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COURT FILE NUMBER	2001-05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF 2324159 ALBERTA INC.
RESPONDENT	FTI CONSULTING CANADA INC., IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF 2324159 ALBERTA INC.
DOCUMENT	**BENCH BRIEF**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP Barristers & Solicitors Suite 4000, 421 - 7th Avenue S.W. Calgary, Alberta, Canada T2P 4K9 Attention: Sean Collins / Pantelis Kyriakakis / Nathan Stewart Telephone: (403) 260-3531 / 3536 / 3534 Facsimile: (403) 260-3501 Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca File No.: 207091-532338

REPLY BENCH BRIEF OF FTI CONSULTING CANADA INC., IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF 2324159 ALBERTA INC.

IN RESPECT OF RBEE AGGREGATE CONSULTING LTD.'S APPLICATION TO CONTEST THE MONITOR'S DETERMINATION NOTICE UNDER THE BONNYVILLE CLAIMS PROCESS

TO BE HEARD BY THE HONOURABLE JUSTICE K.M. EIDSVIK

May 14, 2021 at 2:00 p.m.

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I. INTRODUCTION

1. This reply bench brief of FTI Consulting Canada Inc., in its capacity as the court-appointed monitor (the "**Monitor**") of 2324159 Alberta Inc. ("**ResidualCo**") is submitted solely in response to the Reply Bench Brief of RBEE Aggregate Consulting Ltd. ("**RBEE**"), served on February 12, 2021 (the "**RBEE Reply Brief**"), in connection with an application by RBEE contesting the Monitor's Determination Notice under the Order – Lien Claims – MD of Bonnyville, granted May 20, 2020, by the Honourable Justice K.M. Eidsvik (the "**Bonnyville Lien Process Order**"), in the within proceedings (the "**CCAA Proceedings**"). Pursuant to the Amended Reverse Vesting Order, granted on March 31, 2021 (the "**Amended RVO**"), ResidualCo is the successor in interest to all Excluded ResidualCo Assets and Excluded Liabilities (each as defined in the Amended RVO) of JMB Crushing Systems Inc. ("**JMB**") and 2161889 Alberta Ltd. ("**216**", JMB and 216 are collectively referred to as, the "**Companies**"). Capitalized terms used herein and not otherwise defined shall have the same meaning ascribed to such terms in the Monitor's Bench Brief, filed on October 19, 2020 (the "**Monitor's Brief**"), in the CCAA Proceedings.

2. The RBEE Reply Brief's allegations that the Monitor has improperly inserted itself into the builders' lien dispute and that the Monitor's Brief is an attempt at "bootstrapping" the Monitor's original Lien Determination are thinly veiled attempts to obfuscate the material issues concerning RBEE's Lien Claims. Moreover, such allegations are incorrect and inconsistent with: (i) the Bonnyville Lien Process Order; (ii) the law regarding the role of a court-appointed monitor under a court-ordered claims process; and, (iii) the standard of review concerning a monitor's determinations under a court-ordered claims process.

3. The Monitor was authorized and directed, pursuant to the Bonnyville Lien Process Order, to engage in a review of the various Lien Claims.[1] The Monitor acted in accordance with and carried out its mandate, as provided for under the Bonnyville Lien Process Order. In accordance with its duties as a court officer, the Monitor independently, fairly, and in its neutral capacity reviewed RBEE's Lien Notice and issued a Determination Notice stating that RBEE's Lien Claims were invalid. The fact that RBEE does not agree with the Monitor's determination and disputes same, in no way alters the capacity in which the Monitor carried out its duties.

[1] Order - Lien Claims - MD of Bonnyville, issued on May 20, 2020, at para. 12 (CaseLines 03-78) ["**Bonnyville Lien Process Order**"].

II. FACTS

4. Of the ten (10) Determination Notices issued by the Monitor, RBEE is the only lien claimant currently contesting a Determination Notice.[2]

5. For convenience of reference, the Determination Notice issued to RBEE stated, in relevant part:

> "The above referenced Lien Claim is not a valid Lien or Lien Claim as, **with respect to those registrations made / Lien Notices provided within the 45 days prescribed under the *BLA*, such Liens or Lien Claims** do not relate to work done or materials supplied on or in respect of an improvement."[3]

6. The remaining relevant factual background is set out in the Monitor's Brief[4] and is not repeated in this brief.

7. The transaction between the Companies and Mantle Materials Group, Ltd. has closed and all interests, liabilities and claims concerning this dispute have been transferred to ResidualCo, pursuant to the Amended RVO. The Amended RVO also appointed the Monitor as the Monitor of ResidualCo.[5]

III. ISSUES

8. The primary issues for determination on RBEE's application remain the same; namely, whether the RBEE Lien Claim: (i) gives rise to lien rights under the BLA; and, (ii) is a valid Lien Claim under the BLA and the Bonnyville Lien Process Order. Those issues are addressed in the Monitor's Brief.

9. The RBEE Reply Brief raised certain additional issues, which go beyond determining the validity of RBEE's Lien Claim, on its merits, and instead address the procedure set out in the Bonnyville Lien Process Order. Specifically, the RBEE Reply Brief brings into issue whether: (i) "[t]he Monitor stepped outside of its role by acting as an advocate, and is attempting to

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[2] Thirteenth Report of the Monitor, dated February 23, 2021, at para. 26 (CaseLines 04-490).

[3] Eighth Report of the Monitor, dated October 16, 2020 ["**Eighth Report**"], at Appendix "C" (CaseLines 04-355).

[4] Bench Brief of the Monitor, filed on October 19, 2020 at paras. 5-28 ["**Monitor's Brief**"] (CaseLines 05.24a-317 - 05.24a-324).

[5] Amended Reverse Vesting Order, issued on March 31, 2021, at paras. 4, 8-9, 11, 25-26 (CaseLines 03-375 - 03-380, 03-385 - 03-386).

bootstrap its earlier rejection of RBEE's Liens"; and, (ii) "RBEE's Liens were not filed out of time".[6] These two (2) issues are addressed herein.

IV. LAW

A. The Monitor's Role in Claims Processes

10. The British Columbia Supreme Court, in *Mountain Equipment Co-Operative (Re)* ("***Re MEC***"),[7] recently considered the general principles applicable in claims processes, in the context of an application seeking the appointment of representative counsel. Specifically, the Court stated:

> "[50] The Monitor's comments and its position emphasize that the Claims Process has been put in place and is a comprehensive process for the determination of the claims to be advanced against MEC. ***As with other claims processes granted in CCAA proceedings, it is intended to afford an efficient and expeditious means of resolving claims***, including those of the former employees, to allow distribution to the creditors as soon as possible.
>
> [51] With the Enhanced Powers Order, **the Monitor has assumed conduct of the Claims Process** and has full access to MEC's books and records as may be relevant to that task. Further, **the Monitor, as a court appointed officer, can be expected to address claims in a fair manner**, including those relating to former employees.
>
> [52] ***The Claims Process is intended to benefit all stakeholders, not just the former employees***. Many other creditors will participate in the Claims Process without legal representation as they wish. ***The Claims Process is expected to be easily understood in terms of how the process works, and how disputes are to be raised and addressed***. As noted by the court in *Urbancorp* at para. 18, ***it is a "normal process" for a Monitor to deal with claimants.***" [emphasis added].[8]

11. In *Pacer Construction Holdings Corporation v Pacer Promec Energy Corporation*, the Alberta Court of Appeal considered the purposes and objectives of a claims process, albeit within receivership proceedings, and held that:

> "In Alberta, ***these purposes and objectives are functionally the same: to achieve cost-effective, timely decisions, and procedural and systemic fairness and efficiency.*** These same purposes and objectives also recognize the reality of limited judicial resources and inherent systemic delays that disrupt timely

[6] Reply Bench Brief of RBEE Aggregate Consulting Ltd., served on February 12, 2021 at paras. 2(a)-(b) ["**RBEE Reply Brief**"] (CaseLines 05.24a-960).

[7] 2020 BCSC 2037 ["***Re MEC***"] **[TAB 1]**.

[8] *Re MEC*, *supra* note 7 at paras. 50-52 **[TAB 1]**.

reviews by the court." [emphasis added].[9]

B. Standard of Review Regarding Claim Determinations

12. As noted in the Monitor's Brief, in accordance with this Court's decision in *Aronson v Whozagood Inc.*,[10] claimants are required to put their best foot forward at first instance when submitting a claim, although fresh evidence may be admitted where the interests of justice require it. Specifically, in *Whozagood*, Justice Eamon stated:

> "…[T]he authorities determining what evidence should be considered on appeal are mixed. There are three approaches:
>
> … (c) Appeals are a hybrid, and are on the record that was before the Trustee, unless the Court permits the appeal to be conducted as a *de novo* appeal, involving fresh evidence, where the interests of justice require it.
>
> [29] There is conflicting authority in Alberta over which approach should be taken. Following the decision in *Re Galaxy Sports*, 2004 BCCA 284, **the Alberta Courts have mainly adopted the hybrid approach** (*Re San Juan Resources Inc.*, 2009 ABQB 55; *Transglobal Communications Group Inc (Re)*, 2009 ABQB 195; *Sapient Grid*). This approach requires claimants to put their best foot forward with their proof of claim to ensure efficient and expeditious claims determinations, while ensuring that the process is fair to all concerned. The Court has discretion to admit fresh evidence where the interests of justice require it. The test for admitting fresh evidence is not limited to the stringent test which applies to appeals from trials conducted in a Court as set out in *Palmer v The Queen*, [1980] 1 SCR 759 at p 775, 1979 CanLII 8.[11]
>
> …
>
> [34] I prefer the hybrid approach in *San Juan* and the cases that followed it.
>
> (a) Parliament assigned the roles of investigating and disallowing claims to the bankruptcy trustee (BIA, s 135). Creditors must "specify the vouchers or other evidence, if any, by which [the claim] can be substantiated" and the trustee may require further evidence (BIA, ss 124(4), 135(1)).
>
> (b) The *de novo* approach would seriously undercut a bankruptcy trustee's authorities and functions.
>
> (c) The Court can ensure fairness and encourage diligence by creditors in submitting claims to the bankruptcy trustee by allowing fresh evidence in

[9] *Pacer Construction Holdings Corporation v Pacer Promec Energy Corporation*, 2018 ABCA 113 at para. 102 (see also, para. 101) **[TAB 2]**.

[10] Monitor's Brief, *supra* note 4 at para. 30 (CaseLines 05.24a-325 - 05.24a-326); *Aronson v Whozagood Inc.*, 2019 ABQB 656 ["***Whozagood***"] **[TAB 3]**.

[11] *Whozagood*, *supra* note 10 at paras. 28-29 **[TAB 3]**.

appropriate cases." [emphasis added].[12]

V. ARGUMENT

A. The Monitor's Actions and Determination Notice Are Appropriate and in Accordance with the Monitor's Role and Duties

i. The Monitor Has Acted In Accordance with the Bonnyville Lien Process Order and Customary Practice

13. The Monitor has acted in accordance with its duties under the Bonnyville Lien Process Order. Specifically, the Bonnyville Lien Process Order, *inter alia*, required that:

> "Upon receipt of the information relating to a Lien or Lien Claim contemplated by paragraph 12 hereof, ***the Monitor shall make its Lien Determination in respect thereof and provide a Determination Notice to the Lien Claimant, JMB, and any other Interested Party***." [emphasis added].[13]

14. The Monitor, in accordance with the Bonnyville Lien Process Order, reviewed and examined numerous Lien Claims and issued its corresponding Determination Notices. RBEE's assertion that the Monitor's participation "veer[ed] into this prohibited domain … as a fiduciary and officer of the court"[14] is entirely inaccurate. RBEE has overlooked that the Monitor's duty, in the circumstances, requires that it comply with orders issued within the CCAA Proceedings, including the Bonnyville Lien Process Order. If the Monitor were not permitted to support its Determination Notice, there would be little benefit to any corresponding claim process or having the Monitor review and issue a determination of such claims, at first instance. Simply put, just because the Monitor does not agree that RBEE's Lien Claim is valid does not mean such determination was made in an unfair or biased manner.

15. Furthermore, the Monitor's participation under the Bonnyville Lien Process Order is in accordance with customary practice. It is common for a court-appointed monitor to participate in a dispute concerning its own determination. The reported case law is replete with references to the factums submitted by monitors in support of their lien or claim determinations under various

[12] *Whozagood*, *supra* note 10 at paras. 34-35 **[TAB 3]**.

[13] Bonnyville Lien Process Order, *supra* note 1 at para. 12 (CaseLines 03-78).

[14] RBEE Reply Brief, *supra* note 6 at para. 12 (CaseLines 05.24a-963).

claims processes.[15]

ii. The Determination Notice Was Issued In Accordance with the Bonnyville Lien Process Order and Customary Practice

16. The Determination Notice was issued in accordance with the Bonnyville Lien Process Order. Specifically, the Determination Notice was to provide "written notice of a Lien Determination"[16] being "the validity of a Lien, a Lien Claim and the quantum thereof".[17] In fact, the Determination Notice not only provided the Monitor's determination of the validity of RBEE's Lien Claims but also identified the specific legal element that was missing; that is, that RBEE's Lien Claim did not constitute an "improvement".

17. Furthermore, the Monitor's Determination Notice, like the notices given by court officers in the vast majority of claims processes, is not a memorandum or decision, but a succinct response outlining the general issues associated with an underlying claim. As the British Columbia Supreme Court stated in *8540025 Canada Inc. (Re)*, "[t]he role of the monitor ought not to be analogized to that of a judge who is obliged to give reasons for judgment."[18] Furthermore, as noted by the Court in *Re MEC*, a CCAA claims process is "intended to afford an efficient and expeditious means of resolving claims".[19]

18. Requiring the Monitor to prepare what is effectively a detailed brief with case law references, as RBEE seems to imply, is not customary and would defeat the purpose of having an expedited process. If every creditor were entitled to obtain a detailed memorandum or legal treatise concerning the determination of their claim, the costs and fees associated with claims processes would increase substantially and undermine the primary purpose of running such processes.

19. Furthermore, the form of the Determination Notice utilized in the Bonnyville Lien Process Order not only accords to such purposes but is similar to the forms of lien or claim determinations provided for in other recent CCAA proceedings; which provide for a succinct statement of the

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[15] See *e.g.*, *8640025 Canada Inc. (Re)*, 2018 BCCA 93 at para. 62 ["***8640025***"] **[TAB 4]**; *8640025 Canada Inc. (Re)*, 2019 BCSC 8 at paras. 44-45 ["***8640025* 2019 BCSC**"] **[TAB 7]**, aff'd *8640025 Canada Inc. (Re)*, 2019 BCCA 473 ["***8640025* 2019 BCCA**"] **[TAB 5]**; *8640025* 2019 BCCA, *supra* at paras. 47-49, 55, 60 **[TAB 5]**; *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757 at paras. 18, 38 **[TAB 6]**.

[16] Bonnyville Lien Process Order, *supra* note 1 at para. 3(e) (CaseLines 03-75).

[17] Bonnyville Lien Process Order, *supra* note 1 at para. 3(o) (CaseLines 03-76).

[18] *8640025* 2019 BCSC, *supra* note 15 at para. 50 **[TAB 7]**, aff'd *8640025* 2019 BCCA, *supra* note 15 **[TAB 5]**.

[19] *Re MEC*, *supra* note 7 at para. 50 **[TAB 1]**.

reasons for any disallowance of a lien (or other claim). Recent examples include the claims procedure orders issued in the matters of *957855 Alberta Ltd.*;[20] *Canntrust Holdings Inc.*;[21] *Delphi Energy Corp.*;[22] and, *Strategic Oil & Gas Ltd.*,[23] which each provided for a one-line or one-paragraph response by the monitor. This approach has been adopted to encourage efficiency and the expedient resolution of a large number of claims.

20. As is common in most CCAA proceedings, RBEE was able to and did in fact request additional details concerning the Monitor's Determination of its Lien Claim. Following the issuance of the RBEE Determination Notice, in July 2020, counsel to RBEE requested additional details concerning the Monitor's determination and a copy of the Bonnyville Contract; all of which was immediately provided. As a result, in the present circumstances, RBEE has suffered no prejudice and has had ample time to: (i) review the Determination Notice prior to filing its lien determination application; (ii) seek additional information regarding any questions or concerns associated with the Monitor's Determination Notice; and, (iii) review the Monitor's Brief (filed on October 19, 2020) prior to the hearing of RBEE's application.

iii. The Monitor Has Not "Bootstrapped" Its Determination Notice

21. RBEE states that the Monitor's Brief was an attempt to "bootstrap" the Monitor's previous conclusions with respect to the Lien Determinations. In support, RBEE argues that:

> "Specifically, the Lien Determination Notice:
>
> a) Makes no reference to the Liens being filed out of time;
>
> b) Makes no reference to the Lands not being lienable;
>
> c) Does not provide any details clarifying why the work done or materials supplied do not constitute an improvement."[24]

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[20] Claims Procedure Order, issued on September 16, 2020 by the Honourable Justice Hainey, in the matter of 957855 Alberta Ltd., *et al.* (Ontario Superior Court of Justice, Comm. List, File No. CV-20-00642783-00CL), at Schedule "F" **[TAB 8]**.

[21] Claims Procedure Order, issued on May 8, 2020 by the Honourable Justice Hainey, in the matter of Canntrust Holdings Inc., *et al.* (Ontario Superior Court of Justice, Comm. List, File No. CV-20-00638930-00CL), at Schedule "D" **[TAB 9]**.

[22] Order (Claims Process), issued on May 22, 2020 by the Honourable Madam Justice Horner, in the matter of Delphi Energy Corp., *et al.* (Alberta Court of Queen's Bench File No. 2001-05124), at Schedule "D" **[TAB 10]**.

[23] Order (Claims Procedures), issued on October 11, 2019 by the Honourable Justice Neufeld, in the matter of Strategic Oil & Gas Ltd., *et al* (Alberta Court of Queen's Bench File No. 1901-05089), at Schedule "D" **[TAB 11]**.

[24] RBEE Reply Brief, *supra* note 6 at para. 5 (CaseLines 05.24a-961).

22. RBEE's submissions are incorrect. Specifically:

(a) the Monitor's Determination Notice states that "with respect to ***those registrations made / Lien Notices provided within the 45 days*** prescribed under the *BLA*". This clearly indicates that not all Liens or Lien Notices were made or provided within the requisite time period. However, the Monitor continued with its analysis of RBEE's claims as certain Lien Claims or Lien Notices were in time and did assert a claim to the Holdback Funds or were otherwise subject to the Bonnyville Lien Process Order;

(b) to the extent that RBEE takes issue with the statement in the Monitor's Brief that municipal roads are likely not lienable,[25] it is important to distinguish that the Monitor's Determination Notice was issued in response to RBEE's Lien Notice; which **did not** assert any claim against any municipal roads. RBEE first raised a potential[26] claim against municipal roads in its supplementary affidavit.[27] Rather than challenging the admission of new information or claims, the Monitor instead addressed such new claims, on their merits. It is not appropriate or realistic for RBEE to expect the Determination Notice to address issues or claims not yet raised; and,

(c) with respect to the final issue raised by RBEE, that the Determination Notice "[d]oes not provide any details clarifying why the work done or materials supplied do not constitute an improvement", the Bonnyville Lien Process Order did not require the Monitor to prepare a lengthy treatise on the legal merits of the claim. Such a requirement is not the customary approach and would defeat the purpose of a lien claims process. As set out above, determinations within a claims process are of a summary nature. Additionally, RBEE, as all claimants, was at all times able to and **did in fact** request additional information concerning the Monitor's determination and has had ample time and opportunity to canvas this matter and review the Monitor's Brief.[28]

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[25] Monitor's Brief, *supra* note 4 at para. 46 (CaseLines 05.24a-333).

[26] Monitor's Brief, *supra* note 4 at para. 46: "While it does not appear to be the case, as the Lien Notices assert a Lien Claim against the Lands […] to the extent any Lien Claim is asserted against the MD of Bonnyville's roads, such Lien Claims are likely invalid as a result of section 7(1) of the BLA" (CaseLines 05.24a-333).

[27] The Supplemental Affidavit of David Howells, sworn on October 9, 2020 and tendered by RBEE, stated that the crushed aggregates supplied by JMB to the MD of Bonnyville were used "on various Municipality roads" or "projects around the Municipality for repairs of soft spot sections on each road". Supplemental Affidavit of David Howells, sworn on October 9, 2020, at paras. 4(a), (b), (c) (CaseLines 05.24a-308).

[28] Affidavit of Blake Elyea, sworn on November 20, 2020, at paras. 11(g)-(h) (CaseLines 05.16-2315).

iv. Appeal Principles Under Administrative Law Are Not Applicable in the Current Circumstances

23. The principles and the standard of review under administrative law are not applicable in the current circumstances. The Monitor is a court officer, not an administrative tribunal. The issues raised in the RBEE Reply Brief, with respect to administrative tribunals participating in a review of their own decisions, are inapplicable in the current circumstances. Concerns regarding attempts to apply administrative law principles in a claims process were raised by the British Columbia Court of Appeal in *8640025*,[29] for good reason, as a claims process within CCAA proceedings is intended to provide for the efficient determination of claims, where further disputes are resolved by the supervising court, in a manner "consistent with the objectives of efficiency, certainty and cost-saving that underlie CCAA proceedings".[30]

24. As in *All Canadian Investment Corporation (Re)*, RBEE's submissions "appear to confuse a true appeal of the Monitor's decision with a judicial review".[31] Monitors defend their determinations regularly and while the standard of review can vary, the applicable principles are not those associated with the decisions of administrative panels and tribunals. Whether the Determination Notice was correct will, generally, depend upon the evidence put forward by the claimant in support of its claim.[32] RBEE's Reply Brief simply attempts to muddy the waters and deflect from the merits of the validity of RBEE's Lien Claim.

B. RBEE's Claim Is Time-Barred

25. RBEE's own evidence indicates that certain of RBEE's Lien Claims are out of time. RBEE's Lien Notice stated that RBEE last provided services, in respect of the Shankowski Pit, on April 6, 2020.[33] RBEE first made a Lien Claim against the Lands (as defined in the Bonnyville Lien Process Order) on May 29, 2020, 53 days after RBEE last performed any services.

26. While the affidavit in support of RBEE's Lien Notice states that "the aggregate rock and gravel crushed by JBEE [sic] continues to be transported from the Shankowski Pit to the

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[29] *8640025*, *supra* note 15 at para. 60 **[TAB 4]**.

[30] *8640025*, *supra* note 15 at para. 66 **[TAB 4]**.

[31] *All Canadian Investment Corporation (Re)*, 2020 BCSC 855 at para. 20 ["***All Canadian***"] **[TAB 12]**. The monitor in *All Canadian* made submissions in respect of the appeal from its claim determination, which was upheld by the court: see *e.g.* para. 37.

[32] *Whozagood*, *supra* note 10 at para. 29 **[TAB 3]**.

[33] Eighth Report, *supra* note 3 at Appendix "B", Lien Notice dated May 29, 2020, at Schedule "A", para. 26 ["**RBEE Lien Notice**"] (CaseLines 04-267).

Municipality Lands",[34] that is not the applicable test. The applicable test under the BLA, regarding whether a lien for the performance of services has been registered in time, is whether the lien has been registered "within the time period commencing when the lien arises and […] **terminating 45 days from the day that the performance of the services is completed** or the contract to provide the services is abandoned." [emphasis added].[35]

27. RBEE's assertion, raised for the first time in the RBEE Reply Brief, that "[u]sing the date of off-site services could lead to an absurdity" does not withstand scrutiny. RBEE submitted that:

> "[t]hose that do not own the materials, but are retained to manufacture, repair, or assemble the materials, could perform services at their own pace, and complete work far in advance of when the materials are required at the owner's lands. It would be inefficient to have subcontractors filing liens for off-site services, when the owner has not received the benefit of those services …"[36]

28. If RBEE's submission is accepted, the period within which valid liens may be filed, in respect of off-site work, would be potentially unlimited. For instance, if certain materials were not delivered for a period of two years after completion of the work by the prospective lien claimant, such claimant would not be required to file its lien until the delivery - far outside of the statutorily-mandated 45 day period. This highlights one of the main differences between supply contracts versus construction contracts.

29. Furthermore, under RBEE's approach, lien claimants would have no reasonable means of determining what the statutory time period is when performing off-site work, beyond relying on the representations of the contractor/owner as to when the work product has been delivered or an improvement was made. Reference to the last date on which the claimant performed work or furnished materials is: (i) straight-forward; (ii) consistent with the remedial purposes of the BLA;[37] and, (iii) accords with the statutory language of the BLA.[38] Similarly, this process also benefits lenders, subcontractors, and other persons who rely upon the straightforward notice provisions of the BLA.

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[34] RBEE Lien Notice, *supra* note 33, at Schedule "A", para. 27 (CaseLines 04-267).

[35] *Builders' Lien Act*, RSA 2000, c. B-7, at s. 41(2)-(2)(a) ["***BLA***"] **[TAB 13]**.

[36] RBEE Reply Brief, *supra* note 6 at para. 19 (CaseLines 05.24a-965).

[37] *Maple Reinders Inc. v W. Dalton Energy Corp.*, 2007 ABCA 247 at para. 21 **[TAB 14]**.

[38] BLA, *supra* note 35 at ss. 41(1)(a)-(2)(a) **[TAB 13]**.

VI. RELIEF REQUESTED

30. The Monitor respectfully requests that this Honourable Court dismiss RBEE's application seeking to reverse the Monitor's Determination Notice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5TH day of May, 2021

McCarthy Tétrault LLP

Per: *"McCarthy Tétrault LLP"*
Sean Collins / Pantelis Kyriakakis / Nathan Stewart
Counsel to FTI Consulting Canada Inc., in its capacity as the court-appointed monitor of 2324159 Alberta Inc., and not in its personal or corporate capacity

VII. LIST OF AUTHORITIES

1. *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037;

2. *Pacer Construction Holdings Corporation v Pacer Promec Energy Corporation*, 2018 ABCA 113;

3. *Aronson v Whozagood Inc.*, 2019 ABQB 656;

4. *8640025 Canada Inc. (Re)*, 2018 BCCA 93;

5. *8640025 Canada Inc. (Re)*, 2019 BCCA 473;

6. *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757;

7. *8640025 Canada Inc. (Re)*, 2019 BCSC 8;

8. Claims Procedure Order, issued on September 16, 2020 by the Honourable Justice Hainey, in the matter of 957855 Alberta Ltd., *et al.* (Ontario Superior Court of Justice, Comm. List, File No. CV-20-00642783-00CL), at Schedule "F";

9. Claims Procedure Order, issued on May 8, 2020 by the Honourable Justice Hainey, in the matter of Canntrust Holdings Inc., *et al.* (Ontario Superior Court of Justice, Comm. List, File No. CV-20-00638930-00CL), at Schedule "D";

10. Order (Claims Process), issued on May 22, 2020 by the Honourable Madam Justice Horner, in the matter of Delphi Energy Corp., *et al.* (Alberta Court of Queen's Bench File No. 2001-05124), at Schedule "D";

11. Order (Claims Procedures), issued on October 11, 2019 by the Honourable Justice Neufeld, in the matter of Strategic Oil & Gas Ltd., *et al* (Alberta Court of Queen's Bench File No. 1901-05089), at Schedule "D";

12. *All Canadian Investment Corporation (Re)*, 2020 BCSC 855;

13. *Builders' Lien Act*, RSA 2000, c. B-7; and,

14. *Maple Reinders Inc. v. W. Dalton Energy Corp.*, 2007 ABCA 247.

TAB 1

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mountain Equipment Co-Operative (Re),* 2020 BCSC 2037

Date: 20201221
Docket: S209201
Registry: Vancouver

In the Matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, C. C-36, as amended

- AND -

In the Matter of 1077 HOLDINGS CO-OPERATIVE and 1314625 ONTARIO LIMITED

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Representative Counsel / Charge)

Counsel for the Petitioners, 1077 Holdings Co-Operative and 1314625 Ontario Limited:	H. Gorman, Q.C. S. Boucher
Counsel for the Monitor, Alvarez & Marsal Canada Inc.:	M.I.A. Buttery, Q.C. H.L. Williams
Counsel for Lorne Hoover, on his own behalf and on behalf of former MEC employees:	C. Gusikowski
Place and Date of Hearing:	Vancouver, B.C. November 24 and 27, 2020
Place and Date of Decision:	Vancouver, B.C. December 21, 2020

INTRODUCTION

[1] Lorne Hoover is a former employee of the petitioner, Mountain Equipment Co-operative ("MEC"). MEC has since changed its name to 1077 Holdings Co-operative.

[2] Mr. Hoover seeks an order appointing Victory Square Law Office ("VSLO") as representative counsel for all of MEC's former employees in relation to claims that will be advanced by them in this *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("*CCAA*") proceeding.

[3] In addition, Mr. Hoover seeks a court ordered charge in the amount of $85,000 against MEC's assets to secure that representation, with priority over all claims, save for certain court ordered charges that have already been court approved (such as the Administrative Charge, the D&O Charge and the KERP).

[4] MEC opposes this relief as unnecessary and unwarranted. The Monitor has raised similar concerns, also stating that the relief may be redundant and unnecessary in the circumstances.

BACKGROUND FACTS

[5] On October 2, 2020, I granted the Sale Approval and Vesting Order (SAVO) by which the Court approved a sale of substantially all of MEC's assets: *Mountain Equipment Co-Operative (Re),* 2020 BCSC 1586.

[6] On October 30, 2020, the sale transaction closed. Fortunately, the purchaser took over more retail locations than initially forecast, such that 21 of the 22 retail stores are to continue. In addition, the purchaser retained over 90% of MEC's active employees who worked in those locations across Canada.

[7] MEC received net sale proceeds of approximately $22.9 million. Further amounts (approximately $7.5 million) remain held in escrow pending final accounting adjustments to be completed under the sale.

[47] The comments found in *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 are well accepted in describing the role of a monitor in *CCAA* proceedings, in that:

> [109] . . . the monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose.

[48] Having reviewed the Monitor's statements in context, I consider that Mr. Hoover's submissions on this point are misplaced. The Monitor has considered the particular circumstances of the former employees, but importantly, the Monitor has also considered the relief sought by them more generally in the present circumstances of this *CCAA* restructuring proceeding. To do so is entirely appropriate, since the interests of the former employees cannot be considered in isolation in terms of the balancing of interests of all stakeholders.

[49] As with many issues, the Monitor is uniquely situated to comment on the overall circumstances so as to assist the Court in the balancing exercise. Indeed, the very authorities that are cited by all parties here, including the former employees, as to the applicable test in appointing representative counsel (*Canwest Publishing*), specifically sets out that one factor to be considered is the position of the Monitor.

[50] The Monitor's comments and its position emphasize that the Claims Process has been put in place and is a comprehensive process for the determination of the claims to be advanced against MEC. As with other claims processes granted in *CCAA* proceedings, it is intended to afford an efficient and expeditious means of resolving claims, including those of the former employees, to allow distribution to the creditors as soon as possible.

[51] With the Enhanced Powers Order, the Monitor has assumed conduct of the Claims Process and has full access to MEC's books and records as may be relevant to that task. Further, the Monitor, as a court appointed officer, can be expected to address claims in a fair manner, including those relating to former employees.

[52] The Claims Process is intended to benefit all stakeholders, not just the former employees. Many other creditors will participate in the Claims Process without legal representation as they wish. The Claims Process is expected to be easily understood in terms of how the process works, and how disputes are to be raised and addressed. As noted by the court in *Urbancorp* at para. 18, it is a "normal process" for a Monitor to deal with claimants.

[53] In all of the circumstances, I am not convinced that a representative counsel appointment is appropriate at this time. If certain issues emerge in the Claims Process that might support a more coordinated resolution of common issues, either the Monitor or any of the former employees have leave to reapply for such relief.

REPRESENTATIVE COUNSEL CHARGE

[54] I will also address Mr. Hoover's request for a court ordered charge for representative counsel if I had acceded to his request for representative counsel and to address any future application that might arise.

[55] Mr. Hoover seeks a charge of $85,000 against MEC's property to secure what he expects will be VSLO's anticipated fees so as to allow for the former employees' "effective participation" in the Claims Process.

[56] Section 11.52(1)(c) of the *CCAA* allows the court to grant a charge on a petitioner's assets to secure payment of the legal fees and disbursements for representative counsel who may be appointed:

> 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> . . .
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> . . .

TAB 2

In the Court of Appeal of Alberta

Citation: Pacer Construction Holdings Corporation v Pacer Promec Energy Corporation, 2018 ABCA 113

Date: 20180321
Docket: 1701-0007-AC
Registry: Calgary

Between:

Pacer Construction Holdings Corporation

Not a Party to the Appeal
(Plaintiff)

- and -

FDS Prime Energy Services Ltd.

Respondent

- and -

Pacer Promec Energy Corporation and Pacer Promec Energy Construction Corporation

Not Parties to the Appeal
(Defendants)

- and -

FTI Consulting Canada Inc., in its capacity as court-appointed receiver and manager of Pacer Promec Energy Corporation and Pacer Promec Energy Construction Corporation

Appellant

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Frederica Schutz

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice R.A. Graesser
Dated the 9th day of December, 2016
Filed the 9th day of December, 2016
(2016 ABQB 697, Docket: 1501 02652)

Memorandum of Judgment

The Court:

Introduction

[1] The appellant FTI Consulting Canada Inc (hereafter "the Receiver") is the court-appointed receiver of both Pacer Promec Energy Corporation and Pacer Promec Energy Construction Corporation.

[2] FDS Prime Energy Services Ltd (hereafter "Prime") subcontracted with Pacer Promec Energy Construction Corporation for work to be completed on the site of Canadian Natural Resources Limited's (hereafter "CNRL") Alberta Horizon plant. Prime eventually filed liens on property owned by Pacer Promec Energy Corporation.

[3] Since the Receiver of Pacer Promec Energy Corporation and Pacer Promec Energy Construction Corporation is the same, and there are no substantive distinctions between the two for the purposes of this appeal, as did the chambers judge below we will continue to refer to the corporations in receivership as "PPEC".

[4] Prime submitted to the Receiver a secured proof of claim in the amount of $2,996,050 ("Lien 1") relating to work that Prime claimed to have done pursuant to four contracts and three purchase orders.

[5] The Receiver disallowed Lien 1, and the disputed claim was then dealt with pursuant to the Claims Procedure Order granted in the PPEC receiverships, a procedure presided over by an appointed Claims Officer.

[6] Lengthy affidavits and extensive written submissions were tendered before the Claims Officer, and the primary deponents representing Prime and the Receiver were both cross-examined. In addition, the Claims Officer requested and received affidavits from former employees of PPEC, who also underwent cross-examination. An oral hearing took place before the Claims Officer, following which supplemental written submissions were sought and received.

[7] The Claims Officer partially allowed Prime's Lien 1 claim, but only to the extent of $87,377.42. The chambers judge upheld the Claims Officer's determination that monies claimed under various contracts and purchase orders for work done more than 45 days before the registration of Lien 1, were not secured by Lien 1. No appeal has been taken in respect of these contracts and purchase orders.

[8] The primary point of disagreement between Prime and the Receiver in respect of the balance of Lien 1 was whether subcontract N5000 was terminated or abandoned. The Receiver

Bearing this in mind, drafters of such orders would be well-advised to turn their minds to standard of review if the intention is to allow for any kind of less deferential appeal.

[97] In ***Triton*** at paras 13-16, the Ontario Superior Court refused to conduct a *de novo* hearing where the proceeding before the claims officer was a "full blown trial-like proceeding", and rightfully noted that "[i]f the threshold for permitting appeals to be heard on a *de novo* basis is set too low, it will encourage such reviews and thereby add significantly to the costs and length of proceedings which are inconsistent with the fundamental purposes of the CCAA and the Commercial List practice." In our view, allowing a *de novo* review and thereby adding to the costs and length of proceedings, is equally inconsistent with the fundamental purposes of the receivership claims process in these proceedings.

[98] The earlier Alberta decision in ***Canadian Airlines Corp (Re)***, 2001 ABQB 146, 294 AR 253 which appears to support a *de novo* approach, is distinguishable. First, that appeal was solely concerned with matters of law; and second, it was decided prior to a line of cases that have consistently favoured a stricter deferential standard of review.

[99] As Gascon J (as he then was) further noted in ***AbitibiBowater inc (Arrangement relatif à),*** 2011 QCCS 4284 at para 77, 206 ACWS (3d) 10 [***AbitibiBowater***]:

> **77** The standard of review established by this trend of cases is palpable and overriding error for findings of fact and correctness for findings of law. In fact, the standard of review applied in the end to the decision of the claims officer in *Canadian Airlines* would have been the same under the criteria identified in these cases. From that standpoint, the *Canadian Airlines* case is consistent with the standard of review of these more recent *CCAA* cases.

[100] In ***AbitibiBowater*** at para 66, the parties "had the benefit of a thorough adversarial proceeding before the Claims Officer", described as both sides presenting affidavit evidence with document production, including expert reports, *viva voce* testimony with cross-examinations, and counsels' oral and written submissions. The process here, was akin to that in ***AbitibiBowater***.

[101] In our view, there is no principled basis to depart from the appellate standard of review widely endorsed for *CCAA* proceedings, by reason only that the Claims Officer is court-appointed and not subject to the *BIA* or the *CCAA*. Indeed, the Receiver makes the valid point that under those statutes the functions of a claims officer are not legislatively prescribed either. Therefore, whether by appointment under statute or by common law, the function of the Claims Officer in a receivership ought to be assessed in the same manner—by asking and answering this question: what purposes and objectives are served by the claims process, the Claims Procedure Order, and the Claims Officer's function?

[102] In Alberta, these purposes and objectives are functionally the same: to achieve cost-effective, timely decisions, and procedural and systemic fairness and efficiency. These same

purposes and objectives also recognize the reality of limited judicial resources and inherent systemic delays that disrupt timely reviews by the court.

[103] All of this calls for a stricter deferential standard than a "*de novo*" review or "no deference". Rather, the standard of review ought to be that which is set out in ***Tiercon*** above concerning decisions made by claims officers, and in a different context in ***Housen v Nickolaisen,*** 2002 SCC 33, [2002] 2 SCR 235.

[104] The standard of review set in both of these cases is correctness on questions of law, and palpable and overriding error on questions of fact or mixed fact and law. Nothing precludes the reviewing judge, in the appropriate case, from admitting additional evidence provided the judge is satisfied with the explanation as to why it was not adduced during the initial claims process where the parties ought to have put their best case forward. Automatically accepting additional evidence on appeal, without any gatekeeping scrutiny, would encourage a careless approach to the claims process and have the effect of transferring the obligations imposed upon Claims Officers to the court.

[105] We conclude that neither the original Claims Procedure Order and claims process, nor the parties, would be well served by the judicial approach promoted by the chambers judge of a *de novo* hearing. Such an approach is devoid of the adjudicative pragmatism expected in commercial matters and, thus, is basically unfit for the urgent realities of participants caught up in a dynamic receivership situation. Such an approach ignores the undoubted expertise of the participants and the Claims Officer, which would undercut presumptions of fitness with regard to both the process, and the Claims Officer. Finally, such a judicial approach would render a claims process—that was intended to operate with expediency—ineffectual, costly, time-consuming and uncertain.

[106] For the foregoing reasons, we are of the view that the chambers judge was wrong in determining that the Claims Officer was not entitled to the "same level of deference [as] the judge appointing him . . .", and that a *de novo* approach to review was required. To the contrary, the Claims Officer's decision is to be assessed on a standard of review as follows: (1) on questions of law, correctness; (2) on questions of fact or questions of mixed fact and law, palpable and overriding error.

[107] Having determined the correct standard of review, we must now consider whether the chambers judge, despite his statements to the contrary, actually applied the appropriate standard of review when he reviewed the Claims Officer's disposition. This brings us to the second ground of appeal.

> *Ground 2: Did the Chambers Judge Err by Determining that Subcontract N5000 continued past December 2014, and therefore the amounts owing under it were secured by Lien 1?*

[108] In broad terms, the issue under this ground of appeal is whether the chambers judge erred in concluding that the Claims Officer had erred in determining that subcontract N5000 was abandoned or terminated.

TAB 3

Court of Queen's Bench of Alberta

Citation: Aronson v Whozagood Inc, 2019 ABQB 656

Date: 20190822
Docket: BK01 094950
Registry: Calgary

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC, c B-3, AS AMENDED

AND IN THE MATER OF WHOZAGOOD INC.

Between:

Andrew Aronson, Brian Cook, Nicole Foote, and Don Hawley

Appellants

- and -

Whozagood Inc.

Respondent

Decision
of the
Honourable Mr. Justice J.T. Eamon

I Overview

[1] The Appellants Andrew Aronson, Brian Cook, Nicole Foote, and Don Hawley claimed to be creditors in the bankruptcy of WhoZaGood ("WZG"). Each was retained or employed under one or more written contracts with WZG and provided services to WZG. These contracts provided the Appellants compensation only if certain financial milestones were met. These milestones were not met, so WZG did not owe compensation under those contracts. However, the Appellants claimed that the contracts had been modified by verbal agreements with WZG

[21] The Trustee also raised issues over exchange rates which some of the Appellants used to convert US dollars to Canadian dollars. These are immaterial in this appeal.

III The procedure for the appeal

(a) Overview

[22] On the appeal, the Appellants argued their case as if the appeal was a new hearing. They did not identify any standard by which the Trustee's decisions should be reviewed. They filed affidavit evidence on their appeals containing additional information, much of which existed and would have been available to them when they filed their proofs of claim but was not provided to the Trustee with their proofs of claim (I refer to this as fresh evidence).

[23] In contrast, the Trustee argued that the Court should defer to the Trustee's fact findings on the reasonableness standard. These fact findings include that the accrued compensation transactions were outside the normal course of business, conducted in secret and not disclosed under the May 2018 Consent Order, represented by backdated promissory notes and invoices, not supported by any new contractual consideration, and entered into on the eve of the bankruptcy. Further, the transactions grossly inflated WZG's compensation obligations when compared to the Letters of Undertaking and had the effect of, and were designed to, defeat or delay other creditors.

[24] The Trustee also objected to the fresh evidence. It submitted that the appeals should be considered on the basis of the information before the Trustee when it disallowed the claims.

[25] Before considering the grounds of appeal, I must address:

(a) The evidence and grounds of appeal which can be considered. Can these be expanded for the appeal, or are the Appellants limited to whatever information they provided to the Trustee during the claims process?

(b) The standards by which the decision under appeal should be reviewed. Should I defer to or pay any attention to the Trustee's decisions under review, or make my decisions without reference to the Trustee's conclusions?

[26] There are many possible combinations, both in terms of the evidence or grounds which can be considered on the review and the nature of deference or attention which should be given to the decision under review (***Pacer Construction Holdings Corporation v Pacer Promec Energy Corporation***, 2018 ABCA 113 at para 64).

[27] For the reasons set out below, I conclude that the Appellants require permission to provide fresh evidence and permission should be refused. Further, the Trustee's fact findings should be reviewed on a deferential standard (palpable and over-riding error).

(b) Nature of appeal and review standards

[28] Registrar Schlosser points out in ***Sapient Grid Corp (Re)***, 2012 ABQB 357 at paras 30-33 that the authorities determining what evidence should be considered on appeal are mixed. There are three approaches:

(a) Appeals are *de novo* (conducted as if the original hearing had not taken place) and fresh evidence can be considered on appeal as a matter of course.

(b) Appeals from a Trustee are true appeals, on the record that was before the Trustee.

(c) Appeals are a hybrid, and are on the record that was before the Trustee, unless the Court permits the appeal to be conducted as a *de novo* appeal, involving fresh evidence, where the interests of justice require it.

[29] There is conflicting authority in Alberta over which approach should be taken. Following the decision in ***Re Galaxy Sports***, 2004 BCCA 284, the Alberta Courts have mainly adopted the hybrid approach (***Re San Juan Resources Inc***, 2009 ABQB 55; ***Transglobal Communications Group Inc (Re)***, 2009 ABQB 195; ***Sapient Grid***). This approach requires claimants to put their best foot forward with their proof of claim to ensure efficient and expeditious claims determinations, while ensuring that the process is fair to all concerned. The Court has discretion to admit fresh evidence where the interests of justice require it. The test for admitting fresh evidence is not limited to the stringent test which applies to appeals from trials conducted in a Court as set out in ***Palmer v The Queen***, [1980] 1 SCR 759 at p 775, 1979 CanLII 8.

[30] In contrast, other Alberta judges have adopted the *de novo* approach (***Alberta Permit Pro Inc (Re)***, 2011 ABQB 141; ***Experienced Equipment Sales & Rentals Inc***, 2011 ABQB 641). In ***Alberta Permit Pro***, Veit J preferred the *de novo* procedure, citing the "tight time lines imposed by Parliament in respect of the proceedings, the limited resources of the Trustee, the cost of providing "records", and, most importantly, the considerable delay and additional expense caused by returning matters to the Trustee for reconsideration in every case where either the Trustee did not give sufficient reasons to allow an appeal court to adequately assess the Chair or the Trustee's reasons, or where the Trustee made an error of law on which correctness would be the standard of review ..." (at para 39).

[31] The Alberta Court of Appeal does not appear to have ruled on the question. Some guidance might be taken from its decision in ***Pacer Construction***, where the Court dealt with the procedures and standards of review in respect of a decision under a claims procedure order in a receivership.

[32] The claims officer in that case conducted a hearing between opposing parties, a situation which is not parallel to the manner in which a bankruptcy trustee typically proceeds in determining a claim under section 135 of the BIA. Nevertheless, some of the considerations mentioned by the Court suggest that the hybrid approach would best balance the competing considerations in a bankruptcy proceeding.

[33] The Court held that the judicial review of the claims officer's determination contemplated gatekeeping scrutiny of additional evidence tendered on an appeal, to avoid encouraging a careless approach to the claims process and the effect of transferring the obligations imposed on claims officers to the court (*ibid* at para 104). Further, the standard of review was correctness on questions of law, and palpable and overriding error on questions of fact or mixed fact and law (*ibid* at para 104). This approach provided the adjudicative pragmatism required in commercial matters, ensured the process operated expediently, and respected the presumptions of fitness of the participants in the process (*ibid* at para 105). It also reminded that the correctness standard of

review is critically different than the *de novo* standard because the former proceeds with no regard to the original decision while the latter raises a presumption of fitness (*ibid* at para 66).

[34] I prefer the hybrid approach in ***San Juan*** and the cases that followed it.

(a) Parliament assigned the roles of investigating and disallowing claims to the bankruptcy trustee (BIA, s 135). Creditors must "specify the vouchers or other evidence, if any, by which [the claim] can be substantiated" and the trustee may require further evidence (BIA, ss 124(4), 135(1)).

(b) The *de novo* approach would seriously undercut a bankruptcy trustee's authorities and functions.

(c) The Court can ensure fairness and encourage diligence by creditors in submitting claims to the bankruptcy trustee by allowing fresh evidence in appropriate cases.

[35] As to standard of review, I agree with the standard of review analysis of Yamauchi J in ***Transglobal*** (at paras 51-71), and his conclusions (*ibid* at paras 71-72) that legal issues including extricable legal issues arising in questions of mixed fact and law are assessed on the correctness standard, and questions of fact are assessed on the reasonableness standard. His conclusions are also consistent with the developing standards of review applicable to decisions of other adjudicators in insolvency proceedings (see ***Pacer*** at paras 83-106), and best accomplish the needs of commercial parties in insolvency proceedings identified in ***Pacer*** (at paras 93 and 105). Although a bankruptcy trustee does not conduct traditional adversarial hearings, this alone should not preclude the application of a deferential standard to meet the objectives of maintaining the autonomy and integrity of the process, given the Court's over-riding discretion to permit fresh evidence where necessary to do justice.

[36] However, if I decide to allow fresh evidence, the standard of review of fact findings would change to correctness. The correctness standard in this context would require me to consider whether the evidence persuades me that a better decision is available (***Pacer*** at para 66). The issue of whether to allow fresh evidence is addressed in Part IV below.

[37] The Trustee submitted that the correctness standard applies to the Trustee's ultimate conclusion on each issue (whether the Letters of Undertaking govern the parties' contractual relationship; whether the promissory notes are unenforceable under insolvency laws). These are issues of mixed fact and law, so the Trustee's position would substitute the standard of correctness for the usual standard of review for questions of mixed fact and law (palpable and overriding error unless an extricable error of law is identified). I do not agree with the Trustee's position, but the possible difference in the standard of review for questions of mixed fact and law makes no difference in this case because the errors are apparent on either standard.

TAB 4

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *8640025 Canada Inc. (Re),*
2018 BCCA 93

Date: 20180314
Docket: CA44978

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

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc., Teliphone Data Centers Inc. and Teliphone Canada Corp.

Between:

8640025 Canada Inc., Teliphone Data Centers Inc. and Teliphone Canada Corp.

Respondents
(Petitioners)

And

TNW Networks Corp.; Teliphone Corp.; Cloud-Phone Inc.; ChoiceTel Networks Ltd.; Titan Communications Inc.; 8583498 Canada Ltd.; 9151-4877 Quebec Inc., dba Dialek Telecom; Orion Communications Inc.; Investel Capital Corporation; New York Telecommunication Exchange Inc.. operating as NYTEX; United American Corp. (US Florida), formerly Teliphone USA Corp.; Coastline Broadcasting Ltd.; and Benoit Laliberte

Applicants
(Appellants)

And

Ernest & Young Inc., Court-Appointed Monitor for the Petitioners

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated December 14, 2017 (*8640025 Canada Inc. (Re)*, Vancouver Registry Docket S1610905).

Counsel for the Appellant, Teliphone Corp.:	H.C.R. Clark, Q.C.
Counsel for all other Appellants:	G.F. Gregory
Counsel for the Respondent, Ernst & Young Inc., Court-Appointed Monitor of 8640025 Canada Inc. and Teliphone Data Centres Inc.:	G.G. Plottel S. Nelligan
Counsel for the Respondent, Navigata Communications Ltd.:	K.A. Robertson
Counsel for the Respondent, Bond Mezzanine Fund III Limited Partnership:	R.J. Argue
Place and Date of Hearing:	Vancouver, British Columbia January 30, 2018
Place and Date of Judgment:	Vancouver, British Columbia March 14, 2018

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Fisher

Summary:

CCAA proceedings were taken by two companies (later joined by a third) that carried on a highly-integrated telecommunications business with other companies that were not insolvent and therefore not under CCAA protection. Monitor was appointed and given authority inter alia to pursue a sale of (petitioners') business assets; various disputes arose concerning ownership thereof. BCSC ordered Monitor to carry out a 'derivation' analysis aimed at determining source of funds with which assets had been acquired. Monitor carried out detailed analysis, but in August 2017, this court on an appeal ruled Monitor had lacked authority to sell certain assets.

Similar disputes arose again after Monitor rejected appellants' proof of claim. Leave was granted by this court on the sole issue of what standard of review applied to the Monitor's determination concerning ownership in the course of proof of claim process. Court of Appeal held that the appeal from the Monitor's determination of the proof of claim was a "true" appeal and that the applicable standards of review were those set forth in Housen v. Nikolaisen 2002 SCC 33. This conclusion was seen to be consistent with other Canadian authorities in the insolvency field, the statutory context and the practical realities of a CCAA administration.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This is the second time this court has been asked to intervene in connection with a proposed sale on behalf of the petitioning companies 8640025 Canada Inc. ("864") and a subsidiary thereof, Teliphone Data Centres Inc., of certain business assets to a purchaser ("Distributel") pursuant to s. 36 of the *Companies' Creditors Arrangement Act* ("*CCAA*"). It is also the second time that the proposed sale has foundered on the issue of whether the petitioners in fact own the assets in question such that the assets can be sold in the *CCAA* proceeding. Uncertainty on that point arises because the purchaser wishes to acquire all the assets pertaining to a complex and highly integrated telecommunications business (the "Business") carried on by several corporations comprising the "TNW Group of Companies". The petitioners are part of that Group and are insolvent. They have sought the protection of the *CCAA*. Other members of the Group, appellants in this court, are *not* insolvent and are therefore not part of the *CCAA* proceeding. (We were not told what exactly membership in the 'Group' entails.)

> proofs at a later date in court; and the business now conducted at creditors' meetings by trustees (who are generally supervised by inspectors under the *BIA*) would be largely co-opted to courts of law, with all the attendant expense, delay and formality. [At para. 41]

As I read *Abitibi*, the Court agreed with this conclusion, as did the chambers judge in the case at bar.

[59] With respect to standard of review, we were referred by counsel in *Galaxy* to the standard of review analysis in administrative law and in particular "the pragmatic and functional" approach that was applied to decisions of administrative tribunals at that time. On a consideration of the "contextual" factors mandated by that approach, this court saw:

> … no reason to disagree with the longstanding principle enunciated in *Re McCoubrey* [(1924) 5 C.B.R. 248 (Alta. T.D.)] which requires the application of a "correctness" standard where compliance with a "mandatory provision" (which I would equate to a question of law or statutory compliance) is involved, and the application of a "reasonableness" standard where the determination of a factual matter or an exercise of true discretion is called for. [At para. 39; emphasis added.]

Into the former category, the Court placed a decision of the chair of the creditors' meeting rejecting a proof of claim for voting purposes and the trustee's decision disallowing a proof of claim under ss. 124 and 135(2). In the latter category, the Court placed the trustee's role in valuing contingent and unliquidated claims under s. 135(1.1). (At para. 39.)

[60] Since *Galaxy* was decided, administrative law has changed substantially and the standards of review in ordinary civil appeals have solidified, beginning with *Housen*. Matters of mixed fact and law are now subject to the same standard as purely factual matters. I am doubtful that administrative law considerations should be injected into the analysis of standard of review in this case – except for the fact that the chambers judge appears to have conflated the "palpable and overriding error" standard (adopted at para. 15 of his reasons) with that of "reasonableness" (referred to in para. 13.) Although he purported to agree with *Abitibi*, the *Housen* standard – *not* reasonableness – was held to apply to the findings of fact or mixed fact and law

at issue in that case. (That said, the two are probably not far apart: where a palpable and overriding error as to a factual matter is made, it would be difficult to say the analysis is nonetheless reasonable.)

Application to this Case

[61] What then is the standard of review applicable to the determinations made by the Monitor in this instance as to the saleability (i.e., ownership) of the Disputed Assets in the course of determining the appellants' proofs of claims? As Teliphone Corp. observed in its factum, the *CCAA* does not expressly contemplate property ownership disputes. There appears to be no decision of an appellate court that establishes an appropriate process to determine *ownership* issues, or determines the applicable standard of review. Nevertheless, since the *CCAA* and *BIA* are to be regarded as parts of a larger scheme of insolvency legislation it is useful to consider comparable decision-makers under the *BIA. Galaxy* determined the decision of a trustee concerning compliance with a 'mandatory' provision under the *BIA* – an issue of law – was reviewable on a correctness standard. Subsequent lower court decisions have adopted similar reasoning with respect to decisions of trustees allowing or rejecting proofs of claim under s. 81(2): see *Sran v. Sands & Associates* 2010 BCSC 937 at paras. 46-7; and *Hertz v. 1593658 Ontario Inc.* 2011 SKQB 379 at para. 38.

[62] The process followed by the Monitor in the case at bar was not the creature of any statute but of the Supreme Court's order of September 2017. As the Monitor states in its factum:

> The Disputed Property Claims Process was customized for the purpose of these *CCAA* proceedings. The Monitor was authorized to fulfill the function of the arbiter, as it had developed considerable knowledge of this factually complex *CCAA* matter, was less costly than involving an outside party, and was unable to do so to meet the urgency of the circumstances. An extremely compressed timeline was involved, and no outside party could realistically fulfill the role in the circumstances. [At para. 53.]

As mentioned earlier, the order specified that any Claiming Party dissatisfied with the Monitor's decision could appeal to the court; as well, s. 13 of the *CCAA* provided an appeal with leave.

[63] The Process followed by the Monitor did not entail a formal hearing of witnesses' testimony, but clearly involved the examination of many documents, public and private, and lengthy affidavits of representatives of interested persons. The Monitor asserts that by making it the "arbiter" of the parties' disputes regarding assets, those parties could be taken to have understood that the Monitor would consider the information, documents and evidence it had amassed over the previous nine months, as well as any further evidence that the Claiming Persons were invited to file if they wished. Thus, the Monitor says, there was never any expectation of a "record" in the sense of a formal body of evidence to be considered by it. The Monitor analogizes the process it followed to the "reasonable investigations" normally conducted by trustees in bankruptcy in reviewing claims, citing paras. 39 and 42 of *Re Sran*. It goes on to assert that without a "record", it was "frankly impossible for the *CCAA* judge to consider the Monitor's factual determination on the basis of correctness." (My emphasis.)

[64] I agree that *factual* determinations and those of *mixed fact and law* are not subject to a correctness standard, but should now be subject to a standard of palpable and overriding error. However, in this case, the fact a sale of assets was being proposed made it necessary for the Monitor to determine exactly what assets were property of the petitioners or TNW Networks – a decision likely to involve issues of law not usually made by monitors under the *CCAA*. This court's decision of August 17, 2017 leaves no doubt, for example, that the Monitor here did not have the authority, as a matter of law, to approve the sale of assets belonging to entities other than the Petitioners and TNW Networks. Obviously, this court regarded this principle as one of law, and indeed of jurisdiction.

[65] In my view, these considerations all support the conclusion that the appeal contemplated by the September order was correctly regarded as a "true appeal" (at least in the absence of any determination that a *de novo* hearing was required to avoid a miscarriage of justice); and that the standard of review, on *extricable* questions of *law,* was correctness. To the extent that questions of law – for example the question of whether the assets of a company that is not in *CCAA* proceedings may be sold by reason of the fact that its *parent company* is in *CCAA* proceedings – can be 'extricated', the correctness standard applies. But obviously, not all issues entailed in determining a proof of claim will be extricable issues of law. Indeed, *most* such issues (including the valuation of creditors' claims) will be ones of fact or mixed fact and law, to which the applicable standard will be that of palpable and overriding error.

[66] This result recognizes that although a formal adversarial process did not take place before the Monitor, the Monitor considered a great deal of evidence and *viva voce* testimony as well as taking advantage of his pre-existing familiarity with the factual background of the matters before him. Indeed, this is one of the reasons the Monitor was chosen to conduct the disputed claims process. Given that the Monitor is an officer of the Court, that it is expected to be 'above the fray' and that it is qualified to act as a trustee under the *BIA* and thus has some special expertise, it seems to me that its decisions of fact or mixed fact and law made in the course of ruling on proofs of claim are appropriately assessed on the deferential standard of 'palpable and overriding error'. This conclusion is also consistent with the objectives of efficiency, certainty and cost-saving that underlie *CCAA* proceedings.

TAB 5

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *8640025 Canada Inc. (Re),*
2019 BCCA 473

Date: 20191227
Dockets: CA45854; CA45856

Docket: CA45854

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

And

In the Matter of the *Canada Business Corporations Act*,
R.S.C. 1985, c. C-44, as amended

And

In the Matter of a Plan of Compromise and Arrangement of
8640025 Canada Inc. and Teliphone Data Centres Inc.

Between:

8640025 Canada Inc. and Teliphone Data Centres Inc.

Respondents
(Petitioners)

And

Teliphone Corp.

Appellant
(Respondent)

And

Ernst & Young Inc., Court-Appointed Monitor of the Petitioners

Respondent

- And -

Docket: CA45856

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

And

In the Matter of the *Canada Business Corporations Act*,
R.S.C. 1985, c. C-44, as amended

And

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centres Inc.

Between:

8640025 Canada Inc. and Teliphone Data Centres Inc.

Respondents
(Petitioners)

And

TNW Networks Corp.; Cloud-Phone Inc.; ChoiceTel Networks Ltd.; Titan Communications Inc.; 8583498 Canada Ltd.; 9151-4877 Quebec Inc., dba Dialek Telecom; Orion Communications Inc.; Investel Capital Corporation; New York Telecommunication Exchange Inc., operating as NYTEX; United American Corp. (US Florida), formerly Teliphone USA Corp.; Benoit Laliberté; and Coastline Broadcasting Ltd.

Appellants
(Respondents)

And

Ernst & Young Inc., Court-Appointed Monitor of the Petitioners; Bell Canada; Northwestel Inc.; Bell Mobility Inc.; Bell Aliant Regional Communications Inc.; and Teliphone Corp.

Respondent

Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Fitch
The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated January 7, 2019 (*8640025 Canada Inc. (Re)*, 2019 BCSC 8, Vancouver Docket S1610905).

Counsel for the Appellant in CA45854:	H.C.R. Clark, Q.C.
Counsel for the Appellant in CA45856:	G.F.T. Gregory
Counsel for the Respondent, Ernst & Young Inc., Court-Appointed Monitor of the Petitioners, in CA45854 and CA45856:	G.G. Plottel
Place and Date of Hearing:	Vancouver, British Columbia October 15–16, 2019
Place and Date of Judgment:	Vancouver, British Columbia December 27, 2019

Written Reasons by:
The Honourable Madam Justice Griffin

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Fitch

Summary:

The appellants are companies related to the petitioners subject to this CCAA proceeding. The appellants appeal a decision of a judge dismissing their appeals from the Monitor's dismissal of their claims to ownership of some of the property held by the petitioners. Held: Appeal dismissed. The Monitor's conclusions were based on findings of fact or mixed fact and law, for which there was evidentiary support, and the process was based on prior court orders that were not appealed. The judge did not err in concluding that the appellants had not shown that the Monitor made an error of law or a palpable and overriding error of fact.

Chambers Reasons No. 1, First Appeal of Monitor's Decisions, December 14, 2017

[47] After the Monitor disallowed most of the Appellants' claims, the Monitor brought an application before the Supreme Court seeking approval of the sale of the Disputed Assets that it had determined to be Saleable Assets. The parties also treated this as an appeal in accordance with the Disputed Claims Process settled by the September 15, 2017 order. The matter was heard on December 14, 2017. Because the sale was subject to a deadline of December 28, 2017, the judge issued brief oral reasons. I have referred to these as Chambers Reasons No. 1 even though there were many chambers decisions before this.

[48] The judge found no appealable error on the part of the Monitor in Chambers Reasons No. 1. In doing so, the judge held:

a) the determination of the ownership of assets has been difficult for three reasons:

i. Senior Management of the TNW Group made a decision before the *CCAA* process began to operate the Group as if it was a single company, including depositing all customer billings to a pooled bank account, and recording all transactions in a common general ledger (para. 8);

ii. the Monitor asked for records of various important transactions but in several instances no such documents were forthcoming. It is for the Appellants to demonstrate to the Monitor what they own. The Appellants have not provided readily accessible particulars of the claimed assets (para. 9);

iii. affidavits proffered by the Appellants have in some instances challenged the accuracy of audited financial statements long after they had been prepared (para. 10);

b) the Appellants put their full case before the Monitor by providing numerous affidavits setting out the evidence they view as relevant to demonstrate the validity of their proofs of claim, all of which the Monitor considered *(*para. 14*).* The reliability of the affidavits made by Senior Management of the TNW Group have been called into question and it was proper for the Monitor to consider them with a critical eye *(*para. 11);

c) the determinations of the Monitor about the ownership of assets largely involved questions of fact. The proofs of claim were rejected principally because the management of the TNW Group was unable to provide the Monitor with satisfactory evidence of ownership (para. 13);

d) the Monitor properly made its determinations on the evidence before it; the Monitor did not ignore relevant and probative evidence. The Monitor did not make an overriding and palpable error on factual findings. (para. 15);

e) the Monitor was entitled to rely on documents given to it by Senior Management, including what I will later describe as the organization chart, and did not err by repeatedly referring to those documents when it made its decisions. It also had regard for a large body of other evidence (para. 16);

f) the Monitor was not adversarial on the appeal but made fair and helpful submissions (para. 18).

[49] The judge also approved the Monitor's activities as described in the Monitor's 13th, 14th and 15th Reports, by order made December 14, 2017. These activities included conduct of the Disputed Claims Process. The Monitor emphasizes that this aspect of the judge's order has never been appealed, which is relevant, the Monitor submits, because much of the substance of the complaints on this appeal really have to do with process, which was set by the Derivation Order and Disputed Claims Process and has also never been appealed.

Chambers Reasons No. 2, Reconsideration of Appeal from Monitor, January 7, 2019

[55] The judge case managed the reconsideration hearing to attempt to keep it focused. The judge made an order dated March 29, 2018 that the parties provide written applications or submissions setting out any "alleged extricable legal issues on appeal and/or the Teliphone Appellants' one factual issue on appeal". By order made June 20, 2018, the judge ordered that the re-hearing was intended to present the written arguments as filed and "is to be a consideration of the extricable legal questions in light of the Court of Appeal's Reasons" in Appeal No. 2.

[56] The reconsideration or second chambers appeal from the Monitor's Decisions was a three day hearing.

[57] In Chambers Reasons No. 2 the judge found no fault with the Monitor's rejection of the proofs of claim: no reviewable error of law, nor any overriding and palpable error of fact or of mixed law and fact (para. 57). The judge dismissed the Appellants' appeal of the Monitor's Decisions. This third appeal is taken from this decision of the judge.

[58] The judge in Chambers Reasons No. 2 set out the background and the preceding appellate decisions. In identifying the issues he relied upon the submissions of the parties.

[59] The judge's analysis of Teliphone's claims largely relied upon accepting the submissions of the Monitor, which he excerpted and quoted from extensively, and his analysis of the other Claiming Parties' claims was brief.

[60] The judge concluded:

> [57] On this rehearing of the appeal from the monitor's rejection of the "proofs of claim" of the appellants, after applying the standard of review articulated by the Court of Appeal, I conclude that I have not been presented with any argument that persuades me to change the conclusion I reached in my reasons of December 14, 2017 on the first chambers appeal namely, that the monitor made no reviewable error of law, nor made any overriding and palpable error when addressing questions of fact or of mixed law and fact. On the contrary, I find the monitor approached to its formidable task with

scrupulous care and without reviewable error. I agree with the monitor's submissions.

[58] In particular, I have no basis on which to resile from my findings of December 14, 2017, that:

a) the monitor was entitled to rely on the Boale Wood organizational chart given to it by management of the TNW group. I repeat my remarks from my reasons dismissing the first appeal:

> ... The management of the petitioners provided the so-called Boale Wood organizational chart and it was later discussed with that management. The appellants criticize the Monitor for its conduct when making its deliberations, which has been described as doggedly adhering to the organizational chart throughout. In my opinion, the Monitor was entitled to rely on a document given to it by management. It did not err by repeatedly referring to it when it made its decisions.

b) management frequently failed to provide the monitor with documents evidencing important transactions; and

c) management of the TNW Group in many instances was unable or unwilling to provide evidence to the monitor demonstrating ownership of assets.

[59] Despite the monitor's request to the appellants to provide proper proofs of claim, they were not forthcoming. In my opinion, the appellants are the authors of their own difficulties. The TNW Group has conducted its affairs in a manner that, throughout these *CCAA* proceedings, has obscured outside scrutiny. The monitor has thus been obliged to engage in an elaborate forensic exercise quite unsuited to a *CCAA* proceeding, which is intended to be reasonably expeditious. Nevertheless that forensic exercise has been conducted and I find no fault with it. Nothing short of an oral hearing with cross-examination on numerous elaborate affidavits, which cross-examination followed disclosure of documents, could offer any prospect of a different outcome from that arrived at by the monitor. I am not satisfied that even if that were done the outcome would be different. Furthermore, no party recommends what would amount to a trial.

[61] In the result, the judge dismissed the Appellants' appeals from the Monitor's Decisions.

Issues

[62] The Appellants' various interests on this appeal arise from their claims to own some of the Disputed Assets determined by the Monitor to be Saleable Assets. The focus on this appeal is whether the judge erred in failing to find that the Monitor made an extricable error of law in the Monitor's Decisions.

TAB 6

COURT OF APPEAL FOR ONTARIO

CITATION: Urbancorp Toronto Management Inc. (Re), 2019 ONCA 757
DATE: 20190927
DOCKET: C65891

van Rensburg, Hourigan and Huscroft JJ.A.

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF a plan of compromise or arrangement of Urbancorp Toronto Management Inc., Urbancorp (St. Clair Village) Inc., Urbancorp (Patricia) Inc., Urbancorp (Mallow) Inc., Urbancorp (Lawrence) Inc., Urbancorp Downsview Park Development Inc., Urbancorp (952 Queen West) Inc., King Residential Inc., Urbancorp 60 St. Clair Inc., High Res. Inc., Bridge on King Inc. (Collectively the "Applicants") and the affiliated entities listed in Schedule "A" hereto

Matthew Milne-Smith and Chantelle Cseh, for the appellant, KSV Kofman Inc., in its capacity as Monitor

Kevin D. Sherkin and Jeremy Sacks, for the respondent, Speedy Electrical Contractors Ltd.

Neil Rabinovitch, for Guy Gissin, the Israeli court-appointed Functionary and Foreign Representative of Urbancorp Inc.

Heard: March 28, 2019

On appeal from the order of Justice Frederick L. Myers of the Superior Court of Justice dated May 11, 2018, with reasons reported at 2018 ONSC 2965, 60 C.B.R. (6th) 241.

van Rensburg J.A.:

OVERVIEW

[1] King Residential Inc. ("KRI") is part of the Urbancorp group of companies, which are presently involved in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). Speedy Electrical Contractors Ltd. ("Speedy") filed a claim against KRI pursuant to a secured guarantee given by KRI to Speedy for debts owed by Edge on Triangle Park Inc. ("Edge") and Alan Saskin. KRI's monitor, KSV Kofman Inc. (the "Monitor") argued that Speedy's claim (which was in the amount of $2,323,638.54) should be disallowed, among other things, because the secured guarantee was a transfer at undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") and a fraudulent conveyance under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "FCA"). The motion judge disagreed and dismissed the Monitor's motion for an order disallowing Speedy's claim. The Monitor appeals, with leave.

[2] The Monitor challenges the motion judge's finding, in relation to s. 96(1)(b) of the BIA, that the secured guarantee was between arm's length parties. The Monitor says that the motion judge erred in law in focussing on the relationship between KRI and Speedy, rather than the relationships among KRI, Edge and Mr. Saskin. The Monitor also contends that there was reversible error in the motion judge's conclusion that the fraudulent intent necessary under s. 96(1)(a) of the BIA and s. 2 of the FCA was not proved.

are other insolvency proceedings involving other Urbancorp entities, including Edge.

[18] On September 15, 2016, Newbould J. made an order establishing a procedure to identify and quantify claims against the CCAA-protected entities and their current and former directors and officers. Speedy filed a proof of claim, dated October 19, 2016, against KRI in the amount of $2,323,638.54 pursuant to its secured guarantee. On November 11, 2016, the Monitor disallowed the claim on the basis that the granting of the guarantee could be voidable as a transfer at undervalue or as a fraudulent conveyance or preference. On November 25, 2016, Speedy filed a notice disputing the disallowance.

[19] After some delay, the Monitor brought a motion on March 7, 2018, for an order declaring that Speedy's claim be disallowed in full. Guy Gissin, in his capacity as the court-appointed functionary of UCI in proceedings in Israel (the "Israeli Functionary") participated in the court below, and was represented in court in this appeal.[1] The Israeli Functionary was appointed in 2016 pursuant to an application under Israel's insolvency regime. The Israeli Functionary supported the Monitor on its motions to disallow Speedy's claim. The Israeli Functionary also sued Mr. Saskin and others in Israel, alleging, among other

[1] The Israeli Functionary did not file a factum in this court, although counsel was present for the argument of the appeal.

judge considered only the relationship between Speedy and KRI, instead of the relationship between KRI and the other parties to the DEA, namely Edge and Mr. Saskin. The Monitor says that, because KRI, Edge and Mr. Saskin were related parties, and clearly non-arm's length, the entire DEA was void as against the Monitor, including the secured guarantee that was provided to Speedy as a term of the DEA. According to the Monitor, the motion judge failed to make any finding on this central issue. It is unclear whether any such argument was advanced before the motion judge.

[38] The Monitor submits that, in contrast with s. 95 of the BIA, which deals with fraudulent preferences and requires a "transfer" from an insolvent debtor to a "creditor", s. 96 does not explicitly use the word "creditor" and is therefore intended to encompass a broader set of relationships and harm. Edge and Mr. Saskin, in addition to Speedy, benefited from the DEA, and since Edge and KRI are both controlled by Mr. Saskin, these parties are related and presumed not to be operating at arm's length pursuant to the BIA. As such, the "transfer" was between non-arm's length parties, and can be voided without any determination of the debtor's fraudulent intent or insolvency under s. 96(1)(b)(i) since it occurred less than one year before the date of the initial bankruptcy event. The Monitor argues that this interpretation is consistent with the objective of s. 96 which is to provide a remedy for asset-stripping by insolvent debtors.

TAB 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *8640025 Canada Inc. (Re),*
2019 BCSC 8

Date: 20190107
Docket: S1610905
Registry: Vancouver

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

and

In the Matter of the *Canada Business Corporations Act*,
R.S.C. 1985, c. C-44, as Amended

and

In the Matter of a Plan of Compromise and Arrangement of
8640025 Canada Inc. and Teliphone Data Centers Inc.

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for Teliphone Corp.:	H.C.R. Clark, Q.C.
Counsel for TNW Networks Corp., Cloud-Phone Inc. Choicetel Networks Ltd., Titan Communications Inc., 8583498 Canada Ltd., 9151-4877 Quebec Inc. dba Dialek Telecom, Orion Communications Inc. Investel Capital Corporation, New York Telecommunication Exchange Inc., operating as NYTEX, United American Corp. (US Florida) formerly Teliphone USA corp., Benoit Laliberte, and Coastline Broadcasting Ltd. :	G.F. Gregory
Counsel for the Monitor, Ernst & Young Inc.:	G. Plottel S. Nelligan

Counsel for Bell Canada, Northwestel Inc., Bell Mobility Inc., Bell Aliant Regional Communications Inc.:	L. Hiebert
Representative for 8640025 Canada Inc. and Teliphone Data Centres Inc. appearing in person:	S. Panesar
Place and Date of Trial/Hearing:	Vancouver, B.C. August 27 – 29, 2018
Place and Date of Judgment:	Vancouver, B.C. January 7, 2019

Table of Contents

Introduction

[1] Ernst & Young Inc. is the court appointed monitor in these proceedings, brought pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. It asserts that in furtherance of its obligations as monitor it has jurisdiction to sell certain assets of companies within what is known as the TNW Group. 8640025 Canada Inc. ("864") and Teliphone Data Centers Inc. (collectively, the "petitioners"), who are both part of the TNW Group, accept that the monitor has jurisdiction over their assets, but other companies within the TNW Group, who are the clients of Mr. Clark and Mr. Gregory (which companies I will refer to as "the appellants"), dispute their assets are available for sale by the monitor.

[2] Following an order of this Court, the appellants delivered what they have described as "proofs of claim" to the monitor. They were rejected. The rejection was appealed to this Court, which upheld the monitor's decision. The Court of Appeal granted leave to appeal on the question of the appropriate standard of review that ought to have been applied by this Court. The appeal was allowed with the Court of Appeal giving directions on the standard of review. The matter was remitted to this Court to rehear the appeal from the decision of the monitor applying the standard of review mandated by the Court of Appeal. These reasons address the rehearing of the appeal.

[3] As is apparent these *CCAA* proceedings have been lengthy, contentious, and complex. There is an extensive application record which I had read. I have had the benefit of oral and written submissions. The written submissions are detailed and I have reread them to prepare these reasons. I have found the submissions of the monitor to be persuasive.

The Background

[4] On November 18, 2016, the petitioners filed a notice of intention to make a proposal pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*],

> 48. That is not so, Teliphone Corp. executed a General Security Agreement ("GSA"), further to a guarantee of an existing indebtedness in 2012. That GSA is attached as Exhibit B to the Seventh Report of the Monitor.
>
> 49. With respect to that indebtedness, a Settlement and Forbearance Agreement was entered into in April, 2014, an executed copy of which is now produced and shown to me and marked as Exhibit "H" to this my affidavit. I understand the original was executed.
>
> 50. In December 2013, Teliphone Corp. sold its shares in TNW to Investel, to the knowledge of Bell.
>
> 51. In July of 2014, TNW negotiated a loan with the Bank of Nova Scotia. As part of that financing, TNW was required to pay $907,568.18, which was a sum sufficient to discharge the Legacy debt secured by the security in favour of Bell. Now produced and shown to me and marked as Exhibit "I" to this my affidavit is an Irrevocable Direction to Pay in that regard.
>
> 52. As a consequence, there was a Subordination Agreement entered into between Bell and the Bank of Nova Scotia, but that only extended to security over the Petitioner, as Teliphone Corp.'s indebtedness and obligation was discharged. Now produced and shown to me and marked as Exhibit "J" to this my affidavit is a copy of that priority agreement.

[43] Teliphone Corp. concludes its written submissions by observing that "a detailed analysis of each of the monitor's decision[s] as it relates to particular assets would consume far too much of the court's time and, in essence, make this application unmanageable. On the last appeal, over eight days of court time was consumed". Teliphone Corp. submits that, if this Court addresses "the five significant errors raised by it", the matter should then be remitted to the monitor for further determination guided by this Court's reasons.

The Monitor's Submissions

[44] In its response to the submissions of Teliphone Corp. the monitor sets out the procedural background and then addresses the standard of review in a manner consistent with the judgment of the Court of Appeal. At paras. 46 to 48 the monitor submits:

> 46 Affleck J. has already assessed the Monitor's determinations on the basis of palpable and overriding error, and determined that such errors did not occur. To comply with the Court of Appeal's reasons, it is only now

necessary to determine if there were any extricable questions of law to which the correctness standard must be applied.

47. As such, the Applicants' application does not engage a re-hearing or hearing de-novo of the appeal from the disallowance of the Proof of Claim which was heard in November - December 2017, since findings on the various questions of fact and mixed fact of law have already been made at the standard found by the Court of Appeal to apply (palpable and overriding error). Instead, it only requires a reconsideration of the specific extricable questions of law.

48. Extricable questions of law, which are reviewable for correctness, include “the application of an incorrect legal principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor".

Heritage Capital Corp. v. Equitable Trust Co., 2016 SCC 19 at para. 22, citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC at para. 53.

[45] The monitor then refers to each of the five issues on which Teliphone Corp. asks this Court to give directions. The monitor’s submissions on each of the five issues are extensive and detailed. There is no satisfactory means to condense the submissions while also doing them justice. I will quote them in full:

Questions on Review

49. Teliphone has set out five issues or findings where it asserts the Monitor made errors:

(a) Whether a particular company was a subsidiary of the Petitioners on January 1, 2016 is to be determined by reference to the Organizational Chart;

(b) whether in January of 2013, Teliphone transferred all of its assets to the Petitioners;

(c) where the purchaser paid for various assets and for all servicing costs from its bank account, for the purposes of the Derivation Analysis, those assets were derived from the assets of the Petitioners;

(d) that the "Legacy Companies" had no assets at all having at some time in some fashion transferred all their assets to the Petitioners; and

(e) that Teliphone and various others are subject to security in favour of the creditors of the Petitioners.

50. These issues will be responded to in the order in which they are presented by Teliphone.

which it set out its thinking and its views. I am not persuaded the argument of the claiming parties, that the monitor improperly relied on new arguments, has any merit.

b) "Inadequate reasons"

[50] The role of the monitor ought not to be analogized to that of a judge who is obliged to give reasons for judgment. The vesting order, which set out the proof of claim process in para. 12 provided that if agreement was not reached, or a determination made of a saleable asset on or before October 2, 2017, "the Claiming Person shall deliver to the monitor no later than October 13, 2017 a proof of claim, verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the Disputed Asset to be identified. For clarity, such proof of claim may include more than one Disputed Asset". The monitor, within 15 days of receipt of such proof of claim, was either to admit the claim or not.

[51] Nothing in the September 15 vesting order required the monitor to provide an explanation resembling reasons for judgment for either accepting or rejecting a proof of claim. Nevertheless, in a 13-page letter of October 4, 2017, the monitor gave an extensive explanation of the approach it had taken to the claims that had been advanced. In an 11-page letter of October 16, 2017, the monitor gave further explanations of its approach. I quote from part of that letter:

> No reliable evidence of ownership of the Remaining Disputed Assets has been provided in the Proof of Claim to substantiate the claims of ownership by the Subsidiaries as Claiming Persons. While there should be straightforward primary evidence, in the form of documents, to establish ownership of, for example, a lease, vehicles or licenses, no such primary evidence has been provided in the Proof of Claim. The lack of such primary evidence supports the original and confirmed advice provided by the Shareholder Representatives that the Subsidiaries are shell companies without assets, and that the Petitioners, who actually used the assets in the Business, beneficially own such assets.

[52] The appellants submit the share records show the monitor's statement is wrong.

TAB 8

SCHEDULE F

NOTICE OF REVISION OR DISALLOWANCE

With respect to Claims against 957855 Alberta Ltd. (formerly NewsWest Inc.), Rosebud Creek Financial Corp., (together, the "Applicants") and Metro 360 General Partnership (together with the Applicants, the "CCAA Entities"), and/or D&O Claims against the Directors and/or Officers of the CCAA Entities

Claims Reference Number: _____

To: _____
(the "**Creditor**")

Capitalized terms not defined in this Notice of Revision or Disallowance have the meaning ascribed to them in the Order of the Ontario Superior Court of Justice (Commercial List) dated September 16, 2020 (the "**Claims Procedure Order**") granted in the Applicants' proceedings under the *Companies' Creditors Arrangement Act*.

Pursuant to the Claims Procedure Order, the Monitor gives you notice that it has reviewed your Notice of Dispute, Proof of Claim or D&O Proof of Claim and has revised or disallowed all or part of your purported Claim set out therein for voting and/or distribution purposes. Subject to further dispute by you in accordance with the Claims Procedure Order, your Claim will be as follows:

	Amount as submitted	**Applicable Debtor**	**Amount allowed by Monitor for voting purposes:**	**Amount allowed by Monitor for distribution purposes:**
A. Unsecured	$		$	$
B. Secured	$		$	$
C. D&O Claim	$		$	$
D. Total Claim	$		$	$

Reasons for Revision or Disallowance:

_____

_____

_____

_____

_____

SERVICE OF NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE

If you intend to dispute your Claim specified in this Notice of Revision or Disallowance, you must, no later than 5:00 p.m. (Toronto time) on the day that is twenty-one (21) calendar days after this Notice of Revision or Disallowance is deemed to have been received by you (in accordance with the Claims Procedure Order), deliver a Notice of Dispute of Revision or Disallowance to the Monitor by ordinary prepaid mail, registered mail, courier, personal delivery, facsimile transmission or email to the following address:

KSV Restructuring Inc., Court-Appointed CCAA Monitor of
957855 Alberta Ltd. (formerly NewsWest Inc.) and
Rosebud Creek Financial Corp., in respect of
Metro 360 General Partnership
150 King Street West, Suite 2308
Toronto, Ontario M5H 1J9

Attention: Murtaza Tallat
Telephone: (416) 932-6031
E-mail: mtallat@ksvadvisory.com

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt thereof by the Monitor during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

The form of Notice of Dispute of Revision or Disallowance is enclosed and can also be accessed on the Monitor's Website at: https://www.ksvadisory.com/insolvency-cases/case/metro360.

IF YOU FAIL TO FILE A NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU FOR DISTRIBUTION PURPOSES.

DATED at _____ this _____ day of _____, 2020.

KSV RESTRUCTURING INC., solely in its capacity as Court-Appointed CCAA Monitor of 957855 Alberta Ltd. (formerly NewsWest Inc.) and Rosebud Creek Financial Corp., in respect of Metro 360 General Partnership, and not in its personal or corporate capacity

Per: _____

For more information see https://www.ksvadisory.com/insolvency-cases/case/metro360, or contact the Monitor by telephone at (416) 932-6031.

TAB 9

SCHEDULE “D”

NOTICE OF REVISION OR DISALLOWANCE

NOTICE OF REVISION OR DISALLOWANCE
of CANNTRUST HOLDINGS INC., CANNTRUST INC.,
CTI HOLDINGS (OSOYOOS) INC., and ELMCLIFFE INVESTMENTS INC.
(hereinafter referred to as the "**Applicants**" or individually as the "**Applicant**") or
THEIR FORMER and CURRENT DIRECTORS and OFFICERS (hereinafter referred to as the "**Directors**" and "**Officers**")

To: [Name of Claimant] **Reference #: [ID]**

Re: Proof of Claim filed by you against [Applicant(s) and/or Director(s) or Officer(s)]

Pursuant to the order of the Honourable Mr. Justice Hainey dated May 8, 2020, Ernst & Young Inc. in its capacity as Monitor of the Applicants, hereby gives you notice that the Applicants have reviewed your Proof of Claim and has revised or disallowed all or part of your Claim as follows:

Type of Claim	Amount as Submitted ($CDN)	Amount allowed ($CDN)	Amount allowed as secured ($CDN)	Amount allowed as unsecured ($CDN)
Pre-Filing Claim				
D&O Claim				
Restructuring Claim				

Reason for the Revision or Disallowance:

Next Steps:

If you do not agree with this Notice of Revision or Disallowance please take notice of the following:

1. If you intend to dispute a Notice of Revision or Disallowance, you must, by no later than **5:00 p.m. (Eastern Time) on the day which is fourteen (14) days after the date of this Notice of Revision or Disallowance**, deliver a Notice of Dispute, in the form attached hereto, by e-mail (in PDF format) (*preferred*), registered mail, personal service, facsimile or courier to the address indicated herein. The form of Notice of Dispute is enclosed.

2. If you do not deliver a Notice of Dispute in the time specified, the value of your Pre-Filing Claim, D&O Claim or Restructuring Claim, as the case may be, shall be determined to be as set out in this Notice of Revision or Disallowance.

Address and numbers for service of Notice of Dispute:

Ernst & Young Inc.
Court-appointed Monitor of CannTrust Inc. & others
E-mail: CannTrust.Monitor@ca.ey.com

Fax: 416-943-3300
Address: 100 Adelaide Street, West, PO Box 1, Toronto ON M5H 0B3

If you have any questions you can contact us using the information above or call us at 1-855-224-0800 or 416-943-2091.

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

Dated at Toronto this [DATE].

ERNST & YOUNG INC.

In its capacity as Court-Appointed Monitor of CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC., and ELMCLIFFE INVESTMENTS INC.

Per: _____

Name:
Encl.

TAB 10

Schedule "D"

NOTICE OF REVISION OR DISALLOWANCE

Claim Reference Number: _____

Name of Applicants: Delphi Energy Corp., Delphi Energy (Alberta) Limited and/or Delphi Energy Partnership

TO: _____
(Name of Creditor)

Defined terms not defined in this Notice of Revision or Disallowance have the meaning ascribed in the Order of the Court of Queen's Bench of Alberta, dated May 22, 2020 (the "**Claims Process Order**"). All dollar values contained herein are in Canadian dollars unless otherwise noted.

Pursuant to the Claims Process Order, PricewaterhouseCoopers Inc., in its capacity as Court-appointed Monitor of the Applicants, hereby gives you notice that it has reviewed your Proof of Claim in conjunction with the Applicants and has revised or disallowed your Claim. Subject to further dispute by you in accordance with the Claims Process Order, your Claim will be allowed as follows:

Amount Allowed by Monitor:

	Proof of Claim Amount	**Voting**	**Distribution**
Unsecured Claim	$ _____	$ _____	$ _____
Secured Claim	$ _____	$ _____	$ _____
Equity Claim	$ _____	$ _____	$ _____
Director and Officer Claim	$ _____	$ _____	$ _____

REASON(S) FOR THE REVISION OR DISALLOWANCE:

_____
_____
_____
_____
_____

SERVICE OF DISPUTE NOTICES

If you intend to dispute this Notice of Revision or Disallowance, you must within **ten (10) days from the date you received (or are deemed to have received) this Notice of Revision or Disallowance** deliver to the Monitor and Applicants a Dispute Notice (in the form enclosed) either by prepaid registered mail, personal delivery, courier, facsimile, or electronic mail to the address below.

To the Monitor:

PricewaterhouseCoopers Inc.
In its capacity as the court appointed Monitor of Delphi
Attention: Lynda Huber

Suite 3100, 111 5th Avenue SW
Calgary, AB T2P 5L3
Email: ca_delphi_ccaa_claims@pwc.com
Phone: 403.509.7309

To the Applicants:

Osler, Hoskin & Harcourt LLP
Attention: Emily Paplawski

Suite 2500, 450 1st Street SW
Calgary, AB T2P 5H1
Email: epaplawski@osler.com
Phone: 403-260-7071
Facsimile: 403-260-7024

IF YOU FAIL TO FILE YOUR DISPUTE NOTICE WITHIN TEN (10) DAYS OF THE DATE YOU RECEIVED (OR ARE DEEMED TO HAVE RECEIVED) THIS NOTICE OF REVISION OR DISALLOWANCE, THE VALUE OF YOUR CLAIM WILL BE DEEMED TO BE ACCEPTED AS FINAL AND BINDING AS SET OUT IN THIS NOTICE OF REVISION OR DISALLOWANCE.

DATED this _____ day of _____, 2020.

TAB 11

NOTICE OF REVISION OR DISALLOWANCE (CLAIMS PROCEDURE)

Claim Reference Number: _____

Name of Applicants: Strategic Oil & Gas Ltd. and Strategic Transmission Ltd.

TO: _____
(Name of Creditor)

Defined terms not defined in this Notice of Revision or Disallowance have the meaning ascribed in the Order of the Court of Queen's Bench of Alberta, dated **[Insert Date of Order]** (the "**Claims Procedure Order**"). All dollar values contained herein are in Canadian dollars unless otherwise noted.

Pursuant to the Claims Procedure Order, KPMG Inc., in its capacity as Court-appointed Monitor of the Applicants, hereby gives you notice that it has reviewed your Proof of Claim in conjunction with the Applicants and has revised or disallowed your Claim. Subject to further dispute by you in accordance with the Claims Procedure Order, your Claim will be allowed as follows:

Amount Allowed by Monitor:

	Proof of Claim Amount	**Voting**	**Distribution**
Applicants Unsecured Claim	$ _____	$_____	$_____
Applicants Secured Claim	$ _____	$_____	$_____
Equity Claim	$ _____	$_____	$_____
Directors and Officers Claim	$ _____	$_____	$_____

REASON(S) FOR THE REVISION OR DISALLOWANCE:

_____

_____

_____

_____

_____

SERVICE OF DISPUTE NOTICES

If you intend to dispute this Notice of Revision or Disallowance, you must within **fourteen (14) days from the date you received (or are deemed to have received) this Notice of Revision or Disallowance** deliver to the Monitor a Dispute Notice (in the form enclosed) either by prepaid registered mail, personal delivery, courier, facsimile, or electronic mail to the address below.

KPMG Inc., the Court-appointed Monitor of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd.

By Mail/Courier/Email/Facsimile:

KPMG Inc.
Suite 3100, 205 – 5th Ave SW
Calgary, AB T2P 4B9

Attention:	Cameron Browning
Email:	cbrowning@kpmg.ca
Phone:	(403) 691-8413
Fax:	(403) 691-8009

IF YOU FAIL TO FILE YOUR DISPUTE NOTICE WITHIN FOURTEEN (14) DAYS OF THE DATE YOU RECEIVED (OR ARE DEEMED TO HAVE RECEIVED) THIS NOTICE OF REVISION OR DISALLOWANCE, THE VALUE OF YOUR CLAIM WILL BE DEEMED TO BE ACCEPTED AS FINAL AND BINDING AS SET OUT IN THIS NOTICE OF REVISION OR DISALLOWANCE.

DATED this _____ day of _____, 2010.

TAB 12

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *All Canadian Investment Corporation (Re),* 2020 BCSC 855

Date: 20200608
Docket: S1710393
Registry: Vancouver

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

And

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

And

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 Compromise and Arrangement of All Canadian Investment Corporation

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Petitioner:	J.D. West
Counsel for Parkland Funding Ltd.:	S. Kelly W. Thiessen
Counsel for the Monitor:	D. Hyndman
Place and Dates of Hearing:	Vancouver, B.C. April 21, 2020 May 19 & 21, 2020
Place and Date of Judgment:	Vancouver, B.C. June 8, 2020

Introduction

[1] In this insolvency proceeding, the Monitor disallowed Parkland Funding Ltd.'s claim as a creditor of the debtor, All Canadian Investment Corporation ("ACIC"). Parkland Funding Ltd. ("Parkland") appeals the Monitor's decision, asserting that the Monitor erred in rejecting its claim as a creditor of ACIC in the amount of $200,000. In its notice of application, Parkland seeks a declaration that it is a creditor of ACIC for the purpose of this proceeding and is entitled to all rights and privileges as a creditor of ACIC.

[2] Prior to its insolvency, ACIC had carried on business as a registered mortgage investment corporation since 1998. It is incorporated pursuant to the *Business Corporations Act*, S.B.C. 2002, c. 57. ACIC's business was to loan funds to third party owners of commercial and residential property, secured by mortgages, from a pool of funds it received from time to time from individuals and corporations who invested in ACIC by purchasing preferred shares.

[3] Coincidentally, Parkland also operated as a mortgage investment company.

[4] ACIC commenced this insolvency proceeding pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] on November 8, 2017. It soon became clear that the proceeding was in effect a liquidating *CCAA*. The Monitor continues in his efforts to recover on the loans made by ACIC, for the benefit of ACIC's creditors and equity claimants. All stakeholders in ACIC's insolvency continue to be better served through a liquidating *CCAA* as opposed to a proceeding brought under the *Bankruptcy and Insolvency Act*, R.S.C.1985, c. B-3.

[5] Further background facts concerning the insolvency may be found at reasons for judgment indexed at 2019 BCSC 1488.

[6] Except for Parkland's claim, the claims of all creditors have been determined by the Monitor. Once Parkland's appeal is determined, the Monitor will take a proposed plan of arrangement to be voted upon by the creditors.

(d) the Monitor erred in law or in mixed fact and law or in fact by failing to recognize the settlement agreement reached on February 12, 2016 as a valid and enforceable contract; and

(d) the Monitor erred when, in the alternative, it treated the subsequent agreement made in September 2016 as "superseding" its prior settlement agreement with ACIC and concluded it extinguished any claim Parkland may have had against ACIC.

[18] Parkland acknowledges that it bears the onus to demonstrate the Monitor committed an error of law based on the standard of review of correctness, or an error of mixed fact or of fact based on the standard of review of palpable and overriding error.

[19] Parkland also raised the issue of reasonableness as a live issue on this appeal. For errors of fact or mixed fact and law, it submits the law requires me to determine whether the Monitor made any palpable and overriding error(s) when I assess the reasonableness of the Monitor's decision.

[20] Parkland referred to paras. 103-107 of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, where the Court said a reasonable decision is one based on internally coherent reasoning and justified in light of the legal and factual constraints that bear on the decision. However, its submissions regarding reasonableness appear to confuse a true appeal of the Monitor's decision with a judicial review. See *8640025 Canada Inc. (Re),* 2018 BCCA 93 at paras. 60-66. However, the Monitor also referred to *Galaxy Sports Inc*. *(Re)*, 2004 BCCA 284, which at para. 39 raises the issue of reasonableness in the insolvency context.

[21] In the event the reasons in *Vavilov* mean that considerations arising on a judicial review are relevant to this appeal, it is also important to keep in mind the Court's statement that a reviewing court must also consider the governing statutory scheme and the common law: paras. 103-114. Regardless, I would consider them on this true appeal in any event.

[33] In the absence of any other evidence, I construe the remarks of Parkland's counsel in para. 31 above concerning the collapse of an earlier settlement to evince his thinking, in September 2016, about a prior agreement. It does not, however, affect my determination that no mutual intention to create contractual relations - *consensus ad idem* - was reached earlier in February.

[34] In this exchange of correspondence, mutuality of intention to create contractual relations in September 2016 is clear.

[35] I wish to comment on the Monitor's submission that there was no consideration for any purported settlement agreement in February 2016, or if there was, it was improvident.

[36] As noted at the outset, I have found that Parkland ceased to be a preferred shareholder of ACIC in 2013. It was not a shareholder in February 2016, such that its claim against ACIC for a redemption of ACIC shares lacked merit. Nonetheless, in my opinion, payment in exchange for a dismissal or discontinuance of a meritless lawsuit may constitute valuable consideration. A party may choose to contribute money to a settlement in exchange for the dismissal of a meritless action in order to secure finality and to save expense or on its other resources.

[37] The Monitor also submits an agreement which requires ACIC to be bound, jointly and severally, to pay $200,000 on account of a share redemption allegedly owed only by AFDI is improvident. I agree that the facts as known at this stage appropriately raise the question and would warrant an enquiry if I had found *consensus ad idem*. That said, there may be circumstances, such as the internal relationship between ACIC and AFDI, which might answer any concerns regarding consideration. In my opinion, it would be inappropriate to determine the issue at this juncture in the absence of additional facts.

TAB 13

Province of Alberta

BUILDERS' LIEN ACT

Revised Statutes of Alberta 2000
Chapter B-7

Current as of July 1, 2012

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Builders' Lien Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Builders' Lien Act		
Builders' Lien Forms	51/2002	*108/2004, 217/2009, 164/2010, 227/2011, 130/2012, 124/2015, 114/2020*

Time for registration

41(1) A lien for materials may be registered at any time within the period commencing when the lien arises and

(a) subject to clause (b), terminating 45 days from the day that the last of the materials is furnished or the contract to furnish the materials is abandoned, or

(b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day that the last of the materials is furnished or the contract to furnish the materials is abandoned.

(2) A lien for the performance of services may be registered at any time within the period commencing when the lien arises and

(a) subject to clause (b), terminating 45 days from the day that the performance of the services is completed or the contract to provide the services is abandoned, or

(b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day that the performance of the services is completed or the contract to provide the services is abandoned.

(3) A lien for wages may be registered at any time within the period commencing when the lien arises and

(a) subject to clause (b), terminating 45 days from the day that the work for which the wages are claimed is completed or abandoned, or

(b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day that the work for which the wages are claimed is completed or abandoned.

(4) In cases not referred to in subsections (1) to (3), a lien in favour of a contractor or subcontractor may be registered at any time within the period commencing when the lien arises and

(a) subject to clause (b), terminating 45 days from the day the contract or subcontract, as the case may be, is completed or abandoned, or

(b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day the contract or subcontract, as the case may be, is completed or abandoned.

TAB 14

In the Court of Appeal of Alberta

Citation: Maple Reinders Inc. v. W. Dalton Energy Corp., 2007 ABCA 247

Date: 20070725
Docket: 0601-0144-AC
Registry: Calgary

Between:

Maple Reinders Inc.

Respondent (Applicant)

- and -

W. Dalton Energy Corp.

Appellant (Respondent)

- and -

Eagle Sheet Metal Inc., Wolseley Canada Inc., Allied Projects Ltd., Westglas Insulation Ltd., Crane Canada Inc., Johnson Controls Inc., Emco Limited and E.H. Price Limited

Not Parties to the Appeal (Respondents)

The Court:

The Honourable Madam Justice Ellen Picard
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Peter Martin

Reasons for Judgment Reserved of
The Honourable Madam Justice Hunt
Concurred in by The Honourable Madam Justice Picard
and Concurred in by The Honourable Mr. Justice Martin

Appeal from the whole of the Order by
The Honourable Mr. Justice B.E. Mahoney
Dated the 17th day of February, 2006
(2006 ABQB 150, Docket: 0201-21214)

Reasons for Judgment Reserved of
The Honourable Madam Justice Hunt

Introduction

[1] This appeal raises issues about the operation of the *Builders' Lien Act*, R.S.A. 2000, c. B-7 ("*BLA*"). Specifically, it concerns whether an owner can appoint an agent to apply to establish a lien fund, and the relationship between the lien fund and a previously-posted security bond. It also puts in issue the correct amount of the lien fund in this case, and whether the remaining lienholder's entitlement is its *pro rata* share of the fund when considered with those of lienholders who previously settled, or the full amount of its claim.

[2] The appeal is dismissed.

Facts

[3] The Calgary Health Region ("CHR") leased property from Canadian Property Holdings (Alberta) Inc. in order to construct a Pharmacy Central Production Facility ("PCPF"). In April 2002, the CHR entered into a contract with Maple Reinders Inc. ("Maple"), a general contractor, for the construction of the PCPF. The CHR is the "owner" of the project, as defined in section 1(j) of the *BLA*.

[4] The same month, Maple entered into a subcontract with Eagle Sheet Metal Inc. ("Eagle") for mechanical work. Eagle entered into eight sub-subcontracts. One of the sub-subcontractors, the appellant W. Dalton Energy Corp. ("Dalton"), agreed to supply and install a humidification system for the sum of $66,340. The other sub-subcontractors are not parties to this appeal, having previously settled their claims as more fully described below.

[5] Dalton supplied the labour, materials and equipment required. It received a payment from Eagle of $40,000, leaving $26,340 outstanding. Maple posted a certificate of substantial completion on the project in September 2002. In November 2002, when Eagle failed to complete its subcontract, Maple terminated the subcontract. Eagle subsequently went out of business and has no assets.

[6] Throughout November and December of 2002, the eight sub-subcontractors registered builders' liens against the PCPF title totalling $198,376. Dalton's lien was for $26,340.

[7] On December 20, 2002, following Maple's application, a Master ordered that Maple could pay security into court pursuant to section 48(1) of the *BLA* and that, upon such payment, the liens would be discharged. Maple posted $228,132.40, which included the total of the eight lien claims plus 15% for costs.

> (2) Money paid into court or any security given under subsection (1)
>
> (a) stands in place of the land,
>
> (b) is subject to the claims of the person whose lien has been removed, and
>
> (c) shall not affect the amount required to be retained under section 18(1) or (1.1) or 23(1) or (1.1).
>
> [...]
>
> ***Application of money realized***
>
> 61(5) Each class of lienholders, as between themselves, rank without preference for their several amounts and the portion of the money available for distribution to each class shall be distributed among the lienholders in that class proportionately according to the amounts of their respective claims as proved.

Objects of the *BLA*

[21] The purpose of lien legislation is to create a mechanism allowing lienholders to enforce their liens at a minimal expense and in a procedurally uncomplicated manner: David I. Bristow, Q.C., et al., *Construction Builders' and Mechanics' Liens in Canada*, 7th ed., looseleaf (Toronto: Carswell, 2005) ("Bristow"). Although lien legislation aims to balance the interests of owners and those who supply owners with labour and materials, it also seeks to prevent prejudice against owners: *Noranda Exploration Co. v. Sigurdson* (1975), [1976] 1 S.C.R. 296 at 302. In other words, it is intended to take account of the interests of both owners and those who make improvements upon the lands of an owner.

[22] Mahoney J. gave the following useful overview of the *BLA* at paras. 29-41 of his judgment:

> [29] A lienholder, under s. 1(f), is a person who has a lien arising under the *Act*. A registered lienholder, s. 1(l), is a lienholder who has registered a statement of lien in land titles and it includes a lienholder who has had their lien removed in accordance with s. 27 (payment from the lien fund) or s. 48(1) (lien removal). When someone does work on the property, a lien arises. A person to whom payment is due or will become due can register a lien against the title of the owner's property. This is based on the equitable principle that an owner