any portion of the Second Lien Notes into Equity Interest pursuant to any Corporate Arrangement Laws; provided that such restructuring does not suspend or otherwise interfere with the making or receipt of any payments due from the Borrower to the Secured Parties under the Loan Documents, or otherwise impair, limit, suspend or stay any of the rights and remedies of the Secured Parties under any of the Loan Documents in respect of the Collateral, or otherwise.

21. the permitted second lien note restructuring is consistent with the 2014 understandings surrounding the first secured lien note financing which, as noted above, publicly noted that Connacher might restructure the second secured lien notes.

22. the first secured lien note financing was specifically intended to facilitate a restructuring as contemplated in the Plan of Arrangement.

23. the fact that interest was not paid on February 2, 2015 and might otherwise be an event of default under the first secured lien note agreement is carved out of events of default because it is part of a permitted second lien note restructuring.

24. the Plan of Arrangement will not alter, amend or otherwise impair, limit, suspend or stay any of the rights of the lenders under the Term Loan Facility.

25. the proper interpretation of the first secured lien note agreement cannot be that, to avoid an event of default for non-payment of interest, the restructuring should have had to proceed between the interest installment payment dates so that no existing event of default was extant and the Plan of Arrangement could have proceeded as a permitted second lien note restructuring.

26. the form of final order seeks waiver of its alleged default so that the Plan of Arrangement can proceed.

27. Connacher dismissed the Gropper opinion, suggesting that retired Judge Gropper is attempting to interfere with my jurisdiction. Counsel asserts that retired Judge Gropper would have issued hundreds of such orders while he was on the bench.

28. assuming the alleged default is a real one, I should release Connacher. Counsel cites cases which he states prevented persons from invoking any type of default resulting from an Application and/or Arrangement, in particular ***Ainsworth Lumber***, ***Tembec*** and ***Mobilicity,*** and counsel claims that courts have approved Plans of Arrangement where existing defaults, not those arising solely by virtue of Plan of Arrangement steps, have in fact been waived, citing ***Mobilicity***, ***Essar*** and ***Frontera Copper***.

29. Credit Suisse did not state in its brief filed for the interim order Application that the Plan of Arrangement affected the legal rights of the first secured lien noteholders, just their economic rights.

30. only groups whose legal rights are impacted are entitled to vote on the Plan of Arrangement and are taken into account in determining whether the Plan of Arrangement is fair and reasonable, except in extraordinary circumstances.

31. the Plan of Arrangement will not, in fact, impact the economic interests of the first secured lien noteholders.

32. I do not have to worry about the New York action in exercising my jurisdiction under the *CBCA* because I am simply being asked to determine if the Plan of Arrangement is fair and reasonable, which I have the jurisdiction to do. If I do think I have to consider the New York action, I have "strong cause" to ignore the express choice of forum and governing law clauses in the first secured lien note agreement because my order will allow Connacher to restructure debt and continue operations. I cannot let a New York court oversee a *CBCA* restructuring.

33. Counsel goes on to cite what it considers to be New York law regarding acceleration clauses, ambiguities in agreements and other principles of New York law which it alleges I can consider if I decide to attempt to consider and apply New York law.

**Credit Suisse Arguments**

[17] Turning now to Credit Suisse's arguments:

1. I lack jurisdiction to adjudicate the parties' rights under the first secured lien note agreement - New York law and New York courts exclusively govern that action.

2. The first secured lien noteholders were not given the right to vote on the Plan of Arrangement.

3. If I do not dismiss the Application, it should be deferred until the New York action is resolved or, if I give an order, it should without prejudice to the rights of the first secured lien noteholders to pursue recourse in New York.

4. Connacher's projections show it losing between $20 and $30 million each quarter in 2015 and 2016 before factoring in interest, other financial expenses, and the cost of this Application.

5. An injection of $35 million U.S. will not keep Connacher afloat.

6. Failure to pay interest on the second secured lien notes is a standalone event of default and cannot be cured under the terms of the first secured lien note agreement as it perhaps could be under the second secured lien note agreement. Restated, a cure under the second secured lien note agreement is not a cure under the first secured lien note agreement.

7. The permitted second lien note restructuring may escape being an event of default but the order requested of me impairs, limits or suspends the rights of the first secured lien noteholders and is therefore impermissible as a permitted second lien note restructuring.

8. The exception for a permitted second lien note restructuring has no impact on other events of default arising independently; for example, an alleged failure to pay interest under the first secured lien note agreement.

9. There is still an extant default under the second secured lien note agreement arising from failure to pay interest in February of this year because that default may only be waived with the consent of 100% of the second secured lien noteholders. Consent of the holders of plus 75% of the second secured lien noteholders does not give rise to a waiver of that default effecting a cure under the second secured lien note agreement and, if it did, it would still not be a cure under the first secured lien note agreement.

10. Credit Suisse notes that if I reject the Plan of Arrangement, Connacher will apply to convert these proceedings to *CCAA* proceedings.

11. Credit Suisse notes and comments upon the Gropper opinion.

12. The provision of the final order rescinding any alleged default by Connacher and effecting a deemed waiver by the first secured lien noteholders compromises the rights of the first secured lien noteholders.

13. Solvency cannot be determined at this time.

14. Citing the Bloomer questioning of February 13, 2015, the entity emerging from the Plan of Arrangement would not be able to pay the first secured lien noteholders in full and still meet ongoing expenses. I note this conclusion is reinforced at clause 121 of the January 30, 2015 Bloomer affidavit, which states:

> Arrange Co. is solvent. Absent the Arrangement, Connacher anticipates that it will be unable to meet its future obligations as they become due, but it will emerge as a solvent corporation after the implementation of the Arrangement.

15. Forum selection clauses are to be given effect by the courts. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. To overcome one, there must be strong cause and the factors that justify departure from such a clause are very few.

16. Credit Suisse is concerned that my final order might adversely affect the ability of the first secured lien noteholders to enforce rights under the first secured lien note agreement.

17. The first secured lien noteholders have not been given a vote under the Plan of Arrangement. I cannot satisfy Connacher's solvency requirement by effecting a release of the first secured lien noteholders' rights under the first secured lien note agreement without giving them a vote.

18. The *CBCA* is not an insolvency statute. There is no case law approving a Plan of Arrangement where the emerging entity is insolvent. The *CBCA* director's policy says

that plans of Arrangement have only proceeded on the basis that the applicant entity would satisfy the solvency requirement prior to the date the Court was asked to grant final approval of the Plan of Arrangement.

19. The Plan of Arrangement has no valid business purpose. There cannot be a valid business purpose, such as continuity of business and survival of Connacher, until the New York action is resolved. The Plan of Arrangement does not further the interests of Connacher as a going concern.

20. Preservation of Connacher's scare funds should be the primary focus until the New York action is resolved.

21. The Plan of Arrangement does not resolve the interests of all parties in a fair and balanced way. The Plan of Arrangement should not be used to alter legal rights of the first secured lien noteholders under the first secured lien note agreement, especially since they have not been provided with a vote.

22. *BCE* tells us that the Plan of Arrangement must adequately respond to the objections of all parties and affected groups must be treated fairly.

**The Consenting Noteholders**

[18] I turn now to the arguments of the Consenting Noteholders.

[19] The Consenting Noteholders support the Applicants' position and argue that:

1. The Consenting Noteholders have waived default in paying interest in February.
2. Citing various cases (***Essar***, ***Mega Brands***, ***Compton***, ***Ainsworth Lumber***), the Consenting Noteholders argue that I can order that no party may assert a default or cross-default of any kind, existing or not, based on any element of the Court approved Arrangement including, in this case, with respect to non-payment of interest due in February of 2015.
3. The Consenting Noteholders reiterate the argument that Connacher is not in default under the first secured lien note agreement because it is undergoing a permitted second lien note restructuring.
4. Connacher will have to shut down if I do not provide the final order.
5. My jurisdiction to approve a Plan of Arrangement is exclusive.
6. A lot of work has gone into the restructuring and it is fair and reasonable to Connacher.
7. All I need to determine is if non-payment of interest on February 2nd of 2015 was a fair and reasonable element of the Plan of Arrangement. If I think it was, I am empowered waive that default in order to protect the integrity of the Plan of Arrangement.
8. If I am prepared to ignore the fact that non-payment of interest in February may have been an event of default independently of the possibility of it being permitted under the

permitted second lien note restructuring and conclude that it was part of the plan underlying the permitted second lien note restructuring, why should I not grant the waiver?

**Does the Court have the jurisdiction to issue a final order under the *CBCA* where the entity emerging from the arrangement will or might be insolvent?**

[20] I consider the above to be a threshold question and I asked counsel to provide me with additional analysis in regard thereto. In determining if I had the authority to consider issuing the order requested, it was important to me to understand if, in order to exercise authority granted to me under section 192, I must be satisfied on the evidence before me that the emerging entity will be solvent.

[21] That question is related to but, in my view, distinct from the question of whether it is appropriate for the Court to exercise the broad power given to it under section 192(4) to waive an alleged event of default under security agreements, which might, were there indeed a default, impair the Court's ability to determine that the emerging entity will, indeed, be solvent. Counsel have also addressed that question in their helpful submissions.

[22] In that regard, I deal first with this threshold question of whether a determination of the non-insolvency of the emerging entity is a condition precedent to the exercise of my authority under section 192.

[23] Credit Suisse argues that I must be satisfied that the emerging entity will not be insolvent. Connacher and the Consenting Noteholders say I do not. They argue that it is sufficient if an applicant, such as Arrange Co., is solvent, even if the amalgamated entity emerging from the Arrangement might be insolvent.

[24] Turning now to the arguments of counsel on this point. Credit Suisse argues:

1. There is no decided case which supports the Applicants' position;
2. A fair and proper reading of the Director's published position supports the inference that non-insolvent emergence must be demonstrated;
3. Assertions of compliance with statutory requirements based on the use of a non-insolvent Arrange Co. with nominal assets and capital, when the emerging entity will or may be insolvent, ignores the object and purpose of section 192, which is to facilitate restructurings in situations where non-insolvency will be an assured outcome;
4. Fundamental changes to the affairs of insolvent entities where non-insolvency is not an assured outcome are addressed by other legislation such as the *CCAA* and the *Bankruptcy and Insolvency Act*;
5. Consideration of other provisions of the *CBCA*, notably sections 191 and 185, support that assertion that Arrangements sanctioned by section 192 must only proceed on the basis that the Court is satisfied with the non-insolvency of the emerging entity.
6. The possibility of insolvency post-emergence cannot be deemed away so as to satisfy conditions precedent for the Court's exercise of its authority. Doing so effectively operates to disregard the solvency requirement and constitutes an impermissible waiver of legal rights belonging to parties not granted a right to vote in respect of the Arrangement.

7. Cases, particularly ***Mobilicity*** and ***Re Stelco Inc***, support the assertion that powers conferred under section 192 must be deployed only in circumstances where insolvency post-emergence will not exist. To do otherwise is an impermissible expansion or enlargement of the purposes and objectives underlying section 192 and would reflect a misunderstanding of the jurisdictional foundation upon which section 192 rests.
8. There is no case authority for the assertion that the circumstances which may have arisen prior to the date of the final order and which could effect an insolvency may be waived, deemed away, or overridden by a Court in Arrangement proceedings.
9. On the contrary, relevant case law expressly, or by implication, directs attention to the requirement of *de facto* as opposed to deemed non-insolvency post-emergence.
10. Court orders that have been cited by the Applicants and Consenting Noteholders in support of the assertion that the Court may waive such a default were not opposed.

[25] The Applicants and the Consenting Noteholders made a joint submission that:

1. The correct interpretation of section 192 require there be only "*an* applicant" for an order which is not insolvent;
2. The Director's policy statement may indeed be interpreted to permit the Court to exercise its authority to approve an Arrangement where one of the Applicants is not insolvent, irrespective of the solvency or insolvency of the emerging entity.
3. Articles which they have cited, and which I have read and found very helpful, support this contention.
4. From a jurisdictional perspective, solvency of at least one entity is only required at the interim order stage. Subsequent considerations of solvency only arise at the final order stage in the context of a fairness and reasonableness determination or to confirm the requirement that an applicant have been not insolvent remains accurate.
5. Cases support their interpretation of the solvency requirement.

[26] I turn now to my views.

[27] I have concluded from my review of these arguments and from the learned articles contained in the Applicants' submissions, that:

1. I agree with Credit Suisse's interpretation of the case law and with its conclusions regarding the jurisdictional requirements underlying section 192 as a tool for restructuring corporations. In my opinion, cases which consider solvency requirements that must be met for jurisdictional purposes simply have not had to confront that determination in a situation where the emerging entity could be insolvent upon emergence. I find that telling. One would think that if non-insolvency post-emergence were not a requirement for the Court's exercise of authority under section 192 we would see more case law which involved competing jurisdictional claims, with the Court required to decide which was the governing legislation.

2. Restructurings which effect a compromise of debt holder claims against insolvent corporations may, in my view, more properly be conducted under the provisions of applicable insolvency law, as opposed to the *CBCA*;

3. Exercise of the power in section 192(4) to issue a no-default order should be limited to circumstances involving corporations which do not, at that point in time, require

the order to assert non-insolvency in reference to alleged events of default which may have already taken place.

4. While a stay or no-default order may be issued to maintain the *status quo*, the *status quo* should not easily extend to circumstances in which a claim has been advanced based on an alleged existing default.

5. Allowing the restructuring process to remain under the control of the board and management, as opposed to the Court, makes sense in circumstances of confirmable non-insolvency.

6. I have serious reservations about the wisdom of resorting to section 192(4) to effectively compromise or arrange the claims of creditors which have not then been reduced to judgment and who have not voted.

7. I am concerned that an Arrangement as contemplated in section 192(1), while including, among other things, the various elements articulated therein, may not properly contemplate as a pivotal transaction in the Arrangement the removal of the basis for a claim that may have already arisen.



**Further Determinations**

[28] I turn now to some further determinations.

[29] I note that Credit Suisse recognized that this restructuring was in the works when the first secured lien note agreement was negotiated last year. However, I do not believe that fact alone should preclude Credit Suisse from responding to their evaluation of current economic conditions, which involve much lower oil prices and adverse exchange rate fluctuations. I do not believe that should prevent it from asserting its interpretation of its rights and those of the first secured lien noteholders under the first secured lien note agreement.

[30] The Applicants asked me to decide a matter of New York law, or avoid doing so, by invoking my authority under the *CBCA* to approve the Plan of Arrangement, and in the course of doing so cure a potential event of default as prescribed under an agreement over the objections of a party to that agreement.

[31] In essence, the Applicants asked me to exercise authority under the *CBCA* to create conditions precedent to the Application of that very statute. I believe that I must be satisfied that Connacher will emerge from the Plan of Arrangement as a solvent entity, a conclusion I cannot come to until the New York action is resolved, unless I take active steps through the exercise of my discretion to retroactively eliminate the basis for that action.

[32] I must resist efforts to persuade the Court to create, through the exercise of its powers under the CBCA, one element of the factual matrix, that being non-insolvency of the emergent entity, which I have concluded is an essential requirement for the exercise of its power to approve a Plan of Arrangement and, in so doing, extricate Connacher from otherwise potentially applicable insolvency legislation.

[33] This situation involves an alleged existing event of default asserted to arise under the first secured lien note agreement on a standalone a basis, allegedly unqualified by the possibility that

it may have also arisen consciously as one of the steps or actions forming part of the Plan of Arrangement.

[34] Having reviewed the literature, I am mindful of the comments of William Kaplan Q.C. in his article in the *2011 Annual Review of Insolvency Law*. His article is entitled "Stay of Proceedings Under the *Canada Business Corporations Act* - A Question of Balance". At page 163 Mr. Kaplan notes as follows:

> The *CBCA* arrangement provisions were not designed to deal with the full range of issues affecting multiple parties that many insolvencies can present. It is a focused remedy and requires focus for its proper use. Where an applicant requires broader third party orders restraining otherwise lawful conduct, especially on a permanent basis, one must question whether the proceeding is more properly administered under true insolvency process as opposed to the *CBCA*. The broader the third party impact requested, the more searching the analysis of whether the *CBCA* truly should be applied.

[35] On these facts, I am hesitant to use the provisions of section 192 directed at restructuring to potentially affect the resolution of the rights of parties to significant contacts affecting an applicant which are the subject of a present action in another jurisdiction which Connacher appears to have attorned to.

[36] In responding to that request, I believe I should have at least some concern for the impact that such an order might have on the attitude of lenders, particularly foreign lenders. What is the enduring economic and social value of communicating the message that agreements with Canadian borrowers negotiated in good faith and at some considerable expense, containing provisions designed specifically to address possible responses to adverse economic circumstances, can be nullified, or at least compromised by a *CBCA* Court convened to respond to those very adverse economic circumstances?

[37] The evidence put before me allows me to conclude that while the restructuring may buy some time, absent an increase in oil prices and an improvement in the exchange rate between Canada and U.S. currencies, I cannot be satisfied that Connacher as restructured would remain a going concern for all that long.

[38] Accordingly, I am unable to find a valid business purpose underlying the Arrangement. Nor am I able to conclude that the objections of the first secured lien noteholders have been resolved in a fair and balanced manner.

[39] While I acknowledge the presence of negotiations, a fairness opinion, board approval, the transparency of the information circular, and that a majority of the security holders have voted in favour of the Plan of Arrangement, the effect of the order which Connacher asks me to give is to ignore the very priorities which Connacher's financing Arrangement sought to create and preserve.

[40] The reasonable expectations of creditors regarding priorities should be a factor to consider in assessing fairness. This is especially true when those creditors have not been given a vote. I find the Plan unfair because it unfairly purports to extinguish a right which may have accrued to the first secured lien noteholders. I can understand the motivation to restructure, but I can also understand the first secured lien noteholders' motivation to resist where their contractual rights have been potentially altered without the chance to vote.

[41] Accordingly, I do not believe the Plan of Arrangement as put forward is a fair and balanced resolution of what I perceive to be competing interests. The first secured lien noteholders seek to realize on their security before the price of oil goes any lower or the Canadian dollar devaluates further relative to the U.S. dollar, and the order I have been asked to give may adversely affect that right.

[42] The Plan of Arrangement has the potential to adversely affect the legal and economic rights and interests of the first secured lien noteholders by compromising their right to enforce the first secured lien note agreement and by impeding their rights of recovery, should they be determined to have any.

[43] The alternatives to either dismissal or unconditional approval strike me as unhelpful in achieving a timely and fair resolution of Connacher's issues and those of its stakeholders.

[44] In summary, I cannot be satisfied on the evidence before me that Connacher will emerge from the Plan of Arrangement not insolvent and I am not satisfied that the Plan of Arrangement is, under the circumstances, fair and reasonable.

[45] Accordingly, I must dismiss the Applicants' Application for a final order pursuant to section 192 of the *CBCA* approving the Plan of Arrangement.

Heard on the 31st day of March, 2015.
Delivered orally.
**Dated** at the City of Calgary, Alberta this 2nd day of April, 2015.

**C.M. Jones**
**J.C.Q.B.A.**

**Appearances:**

Gorman, H., Q.C. and Cassell, J. - Norton Rose Fulbright LLP
for the Applicants

Friend, A., Q.C., Simard, C., and Zych, K. – Bennett Jones LLP
for the Respondent, Credit Suisse

LeGeyt, D. – Dentons Canada LLP
for the Respondent, Lending Syndicate

Chadwick, R. and O'Neill, B. – Goodmans LLP
for the Consenting Noteholders

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**Corrigendum of the Memorandum of Oral Decision**
**of**
**The Honourable Mr. Justice C.M. Jones**

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Page 15 amend:
Delivered orally on the 2nd day of April, 2015.
Dated at the City of Calgary, Alberta this 8th day of October, 2015.

# TAB 18

# Trizec Corp. (Re), [1994] A.J. No. 577

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Calgary

Forsyth J.

Judgment: July 25, 1994. Filed: July 26, 1994.

No. 9301-16141

**[1994] A.J. No. 577** | [1994] 10 W.W.R. 127 | 21 Alta. L.R. (3d) 435 | 158 A.R. 33 | 20 B.L.R. (2d) 202 | 49 A.C.W.S. (3d) 498

IN THE MATTER OF The Canada Business Corporations Act, R.S.C. 1985, c. C-44 as amended AND IN THE MATTER OF A Plan of Arrangement proposed by Trizec Corporation Ltd. and Horsham Acquisition Corp.

(17 pp.)

## Case Summary

## Statutes, Regulations and Rules Cited:

Canada Business Corporations Act, *R.S.C. 1985, c. C-44, ss. 192*, 195(5), 260.

**Creditors and debtors — Debtor's relief legislation — Plan of arrangement — Court approval, preconditions and considerations — Judicial power to amend a proposed plan — Determination of fairness of plan, applicable test — Rights of opposing parties.**

Application for court approval of a proposed plan of arrangement under section 192 of the Canada Business Corporations Act. The application was brought by TRZ Ltd. and HRS Ltd. as co-applicants. It involved the acquisition by HRS of an equity position in and control of the board of directors of TRZ. The application was opposed by a group of unsecured creditors who sought an amendment of the proposed plan of arrangement. The amendment appertained to the re-allocation amongst certain stockholders in TRZ of the value available under the proposed plan of arrangement. The plan was the product of the desperate need of TRZ to restructure and recapitalize or face bankruptcy. It was supported by all the stockholders in the company except the said group of unsecured creditors who contended that it was unfair. There was no suggestion that the plan was not put forward by the applicants in good faith. All interested parties, including the opponents, agreed that the Plan was preferable to the alternative of liquidation.

HELD: Application allowed.

Based on all the evidence, the court had no difficulty concluding that the plan as proposed fell within the range of what was a reasonable and fair allocation of assets among the parties in this case. Based on the business judgment test which the court must apply in determining the fairness of a plan of arrangement, the court found that the plan was one that a reasonable business person would have approved barring the availability of any advantageous amendment

F.R. Foran Q.C., P.T. McCarthy, R.C. Armstrong and D.C. Tay, for the Montreal Trust Company of Canada and Senior Debenture Holders' Committee. C.D. O'Brien Q.C. and A.L. Friend, for Trizec Corporation Ltd. S.F. Dunphy, for the Board of Directors (Independent Directors). A.H. Mark and A. G. Shewchuk, for the Committee of Preferred Shareholders. T.G. Heinzman, P. Lalonde and R. Orzy, for the Junior Debt Group (Mutual/Appaloosa/Fidelity). T.L. Czechowskyj, for the Director under Canada Business Corporation Act.

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## FORSYTH J.

**1** The matter before me involved an application under s. 192 of the Canada Business Corporations Act *R.S.C. 1985, c. C-44*, as amended ("CBCA"). Horsham Acquisition Corp. ("Horsham") and Trizec Corporation Ltd. ("Trizec"), as co-applicants, sought court approval of a proposed plan of arrangement involving the acquisition by Horsham of an equity position in and control of the Board of Directors of Trizec. A Notice of Opposition and an application for amendment of the proposed plan of arrangement were filed by certain unsecured creditors (the "Junior Debt Group"). The amendment related to the reallocation amongst certain stakeholders in Trizec of the value available under the proposed plan of arrangement.

**2** I rendered my decision on this matter following the close of argument on July 20, 1994, indicating at that time that further reasons would follow. I approved the subject application and grated an order approving the plan of arrangement as proposed by Horsham and Trizec. In reaching this decision, I declined to amend the plan as requested by the Junior Debt Group.

BACKGROUND

**3** The proposed plan of arrangement (the "Plan") is the culmination of efforts by Trizec and its management to restructure and recapitalize the company, such efforts dating from mid-1993 through to the development of the Plan in the form put forth in these proceedings. Restructuring efforts were initiated by Trizec in response to perceived liquidity problems which resulted from a combination of industry over-building and the recession in the early 1990's. The affected parties to the Plan are Horsham, Trizec, and the security holders of Trizec, those being the Senior Debentureholders ("Seniors"), the Junior Debtholders ("Juniors"), and the Preferred and Ordinary shareholders. The Seniors are the only secured creditors of Trizec and have a bed charge over its principal assets, namely the shares in its subsidiaries. The Juniors hold unsecured debt instruments and rank subsequent in priority to the Seniors but ahead of the equity shareholders. The accrued indebtedness of Trizec as of early July, 1994 was estimated at 1357 billion dollars to the Seniors and 330 million dollars to the Juniors. Trizec is in default of the Senior Debentures and Junior Debt as a result of a moratorium on the payment of principal and interest on all debentures and Junior Debt declared by Trizec in October, 1993.

**4** Development of a plan of arrangement was initiated with the formation of the Independent Committee of Directors ("Independent Committee") in early 1994; the members being independent of the major shareholders of Trizec. The Independent Committee initially determined, and such was supported by the evidence presented during these proceedings, that there would likely be little or no value in excess of the amounts owing to the Seniors should that group successfully realize on the debt owed them. The Seniors were prevented from realizing on their debt initially by consensual agreement with Trizec and later by an Order of this Court.

**5** Trizec conducted extensive negotiations with Horsham during the month of March, 1994 for an infusion of capital which could be made available to Trizec stakeholders in conjunction with a restructured equity position in a debt-free company. Trizec entered into a binding agreement with Horsham on April 4, 1994 and subsequently sought to develop a plan of arrangement which would satisfy the stakeholders. The Horsham offer was, and remains, conditional on its being implemented by means of an arrangement under s. 192 of the CBCA by July 25, 1994.

**6** This Court granted an Order on April 26, 1994 continuing the previously granted stay of proceedings which prevented the Seniors from enforcing their security and permitted Trizec the opportunity to have a plan of arrangement voted upon by its stakeholders. The Order provided that approvals for the plan include the approval of a minimum two-thirds of the votes cast by debentureholders.

**7** An initial plan of arrangement was announced by Trizec on April 29, 1994 but was rejected by the Seniors. On May 1, 1994, the Seniors served a notice of motion for an order prohibiting Trizec from proceeding with the announced plan of arrangement and lifting the Court imposed stay. The Seniors agreed to defer those proceedings in order to allow further negotiations toward an acceptable arrangement.

**8** On May 4, 1994 an allocation of assets mutually agreeable to the Seniors and Trizec was achieved. Trizec publicly announced the final terms of the Plan, on May 6, 1994, following a final allocation of assets among the remaining three stakeholder groups.

**9** The Junior Debt Group, representing approximately 50% of the Junior Debt, served a notice of motion on May 6, 1994 for an order either amending the proposed Plan in a manner suggested by them or requiring Trizec to present both the Plan and the Plan as amended to the stakeholders for approval. Trizec brought a cross-motion seeking to have only its plan of arrangement put before the stakeholders. This Court rejected the application of the Junior Debt Group and grated the cross-motion.

**10** Trizec convened meetings of the stakeholders on July 5 and 6, 1994, in accordance with the directions of the prior order grated by this Court, to seek approval for the Plan. The result of the vote, in percentage of votes cast, was as follows: Senior Debentureholders 99.38% in favour, Junior Debt 33.26% in favour, Preferred Shareholders 93% in favour and Ordinary Shareholders 84% in favour.

**11** Horsham, on behalf of Trizec, brought the instant application for approval of the Plan pursuant to s. 192 of the CBCA. The application was supported by the Preferred Shareholders, the Ordinary Shareholders, the Independent Committee and the Senior Debentureholders.

**12** The Junior Debt Group, by Notice of Opposition, declared its opposition to the Plan as presented by Horsham and Trizec. The grounds of opposition alleged were, stated summarily, that the Plan is unfair, including the process by which Trizec developed it. The Junior Debt Group sought to have the Plan amended by this Court in order to effect a redistribution of value from the Ordinary Shareholders to themselves.

APPROVAL OF AN ARRANGEMENT UNDER THE CBCA

**13** All parties agreed as to the nature of the essential test which the court must apply in deciding whether to approve a plan of arrangement under s. 192 of the CBCA. The court must be satisfied that all statutory requirements have been fulfilled, that the arrangement is put forward in good faith and that the arrangement is fair and reasonable: Re Dairy Corporation Canada Ltd., *[1934] 3 D.L.R. 347* (Ont. S.C.); Re Audax Gas & Oil Ltd. (1985), 42 Alta L.R. 353 (Q.B.); Re Canadian Pacific Ltd. *(1990), 73 O.R. (2d) 212* (Ont. H.C.); Re Gentra Inc., *[1993] O.J. No. 2028* (Gen. Div.).

**14** There was no suggestion that the Plan proposed by the applicant was not put forward in good faith. Consequently, I direct my comments to the remaining considerations under s. 192.

STATUTORY REQUIREMENTS

**15** A number of statutory prerequisites must be met before a company may seek court approval of a plan of arrangement. First, the proposed plan must meet the definition of "arrangement" in s. 192(1). Secondly, the corporate applicant must not be insolvent as that term is defined in s. 192(2). Thirdly, as set forth in s. 192(3), it

must not be practicable for the corporation "to effect a fundamental change in the nature of an arrangement under any other provision" of the CBCA.

**16** I found that each of the statutory requirements under s. 192 for the bringing of an application for approval of an arrangement were met in this case. The Plan clearly fails within the ambit of an "arrangement". Further, it could not have been effected under any other provision of the CBCA as no other provision provides the flexibility to deal with a complex reorganization of the nature contemplated in this case, involving secured and unsecured creditors and shareholders.

**17** The solvency requirement of the CBCA is met by virtue of Horsham, a solvent corporation, being the applicant in this case: In the Matter of the CBCA, and In the Matter of a Plan of Arrangement proposed by Amoco Acquisition Co. Ltd. (14 July 1988), Calgary 8701/20108 (Alta. Q.B.) (the "Dome" case); Savage v. Amoco Acquisition Co. Ltd. (1988), 59 Alta. L.R. 260 (C.A).

JUDICIAL POWER TO AMEND

**18** The Junior Debt Group sought to have this Court amend the Plan proposed by the applicant by changing the allocation of value between themselves and the Ordinary Shareholders.

**19** Counsel argued that the Court has the authority to make unilateral changes to a proposed arrangement pursuant to a broad discretionary power found under s. 192(4)(e) of the CBCA which reads:

> (4) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> (5) a order approving an arrangement as proposed by the corporation or as amended in any manner the court may direct. (My emphasis.)

**20** The wording of the statute certainly seems to grant a broad discretion to the court to amend a plan of arrangement. In fact, none of the parties who appeared before me suggested that this Court lacks the authority to amend a plan of arrangement placed in front of it for approval. The only substantive question was as to the scope of the Court's amending power. Does it extend to changes to the fundamental or substantive aspects of a plan of arrangement so as to, in effect, replace a plan put forward by the corporation with another plan which the corporation might not support?

**21** I am not satisfied that the type of amendment proposed, as far reaching as it is, is a matter contemplated by the wording of s. 192(4). In my view, the spirit and intent of s. 192 requires that all stakeholders be given a chace to review their positions and express their judgment in a vote before a substantive change can be made to a plan. This flows naturally from other specific powers of the court outlined in s. 192(4) respecting notice, appointment of counsel, meetings, and shareholder dissent. As I stated in my reasons for rejecting the earlier request of the Junior Debt Group to place a second plan or an amended plan before the stake holders for a vote, "I do not want to be taken as saying that this power may not exist, but it is certainly a power that would be exercised in only extraordinary circumstances": In the Matter of the CBCA and in the Matter of a Plan of Arrangement proposed by Trizec Corporation Ltd. (10 May 1994), Calgary 9301/16141 (Ala Q.B.) at 3.

**22** I find support for my interpretation of s. 192(4) in the submission of counsel for the Director of Corporations for Canada. Section 195(5) of the CBCA provides that notice of an application for approval of an arrangement shall be given to the director appointed under s. 260 of the Act. The Director is entitled to appear and did so here through counsel. The Director recognizes, notwithstanding that the wording of s. 192 is very broad, that such a fundamental amendment imposed unilaterally by a court without any opportunity for further review and voting by stakeholders, would set an unwelcome precedent, perhaps precipitating a review of the legislation.

**23** However, even if the power to make such substantive amendments is contemplated by s. 192(4), I was satisfied

that this is not a situation where this Court should exercise such discretion. In this case there is an arrangement which has developed through hard bargaining by sophisticated business people. Although the Junior Debt Group voted against this Plan, they too agreed it is preferable to the alternative of liquidation. There were no exceptional circumstances in this case which would invite the Court to prescribe substantive changes over the objection of other stakeholders.

**24** It was suggested by counsel that corporations should be required to get all parties "on-side" before bringing forward a plan. However, that is not a requirement of the legislation. Here the Junior Debt Group made it abundantly clear that they support the Plan, except they understandably want a larger share of the allocation. Yet, if the Court were to fundamentally alter the allocation to the Junior Debt Group, other stakeholders might wish to reconsider their positions. In fact, if every stakeholder could argue for a better position at the approval hearing there would be little point in having information circulars, meetings, and votes beforehand and little incentive to reach a consensual agreement.

**25** Counsel for the Junior Debt Group argued that the Seniors have no more say once they have agreed to a plan, unless their allocation is altered. I do not agree with this submission. First, the Seniors are the ones to decide whether their position has been altered, not this Court. As was pointed out by counsel for the Seniors, timing may have played a key role in their voting decision. Further, financial conditions have changed markedly since the vote to the detriment of their position. Any new plan put to a vote today might well be rejected by the Seniors.

**26** Secondly, this is a plan of arrangement as opposed to a liquidation scenario. All parties are interested in their relative allocations as compared to other classes of securities. The final deal was struck through a redistribution of value from the shareholders to the Seniors to obtain the latter's approval. Had the Seniors known that yet more value would be extracted from the shareholders, they may well have demanded a portion of such value for themselves.

**27** An interesting point with respect to standing was raised by counsel for the Independent Committee. Counsel suggested that the corporation is the only party with standing to seek amendment to a plan of arrangement. This argument is founded upon the wording of s. 192(3), which permits the corporation to make an application for approval of a plan of arrangement, and the wording of s. 192(4)(e).

**28** The sensible interpretation of these sections may well be that only the applicant may request that the court amend a plan where such amendment has not been put before all stakeholders. If the court agrees that such an amendment is fair in all the circumstances, given the effect on various stakeholders and any concerns they may have raised before the court, it might exercise its discretion to approve the plan as amended. I am not satisfied, however, that the court, of its own volition, may impose an amendment on an applicant. In any event, it is unnecessary for me to decide this point given my reasons above.

FAIRNESS REVIEW

**29** In approving a plan of arrangement under s. 192 of the CBCA, the Court is not expressly required by the words of the statute to consider the "fairness" of the arrangement. Notwithstanding that the discretion of the Court appears untrammelled, in practice the fairness of a particular plan has been a principle element of the court's inquiry in determining whether to approve a plan.

**30** It was forcefully submitted to me that the Junior Debt Group preferred that the Plan be approved as proposed should I refuse to amend it as they requested. I therefore proceeded on the basis that this was a consensual arrangement. However, notwithstanding the consensual nature of the plan, I was still required to make a determination as to whether, under all the circumstances, the Plan was fair.

a) Business Judgment Test

**31** The appropriate test a court must apply in determining the fairness of a plan of arrangement is the "business judgment" test. This test, which has been accepted and restated in numerous decisions, boils down to whether the court may conclude that an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan: In Re Alabama, New Orleans, Texas and Pacific Junction Railway Co., [1891] 1 Ch. 213 (C.A.); In Re Dorman, Long and Company Limited, [1934] 1 Ch. 635 (Ch. D.); Re Dairy Corporation of Canada Limited, supra Premji v. Amoco Acquisition Co. (1988), *61 Alta. L.R. (2d) 279* (C.A.).

**32** It is important to remember that in determining the fairness of a proposal the court need not determine that it is the "most fair" proposal possible. Rather, the court need determine only that it is fair and reasonable in all the circumstances. I agree with the words of Lindley, L.J. in Re English, Scottish and Autralian Chartered Bank, [1891-4] All E.R. Rep. 775 where he stated at p. 781:

> If you lay before creditors a scheme which they think is sufficient, I do not think it is the province of the court to say that every possible and conceivable scheme which the ingenuity of ma can suggest was not laid before them and submitted to them. They are business men. They have looked at it; they know their own interests, and they have approved the scheme by a vast majority in favour of it.

**33** In this case the Junior Debt Group voted against the Plan by a majority, but at the same time insisted to the Court that they approved of the Plan unamended, if need be, having regard to all of their alternatives. The vote itself is not binding, but is merely an indicator. In fact, existing jurisprudence indicates that such votes may be ignored by the court in deciding whether to approve a plan: Savage v. Amoco Acquisition Co. Ltd., supra. In effect, the Juniors decided that they would argue for a better allocation, but if they did not get one they then approve of this Plan. It appears to me therefore that the business judgment of these stakeholders is to proceed with the Plan proposed by Trizec.

**34** I have examined all of the evidence that was before me, including fairness opinions from various investment banking firms and the Director for Corporations for Canada, and summaries of allocations made in other plans of arrangement which have come before the courts. Based on this evidence, I had no difficulty concluding that the Plan as proposed fell within the rage of what is a reasonable and fair allocation of value among the stakeholders in this case. Accordingly, I found the Plan was one that a reasonable business person would have approved barring the availability of any advantageous amendment.

b) Process

**35** Two specific difficulties relating to fairness were propounded by the Junior Debt Group, and I propose to deal with these here. The first is that Trizec is using time constraints imposed by the Horsham deal to unduly pressure the Junior Debt Group to consent to a deal they do not like. I am well aware that an applicant can use the threat of dire consequences as a hammer to coerce stakeholder groups into accepting a plan with which they may be unsatisfied. However, in circumstances such as these, it is difficult for a court to discern whether one stakeholder group is using the judicial process to obtain an unfair advantage. Alternatively, it may be argued that the applicant is using the obvious desire of all involved to have some sort of plan in order to gain an unfair advantage for one stakeholder group over another. In this regard I think it is notable that a majority of the holders of unsecured debt other than the Junior Debt Group voted in favour of the Plan as proposed. This indicates to me that holders of unsecured debt not involved in this litigation consider the arrangement fair and reasonable in their business judgment, having regard for the process of mutual pain that such arrangements are acknowledged to produce.

**36** Moreover, as I stated in Dome, supra at p. 22, the court must be careful not to cater to thee special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders. In the case at bar we have senior debentureholders who, in all likelihood, would receive the entire

value of Trizec were they to realize on their security. Yet, they voted in favour of an arrangement which leaves approximately 200 million dollars "on the table" for the benefit of other security holders. The Seniors made this decision in early May, 1994, and maintained it at the vote in early July, 1994, despite the deterioration of their position through fluctuations in the financial markets. This value can be thought of as in the nature of a gift, vis-a-vis other security holders: Re Tea Corporation Ltd, [1904] 1 Ch. 12 (C.A). Since the Juniors are receiving more under this Plan than they would under any available alternative, it can hardly be said that they are being "crammed down".

**37** The Junior Debt Group further argued that the Plan was unfair as a result of the alleged unfairness of the process used to decide the final allocations of value. The Junior Debt Group submitted that they were not consulted properly in the negotiation process. I find that the evidence in the examination of Mr. Langerman, a senior executive with one of the members of the Junior Debt Group, is clear in this respect. While the Juniors were not provided a seat at the negotiating table between Trizec and the Seniors, they had ongoing discussions with Trizec management; at first directly, and then through the investment banking firm of Goldman Sachs.

**38** In some circumstances I would view the lack of direct negotiations between Trizec and the Juniors with disapproval. However, in this case the Junior Debt Group refused to execute a confidentiality agreement satisfactory to Trizec as they desired to maintain the ability to trade in related securities.

**39** Counsel for the Junior Debt Group argued that it wanted only to discuss their own allocation under the Plan and not the allocation to the other stakeholders. I find this argument disingenuous, particularly given counsel's argument that the Seniors' position should be considered fixed. Any negotiations as to the allocation to the Juniors would directly affect the allocation to the preferred and ordinary shareholders. An acceptable confidentiality agreement was necessary in order to allow detailed direct negotiations with respect to various allocations of value between the various securities, given that markets existed both for the present debt and equity securities of Trizec and the yet to be created instruments under the Plan.

(c) Creditors' Rights

**40** Impressive arguments were made by counsel for the Junior Debt Group in support of the proposition that it is inappropriate to use a plan of arrangement under s. 192 to compromise debt. The crux of these arguments is that as creditors they are entitled to be paid in full before any funds are advanced to preferred and ordinary shareholders. That being the case, so the argument goes, no plan may be considered fair until all creditors have either been paid in full or agreed to the terms of the plan, possibly foregoing part of the debt owing to them. In effect, counsel suggested that a plan is fair only when all of the creditors say it is fair.

**41** The Junior Debt Group further argued that once the Directors of Trizec determined that the solvency of the company might be in jeopardy, their duty to the shareholders was subordinated to a duty to ensure that creditors are paid in full. Numerous cases dealing with fraudulent conveyances and the consummation of risky business ventures using creditors' money were cited in support of this submission.

**42** I fail to see how the authorities cited by counsel are relevant to the instant situation. I acknowledge that a specific duty to shareholders becomes intermingled with a duty to creditors when the ability of a company to pay its debts becomes questionable. However, a wholesale transfer of fiduciary duty to creditors likely does not occur at the stage of proceedings where an arrangement is sought as opposed to a case where liquidation occurs. There can be no doubt on reading the CBCA that when a plan of arrangement is sought shareholders are a legitimate stakeholder group whose interests are to be considered in any allocation of value. In my view, Parliament clearly intended that a plan of arrangement might involve a compromise on the part of all parties for the greater good of the whole.

**43** I find that the priority which a security holder would receive in the event of liquidation is one factor relevant to determining the fairness of a plan. However, it is not, in and of itself, determinative. If creditors believe shareholders

deserve nothing, then such creditors may enforce their security. If this places the company into liquidation, shareholders will receive only the scraps, if any, that remain after creditors are paid in full.

**44** In this case, all parties vehemently argued that liquidation is not desirable. Presumably, they made this decision after examining all the alternatives and in consideration of their own self-interest. It is clear that but for the Plan of Arrangement the Junior Debt Group would likely have no liquidation preference to exercise.

**45** The Junior Debt Group have merely asserted their dissatisfaction with the allocation of value as between themselves and the ordinary shareholders. They have not put forward any evidence to indicate that under a different scenario, other than an arrangement, they would receive value near the value allocated them under the Plan. Once creditors, in their own best interest, opt for a plan of arrangement as opposed to liquidation, it lies ill in their mouths to then assert that they have absolute priority based on their rights under a liquidation.

**46** I note in passing that the Junior Debt Group's position regarding creditors' priorities would require 100% approval from the Seniors in this case. In fact, some of the Seniors voted against this Plan. Taken to its logical conclusion, this argument suggests that no plan can be approved until any such dissenters are paid in full. This proposition is untenable in a situation that demands compromise from all involved.

d) Other Matters

**47** It was also argued before me that the aspects of the Plan dealing with directors' liability and the executive share purchase plan should be excised as they affect the overall asset value of the corporation. As I indicated in my original remarks, I am inclined to follow the reasoning of Farley J., in Gentra, supra in relation to this issue. These are subsidiary matters which need not be addressed here. As I stated at that time, I make it clear that in approving the Plan I do not preclude any interested party from pursuing these two issues on, for example, grounds of oppression or otherwise if they so desire.

DISPOSITION

**48** An order has been issued approving the Plan of Arrangement without amendment.

**49** I made no ruling as to costs at the fairness hearing and make none now. Should counsel wish to submit argument on this issue they are free to do so.

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# TAB 19

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Run of River Power Inc. (Re),* 2014 BCSC 1397

Date: 20140724
Docket: S143477
Registry: Vancouver

**In the Matter of Section 288 of the *Business Corporations Act*, S.B.C. 2002, Chapter 57, as amended**

**- and -**

**In the Matter of a Proposed Arrangement among Concord SCCP General Partner (I) Inc., ROR Acquisition Ltd., Run of River Power Inc., Rockford Energy Corp., 0999130 B.C. Ltd. and The Shareholders of Run of River Power Inc.**

**Run of River Power Inc.**

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioner Run of River Power Inc.: | Christopher J. Ramsay<br>Nafeesa Valli-Hasham<br>Sean Tessarolo, A/S |
| Counsel for the Respondents Concord SCCP General Partner (I) Inc. and ROR Acquisition Ltd. | Rebecca Morse |
| Counsel for the Respondent JVD Installations Inc. | Darren R. Bieganek, Q.C.<br>Michael G. Demers |
| Place and Date of Hearing: | Vancouver, B.C.<br>June 30, 2014 |
| Place and Date of Judgment: | Vancouver, B.C.<br>July 24, 2014 |

## Introduction

[1] The petitioner, Run of River Power Inc. ("ROR"), is in the business of renewable resource development through its various subsidiaries. Unfortunately, the current finances of ROR are such that its ability to continue its operations, at least in part, depends upon reorganizing its corporate shareholdings through these proceedings.

[2] This proceeding was filed on May 7, 2014 and in the usual fashion, ROR obtained a court order on that date setting out the process for the calling of the shareholders' meeting. Having held that meeting and having obtained overwhelming support from its shareholders, ROR now seeks final court approval of its arrangement (the "Arrangement") pursuant to s. 291 of the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*BCA*").

[3] A creditor having claims against ROR and certain of its subsidiaries opposes the granting of the final order, citing that the effect of implementing the Arrangement will be to deprive it of recovery in the event that it succeeds in ultimately proving its claim.

[4] For the reasons that follow, ROR's Arrangement is approved. In summary, I find that all statutory procedures have been met; the application has been made in good faith; and the Arrangement is fair and reasonable.

## Background Facts

[5] ROR is a developer of renewable, sustainable energy though its portfolio of clean energy projects, which involve hydroelectric facilities that harness the power of mountain streams to create electricity. ROR is a British Columbia corporation, a reporting issuer in British Columbia and Alberta, and is quoted on the TSX Venture Exchange (the "TSXV") under the symbol "ROR".

[6] ROR has nine wholly owned subsidiaries: Crawford Energy Corporation, Northwest Cascade Power Ltd., Raffuse Energy Corporation, Sea to Sky Power Corporation ("SSPC"), Western Biomass Power Corporation, 1554675 Ontario

Limited (currently inactive), Rockford Energy Corporation ("REC"), Jascott Holdings Corp. and Skookum Energy Corp. In addition, ROR has an 80% interest in Pacific Northwest Biomass Corporation.

[7] One of ROR's wholly owned subsidiaries, REC, is a British Columbia corporation which specializes in the development of small hydro plants. REC is the owner of the Brandywine Creek Hydro Project (the "Brandywine Project") in Whistler, British Columbia.

[8] 0999130 B.C. Ltd. ("REC Acquirer") is a British Columbia corporation beneficially owned by, *inter alia*, certain holders of outstanding debentures and convertible debentures of ROR.

[9] Richard Hopp, Peter Zell and Brett Robinson are directors of ROR. Mr. Zell is also a director and shareholder of REC Acquirer.

[10] The Skookum Creek Power Partnership ("SCPP") is a British Columbia general partnership which owns the Skookum Creek Hydroelectric Project (the "Skookum Project"). The Skookum Project is a "run of river" hydroelectric project located in the Mamquam Valley, east of Squamish, British Columbia. Concord SCCP General Partner (I) Inc. ("Concord"), a British Columbia corporation, is the managing partner of SCPP.

[11] Sea to Sky Power Corporation (defined as "SSPC" above), another wholly owned subsidiary of ROR, is the Design Builder under the Design Build Contract between SCPP (also defined as the "Skookum Owner" in the documentation) and SSPC.

[12] Sea to Sky Power Construction Ltd. ("Construction") was incorporated to oversee and make key decisions in relation to the Skookum Project and to provide an entity through which the shareholders of Construction may share in the benefits of the Skookum Project. Construction agreed to perform SSPC/the Design Builder's obligations to SCPP/the Skookum Owner under a Design Build Pass-Through Agreement.

[13] ROR is a guarantor of the obligations of SSPC to SCPP/the Skookum Owner under the Design Build Contract.

[14] ROR Acquisition Ltd. ("AcquireCo") is a newly-formed British Columbia corporation that is a wholly-owned subsidiary of Concord. AcquireCo was incorporated for the sole purpose of effecting the Arrangement and has not conducted any business activities to date.



**The Arrangement**

[15] On May 6, 2014, ROR, Concord, AcquireCo, REC and REC Acquirer entered into an arrangement (the "Original Arrangement") which was subsequently amended on May 30, 2014 and June 27, 2014 (collectively with the Original Agreement, the "Arrangement"). The steps under the Arrangement are:

a) ROR will acquire the shares in the following subsidiaries: (i) Crawford Energy Corporation, (ii) Northwest Cascade Power Ltd., (iii) Raffuse Energy Corporation, and (iv) Western Biomass Power Corporation (collectively, the "Amalgamating Subsidiaries"). Subsequently, ROR will amalgamate with the Amalgamating Subsidiaries (the "First Amalgamation") to form the amalgamated company ("ROR Amalco");

b) The ROR shareholders will sell all of the issued and outstanding shares in ROR to AcquireCo (the "ROR Disposition");

c) AcquireCo and ROR Amalco (the "Second Amalgamating Corporations") will amalgamate (the "Second Amalgamation") such that the amalgamated company ("Amalco") will become a wholly-owned subsidiary of Concord;

d) Certain liabilities of ROR incurred on or before the closing of the Arrangement will be repaid (the "Debt Repayment"); and

e) After the satisfaction of certain of ROR's creditors, the "ROR Consideration" (which means the amount, if any, by which the Available Funds exceeds the sum of (i) ROR Closing Liabilities and (ii) fees and

expenses of the Trustee under the Payment Indenture) will be distributed to the ROR shareholders on a *pro-rata* basis.

[16] Certain transactions are a precondition to the completion of the Arrangement, but are not part of the Arrangement for which approval is sought. These transactions are that REC Acquirer will acquire from ROR all of the shares in its subsidiary, REC (the "REC Shares") and all debts and liabilities of REC to ROR (the "REC Claims") (collectively, the "REC Sale") such that REC, which owns the Brandywine Project, will become a wholly-owned subsidiary of REC Acquirer. The consideration paid by REC Acquirer is $8,040,000 including some cash on closing ($850,000) and an assignment and set-off of certain debentures. In addition, AcquireCo will pay a further $1.25 million on closing such that a total of $2.1 million cash will be available on closing. Therefore, the total consideration is $9.29 million.

[17] Initially, SSPC was intended to be included as one of the Amalgamating Subsidiaries in the First Amalgamation. However, SSPC was later removed as a party to the Arrangement due to it being named as a defendant in certain litigation commenced fairly recently by a creditor. It appears that this event would have put the Arrangement in jeopardy in terms of Concord and AcquireCo asserting that it constituted a material adverse change. Mr. Hopp states that this change was not done to frustrate the claim of the creditor but to facilitate the completion of the Arrangement and avoid it being terminated to the detriment of ROR's stakeholders.

[18] In substance, ROR and some of its subsidiaries (including SSPC which is the Design Builder for the Skookum Project) will be folded into companies controlled by Concord. As will become apparent below, the crux of the issue arises due to the transfer by ROR of its shares in REC to another entity, REC Acquirer, in accordance with the REC Sale.

[19] On May 7, 2014, the Court pronounced an Interim Order pursuant to the *BCA* authorizing ROR to hold and conduct a special meeting of the ROR shareholders for the purpose of approving the Arrangement and to provide notice of the meeting. The

Interim Order also provided for dissent rights of shareholders and authorized ROR to apply for final approval of the Arrangement.

[20] On May 30, 2014, a meeting of ROR shareholders was held. Of the approximately 59 million ROR shares voted (representing 58.99% of the outstanding), 97.46% voted in favour of the Arrangement. Of the approximately 11 million ROR shares held by disinterested shareholders, 86.38% voted in favour of the Arrangement. Accordingly, the ROR shareholders approved the Arrangement by a special majority of all of the voting shareholders and by a majority of the disinterested shareholders who cast their votes.



**Rationale for the Arrangement**

[21] The Arrangement is said to be borne from financial necessity. ROR contends that the Arrangement is necessary for its economic survival.

[22] In November 2013, the British Columbia government confirmed its approval of BC Hydro's Integrated Resource Plan ("IRP"). The IRP provides a 20-year outlook of how BC Hydro expects to reliably and cost-effectively meet the anticipated future electricity needs of the province. As a result of BC Hydro's assessment, it is not expected that there will be any formal calls for clean power for the foreseeable future. Accordingly, clean energy development opportunities in British Columbia are expected to be limited unless there is a dramatic change in the supply/demand picture from what is outlined in the IRP.

[23] During the 2013 fiscal year, ROR recognized significant losses compared to the 2012 fiscal year, mainly due to the recognition of an impairment of ROR's projects under development, the recognition of an adjustment to the fair value of the convertible royalty interest and finance costs. The impairment is said to be just over $5 million.

[24] Mr. Hopp, one of ROR's directors, states that these losses, combined with the economic outlook for clean energy development opportunities as set out in the IRP

and other material uncertainties, cast doubt on ROR's ability to continue as a going concern and meet its financial obligations as they become due.

[25] In fact, it is conceded in ROR's materials that it is insolvent and that if the Arrangement does not proceed, it will likely have to seek creditor protection. The fact of the insolvency is well supported by the most recent unaudited financial statements from March 2014. Those disclose assets of a book value of $23 million and liabilities of $26.4 million and a deficit of $3.4 million. Losses are in excess of $11.3 million for 2013 and over $1 million for the three month period ending March 2014.

[26] On May 31, 2014, some ROR Debentures became due but ROR was not able to make payment. These ROR Debentureholders have not demanded payment as they are awaiting the outcome of the Arrangement. Other ROR Debentures are due in August 2014. ROR states that the Arrangement is necessary for ROR to be able to satisfy any demands for payment by the ROR Debentureholders.

[27] As a result of these financial issues, ROR's management canvassed the market for opportunities to realize some value for ROR's shareholders on their investment, including selling all or part of ROR to a third party. The initial opportunities which presented themselves were, in the opinion of management and the ROR board of directors, not favourable to ROR or ROR's shareholders.

[28] The later transactions proposed by Concord in early April 2014, which are in substance now contained in the Arrangement, were seen to be in the best interests of ROR and a decision was made to proceed.

[29] The ROR board of directors has obtained outside opinions on the fairness of the transactions, both as preconditions to the Arrangement and in the Arrangement itself.

[30] In February 2014, BowMont Capital and Advisory Ltd. ("BowMont") was retained to perform financial advisory services in connection with a potential sale of ROR, or some or all of the assets of ROR. In April 2014, the ROR board retained BowMont to provide an opinion as to the fairness, from a financial point of view, of

the consideration to be received by the ROR shareholders pursuant to the Arrangement. On May 6, 2014, BowMont concluded that the transaction was fair, from a financial point of view, to ROR's shareholders.

[31] In April 2014, ROR was advised that the TSXV required that a formal valuation be provided in respect of the REC Sale. On April 29, 2014, the ROR board engaged Evans & Evans Inc. ("Evans") to provide a Valuation and Fairness Opinion. On May 5, 2014, Evans concluded that the transaction was, from a financial point of view, fair to the ROR shareholders. Evans also concluded that the fair market value of REC and the Brandywine Project was $7.2-$7.88 million.

[32] Upon reviewing the proposed transactions, ROR's management and the ROR board of directors, determined that Concord's proposal was in the best interests of ROR and that they would proceed to seek court approval. Mr. Zell abstained from participating in that process, given his conflicting interest in REC Acquirer.

[33] Even so, this will not be a successful reorganization for the ROR shareholders. As stated above, approximately $2.1 million will be available on closing (after payment of certain debentures) and it is anticipated that this amount will be used to pay certain costs such as audit fees, agent fees, legal fees, severance and other creditor liabilities that might be either compromised or just paid, as determined by Mr. Hopp.

[34] Evans anticipates that after paying estimated liabilities relating to the REC Sale and these costs, the available funds on closing will be $805,531. If this result bears out, that will result in an estimated recovery to the ROR shareholders of "nil" or only $0.008 per share.

**JVD Installations Inc.**

[35] JVD Installations Inc. ("JVD") is a British Columbia corporation which provides industrial construction services to the oil and gas, energy, petro-chemical, forestry and mining sectors. It holds a 1/3 interest in Construction; the other owners being

SSPC and Mountain Lake Construction Ltd., each with a 1/3 interest as well. The ownership provides some upside to JVD and the other shareholders in the Project.

[36] JVD's interest in ROR and its subsidiaries arises in relation to the Skookum Project. It has no claims against REC or in relation to the Brandywine Project.

[37] Pursuant to an OECP Construction Subcontract Agreement dated July 19, 2012 (the "JVD Subcontract"), Construction retained JVD to carry out certain works including the supply of labour, equipment and material in relation to the Skookum Project.

[38] On May 16, 2014, JVD commenced a debt action and builder's lien action in relation to the Skookum Project, claiming the sum of approximately $5.5 million arising from the supply of various labour and materials. Despite the JVD Subcontract with Construction, the claim is also advanced against SSPC. The theory of the claim against SSPC is that, by reason of the Design-Build Pass-Through Agreement or other contractual arrangements, Construction was acting as the agent of SSPC and therefore SSPC is liable for the payment of the outstanding amounts. In argument, the principal amount due is said to be $3.6 million, exclusive of certain fees and costs to complete. It was the filing of this claim that led to the later amendment of the Arrangement by which SSPC was removed as an Amalgamating Subsidiary such that the corporate structure including SSPC and Construction is now intended to remain intact despite the Arrangement.

[39] In late May 2014, JVD's counsel wrote to ROR's counsel objecting to the Original Arrangement. Among the complaints was that the payments to some of the creditors (not JVD) would amount to a preference under the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164 and would constitute an act of bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 42(1)(g) (the "*BIA*").

[40] After the amendment of the Arrangement, when JVD realized that the companies involved in the Skookum Project would remain intact, it also realized that even so, the prospects of collecting its debt remained slim. It asserts, without any

objection, that neither SSPC nor Construction have any material assets or equity in their assets.

[41] In the face of these concerns, to which ROR had no response, JVD has now advanced new claims against ROR, one of the arranging parties:

a) JVD now alleges that ROR is a guarantor of SSPC under the Design Build Contract and that accordingly, it is also a guarantor of the amounts owed to it by Construction/SSPC. This allegation has not yet been pleaded. As argued by ROR, I have serious doubts that this argument will succeed at the end of the day. The guarantee under the Design Build Contract is clearly in favour of SCPP, as the Skookum Owner and relates to obligations under that Design Build Contract. It does not refer to any obligations from a contractor of SSPC who might be engaged. It is therefore questionable at best that there is any privity of contract between ROR and JVD in respect of this guarantee: see Kevin Patrick McGuinness, *The Law of Guarantee*, 2d ed. (Toronto: Carswell Thomson Professional Publishing, 1996) at para. 4.46;

b) On June 25, 2014, JVD filed a further Notice of Civil Claim as against ROR, alleging a cause of action based on fraudulent misrepresentation. The damages are similarly said to be in the millions of dollars. ROR has yet to respond to that claim.

[42] JVD's claims are, as yet, unproven and may never be proven. However, I do not consider it appropriate to engage in a substantial weighing of the merits of the claims, even if that were possible based on the record, which it is not. Accordingly, JVD's claim remains contingent as against ROR at this time.

[43] JVD opposes ROR's application for final approval of the Arrangement on the basis that the Arrangement is a vehicle for circumventing its rights as a creditor of ROR. In opposing ROR's application, it is JVD's assertion that the Arrangement is not fair and reasonable.

[44] Charles Sanders, JVD's Chief Financial Officer, asserts that the Arrangement does not adequately or properly address its creditor rights and attempts to adversely affect its creditor rights. He specifically states:

> If the arrangement is approved, at the end of that process there will be no active business of ROR. ROR will be in the hands of the Concord Parties who will clearly control the flow of money and would certainly not entertain a claim being brought by itself against it for payment under the terms of the [Design Build Agreement]. The entire Project is, however, put at risk given that the [License to Occupy] requires that Sea to Sky, and therefore presumably the Partnership, is obligated to pay all accounts and expenses if they become due for work performed on or material supplied to the land. If the situation continues with JVD not being paid, ROR and the Partnership put at risk the continued existence of the Project as the [License to Occupy] could be terminated.

[45] In substance, JVD argues that ROR's only income producing asset (the Brandywine Project) is being transferred to others (REC Acquirer, including the interested director, Mr. Zell) at the expense of significant creditors and that the remaining assets in SSPC/Construction are of little or no value. In addition, JVD states that only some of ROR's creditors are to be paid (not JVD), while shareholders obtain some recovery.

[46] ROR takes no objection to JVD having standing on this application to oppose the granting of the final Order: *Laurentian Bank of Canada v. Princeton Mining Corp.*, [1993] B.C.J. No. 2192 (S.C.).

## The Law

[47] The *BCA* provides that:

> **288** (1) … a company may propose an arrangement with shareholders, creditors or other persons and may, in that arrangement, make any proposal it considers appropriate, including a proposal for one or more of the following:
>
> …
>
> (c) an amalgamation of the company with one or more corporations;
>
> …

[48] The Arrangement here is proposed to ROR's shareholders and not its creditors.

[49] In accordance with the provisions of s. 291 of the *BCA*, once the Arrangement is approved by the shareholders as directed by the Interim Order, final court approval is required.

[50] The governing authority is the well-known decision in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 137, in that ROR must satisfy the court that: (1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable.



## Discussion

### (1) Have the statutory procedures been met?

[51] ROR has presented evidence that it has complied with the notice provisions in s. 290 of the *BCA* and that it has complied with the requirements set out in the Interim Order, including the circulation of the "Meeting Materials" as defined in that Order.

[52] No person, including JVD, takes issue with the assertion that there has been compliance.

[53] I therefore find that ROR has met the required statutory procedures.

### (2) Is the Arrangement put forward in good faith?

[54] I have already outlined above the efforts that ROR's management and the board of directors undertook to address ROR's financial difficulties including the current default and imminent default in payment of its debentures. In brief, these efforts include canvassing the market and considering proposals; negotiating the Arrangement which was considered to be in the best interests of ROR and its shareholders; obtaining two fairness opinions from BowMont and Evans; and consulting with independent financial and legal advisors.

[55] As stated in *TELUS Corporation (Re)*, 2012 BCSC 1919, a robust process may support that the arrangement is being put forward in good faith:

> [211] An extensive and robust process to consider an arrangement has been found to support the contention that an arrangement is put forward in good faith: *Magna International Inc. (Re)*, 2010 ONSC 4123 at para. 108 …, aff'd 2010 ONSC 4685 (Div. Court) …; *Gazit America Inc. (Re)*, 2012 ONSC 4549 at paras. 10-11.

[56] JVD argues that the Arrangement is not being put forward in good faith because it is being done to avoid payment to JVD. I would not accede to this argument. While I appreciate that JVD is owed a substantial sum of money, I am satisfied that the driving factors behind the Arrangement lie elsewhere. In fact, efforts to resolve the financial issues faced by ROR were underway well before JVD even advanced its claim against ROR in June 2014, as noted above.

[57] It remains the case that JVD still has its claim against SSPC and Construction. I appreciate that the chances of recovery of its claims against those corporations may be of little comfort now, but in the meantime, ROR, as the parent company, is taking meaningful steps to address its financial situation. As I will discuss in more detail below in terms of the fairness of the Arrangement, there is no guarantee that as a result of those efforts, sufficient monies will be put aside for any contingent creditors, such as JVD.

[58] I also consider that the materials disclose, particularly from the Arrangement, as amended, that no impact on JVD's creditor rights is intended by the Arrangement. The Information Circular provides:

> From time to time, ROR may be involved in other claims in the normal course of business. Management assesses such claims and where considered likely to result in a material exposure and where the amount of the claim is quantifiable, provisions for loss are made based on management's assessment of the likely outcome. …
>
> Under the Arrangement, the liabilities of ROR will be transferred to the Acquirer, which would include any liabilities of ROR in respect of legal proceedings. …

[59] Accordingly, it remains the case that ROR's contingent liability to JVD will remain even after the Arrangement is implemented. JVD would also continue to have the right to assert any allegations of fraudulent preference if and when it might prove its claim.

[60] JVD also argues that Mr. Hopp is "hopelessly conflicted" and that the process has therefore been tainted. Mr. Hopp is the CEO and a director of ROR. He is also the sole director and president of SSPC and Construction.

[61] JVD argues that Mr. Hopp would have known of JVD's expectation that it would be paid for the provision of its services under the JVD Subcontract. I do not consider that Mr. Hopp took any contrary position. However, JVD then argues that Mr. Hopp has moved forward with the Arrangement to ensure that creditors including JVD "are not to be paid" and that he is in breach of various fiduciary duties by causing ROR to fraudulently prefer other creditors and shareholders to JVD.

[62] This argument has no merit. I accept Mr. Hopp's evidence as to the reasons why the Arrangement is being proposed. There is no basis upon which I could conclude that it was done to thwart the collection efforts of JVD. In fact, the Arrangement was later amended to preserve the corporations involved in the Skookum Project where JVD's main claim lies.

[63] It is equally apparent that any potential conflicts of the involved directors have been fully disclosed to all parties eligible to vote on the Arrangement in addition to JVD. This disclosure was contained in the Information Circular provided to voting shareholders prior to the vote. The disclosure provided was sufficient to allow the voting parties to form a reasonable judgment of the directors' relevant interests. In *TELUS*, the court stated:

> [222] Accordingly, it is evident that even if a director or officer has a "material interest", that will not prevent a company from proposing an arrangement. It is, however, mandatory in such a situation that full disclosure of any "material interest" be given to the shareholders so that the shareholders can consider that matter in relation to the proposed arrangement. Further, even assuming a conflict of interest, the arrangement provisions provide considerable safeguards, including the shareholder vote, the independent opinions that might be obtained and finally, the consideration by the court as to whether the arrangement is brought in good faith and whether it is fair and reasonable, in accordance with the *BCE* test.

[64] Mr. Zell, an interested director of ROR, abstained from voting on the Arrangement since he is also involved in REC Acquirer.

[65] I conclude that ROR has proposed the Arrangement in good faith.

**(3) Is the Arrangement fair and reasonable?**

[66] The court in *BCE* at para. 138 stated that the fair and reasonable requirement is met where the following criteria have been satisfied:

a) the arrangement has a valid business purpose, and

b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way

***(i) Creditor Interests***

[67] As I have stated above, it is undisputed that the Arrangement does not purport to affect creditors' rights.

[68] Even so, JVD argues that given ROR's admitted insolvency, the dispositions would normally be subject to the statutory requirements and judicial approval in accordance with insolvency legislation such as the *BIA* and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (see s. 36 in particular dealing with asset sales).

[69] The intersection between arrangements of shareholder rights and creditor rights was specifically addressed in *Trizec Corp (Re)*, [1994] A.J. No. 577 (Q.B.). Forsyth J. addressed arguments by certain unsecured creditors who opposed the arrangement of the equity in Trizec. Those arguments were similar to the arguments advanced here by JVD that no consideration can be paid to the shareholders until creditors are paid. That position was rejected:

> **40** Impressive arguments were made by counsel for the Junior Debt Group in support of the proposition that it is inappropriate to use a plan of arrangement under s. 192 to compromise debt. The crux of these arguments is that as creditors they are entitled to be paid in full before any funds are advanced to preferred and ordinary shareholders. That being the case, so the argument goes, no plan may be considered fair until all creditors have either been paid in full or agreed to the terms of the plan, possibly foregoing part of the debt owing to them. In effect, counsel suggested that a plan is fair only when all of the creditors say it is fair.

> **41** The Junior Debt Group further argued that once the Directors of Trizec determined that the solvency of the company might be in jeopardy, their duty to the shareholders was subordinated to a duty to ensure that creditors are paid in full. Numerous cases dealing with fraudulent conveyances and the consummation of risky business ventures using creditors' money were cited in support of this submission.
>
> **42** I fail to see how the authorities cited by counsel are relevant to the instant situation. I acknowledge that a specific duty to shareholders becomes intermingled with a duty to creditors when the ability of a company to pay its debts becomes questionable. However, a wholesale transfer of fiduciary duty to creditors likely does not occur at the stage of proceedings where an arrangement is sought as opposed to a case where liquidation occurs. There can be no doubt on reading the CBCA that when a plan of arrangement is sought shareholders are a legitimate stakeholder group whose interests are to be considered in any allocation of value. In my view, Parliament clearly intended that a plan of arrangement might involve a compromise on the part of all parties for the greater good of the whole.
>
> **43** I find that the priority which a security holder would receive in the event of liquidation is one factor relevant to determining the fairness of a plan. However, it is not, in and of itself, determinative. If creditors believe shareholders deserve nothing, then such creditors may enforce their security. If this places the company into liquidation, shareholders will receive only the scraps, if any, that remain after creditors are paid in full.

[70] In this case, just as in *Trizec*, ROR has sought out, and by all accounts arrived at, a solution that would avoid the liquidation of assets that would undoubtedly redound to the detriment of all concerned, including JVD. As I will discuss below, this liquidation scenario does not in any event result in any recovery for JVD.

[71] The clear thrust of JVD's argument is that this arrangement is improper and that the court should not sanction it. JVD states in essence that this arrangement is more properly brought under the *BIA* or *CCAA* where efforts can be made to maximize assets under a court supervised process. Clearly, ROR wishes to avoid that type of proceeding. In addition, JVD is not in a position to force ROR into bankruptcy as there appears to be a *bona fide* dispute about the claim. A filing under the *CCAA* is usually initiated by the debtor.

### *(ii) Valid business purpose*

[72] The court in *BCE* stated:

> [145] The valid business purpose prong of the fair and reasonable analysis recognizes the fact that there must be a positive value to the corporation to offset the fact that rights are being altered. In other words, courts must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation. The proposed plan of arrangement must further the interests of the corporation as an ongoing concern. In this sense, it may be narrower than the "best interests of the corporation" test that defines the fiduciary duty of directors under s. 122 of the *CBCA* (see paras. 38-40).

[73] I have already set out above that the purpose of the Arrangement is to possibly provide some benefit to ROR shareholders in circumstances where there is significant doubt as to the ongoing financial viability of ROR and its subsidiaries.

[74] In the circumstances, there is clearly a "positive value" to ROR in undertaking these arrangements which will hopefully see some value for some of its stakeholders. On the other side of this equation is the liquidation scenario which would most certainly be more detrimental to all stakeholders, shareholders and creditors alike.

[75] In the Information Circular, ROR sets out its "Reasons for Recommendation":

> In the course of their evaluations of the Arrangement, the Board consulted with ROR's senior management and legal counsel and reviewed an extensive amount of information, including the Valuation and Fairness Opinion. The conclusions and recommendations of the Board are based upon the following factors, among others:
>
> - The current financial position of ROR, as well as the financial position, opportunities and the outlook for future potential and operating performance of ROR and the business currently operated by ROR.
> - Negative market outlook and lack of clarity in terms of timing and/or plausibility of the possible industry turn does not offer ROR sufficient assurance of being able to continue without a substantial change in its operations as well as financial resources.
> - A number of strategic options, previously evaluated by ROR and the Board, have failed to materialize.
> - ROR requires a comprehensive restructuring that includes reduction in operating expenses and access to sources of capital and tax credit programs that are not available to the public company.
> - An independent fairness opinion from a qualified independent valuator stating that the Arrangement is fair, from a financial point of view, to the ROR Shareholders.

- The receipt of all-cash consideration by ROR pursuant to the Arrangement will provide certainty of value.
- The ability of ROR to continue to asses alternatives up to the time the Arrangement is effected.
- The fact that the approval of 66 2/3 % of the votes cast by all ROR Shareholders present in person or represented by proxy at the ROR Meeting are required to approve the Transaction and those who oppose can dissent and a majority of the minority ROR Shareholders present in person or represented by proxy at the ROR Meeting must also approve the Arrangement Resolution.

[76] ROR submits that the Arrangement benefits all affected stakeholders. The "ROR Closing Liabilities" which are to be paid are defined in the Arrangement as all of the outstanding indebtedness and liabilities of ROR and its Subsidiaries (other than REC) incurred on or before the effective time other than the "Excluded Liabilities". The ROR Closing Liabilities are to be paid first. Following the satisfaction of the ROR Closing Liabilities, and in the event that any monies remain, the ROR shareholders will then receive a nominal cash payment in exchange for their shares based on a *pro rata* share of the ROR Consideration.

[77] JVD argues that preserving shareholder value is not a valid business purpose. However, the assets have been valued, as confirmed by the fairness opinions received by the board of directors. The realization from these arrangements will see certain consideration flow, including to certain creditors of ROR and again, if sufficient monies remain, to the shareholders. Because the money is not flowing to JVD as it wishes does not mean that fair market value is not being obtained and that the realization of that value is not a valid business purpose.

[78] It is important to note again that ROR is not packing up its entire business operations and distributing monies where it should not. In fact, the intention of the Arrangement is to assist ROR in meeting its financial obligations as they become due in the future. This is particularly so in circumstances where ROR's future financial viability is in question. The Arrangement will result in the delisting of ROR from the TSXV. The fact that ROR will no longer exist as a public company will allow Amalco to access sources of capital and tax credit programs that are not otherwise

available to a public company. This comprehensive restructuring will also allow ROR to reduce its operating costs which are no longer tenable given its impaired financial situation. Importantly, it will remain (as Amalco) in control of certain of the subsidiaries who are in the midst of the Skookum Project and who also hold other development assets.

[79] As is apparent from the results of the vote, the ROR shareholders are in substantial agreement that the benefits of the Arrangement are far greater than the alternatives faced by ROR if it does not proceed.

[80] JVD argues that there is no evidence that ROR has considered other options such as debt financing, an auction process or a sale as a going concern (although clearly the REC Sale is as a going concern). In any event, I see no basis upon which to second guess the efforts and decision of the ROR management and board of directors here: *BCE* at para. 154.

[81] In that sense, I am satisfied that these arrangements are driven by necessity to ensure not simply that ROR remains competitive, but that its very existence is continued: *BCE* para. 146. I conclude that there is a valid business purpose for the Arrangement.

### *(iii) Balancing of Interests and Resolution of Objections*

[82] The court must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case: *BCE* at para. 148. A variety of factors may be considered: *BCE* at para. 149. The goal is not a perfect arrangement, but a reasonable one in light of the specific circumstances: *BCE* at para. 155.

[83] In *BCE*, the court addressed the nature of the claims of the objecting group, who were debentureholders who, as a result of the arrangement, were going to suffer by reason of a fall in the trading value of the debentures. The court made it clear that the interests which the arrangement provisions seek to protect are, generally, *legal* interests, not *economic* ones:

> [130] The s. 192 procedure originally was aimed at protecting shareholders affected by corporate restructuring. That remains a fundamental concern. However, this aim has been subsequently broadened to protect other security holders in some circumstances.
>
> [131] Section 192 clearly contemplates the participation of security holders in certain situations. …
>
> [132] A difficult question is whether s. 192 applies only to security holders whose *legal rights* stand to be affected by the proposal, or whether it applies to security holders whose legal rights remain intact but whose *economic interests* may be prejudiced.
>
> [133] The purpose of s. 192, discussed above, suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the *rights* of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval. The distinction between the focus on legal rights under arrangement approval and reasonable expectations under the oppression remedy is a crucial one. The oppression remedy is grounded in unfair treatment of stakeholders, rather than on legal rights in their strict sense.
>
> [134] This general rule, however, does not preclude the possibility that in some circumstances, for example threat of insolvency or claims by certain minority shareholders, interests that are not strictly legal should be considered: see Policy Statement 15.1, s. 3.08, referring to "extraordinary circumstances".
>
> [135] It is not necessary to decide on these appeals precisely what would amount to "extraordinary circumstances" permitting consideration of non-legal interests on a s. 192 application. In our view, the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not, without more, constitute such a circumstance.

[84] Both the trial court and the Supreme Court of Canada found that the contractual rights of the debentureholders remained intact and as such only *economic* interests were affected: *BCE* at paras. 26, 159-161. See similar discussion in *TELUS* at paras. 270-272.

[85] Similarly here, JVD's rights which might be affected are economic interests, not legal interests or rights. The Arrangement certainly does not affect their rights as against SSPC and Construction, and its newly advanced claim against ROR also remains intact. It does not, as alleged by JVD, "eliminate creditor claims".

[86] Any rights JVD may have to repayment of a debt against ROR will exist unaltered after the Arrangement is completed. In fact, the Arrangement has been specifically structured to ensure that all existing indebtedness and liabilities of ROR and its subsidiaries (other than REC) incurred on or before the Effective Date are to be paid except for the Excluded Liabilities (which JVD is not). In the event that JVD is determined to have a claim, it will share *pro rata* with the other creditors.

[87] Nor is it seriously suggested that there are any "exceptional circumstances" here which might justify a consideration of pure economic interests of JVD: *BCE* at paras. 134, 159. JVD's interests are simply those of an unsecured creditor having a contingent claim against ROR.

[88] Those parties who do hold legal rights are clearly satisfied that those rights have been dealt with in a fair and reasonable way, both procedurally and substantively. The overwhelming vote in favour of the Arrangement is certainly indicative of that. Dissent rights were made available to the ROR shareholders, although no shareholder exercised those dissent rights.

[89] I also agree that the Arrangement is substantively fair to all stakeholders generally. The vast majority of those entitled to vote approved the Arrangement. The effect of the Arrangement on ROR's creditors was considered. The result of this consideration was the settlement of the ROR Closing Liabilities. The liabilities which are included in the ROR Closing Liabilities will survive in the post arrangement entities.

[90] The gravamen of JVD's complaint is that the only operating asset in the ROR group, which is REC's Brandywine Project, is being transferred to another party and if and when JVD proves its claim against ROR, it will not have access to ROR's shares in REC to recover any judgment.

[91] This argument is simply and powerfully met by the financial information which suggests that no recovery would be available from REC and the Brandywine Project in that event even should that scenario unfold. The relevant facts are:

a) if JVD proves its contingent claim based on the guarantee and fraudulent misrepresentation allegations, it will be an unsecured creditor of ROR;

b) ROR has significant secured debts which would rank ahead of JVD with respect to payment if ROR were forced to liquidate its assets.

c) based on the unaudited interim financial statements of ROR for the three months ending on March 31, 2014, the net book value of REC was $6,412,929;

d) the independent valuation prepared by Evans determined the fair market value of REC to be in the range of $7.25-$7.88 million. This report also determined that the fair market value of the ROR Shares (excluding REC) is nil (or $0.008 per share);

e) the Brandywine Project and ROR's assets (including its shares in REC) are subject to the registered security interests of secured creditors which total approximately $13,238,457 plus interest (unaudited estimate), including:

   i. Industrial Alliance Insurance, Financial Services Inc. and CCG Trust Corporation (the project lenders for the Brandywine Project) are secured with respect to a loan, with principal outstanding of approximately $9,417,337 as of March 31, 2014;

   ii. the holders of the subordinated secured debentures are owed $3.5 million plus interest; and

   iii. other secured creditors hold registered security interests as against the personal property of ROR including Bank of Montreal.

[92] These figures have not, of course, been tested by JVD. However, for the purposes of this application, they are not contested. In any event, even with some slippage to the benefit of a creditor or potential creditor of ROR, things do not look rosy. Based on these figures alone, the total outstanding secured debt with respect

to ROR's interest in REC and with respect to REC's assets is approximately $5.3 million greater than the high estimate of fair market value of the REC shares.

[93] Accordingly, I agree with ROR that even if the Arrangement is not completed, and REC remained a subsidiary of ROR, JVD, as an unsecured creditor, would likely have no ability to access any value in the Brandywine Project in any event.

[94] Again I would emphasize that this court is not being asked to approve the transactions by which the REC shares are being transferred by ROR to REC Acquirer. JVD retains any right to challenge those transactions in the future should it wish to do so, by any of the insolvency statutes referred to above or at common law.

[95] Even accepting JVD's argument that the matter should be considered in a formal insolvency proceeding, rarely do estimate values bear out. In addition, what exacerbates those situations is the considerable professional cost that must be borne by all stakeholders before any distribution to creditors.

[96] I conclude that the Arrangement is fair and reasonable.

## Conclusion

[97] The order is granted on the terms sought in Schedule "B" to the Petition.

"Fitzpatrick J."

# TAB 20

Action No.: 2001-08434
E-File Name: CVQ20CALFRAC
Appeal No.: _____

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

IN THE MATTER OF SECTION 192 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 12178711 CANADA INC., CALFRAC WELL SERVICES LTD., CALFRAC (CANADA) INC., CALFRAC WELL SERVICES CORP. and CALFRAC HOLDINGS LP, by its General Partner CALFRAC (CANADA) INC.

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# P R O C E E D I N G S

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Calgary, Alberta
August 7, 2020

Transcript Management Services
1901-N, 601 - 5 Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392
Email: TMS.Calgary@csadm.just.gov.ab.ca

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| August 7, 2020 | Morning Session |
| The Honourable<br>Mr. Justice Nixon | Court of Queen's Bench<br>of Alberta |
| C.D. Simard (remote appearance) | For 12178711 Canada Inc., Calfrac Well Services Ltd., Calfrac (Canada) Inc., Calfrac Well Services Corp., and Calfrac Holdings LP, by its General Partner Calfrac (Canada) Inc. |
| L. Jackson (remote appearance) | For Wilks Brothers |
| S. Iyar | Court Clerk |

THE COURT: Good morning.

MR. SIMARD: Good morning, My Lord.

THE COURT: Again, just administrative matter, I have Justice Kachur here just observing. For similar reasons that I mentioned yesterday, she's a new appointment and is taking the opportunity to see how different justices deal with matters on a procedural basis.

Before I commence, any business? And I'll just acknowledge that I did received, this morning, and thank you, the draft orders from both the Calfrac side and the Wilks Brothers' side. Any other business we should address before I give the decision?

MR. SIMARD: No, My Lord, I don't believe so.

THE COURT: Okay. Just -- I'm not going to go through the complete list of people that may be online, I'll just confirm that Mr. Simard is online for Calfrac. Ms. Jackson, are you online for the Wilks Brothers?

MS. JACKSON: Yes, My Lord.

**Reasons for Judgment**

THE COURT: Thank you. I turn to the decision in respect of the application by Calfrac Entities for an interim order.

These are the oral reasons for judgment by myself, Justice Blair Nixon.

Insofar as this is an oral judgment, I retain the right to review the transcript and to add case names and citations. I may issue written reasons, but I have not yet made a final decision in that regard.

In oral judgments, it is not my practice to cite legislation, jurisprudence, or the rules of court in detail, notwithstanding that they have all been considered.

## I. Introduction

12178711 Canada Inc., which I will refer to as "Calfrac ArrangeCo", Calfrac Well Services Ltd., which I will refer to as "Calfrac", Calfrac (Canada) Inc, which I will refer to as "CCI", Calfrac Well Services Corp., which I will refer to as "CWSC", and Calfrac Holdings LP, which I will refer to as "CHLP", through its general partner, CCI, are the applicants in this hearing. (I will collectively refer to them as the "Applicants", or "Calfrac Entities", as appropriate.)

The Calfrac Entities bring this application pursuant to Section 192 of the *Canada Business Corporations Act*. They seek an interim order, which I will refer to as the "Interim Order", in connection with a plan of arrangement under the *CBCA*; I will refer to that as the "Arrangement".

In recent years, global energy markets have been experiencing numerous industry challenges, including significant downward pressure on commodity prices. These challenges have impacted Calfrac and its direct and indirect subsidiaries (collectively, the "Calfrac Group").

The Calfrac Group provides specialized energy services to oil and natural gas producers in a number of jurisdictions. The impacts of industry geopolitical commodity price challenges and the over-supply of oilfield services equipment on the Calfrac Group's recent financial performance have resulted in, among other things, a capital structure and liquidity position that is no longer sustainable in light of the Calfrac Group's operating income. There is inadequate financial flexibility for the Calfrac Group to effectively advance its business going forward.

The Calfrac Group is seeking to implement the Arrangement to give effect to a proposed recapitalization transaction (the "Recapitalization Transaction"), which will, among other things, reduce the Calfrac Group's total outstanding indebtedness by approximately $570 million and its annual cash interest payments by approximately $52 million, and provide a sustainable capital structure for the Calfrac Group going forward.

On July 13, 2020, this Court granted a Preliminary Interim Order pursuant to Section 192 of the *CBCA* that, among other things, granted a stay of proceedings in furtherance of the Arrangement (the "Stay Provision").

The Wilks Brother LLC (the "Wilks Brothers") hold a majority of the Second Lien Notes issued by CHLP. The Wilks Brothers subsequently made an application seeking to amend the Stay Provision by exempting the Second Lien Noteholders from its operation (the "Comeback Hearing").

On July 23rd, 2020, I heard that application and on July 27th, 2020, I gave oral reasons dismissing the application and preserving the Stay Provision in the form granted by me on July 13th, 2020.

The Applicants bring this Application to address the various procedural matters contained in a proposed Interim Order regarding, among other things, the calling, holding, and conduct of meetings of the Affected Securityholders (as defined below) to vote on the Arrangement (the "Meetings"), voting and other matters related to the Arrangement, and certain ancillary relief.

II. Issues

Based on the Briefs and the oral submissions received from the stakeholders in this Arrangement hearing concerning the application for an Interim Order, the issues are as follows:

a. Should I allow the record date to be revised from July 13th, 2020 record date set in the Preliminary Interim Order hearing to August 10, 2020 (the "Record Date Issue")? This question concerns paragraphs 2 to 4 of the draft Interim Order that I was initially provided by the Calfrac Entities.

b. Should the deeming language in paragraph 17 of the draft Interim Order that deals with the Information Circular be allowed to stand as originally framed by the Calfrac Entities (the "Deemed Language Issue)?

c. Should the language in paragraph 42 of the draft Interim Order that deals with voting be allowed to stand as originally framed by the Calfrac Entities (the "Voting Issue)?

d. Does the language in paragraph 45 of the draft Interim Order seek to disenfranchise the shareholders and render their vote moot, and other concerns with respect to that paragraph (the "Paragraph 45 Issues)?

e. Should I grant the draft Interim Order in the form proposed by the Applicants?

III. Conclusions.

Based on the evidence and analysis leading up to the hearing yesterday, and on my review of the two alternative draft orders that I received within the last two hours this morning, my conclusions concerning the above issues are as follows.

Concerning the Record Date Issue, I infer that it is no longer an issue because neither of the draft Orders that I received this morning purport to amend the language. For completeness, I note for the record that I accept the August 10th, 2020 Record Date for the reasons advanced by the Calfrac Entities yesterday.

Concerning the Deemed Language Issue that was raised concerning paragraph 17 of the draft Interim Order, I infer that it is no longer an issue because neither of the draft Orders that I received this morning purport to amend the language. For completeness, I note for the record that the Calfrac Entities amended paragraph 17 of the draft Interim Order yesterday afternoon to address the issues of concern raised by the Wilks Brothers. I accept that revised wording for purposes of this Application.

Concerning a Voting Issue that was raised concerning paragraph 42 of the draft Interim Order, I direct that the language proposed by the Wilks Brothers be adopted into the final draft of the Interim Order that is being sought in this Application. My reasons for this are two-fold. First, the underlying information that is being sought on a best-efforts basis will be evidence that the Court may want to take into account at the hearing for the Final Order. Second, the voting detail sought from all identified parties will be evidence that the Court may want to take into account at the hearing for the Final Order.

Concerning the Paragraph 45 Issue, many of the issues inherent in the Briefs that were filed in preparation for the hearing on Thursday, August 6, 2020, have been resolved between the parties. In particular, the votes in respect of the Shareholders Arrangement Resolution has now been added to the last sentence of paragraph 45. I accept that revised wording for purposes of this Application.

Concerning the words that the Wilks Brothers seek to delete in paragraph 45 of the draft Interim Order that I received this morning, I direct that those words not be deleted. I find that those words do no more than recognize the jurisdiction of this Court. Further, I do not construe those particular words as limiting any argument that the Wilks Brothers may want to raise at the hearing for the Final Order.

Concerning the form of the draft Interim Order proposed by the Applicants, I grant it subject only to the amendments that I noted above concerning the Voting Issue in respect of paragraph 42.

My detailed reasons for the above conclusions are provided below.

IV. Facts and Findings.

A. The Applicants

Calfrac ArrangeCo is a corporation incorporated pursuant to the *CBCA*.

Calfrac is a corporation amalgamated under the *Alberta Business Corporations Act* ("*ABCA*") and is a public company traded on the TSX. Calfrac is the ultimate parent of all entities in the Calfrac Group.

CCI is incorporated under the *ABCA,* and is 100% owned by Calfrac.

CHLP is a partnership registered pursuant to the laws of the State of Delaware. CCI is the general partner of CHLP.

CWSC is a corporation incorporated pursuant to the laws of the State of Colorado and is 100% owned by Calfrac.

B. The Wilks Brothers LLC

The Wilks Brothers is a significant shareholder, unsecured noteholder, and second lien lender to the Applicants. The Wilks Brothers bring limited objections to the proposed Interim Order sought by the Applicants.

C. The Calfrac Business

The Calfrac Group is a leading independent global provider of specialized oilfield services. Its services include fracturing, coil tubing, cementing, and other well stimulation services that are designed to increase the production of hydrocarbons from wells.

Geographically, the operations of the Calfrac Group are currently conducted in Canada, the United States, Argentina, and Russia.

The nerve centre of the Calfrac Group is located in Calgary. A majority of the directors

and officers are based out of the Calgary Head Office, as well as the treasury function and other functions and services.

In view of the current economic challenges, the Calfrac Group proactively commenced a financial structure review process, in consultation with certain of its key stakeholders. It did so with a view to improving the capital structure of the Calfrac Group. The Calfrac Group wanted to improve access to liquidity, address its leverage, strengthen its financial position, and maximum value for its stakeholders.

This initiative by the Calfrac Group has resulted in the proposed Arrangement and Recapitalization Transaction presently before the Court in these *CBCA* proceedings.

D. Preliminary Interim Order

At a hearing that commenced in the Court of Queen's Bench in Calgary at 3:00 PM, mountain time, on July 13, 2020, this Court granted the Preliminary Interim Order which, among other things, granted the Stay Provision and tolled applicable limitation and grace periods in furtherance of the Arrangement, and addressed issues of service and notice.

Notice of that application had been given on the morning of July 13, 2020 to counsel for the Agent, counsel for G2S2 Capital Inc, counsel for the Ad Hoc Committee, and counsel for the Wilks Brothers. All of those parties appeared at the application for the Preliminary Interim Order on July 13th, 2020. The Applicants acknowledged to the Court and the other parties that, because notice had been short, the application was effectively on an *ex parte* basis.

The Stay Provision in the Preliminary Interim Order stayed any right to terminate, demand, accelerate, set off, amend, declare in default, or take any other action under or in connection with any loan, note, commitment, contract, or other agreement, at law or under contract, that may be exercised, commenced or proceeded with by, among others: (i) the Second Lien Noteholders; (ii) the Senior Unsecured Noteholders; or (iii) any administrative agent, collateral agent, sub-agent, indenture trustee, or similar person in respect of, or in connection with, amounts owing to the Second Lien Noteholders or the Senior Unsecured Noteholders.

E. The U.S. Proceedings

Due to the Calfrac Group's presence in the U.S., the Calfrac Entities sought relief ancillary to the *CBCA* proceedings before the U.S. Bankruptcy Court.

On July 14th, 2020, U.S. Bankruptcy Judge, David R. Jones, heard the Calfrac Entities'

request for relief in the U.S. Bankruptcy Court for the Southern District of Texas, located in Houston, Texas. Judge Jones granted an Order Granting Emergency Provisional Relief pursuant to Chapter 15 of the U.S. Bankruptcy Code. A further hearing to address Calfrac's request for recognition of these *CBCA* proceedings as a "foreign main proceeding" is scheduled for August 25, 2020, and will also be heard before Judge Jones.

F. The Comeback Hearing

Subsequent to the Preliminary Interim Order, the Wilks Brothers brought an application in the form of a Comeback Hearing. The Comeback Hearing was heard in the Court of Queen's Bench of Alberta on July 23, 2020.

At that Comeback Hearing, the Wilks Brothers sought to amend or vary the Stay Provision to exempt the Second Lien Noteholders from the Stay Provision. In that hearing, the Wilks Brothers did not challenge or contest any other portion of the Preliminary Interim Order.

On July 27th, 2020, the Court of Queen's Bench of Alberta gave oral reasons dismissing the application and upholding the Stay Provision. In that oral decision, the Court of Queen's Bench of Alberta found that the Stay Provision was necessary to support the Calfrac Entities' efforts to advance the Arrangement. The Court also found that the Stay Provision effectively and appropriately stayed the Second Lien Noteholders, including the "automatic acceleration" of the amounts owing under the Second Lien Notes.

G. Activities Post-Preliminary Interim Order

Since the Preliminary Interim Order, the Applicants have continued to advance the Arrangement and the Recapitalization Transaction with the Affected Securityholders. Consistent with the terms of the Preliminary Interim Order and based on the evidence before me, the Applicants have continued to satisfy their obligations to some suppliers, customers, and employees. In summary, the Applicants have continued to operate their business in the ordinary course.

Based on the evidence before me, I find the terms of the Preliminary Interim Order have provided the Applicants with the necessary time and business stability to commence the Recapitalization Transaction and advanced the Arrangement.

Based on the size and nature of the Calfrac Group's existing capital structure, the Calfrac Entities remain of the view that the Arrangement is required to reduce its debt obligations and provide a path forward for the Calfrac Group.

H. Description of Arrangement

1. Affected Securityholders

I acknowledge that the Wilks Brothers have advanced an alternative to the Arrangement proposed by the Calfrac Entities. I will not address that for purposes of this Application. However, it is open for the Wilks Brothers to address that matter at the application for the Final Order.

Based on the Calfrac approach to the arrangement, two classes of stakeholders will be affected by the Arrangement. Those two classes are: (i) the Senior Unsecured Noteholders; and (ii) the Common Shareholders (collectively, the "Affected Securityholders").

The Arrangement will not affect or compromise the following stakeholders: first, the Calfrac group's secured creditors, being the First Lien Lenders and the Second Lien Noteholders; second, the Calfrac Group's customers; third, the Calfrac Group's employees; and fourth, the Calfrac Group's trade creditors.

2. Elements of the Recapitalization Transaction.

The Recapitalization Transaction to be affected pursuant to the arrangement will, among other things, reduce the Calfrac Group's total outstanding indebtedness by approximately $570 million and its annual cash interest payments by approximately $52 million.

The key elements of the Recapitalization Transaction include: first, an exchange of the Senior Unsecured Notes for common shares; second, a share consolidation; and third, an offering of $60 million principal amount of new 10% senior secured convertible payment-in-kind notes of Calfrac.

3. Early Consent Consideration.

In addition to the pro rata share of the 86 percent of the Common Shares they are otherwise entitled to, the Arrangement contemplates that the Senior Unsecured Noteholders that become Early Consenting Noteholders will also obtain their pro-rata share (based on the face value of the Senior Unsecured Notes) of the 6% of the common shares on a non-diluted basis and excluding the further delusion from the issuance of the Commitment Consideration Shares as early consent consideration for the supporting Recapitalization Transaction.

To become an Early Consenting Noteholder, the Senior Unsecured Noteholder must elect

to do so prior to the Early Consent Date in accordance with the provisions of the underlying Interim Order.

4. Effects of the Arrangement

If implemented, the key effects of the Arrangement include: first, the reduction of the total debt by approximately $572 million; second, the reduction of the annual interest payments by approximately $52.6 million; third, relief from the obligation to pay cash interest in respect of the Senior Unsecured Notes; fourth, improving the liquidity of the Calfrac Group by $45 million; and fifth, existing Common Shareholders will retain their Common Shares, subject to, among other things, the Share Consolidation.

I reviewed the evidence that outlined the *pro forma* capital structure that is being targeted. Based on the evidence before me, if the targeted debt reduction is effected through the Arrangement, it will improve Calfrac Group's ability to access capital markets in the future. It also would provide the Calfrac Group with an increase liquidity, reduced financial risk, and a more sustainable capital structure.

5. Support for the Arrangement

As at July 13, 2020, prior to the Preliminary Interim Order, Calfrac had entered into support agreements with Senior Unsecured Noteholders holding approximately 50% of the outstanding principal amount of the Senior Unsecured Notes.

As at July 22, 2020, the Calfrac Entities had the support of approximately 66% of the Senior Unsecured Noteholders.

As of July 30, 2020, the Calfrac Entities had the support of approximately 70.8% of the Senior Unsecured Noteholders and holders of approximately 23% of the Common Shares.

At the hearing yesterday, a number of stakeholders stated on the record their support for the Arrangement.

6. Peters & Co. Limited Opinions

Peters & Co Limited, an independent financial advisor to the Calfrac Board, has provided two opinions. Those opinions state the following: first, the Senior Unsecured Noteholders and Shareholders would be in a better financial position, respectively, under the Recapitalization Transaction than if the company were liquidated; second, the terms of the Recapitalization Transaction are fair, from a financial point-of-view, to Calfrac.

7. Recommendation of the Board

The Calfrac Board is unanimously recommending that all Affected Securityholders support the Recapitalization Transaction, which will significantly reduce the debt of the Calfrac Entities, provide liquidity for ongoing operations, and provide a sustainable capital structure. Based on my review of the evidence, I find the Calfrac Board is making this recommendation after it considered the opinion provided by Peters & Co Limited, the advice of financial and legal advisors, and a review of the Calfrac Group's various alternatives.

Based on the evidence before me, I infer that while the Arrangement is being implemented, the Applicants will continue to satisfy all of their obligations to employees, suppliers, and government authorities in the ordinary course of business.

8. The Meetings

The applicants seek to hold two Meetings in furtherance of the Arrangement. The first meeting is the Senior Unsecured Noteholder's Meeting. The second meeting is the Shareholders' Meeting. Under the current proposal, both meetings will be held on September 17, 2020.

The Senior Unsecured Noteholders' Meeting will be held in order for the Senior Unsecured Noteholders to consider and, if determined advisable, pass a resolution authorizing, adopting and approving, with or without variation, the Arrangement.

The votes at the Senior Unsecured Noteholders' Meeting will be cast on the basis of one vote per U.S. $1,000 of principal amount of Senior Unsecured Notes held by the applicable registered Senior Unsecured Noteholder as at the Senior Unsecured Noteholder Record Date.

The Shareholders' Meeting will also be held in order for the Existing Shareholders to consider and, if determined advisable, pass resolutions authorizing, adopting, and approving with or without variation: first, the federal continuance; second, the Arrangement; and third, various shareholder approval required by the TSX in connection with the Recapitalization Transaction.

The Applicants seek to set the record date for determination of the Existing Shareholders entitled to notice of, and to vote at, the Shareholders' Meeting to be August 10, 2020. Votes taken at the Shareholders' Meeting shall be cast on the basis of one vote per Common Share outstanding as at that record date.

In summary, concerning the facts and findings, my comments are as follows: (i) based on my review of the evidence in this Application, I find the additional details of the Arrangement and the Recapitalization Transaction have been provided to this Court since July 13, 2020; and (ii) I also find evidence of increased levels of stakeholder support for the Arrangement has been developed since July 13, 2020.

I have reviewed the draft Interim Order that is being sought in this application as it has been revised as late as this morning.

V. Analysis

On an interim application, the Courts have limited their analysis to: first, the applicant's compliance with the statutory requirements of the *CBCA*; and, second, the applicant's good faith in putting forward the proposed Arrangement: ***Re 8440522 Canada Inc***, 2013 ONSC 2509 (Comm. List) at para 41 [***Mobilicity***]; ***Concordia (Re)***, 2017 ONSC 6357 [***Concordia***] at para 24.

The sole purpose of an interim order "is to set the wheels in motion for the approval process relating to the arrangement and to set out the parameters to reach that objective": ***45133541 Canada Inc, Re***, 2009 QCCS 6440 [***Abitibi***] at para 22; ***Mobilicity*** at para 40.

I note for the record that the question of whether the proposed *CBCA* plan is procedurally and substantively "fair and reasonable" is to be determined only at the subsequent application for a final order of proving an arrangement. ***Mobilicity*** at para 41; ***Abitibi*** at para 53. Therefore, any substantive complaints being raised about the Arrangement, including its potential impact, fairness, and reasonableness, entitlements to vote, and solvency upon emergence, are all issues to be determined subsequent to the granting of the interim order, if granted. ***Mobilicity*** at paras 40-41; ***Tervita Corporation (Re)***, 2016 ABQB 662 at paras 20-22, 29 [***Tervita***]. See generally, ***9171665 Canada Ltd***, 2015 ABQB 633 [***Connacher***].

In *Tervita*, stakeholders sought to complain about the substantive elements of the proposed arrangement at an interim order application, similar to this present application. After considering the argument, this Court rejected that approach and enunciated that the following high standard for challenging substantive elements at the interim order stage is - "[w]as it so clear that the proposed plan of arrangement was defective in that respect [the substantive issue being challenged] or in respect of the requirement of good faith that I should refuse the interim order...?: *Tervita* at para 6.

Subsequently, after considering matters, this Court granted the interim order in *Tervita*

and allowed the meetings of the stakeholders to proceed.

I note for the record that when I reviewed the Preliminary Interim Order on July 13, 2020, that the statutory requirements in respect of the application have been fulfilled and that the arrangement was put forward in good faith.

Based on my review of the evidence of this application, I find that the foundational evidence regarding the Applicant's satisfaction of both the statutory requirements and the good faith requirement has not changed.

For completeness, I provide the following review and analysis.

A. Compliance with the *CBCA* Requirements

The Applicants must satisfy the Court that: first, the proposed Arrangement meets the definition of an "arrangement", under subsection 192(1) of the *CBCA*; second, Calfrac ArrangeCo is not insolvent, as that term is defined in subsection 192(2) of the *CBCA*; third, it is not practicable for the Applicants to effect a fundamental change in the nature of the Arrangement under any other provision of the *CBCA;* and, fourth, the Applicants have given the director appointed under section 260 of the *CBCA* (the "CBCA Director") notice of the application.

1. The Arrangement is an "arrangement" under the *CBCA*

Since the granting of the Preliminary Interim Order, the elements of the proposed Arrangement have remained the same, although the particulars have been further developed and articulated. Among other things, the Arrangement includes a share consolidation and an exchange of securities.

Based on the broad definition of what can constitute an "arrangement" under the *CBCA* and the expansive interpretation adopted by the Courts, I find that the proposed Arrangement constitutes an "arrangement" under the *CBCA*.

2. The Solvency Requirement under the *CBCA*

Subsection 192(3) of the *CBCA*, requires that a corporation not be insolvent to undertake a plan of arrangement under that statute.

Based on my review of the evidence and the law when I granted the Preliminary Interim Order, this requirement was satisfied. Based on my review of the evidence now before me and the applicable law, I find this requirement continues to be satisfied.

In particular, I find that Calfrac ArrangeCo has no liabilities and is solvent. Further, following the completion of the Recapitalization Transaction, I find that it is expected that the realizable value of the Calfrac Group's assets will not be less than the aggregate value of their liabilities and stated capital, and that the members of the Calfrac Group will be able to meet their obligations as they become due. That said, that will be a determination for that future hearing.

3. The "Not" Practicable Issue.

Based on my review of the evidence and law when I provided the Preliminary Interim Order, this requirement was satisfied.

Based on my review of the evidence before me now and the applicable law, I find that this practicable requirement continues to be satisfied. In particular, the Arrangement will affect the proposed Recapitalization Transaction in accordance with various detailed steps, as outlined in the evidence that has been provided to me, and in a matter that is most convenient and advantageous to the Calfrac Group and its stakeholders.

4. Notice to the *CBCA* Director

The Applicants provided the *CBCA* director with notice of this Application in accordance with subsection 192(5) of the *CBCA*. While I acknowledge that the *CBCA* Director raised a couple of rhetorical questions, the director has taken no position on the proposed Arrangement at this time.

Given the facts and analysis, I find that there has been compliance with all statutory requirements of the *CBCA* at this time concerning this Application for the Interim Order.

B. The Application Has Been Put Forward in Good Faith

The next issue is whether the Application is being put forward in good faith. The Courts have found that this good faith requirement is met when the applicants are proceeding with an arrangement for a valid business purpose.

Based on my review, I find that the Arrangement serves a valid business purpose. I make this finding because the Arrangement is expected to substantially reduce the Calfrac Group's outstanding indebtedness and annual cash interest payments. Further, the Arrangement will provide new liquidity and working capital, thereby creating a sustainable capital structure for the Calfrac Group.

C. The Interim Order is Appropriate and Should Be Granted

Pursuant to subsection 192(4) of the *CBCA*, this Court has broad jurisdiction to make any interim or final order it thinks fit. That includes the jurisdiction to grant the proposed Interim Order.

Based on my review of the facts and analysis, I find that the Interim Order is necessary and appropriate in the circumstances. For completeness on this finding, I provide the following review and analysis.

1. The Interim Order Establishes a Process that is Fair and Reasonable

As framed, the Interim Order will provide the Meetings to be called, held, and conducted in a procedurally fair manner given that: (i) the meetings will be held and conducted in accordance with the *CBCA* and *ABCA*; (ii) the distribution of the meeting packages by August 21, 2020, is intended to ensure that all affected securityholders are properly notified of the Arrangement and the Meetings to occur on September 17, 2020, and receive information necessary to assess the Recapitalization Transaction and determine whether to vote in favour of the arrangement; (iii) all communications or documents to be sent pursuant to the Interim Order will also be posted on the company website, maintained by the Applicants; and (iv) any amendments or revisions authorized by the Interim Order are standard in nature. For any amendments or modifications that would reasonably be expected to affect the Affected Securityholder's decision to vote for or against the applicable Resolution, notice of such amendment must be (subject to the Noteholder's Support Agreement) distributed prior to the relevant Meeting.

In light of the COVID-19 pandemic, the Applicants seek authorization to hold the Meetings by means of a telephone, electronic, or other communication facility that permits all participants to communicate adequately with each other during the meeting. This will allow for the safest method of meeting, while still ensuring a procedurally-fair process, as all participants will be able to communicate with each other during the Meetings.

Other than the provision to address the accommodations as a result of COVID-19, I note the process for the Meetings is consistent with prior interim orders granted by this Court and the Ontario Superior Court of Justice. Given the circumstances, I grant this order.

2. Early Consent Considerations

All Senior Unsecured Noteholders will have the opportunity to become an Early Consenting Noteholder prior to the Early Consent Date and, in exchange, will receive 6%

of the Common Shares as an early consent consideration for supporting the Recapitalization Transaction. This is in addition to the other Common Shares to be received by such Noteholders pursuant to the Arrangement.

The Courts have previously approved the payment of early consent consideration in *CBCA* proceedings, and in the *CCAA* context (which have been found to be applicable to the *CBCA* proceedings where debt is being compromised). Early consent considerations has been found to be fair and reasonable: (i) where it is made available to any debtholder that wished to become an early consent debtholder prior to the determination date; (ii) where there is no prejudice to the debtholders in being put to an early election; and (iii) where there was a rational purpose for such early consent considerations.

Based on my review of the matter, I find the same considerations apply here: (i) the early consent consideration is available to all Senior Unsecured Noteholders on a reasonable timeline; and (ii) it is being offered for the valid and rational purpose of increasing confidence and early voting in respect of the Arrangement.

3. Foreign Representative

The Applicants are seeking authorization to appoint a foreign representative of the Applicants to apply for a foreign recognition and approval of these proceedings, as necessary, including in the United States.

Based on my review of the matter, I find similar provisions with respect to the foreign representatives have been made in other interim orders for *CBCA* plans of arrangement. Based on the facts and analysis, I find this relief to be reasonable and appropriate in the circumstances where ancillary relief in the U.S. is being sought.

VI. Conclusions

Based on my review and analysis, I find that the Applicants have satisfied all requirements necessary for this Court to issue the Interim Order. In particular, I find that the Applicants: (i) are in compliance with the statutory requirements of the *CBCA*; and (ii) have put forward the proposed Arrangement in good faith.

Given the above facts and analysis, I grant the Interim Order in the form proposed by the Applicants, subject to the amendments to paragraph 42 of the draft Interim Order as I detailed above.

That concludes my decision in respect of this matter. Before I ask if there is any other business, I just wanted to touch on a procedural matter. I have granted the wording that

the Wilks Brothers have proposed and I say to all parties, if any issues arise there, you certainly have leave to come back to me to address matters.

I'm just conscious of (I'll use the Calfrac black lined copy as an example -- this is not part of the decision, this is just a bit of narrative for the stakeholders to take under consideration), when I look at the wording in both the Wilks Brothers and the Calfrac draft orders that I received this morning concerning paragraph 42, in both circumstances there is, in effect, an obligation on the Applicants to file certain evidence. There may be a bit of difficulty for the Applicants to get some of that information, especially in respect of the Wilks Brothers, unless there is cooperation. I am assuming there is cooperation because Mr. Simard actually used the wording in his application, (as read)

> The applicant shall file evidence in advance of the application for the final order in which the applicant shall describe.

I just point that out. I'm assuming the parties are going to be working together to get that information. That is one of the reasons I granted the amendment to the Calfrac order and accepted the Wilks Brothers suggested wording.

Again, I will just simply repeat that if you need to come before me because there is an issue, you certainly have leave. And I am sensitive to the discussion we had yesterday in narrative by a number of the parties, including Mr. Chadwick, in particular, and the useful information that he provided to the Court in his submissions.

That concludes matters from my perspective. Is there any business that we need to attend to?

MR. SIMARD: No, My Lord, I don't think so. Ms. Jackson and I will work together and will very shortly get you the final form of order in the order you've granted it. We'll email that to Ms. Amery so she can forward it to you.

THE COURT: Okay. And again, we'll follow the same process as in the past. As soon as it is received by the Court, I will deal with it promptly. A quick review, as I always do, and assuming is all in order, I will execute it and have it sent back to you by way of email, scanned and email, if that is satisfactory?

MR. SIMARD: It is, thank you.

THE COURT: Thank you. Any other business that we need to address?

MR. SIMARD: No, Sir.

THE COURT: Hearing none, I'll ask madam clerk to adjourn court for today.

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PROCEEDINGS CONCLUDED

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**Certificate of Record**

I, Sakura Iyar, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench held in courtroom 1504 at Calgary, Alberta on the Friday, August 7, 2020, and I was the court official in charge of the sound-recording machine during the proceedings.

**Certificate of Transcript**

I, Cindy Taylor, 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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# TAB 21

# CANADIAN CONFLICT OF LAWS

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Chartered Arbitrator *of the Ontario Bar*

Professor
Osgoode Hall Law School of York University

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**Canadian Conflict of Laws, Sixth Edition**
**Volume 1**



**Library and Archives Canada Cataloguing in Publication**

Walker, Janet 1959—

Canadian Conflict of Laws.—6th ed.

Previous ed. written by Jean-Gabriel Castel and Janet Walker. Frequency of updates varies. Includes bibliographical references and index.

ISBN 0-433-44985–3 (loose-leaf: set)
ISSN 1714-7964.
1. Conflict of Laws—Canada. I. Title.
KE470.A6W34 2005 340.9 C2005-901328-1
KF411.W35 2005

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**Published by LexisNexis Canada, a member of the LexisNexis Group**
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# CHAPTER 7

# PROOF OF FOREIGN LAW AND FOREIGN DOCUMENTS



**[The next page is 7-1]**

its own canons of statutory construction for lack of proof of foreign interpretation).

[23] *Plamondon v. Aviva Canada Inc.*, [2009] O.J. No. 3098, 2009 ONCA 579, at paras. 13-14.

## §7.4 ABSENCE OF PLEADING OR PROOF

If foreign law is not pleaded or, if pleaded, it is not proved or is insufficiently proved, or if the parties agree to forgo the application of foreign law,[0] the court will apply the *lex fori*.[0.1] There may be many reasons why the parties would choose to forgo the application of foreign law. For example, the application of foreign law to a relevant point in issue may not be likely to affect the outcome, or may not make sufficient difference to the case to warrant the increase in expense and complexity occasioned by the introduction of expert testimony. Accordingly, where neither party has pleaded foreign law, it may appear that they have chosen to proceed on the basis of the law of the forum. However, it may not be appropriate to treat the lack of pleading of foreign law as an admission that it does not apply or as precluding an amendment to the pleadings to indicate the intention to rely upon it.[1]

It was once said that in the absence of proof the court would presume the foreign law to be the same as the *lex fori*,[1.0] but it is better to say that in all cases where foreign law is not proved, the *lex fori* prevails as it is the only law available.[1.1] This could result in different relief from that which might be available in the foreign legal system, or no relief at all.[1.2]

The application of the *lex fori* in the absence of proof of the applicable foreign law includes statutes as well as the law established by judicial decision.[2] Where a foreign statute has been proved by admission, in the absence of proof to the contrary, the court will apply the rules of construction of the *lex fori*.[3] The parties may waive the application of foreign law by omitting to plead and prove it, in which case the *lex fori* applies.[4]

In applying the law of the forum due to an insufficiency of proof,[5] a distinction may be made between general principles of law and specific features of a particular legal regime that has been tailored to meet the needs of the forum.[6] In *"Mercury Bell" v. Amosin*,[7] the Federal Court of Appeal distinguished between the general law (common or statutory), which applies because it has some degree of universality, and provisions of a localized or regulatory character, which should be excluded because of their particularity.[8]

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[0] *B & J Petroleum Ltd. v. Rhim*, [2015] A.J. No. 1, 14 Alta. L.R. (6th) 109 (Q.B.).

[0.1] *Funk v. Funk*, [2016] A.J. No. 348, 78 R.F.L. (7th) 360 (Q.B.) (evidence indicating the trust was governed by the law of another province, which was not proved and so was not applied).

[1] *Anand v. Rumpal*, [2014] O.J. No. 5894, 43 C.C.L.I. (5th) 169 (S.C.J.).

[1.0] *Bui v. Canada*, [2013] T.C.J. No. 284, [2014] 2 C.T.C. 2097.

[1.1] Quoted with approval by Turnbull J.A. in *Triathlon Leasing Inc. v. Juniberry Corp.*, [1995] N.B.J. No. 36, 157 N.B.R. (2d) 217, at 228 (C.A.). See also *Sharn Importing Ltd. v. Babchuk*, [1971] B.C.J. No. 477, 21 D.L.R. (3d) 349, at 355 (S.C.): where the foreign law is not proved, the court applies the *lex fori*. In Quebec, para. 2 of art. 2809 *Civil Code* declares that where foreign law has not been pleaded or its contents cannot be established, the court applies the law in force in the province. See also *Mouzakiotis v. Goodyear Tire & Rubber Co. of Canada*, [2001] J.Q. no 5787, J.E.

cannot presume that the law of Oregon corresponds with the present state of our own statutory law."

[6] *Key v. Key*, [1930] O.J. No. 102, [1930] 3 D.L.R. 327 (C.A.): the general law is presumed to be same as *lex fori*; *Morgardshammar AB v. H.R. Radomski & Co.*, [1983] O.J. No. 3342, 145 D.L.R. (3d) 111 (H.C.J.), affd [1984] O.J. No. 3477, 5 D.L.R. (4th) 576 (C.A.); *Gray v. Kerslake*, [1957] S.C.J. No. 62, 11 D.L.R. (2d) 225, *per* Cartwright J.: the presumption relates only to general law and does not extend to special provisions of particular statutes altering the common law; as to such provisions there is no presumption; *Hellens (falsely called Densmore) v. Densmore*, [1957] S.C.J. No. 53, 10 D.L.R. (2d) 561, revg [1956] B.C.J. No. 154, 5 D.L.R. (2d) 203 (C.A.): in the absence of evidence as to the law of Alberta, a British Columbia court should proceed on the basis that in Alberta the general law, as distinguished from special statutory provisions, is the same as that of British Columbia. See also *Marine Trust Co. v. Weinig*, [1935] O.J. No. 283, [1935] 3 D.L.R. 282 (S.C.); *Gronlund v. Hansen*, [1969] B.C.J. No. 420, 4 D.L.R. (3d) 435, at 443 (C.A.); *McCully v. Barbour*, [1970] N.B.J. No. 23, 14 D.L.R. (3d) 216, at 222 (C.A.). *Cf. Crosby v. Constable*, [1957] B.C.J. No. 145, 10 D.L.R. (2d) 220 (S.C.); *Pink v. Perlin & Co.*, [1898] N.S.J. No. 3, 40 N.S.R. 260 (S.C.) (assumption that the common law prevails in the foreign state).

[7] [1986] F.C.J. No. 1044, 27 D.L.R. (4th) 641 (C.A.).

[8] This approach was adopted in *Royal Trust Corp. of Canada v. A.S. (W.)S. [A.S.W.S.J*, [2004] A.J. No. 421, 35 Alta. L.R. (4th) 32, 2004 ABQB 284.

## §7.5 PROVING FOREIGN DOCUMENTS

The proof of foreign public and private documents such as birth, marriage and death certificates, foreign judgments, notarial acts, wills, powers of attorney, affidavits, oaths, solemn affirmations or declarations, etc., is governed by the *lex fori*. For example, the *Canada Evidence Act*[1] provides that evidence of any proceeding or record in a court in Great Britain, Canada, a British colony or possession, the United States, or any other foreign country, or before any justice of the peace or coroner in any province may be given in a proceeding by an exemplification or certified copy purporting to be under the seal of the court or the hand or the seal of the justice or coroner or court stenographer without further proof of its authenticity. Where such a person certifies that he or she has no seal, the evidence may be given by a copy purporting to be certified under the signature of a judge or presiding provincial court judge or of the justice or coroner or court stenographer, without further proof.

Official documents issued in countries other than those provided for in the legislation are subject to formal proof. For example, a foreign judgment is normally proved through by way of an affidavit sworn by a lawyer who is qualified to practice law in the jurisdiction in which the order was made and who is familiar with the proceedings of the court in which the judgment was made and who can give an expert opinion on the authenticity and the effect of the judgment.[2]

Notarial acts in Québec are also specifically covered by federal and provincial legislation.[3] Any document purporting to be a copy of a notarial act or instrument made, filed or registered in the Province of Québec, and to be certified by a notary or prothonotary to be a true copy of the original in his possession as such notary or prothonotary, shall be admitted in evidence in the place and stead of the original and has the same force and effect as the original would have if produced and proved, but it may be proved in rebuttal that there is no original, that the copy is not a true copy of the original in some material particular or that the original is not an instrument of such nature as may,

[2] *G., Re*, [2008] O.J. No. 1906, 56 R.F.L. (6th) 232 (C.J.) (proof of foreign guardianship order).

[3] *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 27; B.C. *Evidence Act*, R.S.B.C. 1996, c. 124 as am., s. 36; Ontario *Evidence Act*, R.S.O. 1990, c. E.23 as am., s. 39. As to copies of entries in any book or record kept in any financial institution, see *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 29. As to the effect of certain certificates of notaries public, see Ontario *Evidence Act*, R.S.O. 1990, c. E.23 as am., s. 41.

[4] *Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 52, 53, 54; Ontario *Evidence Act*, R.S.O. 1990, c. E.23 as am., s. 45; B.C. *Evidence Act*, R.S.B.C. 1996, c. 124 as am., s. 63. Note that a notary public for Ontario was held not to have jurisdiction to administer oaths in Singapore for documents used in Alberta. The affidavit had to be sworn by a Singapore notary in compliance with the *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 47: *Peckford Consulting Ltd. v. Akademia Enterprises Inc.*, [1997] A.J. No. 734, 205 A.R. 2 (Master). As to conduct, money for production of foreign witness for cross-examination on affidavit see *Gone Hollywood Video Ltd. v. Skrabek*, [1997] A.J. No. 538, 52 Alta. L.R. (2d) 133 (Q.B.).

[5] Ontario *Evidence Act*, R.S.O. 1990, c. E.23 as am., s. 50(1); B.C. *Evidence Act*, R.S.B.C. 1996, c. 124 as am., s. 38.

[6] B.C. *Evidence Act*, R.S.B.C. 1996, c. 124 as am., s. 52. When the solemnization of a foreign marriage is proven, there is a *prima facie* presumption that this marriage was duly solemnized in accordance with foreign law, N.S. *Evidence Act*, R.S.N.S. 1989, c. 154, s. 42(2).

[6.1] *Civil Code of Québec*, art. 2822. *Nateus c. Canadian Forest Navigation and Co.*, [2009] J.Q. no 6509, J.E. 2009-1327 (S.C.); *Jannesar v. Yousuf*, [2012] Q.J. No. 16145, 2012 QCCS 6227, J.E. 2013-196 (foreign judgment rendered by default).

[7] See also arts. 3109 and 3110 *Civil Code*.

[8] *D. (D.) et Directeur de la protection de la jeunesse*, [2004] J.Q. no 3401, [2004] R.D.F. 481, J.E. 2004-968 (C.Q.). See also arts. 137 to 140 *Civil Code* which deal with acts of civil status made outside Québec relating to a person domiciled in Québec.

[8.1] *Zimmermann Inc. v. Barer*, [2014] Q.J. No. 7183, 2014 QCCS 3404, affd [2016] Q.J. No. 893, 2016 QCCA 260; *Jules Jordan Video inc. c. 144942 Canada inc.*, [2014] J.Q. no 7055, 2014 QCCS 3343, J.E. 2014-1583; *Canadian Forest Navigation Co. v. Canada*, [2017] F.C.J. No. 257, 2017 DTC 5026 (C.A.) (foreign judgments must be taken as facts even in the absence of homologation but are not dispositive). See also H. Kélada, *Reconnaissance et exécution des jugements étrangers* (Cowansville, Éditions Yvon Blais, 2013), at 37.

[9] Art. 2823 *Civil Code*.

[10] *Code of Civil Procedure*, S.Q. 2014, c. 1, art. 508, para. 3; *Iraq (State) v. Heerema Zwijndrecht bv* , [2012] Q.J. No. 9769, 2012 QCCA 1827, J.E. 2012-2036.

[11] Collection of Conventions, 1951-1980, XII, p. 56.

[12] Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, October 5, 1961, arts. 3 and 4.

# TAB 22

# Court of Queen's Bench of Alberta

**Citation: Luan v ADP Canada Co, 2020 ABQB 387**

**Date:** 20200630
**Docket:** 1501 08891
**Registry:** Calgary



Between:

**Xiaobei Luan, also known as Peipei Luan**

Plaintiff

- and -

**ADP Canada Co.**

Defendant

---

**Memorandum of Decision**
**of the**
**Honourable Mr. Justice J.T. McCarthy**

---

## Introduction

[1] The Plaintiff, Ms. Xiaobei (Peipei) Luan, was an employee of ADP Canada from 2006 to 2015, in the sales division of the company. During her tenure with ADP Canada, Ms. Luan received accolades, awards and promotions for her performance, eventually working her way up to an Area Sales Executive in Calgary.

[2] In early 2015, Ms. Luan was promoted to a position in Denver, Colorado, with ADP LLC, the American division of ADP, through ADP's Leadership Development Program. She successfully obtained the position and moved to Colorado in March 2015 to commence work. Soon after starting in her new position, Ms. Luan was interviewed as a part of an investigation

***Breach of Contract by a Contracting Party***

[164] Regarding the third element, Ms. Luan argues that she understood that her employment in Denver was to last a number of years, and points to the documentation in support of her visa petition that states the "dates of intended employment" to be from February 23, 2015 to February 23, 2018. On the basis of ADP's oral representations and this documentation, Ms. Luan argues that her contract was breached by ADP LLC when she was terminated on April 24, 2015. She argues that ADP Canada has the burden of proving that her contract was at-will, and has failed to do so in this case. ADP Canada argued in turn that the burden of proving the terms of the contract are on Ms. Luan.

[165] It is not uncommon for an employment contract not to be in written form. Under Canadian law, the terms of such a contract are determined by looking at:

> (a) Any terms that have been agreed to by the parties;
>
> (b) Terms that can be implied by the court on the basis that the term is so basic or necessary that if the parties had addressed their minds to the issue they would have been in agreement on the term;
>
> (c) Terms that have become so customary that the court will imply them, even if the parties might not have been in agreement as to the term, unless there is clear evidence to the contrary; and
>
> (d) Any representations by the parties (most often by the employer) which have been relied upon to the detriment of the person receiving the representation, whether or not the representation was the subject on an oral agreement.
>
> Paraphrasing from The Honourable Mr. Justice John R. Sproat, *Employment Law Manual: Wrongful Dismissal, Human Rights and Employment Standards* (Toronto: Thomson Reuters Canada Ltd, 2017) (loose-leaf revision 2019 – Release 8), ch 3, at 3-14.1 – 3-14.2.

[166] In Canada, courts are typically inclined to find an indefinite term contract, rather than a fixed term contract, because employers take the position that a fixed term contract can be terminated at the end of the term without notice (or pay in lieu). Termination without advance notice is "generally perceived to be unfair" and courts are therefore "inclined against such a finding" Sproat at 3-14.4. As a result, courts typically require explicit language to establish a fixed term contract: ***Ceccol Ontario Gymnastic Federation*** (2001), 11 CCEL (3d) 167 (Ont. C.A.).

[167] However, in cases where an employer has represented that employment is guaranteed for a certain term, and the employee reasonably relies on that assumption, a fixed term contract can be created, including in cases where the representation is made to encourage the employee to move to another location: ***Dyer v Mekinda Snyder Partnership Inc*** (1998), 35 CCEL (2d) 299, and citing ***Roberts v Dresser Industries Canada Ltd***, (1990), 75 OR (2d) 609, 28 CCEL 221 (Ont. C.A.).

[168] A difficulty in this case is that the contract with ADP LLC was for employment in Denver, Colorado. ADP Canada submits that Colorado law applies. It also submits, and I accept,

that foreign law must be proven as a fact and generally testimony from an expert on the foreign law is required:

> Foreign law must be proven as a fact and must be proven to the satisfaction of the court by the party relying on the foreign law (Castel and Walker, vol. 1 at p. 7-1). In general, foreign law is proven by the testimony of an expert. The competence and qualifications of the witness can be considered by a court when deciding whether or not to accept the expert's opinion. However, if the evidence of the expert witness is uncontradicted, a court will normally accept it (Castel and Walker, vol. 1 at p. 7-5).
>
> ***Webster-Tweel v Royal Trust Corp of Canada***, 2010 ABQB 139, at para 109.

[169] See also Stephen GA Pitel & Nicholas Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin Law, 2016) at 253.

[170] However, ADP Canada did not submit any law on its own behalf to prove that Colorado law would apply. Nor did it submit any law or call an expert to explain what employment at-will entails, or to explain how a fixed-term or indefinite term contract would be interpreted or breached in Colorado.

[171] In cases where a party wishes to rely on foreign law, the burden is on that party to plead the foreign law and to prove it as fact. If this is not done, a court will apply the law of the forum:

> ... if a party wishes to rely on foreign law, it must specifically plead the same and adduce evidence of it. The burden of proving foreign law lies on the party wishing to rely on it. If the parties omit to plead and prove the foreign law, they have implicitly waived its application. La Forest J., writing for the majority, in Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon, [1994] 3 S.C.R. 1022, adopts the reasoning of Lord Wilberforce in Chaplin v. Boys, [1969] 2 All E.R. 1085 and notes, at page 1053:
>
> > ...in the absence of proof of foreign law, the lex fori will apply. Thus the parties may either tacitly or by agreement choose to be governed by the lex fori if they find it advisable to do so.
>
> This principle has been applied in Alberta in a number of cases, including Traders Realty Ltd. v. Sibley (1982), 20 Alta. L.R. (2d) 378 (Q.B.); Cressey Estate v. Easton, [1997] A.J. No. 289 (Q.B.); and Edmonton (City) v. Lovat Tunnel Equipment Inc., [2001] 4 W.W.R. 490 (Q.B.).
>
> ***Royal Trust Corp of Canada v AS(W)S,*** 2004 ABQB 284, at paras 26-27.

[172] Neither Ms. Luan or ADP Canada pleaded or adduced evidence of the law in Colorado, so this Court will apply Alberta law in determining whether this was a fixed term contract and whether it was breached.

[173] I find the facts of this case are similar to ***Roberts***, where a Canadian company based out of Ontario recruited employees from the UK to work at its manufacturing plant. During the interview, the company represented that if the employees accepted a position they would have security of employment for a reasonable period of time, of at least two years. The employees relied on those representations when they moved to Canada and commenced employment. After finishing their probationary term, the employees were made part of the union and became subject

# TAB 23

**Alberta Court of Queen's Bench**
**Royal Bank of Canada v. Neher**
**Date: 1985-07-02**

*D. Becker, for plaintiff.*

*J. Head, for defendant.*

(Edmonton No. 8503-08357)

July 2, 1985.

[1] Master FUNDUK:— These are two applications, one by each party.

[2] At the time the application was heard the defendant's application to amend his statement of defence was allowed, and both counsel agreed that the plaintiff's application could proceed at that time based on the amended pleadings.

[3] The plaintiff's application is for summary judgment. The basic facts are not in dispute. The problem is with the sufficiency of the *evidence* of the substantive laws of the foreign jurisdiction.

[4] While resident in British Columbia, the defendant obtained a loan from the plaintiff, from a branch in the town where the defendant resided. The defendant also gave to the plaintiff a land mortgage on land in British Columbia as security for the loan.

[5] The defendant subsequently moved to Alberta.

[6] The plaintiff sues the defendant in debt on the "loan agreement". The defendant raises various defences, one being that the plaintiff is restricted in its remedies to the land alone.

[7] There is no doubt that the substantive laws of British Columbia apply to the transaction: *Wincal Properties Ltd. v. Cal-Alta Hldg. Ltd.,* 24 Alta. L.R. (2d) 50, [1983] 3 W.W.R. 57, 27 R.P.R. 39, 43 A.R. 223 (Q.B.). Counsel for the defendant so concedes.

[8] The statement of defence clearly pleads that the plaintiff is limited in its remedies to going against the land. The defence also pleads the Law of Property Act. Counsel for the plaintiff knew what the issue was.

[9] Counsel for the plaintiff then sought to prove the relevant laws of British Columbia by serving a notice to admit facts. It reads:

> TAKE NOTICE that the Plaintiff requires the Defendant to admit for the purposes of this cause, matter or issue only, the following *facts:*
>
> 1. That the legislation of the Province of British Columbia pertinent to land Mortgages is such that a lender under a land Mortgage is not restricted in its remedies to the land, but can enforce the personal covenant for payment contained in the land Mortgage provided the Mortgagee has not obtained an Order of Foreclosure. [The italics are mine.]

[10] Counsel for the plaintiff obviously appreciated that what the relevant substantive laws of British Columbia are *is a question of fact.* There is no such thing as a notice to admit law.

[11] The defendant responded to the notice as follows:

> TAKE NOTICE that the Defendant herein, in response to the Notice to Admit Facts filed by the Plaintiff April 24, 1985 specifically denies that the legislation of the Province of British Columbia pertinent to land mortgages is such that a lender under a land mortgage is not restricted in its remedies to the land, and further denies that such a lender can enforce the personal covenant for payment contained in the land mortgage provided the mortgagee has not obtained an order for foreclosure.

[12] Notwithstanding that, counsel for the plaintiff attempts to prove the relevant laws of British Columbia by (a) providing me with copies of various decisions from British Columbia courts, and (b) providing me with copies of the Law and Equity Act, R.S.B.C. 1979, c. 224, and the Property Law Act, R.S.B.C. 1979, c. 340.

[13] The simple answer is that an issue about what the laws of a foreign jurisdiction are is a question of fact and is accordingly *a matter of evidence: Traders Realty Ltd. v. Sibley* (1982), 20 Alta. L.R. (2d) 378, 27 C.P.C. 275 (M.C.).

[14] I am not prepared to accept reported decisions (and unreported decisions) by a foreign court as *evidence* of what the laws are *in that jurisdiction.*

[15] In addition to the point made in *Traders Realty* about that I would add a further reason. The court knows, from its own experience, that trial judgments reported in the law reports are not always the final word on a point. The court is aware of situations where a trial judgment which is reported in a law report was reversed on appeal but, for whatever reason, the law reports do not show the reversal.

[16] An example is *North West Trust Co. v. Leduc Properties Ltd.,* [1980] 5 W.W.R. 481 (Alta. Q.B.). Any counsel who relied on that decision would be in for a shock. It was reversed on appeal, without written reasons. To my knowledge the reversal does not show in any law reports, for the simple reason the publishers of the law reports usually do not know about appeals dealt with from the bench without written reasons.

# TAB 24

**Alberta Court of Queen's Bench**
**Sigurdson v. Farrow**
**Date: 1981-02-11**

*G. J. Forrest, for plaintiff.*

*J. W. Conway, for defendants.*

(Calgary Q.B. 7901-00284)

11th February 1981.

[1] MEDHURST J.:— This is an application for an order or judgment answering the following question of law pursuant to R. 232, namely:

> "Is the Plaintiff able to maintain the within action in Alberta for Judgment based on the Defendants' personal covenant to pay contained in the mortgage referred to in the Agreed Statement of Facts or is the Plaintiff's action barred by reason of the provisions of section 34(17) of *The Judicature Act,* R.S.A. 1970 [c. 193], as amended?"

[2] The parties have filed an agreed statement of facts. The issue is whether the plaintiff can bring an action in Alberta upon the personal covenant to pay contained in a mortgage against property in British Columbia but executed by the defendants in Ontario. The general rule applicable is set out in 8 Hals. (4th) 500, para. 769, as follows:

> "Whereas matters of substantive law are governed by the lex causae, namely the law applicable under the English rules for the choice of law, all matters of procedure are governed by the lex fori, namely the law of the country in which the action is brought. It is not always easy to classify rules of law into those which are substantive and those which are procedural, but, generally speaking, it may be said that substantive rules give or define the right which it is sought to enforce and procedural rules govern the mode of proceeding or machinery by which the right is enforced."

[3] Where the law applicable to a certain situation is procedural in nature, the forum hearing the case will apply its rule of law. Where the law is substantive, on the other hand, the rule of law of the jurisdiction to which the court is directed by the choice of rules will be applied. Therefore it is necessary to determine whether s. 34(17) of the Judicature Act, the relevant law in this matter, should be characterized as procedural or substantive. This section reads where applicable:

> "(17) In an action brought upon a mortgage of land … the right of the mortgagee … is restricted to the land to which the mortgage … relates and to foreclosure of the mortgage … and no action lies
>
> "(*a*) on a covenant for payment contained in any such mortgage …"

[4] Duff J. in *Livesley v. E. Clemens Horst Co.,* [1924] S.C.R. 605, [1925] 1 D.L.R. 159, declared at p. 608 that the concept of procedure included elements such as the

# TAB 25

2002 CarswellOnt 2119
Ontario Court of Appeal

Somers v. Fournier

2002 CarswellOnt 2119, [2002] O.J. No. 2543, 12 C.C.L.T. (3d) 68, 162 O.A.C. 1, 214 D.L.R. (4th) 611, 22 C.P.C. (5th) 264, 27 M.V.R. (4th) 165, 60 O.R. (3d) 225

# ARTHUR JAMES SOMERS and LOLA SOMERS (Respondents/Appellant in Cross-Appeal) and STEVEN D. FOURNIER and LIBERTY MUTUAL INSURANCE COMPANY (Appellants/Respondents in Cross-Appeal)

Finlayson, Carthy, Cronk JJ.A.

Heard: February 14, 2002
Judgment: June 27, 2002 *
Docket: CA C36748

Proceedings: reversing in part (2001), 8 C.C.L.T. (3d) 112 (Ont. S.C.J.); additional reasons at (), 2002 CarswellOnt 2600 (Ont. C.A.)

Counsel: *Gordon A. Wiggins*, for Appellant/Respondent in Cross-Appeal, S.D. Fournier
*R. Donald Rollo*, *Edward J. Cottrill*, for Appellant/Respondent in Cross-Appeal, Liberty Mutual Insurance Company
*Raymond A.D. Watt*, for Respondent/Appellant in Cross-Appeal, Lola Somers

Subject: International; Torts; Civil Practice and Procedure

**Headnote**

Conflict of laws --- Torts — Choice of law — Situs of tort

Plaintiffs, residents of Ontario, were involved in motor vehicle accident in 1990 with vehicle driven by defendant SF who was resident of New York — Accident took place in New York — Plaintiffs brought action in Ontario and defendants attorned to jurisdiction of Ontario court — Defendants brought motion for declaration that substantive law of New York applied to plaintiffs' action — Motion granted — Motions judge further concluded that procedural law of Ontario applied to action and that procedural law of Ontario governed prejudgment interest, costs and cap on non-pecuniary general damages — Defendants appealed; plaintiff LS cross-appealed — Appeal allowed in part; cross-appeal dismissed — Motions judge did not err in concluding that substantive law of New York State applied to action — Fact that plaintiff was no longer able to pursue accident benefits in New York State or additional or different benefits from her own insurer in Ontario did not support exception to lex loci delicti rule — No actual prejudice to plaintiff was demonstrated

  

> be considered reasonable and truly reflective of the nature and extent of the injuries and the effects of those injuries on the victim.

11 Fournier makes two main submissions in support of his appeal. First, he argues that New York State law concerning costs and pre-judgment interest is substantive law and that it applies to the Action. Accordingly, he asserts that the motions judge erred in concluding that Ontario law concerning costs and pre-judgment interest is procedural law which applies to the Action. Second, and in any event, he submits that Ontario law relating to costs and pre-judgment interest should not operate to defeat his substantive law rights under the law of New York State.

12 In *Tolofson v. Jensen* (1994), 120 D.L.R. (4th) 289 (S.C.C.), the Supreme Court of Canada held that the rule of private international law that should be applied in tort cases is the *lex loci delicti*, that is, the law of the place of the wrong. Thus, under *Tolofson*, the law to be applied to the substantive rights of parties in tort cases is the law of the place where the activity occurred. However, the law of the forum (the *lex fori*) applies to procedural matters. (See the reasons of La Forest J., writing for a majority of the court, at pp. 304-305).

13 The distinction between procedural and substantive law is central to the issues raised on this appeal and cross-appeal. That distinction is often difficult to discern. In *Tolofson*, La Forest J. addressed the important purpose of classifying a rule or legal requirement as substantive or procedural (at pp. 317-318 and 321):

> In any action involving the application of a foreign law the characterization of rules of law as substantive or procedural is crucial for, as Geoffrey Cheshire and Peter North, *Cheshire and North's Private International Law*, 12th ed. by Peter North and J.J. Fawcett (London: Butterworths, 1992), at p. 74-75, state:
>
> > One of the eternal truths of every system of private international law is that a distinction must be made between substance and procedure, between right and remedy. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum.
>
> The reason for the distinction is that the forum court cannot be expected to apply every procedural rule of the foreign state whose law it wishes to apply. The forum's procedural rules exist for the convenience of the court, and forum judges understand them. They aid the forum court to "administer [its] machinery as distinguished from its product": *Poyser v. Minors* (1881), 7 Q.B.D. 329 (C.A.) at p. 333, per Lush L.J. Although clearcut categorization has frequently been attempted, differentiating between what is a part of the court's machinery and what is irrevocably linked to the product is not always easy or straightforward . . . .

  

# TAB 26

2017 BCSC 709
British Columbia Supreme Court

Walter Energy Canada Holdings, Inc., Re

2017 CarswellBC 1166, 2017 BCSC 709, [2017] B.C.W.L.D. 3273, [2017] B.C.W.L.D. 3277, [2017] B.C.J. No. 820, 279 A.C.W.S. (3d) 77, 48 C.B.R. (6th) 62

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

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

In the Matter of a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

Fitzpatrick J.

Heard: January 9-13, 16, 18-20, 2017
Judgment: May 1, 2017 *
Docket: Vancouver S1510120

Counsel: M. Paterson, M.I.A. Buttery, P. Riesterer, M.A. Rowe, K. Sachar for Petitioners
C. Dennis, Q.C., J. Sandrelli, T. Jeffries, O. James for United Mine Workers of America 1974 Pension Plan and Trust
C.D. Bavis, J. Sanders for United Steelworkers, Local 1-424
P.J. Reardon for Monitor, KPMG Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; International
**Related Abridgment Classifications**
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Business associations
I Nature of business associations
I.3 Nature of corporation
I.3.b Distinct existence
I.3.b.ii From related corporations
**Headnote**
Business associations --- Nature of business associations — Nature of corporation — Distinct existence — From related corporations
In 2010, US coal business, W Inc. (US), bought another company's coal mining operations in Canada and organized them under laws of BC as W Group — W Inc. (US) was party to pension plan (Plan) covering 88,000 US retirees and beneficiaries — Coal market dropped — W Inc. (US) commenced bankruptcy proceedings in US — W Group sought protection under Companies' Creditors Arrangement Act (CCAA) — W Inc. (US)'s assets were sold under stalking horse agreement relieving purchaser of liability under Plan — Plan made claim against W Group under US Employee Retirement and Income Security Act (ERISA) in respect of unfunded pension liabilities — W Group brought application for declaration that Plan's claim as against W Group was governed by Canadian substantive law and not ERISA — Application granted — Canadian choice of law principles governed analysis of applicable law — Appropriate choice of law characterization of Plan's claim was that of law of separate legal existence of corporations, and issues concerning person's legal personality were governed by law of person's domicile, which was Canada and BC — BC and Alberta law

 

96 The authorities are clear that determining choice of law is a two-step process: firstly, the Court characterizes the claim to determine which choice of law rule applies; and secondly, the Court applies the proper choice of law rule to the claim. This process was described in *Castel & Walker* at 3-1 as follows:

> In an action involving legally relevant foreign elements, a court may be asked to apply foreign law. To decide whether to do so, the court must ascertain the legal nature of the questions or issues that require adjudication and then apply its appropriate conflict of laws rules to them. For instance, do the facts raise a question of succession or of matrimonial property, or a question of capacity or of form? This analytical process is called the characterization or classification. Its purpose is to enable the court to find legal categories with which the forum is familiar. In other words, the court must allocate each question or issue to the appropriate legal category. The application of the forum's conflict of laws rule to each legal question or issue will indicate which legal system governs that question or issue. That legal system is called the *lex causae*.
>
> Once the court has characterized the issue, it will consider the connecting factor — a fact or element connecting a legal question or issue with a particular legal system. Finally, the court will apply the law identified as the governing law. In doing so it must separate the rules of substance from the rules of procedure of the legal systems involved, because questions of procedure are governed by the *lex fori*.

97 The first step therefore requires that the court ascertain or characterize the "legal nature of the questions or issues". Typical legal categories used for characterization include: property law, the law of obligations, family law, the law of corporations and insolvency. Other categories, or sub-categories, include the law of contract (an "obligation"), tort and equitable remedies, such as unjust enrichment.

98 In Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin Law Inc., 2016) at 223-226, the authors discuss the somewhat perplexing question as to just what is to be characterized. They conclude that facts are not to be characterized, but the courts have variously referred to both "issues" and "causes of action" as being characterized. At 224, the authors highlight, citing *Macmillan Inc. v. Bishopsgate Investment Trust (No. 3)* (1995), [1996] 1 W.L.R. 387 (Eng. C.A.), the possible differences that may arise in that respect and that claimants may attempt to characterize their claims to support their choice of law.

99 In this case, I see no material difference whether one characterizes the 1974 Plan's claim in terms of a "cause of action" or "issue". Fundamentally, the claim arises from the express legislative provisions of *ERISA*. As noted by the Walter Canada Group, there is no equivalent provision of *ERISA* here in Canada or British Columbia. In that event, the claim is to be characterized "as its closest functional equivalent under that [forum's] law", namely Canada and British Columbia: Pitel and Rafferty at 227.

100 The Walter Canada Group and the Union, on one hand, and the 1974 Plan, on the other, present starkly different approaches to the characterization of the 1974 Plan's claim. As I will describe below, the answer to this first step or question in turn leads to a distinct path or set of considerations as to the choice of law issue. The answers to each of the analytical steps also lead to different considerations in relation to most, if not all, of the evidentiary issues and objections raised by the 1974 Plan.

101 Accordingly, the statement found in Pitel and Rafferty at 222 that the characterization of the issue is "central to the choice of law process" is particularly apt here.

102 This two-step process is illustrated by this Court's decision in *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2006 BCSC 1102 (B.C. S.C.), aff'd 2007 BCCA 319 (B.C. C.A.), upon which both parties rely. At paras. 160-181, this Court addressed the characterization issue, which arose from the competing positions of the parties. The defendant asserted that the claim related to a foreign immovable (in which case Argentina law applied) and the plaintiff asserted that the claim was an *in personam* claim for appropriation through a breach of confidence (in which case British Columbia law applied).

  

# TAB 27

1995 CarswellOnt 934
Ontario Court of Justice (General Division), In Bankruptcy

J.P. Capital Corp. (Trustee of) v. Perez

1995 CarswellOnt 934, [1995] O.J. No. 2844, 36 C.B.R. (3d) 57, 58 A.C.W.S. (3d) 45

# Re Bankruptcy and Insolvency Act

Re bankruptcies of J.A. CAPITAL CORPORATION (No. 074183);
JOSE PEREZ (No. 073885); and J.P. CORPORATION (No. 073910)

DELOITTE & TOUCHE INC. (trustee of estates of J.P. CAPITAL CORPORATION, JOSE PEREZ and J.P. CORPORATION, bankrupts) v. JOSÉ PEREZ, VINCENT BLESA, MONZER ZIMMO, ROGER LIKINS, JOHN (JONAS) PRINCE, EXECUVEST SECURITIES INC., EXECUVEST MANAGEMENT CORPORATION, GRAHAM C. BIRD, JEAN LACROIX, LYNE CANUEL, MICHELLE DE LA DEHESA, GUILLERMO DE LA DEHESA, PAUL LABARGE, J.L. GOMEZ, JOSE HENDRIQUES, TIMOTHY WHITEHEAD, BANCO PASTOR, THE GOYANES FAMILY TRUST, 483761 ONTARIO LIMITED, ALICE PARADIS, JOSE PEREZ PARADIS, SEBASTIAN PEREZ PARADIS, DIANE SMITH, PEREZ COMMERCIAL CORPORATION, 1019304 ONTARIO (1992) LIMITED, PEREZ CAPITAL CORPORATION, CHAMBERS OTTAWA INC., PEREZ CANADA INC., CHAMBERS PARTNERSHIP, PEREZ COMMERCIAL TRIANGLE CORPORATION, PEREZ COMMERCIAL QUALICUM CORPORATION, QUALICUM BUSINESS PARK LTD., TRIANGLE PROJECT INC./PROJECT TRIANGLE INC., FIRST OTTAWA DEVELOPMENTS LIMITED, O.C. PROPERTIES INC., PEREZ INVESTMENTS INC., PCC INVESTMENTS OF FLORIDA INC., 484708 ONTARIO INC., 147936 CANADA INC., 694259 ONTARIO LIMITED, 640123 ONTARIO LIMITED, 468419 ONTARIO LIMITED, J. PEREZ (QUEBEC) INC., J. PEREZ (QUEBEC) MANAGEMENT INC., J. PEREZ FINANCIAL SERVICES (QUEBEC) INC., J. PEREZ FINANCIAL SERVICES INC., 3006948 CANADA INC., 174269 CANADA LIMITED, VALP INTERNATIONAL B.V., 977746 ONTARIO LIMITED, HIGHRIDGE WAREHOUSE INC., PAPEYCO TRADING INTERNATIONAL INC., COVENT GARDENS LTD., KATIMAVIK GARDENS LTD., 561204 ONTARIO LIMITED, MORNINGSIDE MEWS LTD., MONFORT INVESTMENTS CORPORATION, 675979 ONTARIO LIMITED, O.C. MANAGEMENT INC., MISTPORT LIMITED

Chadwick J.

Judgment: September 22, 1995
Docket: Docs. Ottawa 074183, 073885, 073910

Counsel: *M.J. Dermer* and *Robert L. Love*, for applicant, Banco Pastor.
*Harold H. Elliot, Q.C.*, *Denis J. Power, Q.C.*, and *Charles Gastle*, for Deloitte & Touche, trustees for bankrupt estates.

***Chadwick J.*:**

1 The trustee, Deloitte & Touche, of the three bankrupt estates has brought a motion dated the 24th of May, 1995, seeking relief against a number of the named respondents.

2 Banco Pastor is one of the named respondents and is a commercial bank organized and established under the laws of Spain. The bank carries on business in Spain and primarily all of the bank's assets are located in Spain. The bank does not carry on any business in the province of Ontario.

between the bankrupt and the Florida corporation also appears to be a friendly relationship and directed from Ottawa. As such, the trustee argues no real effort will be made by Perez or any of the related companies to defend the Florida action.

24 If the trustee's allegations are correct, it would appear that Banco Pastor would have obtained a fraudulent preference by the security given to them on the 7th of June, 1994.

25 The author, Castel, J.G., *Canadian Conflicts of Laws* 3rd ed. 1994 reviews the nature of bankruptcy in relation to conflict of laws. At p. 525 he makes the following comment:

> Canadian law governs the administration and distribution of the estate of a debtor declared bankrupt in Canada. This is an application of the rule that matters of procedure are governed by the *lex fori*. Thus, the appointment of trustees, and their duties and powers, are governed by Canadian bankruptcy law. The incapacity of an inspector to acquire any of the property of the estate for which he or she is an inspector extends to property situated outside Canada. Foreign creditors are in the same position as Canadian creditors. "All debts and liabilities, present or future, to which the bankrupt is subject on the date on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt, shall be deemed to be claims provable in proceedings under this Act." However, the proper law, foreign or domestic, will determine whether a debt is valid by that law as well as the question of which property has passed to the trustee, and subject to what charges it has passed to him or her.

26 I disagree with the position of counsel for Banco Pastor that the only relevant agreement is the original loan agreement dated March 16th, 1993. In my view the documentation in February 1994 and the subsequent security dated June 1994 are relevant in determining whether Banco Pastor has received a fraudulent preference in contravention of the *Bankruptcy and Insolvency Act*.

27 To require the trustee to proceed in three foreign jurisdictions to litigate the validity of the security creates an injustice and places an impossible task and financial burden upon the trustee. Based upon the affidavit evidence before me there will be numerous witnesses in this jurisdiction who will be required to testify relating to the various corporate structures and the transfer of assets. It would be physically impossible to require all of these witnesses to attend in the various foreign jurisdictions to give their evidence.

28 In addition the Spanish agreement is between the bankrupt who resides on Canada and a Spanish loans officer. Obviously that evidence will have to be given in Spanish and the civil laws of Spain applied in the Ontario action. It is possible for this to be done in Ontario.

29 With reference to the Florida property there is only one person who is holding this land in trust and that is a Florida attorney who is receiving his instructions from Canadian principals.

30 Although the trustee may have difficulty enforcing any order or judgment in the foreign jurisdictions that is not the issue before the court at this time.

31 To allow the Banco Pastor application and stay would mean that any bankrupt could transfer or encumber foreign property and take it outside the reach of the trustee and the provisions of the *Bankruptcy and Insolvency Act*.

32 Application is dismissed.

*Motion dismissed.*