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File No.: 314144.00005/23362

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## By Email

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Attention: Keely Cameron and Sarah Aaron  
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Dear Counsel:

**Re: In the Matter of the Plan of Compromise or Arrangement of Razor Energy Corp.,  
Razor Energy Holdings GP Corp., and Blade Energy Services Corp.  
Court File Number 2401-02680**

We are counsel to Arena Investors LP, secured creditor of Razor Energy Corp. and Razor Energy Holdings GP Corp. (together “Razor”). We are writing to advise both yourselves and the Service List established with respect to the above referenced proceedings, that we intend to oppose the application filed by Conifer Energy Inc. on September 3, 2024, presently returnable before the Honourable Justice Mah on September 11, 2024. We will be attending the hearing of the application to speak to this matter.

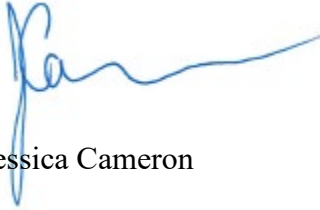
Generally speaking, Arena’s position is that Conifer’s application improperly seeks to elevate what is otherwise an unsecured claim, or at best forms the basis for an Operator’s Lien, above other valid first ranking and perfected secured interests, such as those held by Arena. In addition to relying upon the case law previously filed by Razor, we may also rely upon the following cases as the basis for Arena’s opposition to Conifer’s application: *Cansearch Resources Ltd v Regent Resources Ltd*, 2017 ABQB 535 and *Re Essar Steel Algoma Inc*, 2016 ONSC 6459. Highlighted copies of both cases are enclosed with this letter for ease of reference.

# FASKEN

Please be advised that we will also be providing a copy of this correspondence and case law provided to Justice Mah.

Yours truly,

**FASKEN MARTINEAU DuMOULIN LLP**



Jessica Cameron

JC/sb

Enclosure



2017 ABQB 535

Alberta Court of Queen's Bench

Cansearch Resources Ltd v. Regent Resources Ltd

2017 CarswellAlta 1601, 2017 ABQB 535, [2017] A.W.L.D. 4993, 283 A.C.W.S.

(3d) 192, 52 C.B.R. (6th) 114, 60 Alta. L.R. (6th) 373, 7 P.P.S.A.C. (4th) 278

**Cansearch Resources Ltd (Applicant) and Ernst & Young Inc., in its  
Capacity as Court-Appointed Receiver of Regent Resources Ltd (Respondent)**

G.A. Campbell J.

Heard: August 10, 2017

Judgment: September 5, 2017

Docket: Calgary 1601-16147

Counsel: L. Rasmussen, for Applicant, Cansearch Resources Ltd.

H.A. Gorman, Q.C., A.M. Badami, for Respondent, Ernst & Young Inc.

D. LeGeyt, for Interested party, Alberta Treasury Branches

Subject: Contracts; Corporate and Commercial; Insolvency; Natural Resources

**Related Abridgment Classifications**

Personal property security

IV Priority of security interest

IV.6 Security interests versus other interests

IV.6.e Miscellaneous

**Headnote**

Personal property security --- Priority of security interest — Security interests versus other interests — Miscellaneous

Parties were partners in jointly owned oil and gas facility, and applicant held operator's lien but it was not registered pursuant to [Personal Property Security Act \(PPSA\)](#) — Mortgagee extended mortgage to respondent, and they entered into general security agreement which mortgagee registered pursuant to [PPSA](#) — Respondent stopped paying its share of operating expenses to applicant — At request of mortgagee, respondent was placed into receivership, respondent's interest in oil and gas facility was sold and proceeds were held in trust by receiver — Applicant applied for declaration that it had first priority claim to proceeds of sale based on possessory lien pursuant to [Possessory Liens Act \(PLA\)](#) — Application dismissed — Applicant conceded its unregistered operator's lien was subject to [PPSA](#) and was subordinate to mortgagee's registered general security agreement — It was clear that, by its nature, possessory lien was intended to cover specific chattel on which someone had expended discernable amount of time, effort or money that had enhanced value of that chattel — Possessory lien only applied to chattels and distinct nature and intent meant that it was type of non-consensual lien that might be exempted from normal priority rules pursuant to [s. 32 of PPSA](#) — Applicant, as operator, was obligated by operating agreement to maintain equipment at facility, it clearly expended money, labour or skill in fulfilling obligation, and it might have enhanced value of some of relevant equipment, but more was required before applicant could establish possessory lien — Applicant must identify specifically what equipment possessory lien covered and establish that money, labour, or skill was expended in enhancing value of that specific equipment, but applicant provided insufficient information regarding precisely what chattel equipment its possessory lien would apply to and on what grounds — Applicant had erroneous belief that possessory lien could be conflated with operator's lien but there were important differences in nature and application of each type of lien, and those differences were fatal to applicant's claim that it had possessory lien over respondent's ownership interest — Applicant's generalized expenses were not enough to establish entitlement to possessory lien because there was insufficient evidence to substantiate that unpaid expenses represented money or services provided to enhance value of specific identified chattels — Applicant had not established that it had possessory lien that would give its unpaid expenses first priority claim to proceeds from sale of respondent's ownership interest in facility.

**Table of Authorities****Cases considered by G.A. Campbell J.:**

*AMIC Mortgage Investment Corp. v. Investors Group Trust Co.* (1985), 37 R.P.R. 56, 40 Alta. L.R. (2d) 71, 62 A.R. 174, 1985 CarswellAlta 169, 1985 ABCA 173 (Alta. C.A.) — referred to

*Blue Range Resource Corp., Re* (2000), 2000 CarswellAlta 12, 76 Alta. L.R. (3d) 338, [2000] 4 W.W.R. 738, 15 C.B.R. (4th) 169, 259 A.R. 30, 2000 ABQB 4 (Alta. Q.B.) — referred to

*Blue Range Resource Corp., Re* (November 22, 1999), Doc. Calgary 9901-04070 (Alta. Q.B.) — followed

*Craddock Trucking Ltd. v. Leclair* (1995), 28 Alta. L.R. (3d) 145, 1995 CarswellAlta 114 (Alta. Q.B.) — referred to

*Direct Energy Marketing Ltd. v. Kalta Energy Corp.* (January 15, 2002), Doc. 0001-15284 (Alta. Q.B.) — referred to

*Gauntlet Energy Corp., Re* (2003), 2003 CarswellAlta 1885, 32 C.L.R. (3d) 57, 49 C.B.R. (4th) 219 (Alta. Q.B. [In Chambers]) — considered

*Gauntlet Energy Corp., Re* (2004), 2004 ABCA 20, 2004 CarswellAlta 40, 32 C.L.R. (3d) 68, 49 C.B.R. (4th) 225 (Alta. C.A.) — referred to

*Gimli Auto Ltd. v. Canada Campers Inc. (Trustee of)* (1998), 160 D.L.R. (4th) 373, 1998 CarswellAlta 441, (sub nom. *Gimli Auto Ltd. v. Canada Campers Inc. (Bankrupt)*) 219 A.R. 166, (sub nom. *Gimli Auto Ltd. v. Canada Campers Inc. (Bankrupt)*) 179 W.A.C. 166, 62 Alta. L.R. (3d) 40, [1999] 1 W.W.R. 459, 4 C.B.R. (4th) 254, 13 P.P.S.A.C. (2d) 378, 1998 ABCA 154 (Alta. C.A.) — referred to

*Haggert v. Brampton (Town)* (1897), 28 S.C.R. 174, 1897 CarswellOnt 15 (S.C.C.) — referred to

*Holowach v. Hunt* (1992), 4 P.P.S.A.C. (2d) 1, 133 A.R. 13, 1992 CarswellAlta 378 (Alta. Q.B.) — considered

*Senft v. Bank of Montreal* (1986), 69 A.R. 35, 1986 CarswellAlta 344 (Alta. Q.B.) — considered

*Slater v. Burgoin* (2001), 2001 ABCA 213, 2001 CarswellAlta 1153, 286 A.R. 373, 253 W.A.C. 373 (Alta. C.A. [In Chambers]) — referred to

**Statutes considered:**

*Personal Property Security Act*, R.S.A. 2000, c. P-7

Generally — referred to

s. 3(1) — considered

s. 24 — considered

s. 32 — considered

s. 35 — considered

*Possessory Liens Act*, R.S.A. 1980, c. P-13

Generally — referred to

*Possessory Liens Act*, R.S.A. 2000, c. P-19

Generally — referred to

s. 2 — considered

s. 5 — considered

s. 6 — considered

**Words and phrases considered:****possessory lien**

Therefore, it is clear that, by its nature, a possessory lien is intended to cover a specific chattel on which someone has expended a discernable amount of time, effort or money that has enhanced the specific chattel's value.

The nature and intent of a possessory lien makes it distinct from the Operator's Lien. For example, a possessory lien only applies to chattels, whereas the Operator's Lien may apply to tangible and intangible personal property as well as real property. This

distinct nature and intent means that, unlike the Operator's Lien, a possessory lien is the type of non-consensual lien that may be exempted from the normal priority rules pursuant to section 32 of the PPSA.

Since a possessory lien is an artisan/repairman-type lien, I interpret the requirement for enhancing the value of chattels to be synonymous with maintaining, restoring or enhancing the subject chattel's value.

APPLICATION for declaration that applicant had first priority claim to proceeds of sale of respondent's interest in oil and gas facility property.

**G.A. Campbell J.:**

## **I. Introduction**

1 The Applicant, Cansearch Resources Ltd ("*Cansearch*"), seeks (a) a declaration that it has a first priority claim to proceeds realized from the sale of Regent Resources Ltd.'s ("*Regent*") interest in a jointly owned oil and gas facility property that are currently held in trust by the Respondent, Ernst & Young Inc., (the "*Receiver*") and, (b) an order directing the Receiver to distribute to it proceeds in the amount of Regent's outstanding indebtedness to Cansearch.

2 Cansearch's initial position was that it had an operator's lien that gave it first priority claim as against the Regent estate. However, Cansearch abandoned this position during the hearing of its application. Cansearch now asserts it also has a possessory lien pursuant to the *Possessory Liens Act, RSA 2000, c P-19 [PLA]*, which gives it first priority claim to these proceeds.

3 For the reasons that follow, I find that Cansearch's operator's lien does not give it first priority claim as against the Regent estate. I further find that Cansearch has failed to provide sufficient evidence to establish it has a possessory lien pursuant to the *PLA* that would give it first priority claim as against the Regent estate. Accordingly, Cansearch's application is dismissed.

## **II. Background**

### **A. Facts**

4 The facts in this case are not in dispute.

5 In 2008, Cansearch and Regent became partners in a jointly owned oil and gas facility, the Joffre Gas Battery and Compression Facility (the "*Joffre Facility*").

6 The partnership between Cansearch and Regent was governed by the "Agreement for the Construction, Ownership and Operation of the Joffre Gas Battery and Compression Facility at 2-19-38-25W4M" (the "*Operating Agreement*"), which incorporated by reference the 1999 Petroleum Joint Venture Association Operating Procedure (the "*Operating Procedure*") and the 1996 PASC Accounting Procedure (the "*Accounting Procedure*").

7 Cansearch, as operator, was responsible for managing day-to-day operations at the Joffre Facility for the benefit of both itself and Regent.

8 The Operating Agreement set out its purpose:

#### 301 Agreement Purpose

The purpose of this Agreement is to document the terms of ownership of the [Joffre] Facility and the allocation of Facility costs, provide terms for the construction and operation of the Facility and set out the basis upon which a share of the Facility Products shall be allocated and distributed to each Person delivering Inlet Substances to the Facility Inlet.

#### 302 Facility Purpose

The purpose of the [Joffre] Facility is to gather and process Inlet Substances from the Joffre Area so as to produce [Joffre] Facility Products. . . .

9 The Operating Agreement and Operating Procedure document that Cansearch, as operator, owned an undivided 70.85% interest in each "Functional Unit" while Regent, as non-operator, owned an undivided 29.15% interest in each Functional Unit ("Regent's Ownership Interest"). The Operating Procedure defines "Functional Unit" to mean "a separate component of the Facility . . . ( and means the whole of the Facility if there is no separation into Functional Units) and all real and personal property of every nature and kind attached to, forming part of, or used in connection with, the operation [of the Joffre Facility]".

10 The Accounting Procedure authorized Cansearch, as operator, to charge its joint account with Regent for:

Acquisition of subsurface rights and related bonus costs, lease, license or permit deposits, rentals, renewal or extension fees, royalties, and similar payments required to maintain the interest of the Owners in the Joint Property.

11 The Operating Procedure provided Cansearch with an operator's lien for any unpaid expenses relating to Regent's interest in the Joffre Facility (the "*Operator's Lien*"):

#### 602. Operator's Lien and Remedies

(a) Effective from the Effective Date, Operator shall have a lien and charge, which is first and prior to any other lien, charge, mortgage or other security interest, with respect to the Function Unit Participations of each Owner in the Facility and such Owner's share of Facility Products, to secure payment of such Owner's proportionate share of the costs and expenses incurred by Operator for the Joint Account.

12 At no time did Cansearch register its Operator's Lien pursuant to the *Personal Property Security Act, RSA 2000, c P-7 [PPSA]* or any other relevant statute.

13 The Operating Agreement permitted Regent to mortgage its Ownership Interest if it complied with the following conditions:

#### 903. Financing

Notwithstanding anything contained in this Article IX:

(a) An Owner may mortgage its interest in the Facility; provided that any such mortgage shall expressly provide that the mortgagee shall hold its interest subject to all the terms and provisions of this Agreement, and shall also provide that upon realization of its security, the party acquiring the interest in the Facility shall be required to assume all obligations of the mortgagor under this Agreement . . .

14 In 2012, the Alberta Treasury Branches ("*ATB*") agreed to extend a mortgage of approximately \$28,000,000.00 to Regent. In exchange, Regent and the ATB entered into a general security agreement which covered Regent's Ownership Interest (the "*GSA*"). Cansearch was not a party to the GSA.

15 On May 3, 2012, ATB validly registered the GSA pursuant to the *PPSA*. Cansearch had been operating the Joffre Facility prior to ATB's registration of the GSA.

16 In 2015, Regent stopped paying its share of the operating expenses for the Joffre Facility. As a result, Regent owes Cansearch a total of \$91,683.64, including interest, for the pre-receivership period ending November 30, 2016 (the "*Unpaid Expenses*"). The Unpaid Expenses apparently include an equalization payment, land rental expenses, lease operating expenses, completion expenses, property taxes and equipment maintenance expenses.

17 The validity of the Unpaid Expenses is not in dispute.

18 On December 5, 2016, Regent was placed into receivership at the request of ATB. This Court appointed the Receiver at that time.

19 On December 19, 2016, Cansearch filed an application with this Court seeking, among other things, to have the Unpaid Expenses satisfied from Regent's share of the proceeds from gas production at the Joffre Facility (the "2016 Application"). The 2016 Application asserted that the Operator's Lien gave Cansearch first priority claim over all other creditors as against the Regent estate.

20 On December 20, 2016, the 2016 Application was dismissed with costs by order of Justice DB Nixon.

21 Cansearch subsequently notified the Receiver that its Operator's Lien gave it first priority claim, ranking ahead of ATB's validly registered GSA security interest. The Receiver investigated the matter, but ultimately determined that ATB's GSA gave ATB first priority claim as against the Regent estate.

22 On March 22, 2017, the Receiver obtained Court approval for an interim distribution to ATB in the amount of \$15,000,000.00. Cansearch did not challenge that distribution as Cansearch asserted no claim to those proceeds.

23 On April 20, 2017, Regent's Ownership Interest was sold to a third party pursuant to a Sale Approval and Vesting Order. The Receiver currently holds those proceeds of sale in trust pending its second interim distribution application.

24 On August 1, 2017, Cansearch filed the present application, seeking to have this Court confirm its first priority claim and order the Receiver to satisfy the Unpaid Expenses out of the proceeds funds realized from the April 20 sale of Regent's Ownership Interest.

### ***B. Position of the Parties***

25 There is now no dispute that Cansearch's Operator's Lien for the Unpaid Expenses is subordinate to ATB's GSA. The parties disagree, however, over whether Cansearch has a possessory lien pursuant to the *PLA* over certain equipment at the Joffre Facility, which could rank in priority to the GSA.

26 Cansearch's initial position was that its Operator's Lien provided it with first priority claim to the proceeds from the sale of Regent's Ownership Interest, ranking ahead of ATB and all other creditors. Its position was premised on the argument that the enhanced remedies provided to operators under joint operating agreements must be afforded unique treatment by the courts.

27 The Receiver rejected Cansearch's characterization of the Operator's Lien. It contended that Cansearch possessed only a subordinate, unperfected security interest as against the Regent estate. The Receiver's position was premised on the argument that an unregistered consensual and contractual lien claim cannot displace the *PPSA*, which provides the complete governing statutory priority framework for this matter.

28 As noted, Cansearch abandoned its initial position at the hearing of this application. Cansearch now concedes that its Operator's Lien is subject to the *PPSA* and subordinate to ATB's registered security interest

29 Cansearch's new position is that, in addition to the Operator's Lien, its operation of the Joffre Facility also provides it with a possessory lien under the *PLA*. Its position is premised on the argument that a possessory lien is a type of "meaningful relationship lien" that is exempted from the *PPSA*'s normal priority rules pursuant to section 32 of the *PPSA*. Therefore, Cansearch argues that it still has first priority claim to certain equipment that constitutes the various components of the Joffre Facility and because of that nexus, its possessory lien would extend to the entirety of Regent's Ownership Interest.

30 Cansearch was unable to provide any case law to support its entitlement to a possessory lien. Cansearch was also unable to provide much detail regarding precisely what equipment would be covered by such a lien or what it had done to enhance the value of any of the onsite equipment (whether through money paid or services provided).

31 The Receiver rejects Cansearch's possessory lien argument on the grounds that it has not satisfied the legal test to establish such a lien pursuant to the *PLA*. The Receiver argues that Cansearch has failed to meet its onus of proving its claim based on the evidence before this Court. The Receiver has not suggested that it would be impossible for Cansearch to establish a possessory lien in these circumstances. Rather, the Receiver asserts that Cansearch, after many months of asserting the first priority status of its Operator's Lien, has failed to establish that it has enhanced the value of any chattel owned by Regent. The Receiver emphasized that Cansearch's Unpaid Expenses appear to be general operating expenses incurred by Cansearch in carrying out its duties as the operator of the Joffre Facility.

32 Counsel for ATB appeared at the application and supported the Receiver's position. ATB emphasizes Cansearch's failure to provide any evidence that it enhanced the value of any chattel previously owned by Regent.

33 Because Cansearch's possessory lien argument was only introduced during oral submissions at the hearing of this application, this Court offered the parties an opportunity to adjourn the application and file new evidence and written briefs. All parties declined an adjournment, and elected to proceed with their existing evidence and make oral submissions regarding Cansearch's entitlement to a possessory lien.

### III. Issues

34 The following issues arise from the hearing of this matter:

- 1) Does Cansearch's Operator's Lien have priority over ATB's GSA?
- 2) Does Cansearch have a possessory lien pursuant to the *PLA* that gives it priority over ATB's GSA?

### IV. Arguments and Analysis

#### *A. Does Cansearch's Operator's Lien have Priority over ATB's GSA?*

35 Cansearch now concedes its unregistered Operator's Lien is subject to the *PPSA* and subordinate to ATB's registered GSA. I agree. For completeness, however, I will outline the reasoning behind this determination.

36 In Alberta, the *PPSA* creates a mandatory statutory priority framework governing specified security interests. This framework overrules certain contractual and property rights: *Gimli Auto Ltd. v. Canada Campers Inc. (Trustee of)*, 1998 ABCA 154 (Alta. C.A.) at paras 8-10.

37 It is not common practice in Alberta to register an operator's lien pursuant to the *PPSA*. However, registration is both possible and advisable: see E Leew & Z Purves-Smith, "Operators' and Processors' Liens: Priority, Enforcement and Practical Considerations" (2010) 47.2 ALR 297; M Gaston & E Paplawski, "The Effects of Various Insolvency Proceedings on Joint Operating Interests in the Alberta Energy Industry" in Janis P Sarra, ed, *Annual Review of Insolvency Law* (Carswell, 2016) 29 (WestLaw).

38 Cansearch's Operator's Lien is a consensual and contractual lien created under the Operating Agreement to secure potential future indebtedness. It covers Regent's Ownership Interest, which itself comprises each "separate component of the [Joffre] Facility." As a result, the Operator's Lien may apply to "potentially both freehold and Crown real property interests (both as to surface and mineral rights), and a number of different types of tangible and intangible personal property, all of which together form an economic unit": Leew & Purves-Smith at 300.

39 Since the Operator's Lien is a consensual and contractual lien, it also qualifies as a security interest under section 3(1) of the *PPSA*, which governs its priority vis-à-vis other security interests as against the Regent estate: *Direct Energy Marketing Ltd. v. Kalta Energy Corp.*, [2002] A.J. No. 463 (Alta. Q.B.) at paras 5-6 [*Direct Energy*], citing *Blue Range Resource Corp., Re*, 2000 ABQB 4 (Alta. Q.B.).



40 The priority afforded to the Operator's Lien is dependent upon which section of the *PPSA* governs it. For example, section 32 provides certain types of non-consensual liens with priority over other perfected security interests:

#### Priority of liens

32 Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that the person has with respect to the materials or services has priority over a perfected or unperfected security interest in the goods unless the lien is given by an Act that provides that the lien does not have the priority.

41 Contractual liens, like the Operator's Lien, are not one of the types afforded priority under section 32: *Craddock Trucking Ltd. v. Leclair* (1995), 28 Alta. L.R. (3d) 145 (Alta. Q.B.), 1995 CanLII 9032 at paras 8-9; *Direct Energy* at para 15.

42 The Operator's Lien is therefore governed pursuant to section 35 of the *PPSA*. Accordingly, the normal "first in time" rule applies and priority is dependent upon when, and in this case, if the security interest was perfected. For the Operator's Lien, perfection will be a question of either registration or possession.

43 It is clear from the facts that this Operator's Lien does not have priority based on registration. The parties do not dispute that ATB validly registered the GSA in 2012, while Cansearch never registered its Operator's Lien at any time. Therefore, Cansearch's Operator's Lien can only conceivably have been perfected through possession.

44 Section 24 of the *PPSA* outlines the requirements for perfection by possession. Those requirements are clarified by Justice Romaine in *Blue Range Resource Corp., Re*, [1999] A.J. No. 1665 (Alta. Q.B.) at paras 22-23:

The nature of the possession required under Section 24 and substantially identical provisions under other provincial *PPSA* legislation is set out in two cases cited to me, *Bank of Nova Scotia v. Royal Bank of Canada* (*supra*) and *Royal Trust Corp. of Canada v. No. 7 Honda Sales Ltd.*, [1987] O.J. No. 2399 (Ont. D.C.) and discussed by Cumming and Wood in the *Alberta Personal Property Security Act Handbook* 4th ed. (Toronto: Carswell, 1998). Possession only perfects a security interest under Section 24 if the secured party holds the collateral for the purpose of securing payment. The entire fact situation should be reviewed to determine if the secured party's possession of the property was for that purpose, and not in some other capacity. Although the section specifically negates possession for the purpose of seizure or repossession as a method of perfecting a security interest, it does not follow that possession for any other purpose constitutes possession for the purpose of holding the property as collateral, and the secured party must establish this by the evidence. As pointed out in the *Royal Trust* case (*supra*, at page 56), mere physical handling or custody is not sufficient. The property must be shown to have been held as collateral.

In addition, the possession contemplated by Section 24 must be sufficient to indicate to third parties that Blue Range has given a security interest in the gas to ANG: *Alberta Personal Property Security Act Handbook* (*supra*) at page 222.

45 In other words, for possession to be proven there must be evidence that the relevant property was held by Cansearch as collateral. For example, the Operating Agreement would need to explicitly state that Cansearch, as operator, possessed the property at the Joffre Facility as collateral. Cansearch provided no evidence to support any suggestion that it held any property as collateral and, therefore, it has not met the requirements for perfection by possession.

46 Accordingly, I find, as the parties themselves concluded, that Cansearch's Operator's Lien is an unperfected security interest pursuant to section 35 of the *PPSA* and subordinate to ATB's GSA.

#### **B. Does Cansearch have a Possessory Lien under the PLA that gives it priority over the ATB's GSA?**

47 Cansearch asserts that it has a possessory lien over Regent's Ownership Interest pursuant to the *PLA*. It claims entitlement to such a lien based on the nexus between certain on-site component equipment situated at the Joffre Facility and its role as operator of the Joffre Facility.

## 1. Legal Principles

48 Absent a rule or statute dictating otherwise, the general rule of procedure applies and Cansearch, as the applicant asserting priority, bears the onus of proving it has a possessory lien: see *Slater v. Burgoin*, 2001 ABCA 213 (Alta. C.A. [In Chambers]) at paras 12-13.

49 The possessory lien asserted by Cansearch is a common law lien codified pursuant to the *PLA*. Therefore, Cansearch must establish entitlement in accordance with the requirements of the common law. The relevant legal test to establish entitlement in this instance is outlined in sections 2, 5, and 6 of the *PLA*:

### **Lien on chattels**

2 A person has a particular lien for the payment of the person's debt on a chattel on which the person has expended the person's money, labour or skill at the request of the owner of it and in so doing enhanced its value.

...

### **Possession of property**

5 Actual or constructive and continued possession of the property that is the subject-matter of the debt is essential to the existence of the lien.

### **Extent of lien**

6 A lien extends over all the property on which the lienholder has expended the lienholder's money, labour or skill, but no lien arises on account of a general balance due from the owner of the property to the lienholder.

50 There are two types of common law liens: general and particular. A possessory lien pursuant to the *PLA* qualifies as a particular lien. In *Holowach v. Hunt* (1992), 133 A.R. 13, 1992 CarswellAlta 378 (Alta. Q.B.) at paras 4-8, Master Hunt provides a brief background on the nature of a possessory lien:

The question of the difference between particular or possessory liens on the one hand and general liens on the other is considered by Miller A.C.J. in *Senft v. Bank of Montreal* (1986), 69 A.R. 35 (Alta. Q.B.).

Section 14 of the *Possessory Liens Act*, R.S.A. 1980, c. P-13, provides that nothing in the said Act affects the law respecting general liens.

Miller A.C.J. adopted what was said about common law liens by Master Funduk in *Continental Bank of Canada v. Henry Morgensen Transport Ltd.* (1984), 32 Alta. L.R. (2d) 116, [1984] 5 W.W.R. 110, 54 A.R. 27 (Master), namely, that:

1. Apart from statutes, the term possessory lien is synonymous with common law lien;
2. There are two classes of common law lien, namely, general and particular;
3. A general lien pertains to claims that are related to the property and also to claims that are not related to the property.
4. A particular lien pertains only to claims that are related to the property.

The lien under consideration in the *Continental Bank* case, *supra*, was characterized as a particular lien, and the law relative to a general lien was not dealt with.

51 The possessory lien referenced in *Holowach* relates to the *PLA*'s predecessor statute, the *Possessory Liens Act*, RSA 1980, c P-13 (now repealed) [*PLA 1980*]. For our purposes, however, there is no conceptual difference between the *PLA 1980* and the current *PLA*.

52 In *Senft v. Bank of Montreal* (1986), 69 A.R. 35 (Alta. Q.B.), 1986 CanLII 1844 at para 12, Associate Chief Justice Miller highlights the types of interests that a possessory lien is intended to protect (pursuant to the *PLA 1980*, s 2):

It is clear that categories (1) and (3) are inapplicable to the facts of this case. It is category (2) with which we are concerned here, "where work was done on a chattel". The particular lien in these circumstances is created by the common law as the result of a workman, tradesman, artisan or mechanic having bestowed labour, skill or expense in respect of the chattel of another. Such a lien gives him the right to retain possession of the chattel until his reasonable charges for his services have been paid or satisfied: *Sterling Securities Corporation, Limited v. Hicks Motor Company Limited*, 1928 CanLII 284 (SK CA), [1928] 2 W.W.R. 74 (Sask. C.A.). Further, on particular liens arising in the circumstances of "category (2)", I cite the following from *Halsbury's* (4th ed.), Vol. 28, Para. 537:

It is a common law principle that if a man has an article delivered to him on which he has to do some work and to bestow, trouble or expense, he has a right to retain it until his charge is paid. Thus, the artificer to whom goods are delivered for the purpose of being worked up, the farrier by whose skill an animal is cured of disease and the horse breaker by whose skill an animal is rendered manageable, have liens on the chattels for their charges.

I would also note the following from Macklem and Bristow's, *Construction and Mechanics' Liens in Canada* (5th ed.), at page 579:

the particular lien attaches only to the actual property of the debtor upon which the labour and materials have been expended and attaches only so long as the article remains in the lien claimant's possession. This lien is the lien of an artisan which arises upon his bestowing skill, labour or money upon personal property with the express or implied authority of the owner. [Emphasis in original]

53 This Court is dealing with a conceptually analogous issue under the current *PLA*. Therefore, it is clear that, by its nature, a possessory lien is intended to cover a specific chattel on which someone has expended a discernable amount of time, effort or money that has enhanced the specific chattel's value.

54 The nature and intent of a possessory lien makes it distinct from the Operator's Lien. For example, a possessory lien only applies to chattels, whereas the Operator's Lien may apply to tangible and intangible personal property as well as real property. This distinct nature and intent means that, unlike the Operator's Lien, a possessory lien is the type of non-consensual lien that may be exempted from the normal priority rules pursuant to section 32 of the *PPSA*. Therefore, if Cansearch can establish a possessory lien pursuant to the *PLA*, it would likely have first priority claim over specific chattel equipment at the Joffre Facility.

55 Since a possessory lien is an artisan/repairman-type lien, I interpret the requirement for enhancing the value of chattels to be synonymous with maintaining, restoring or enhancing the subject chattel's value. In other words, a possessory lien would provide Cansearch with "a 'particular' lien over [specific chattel equipment] on which the lien holder has expended money, labour, or skill, provided that the lien holder maintains actual or constructive possession": Leew & Purves-Smith at 322.

## 2. Evidence of a Possessory Lien

56 Cansearch says that, pursuant to the terms of the Operating Agreement, it expended money, labour, or skill maintaining the on-site equipment at the Joffre Facility at Regent's request. Cansearch suggests that the enhancement of this equipment, at the explicit request of Regent, can be inferred from Cansearch's duties as operator. These duties, which are outlined in clauses 401 to 405 of the Operating Agreement, obliged Cansearch, among other duties, to maintain title to the equipment, which Cansearch contends enhanced the value of said equipment.

57 As evidence of the specific equipment covered under the lien, Cansearch points to the Operating Procedure's description of the separate components that comprise a Functional Unit in the Joffre Facility. This description of equipment is listed in Appendix II to Exhibit "A" to the Operator's Agreement and appears to represent a preliminary blueprint of the Joffre Facility

when it was first constructed. Cansearch asserts it enhanced all of the equipment listed in this description and associated schematic, which includes inlet headers, inlet separator and compressor packages, dehydrators, and sales gas pipelines.

58 In regards to value of enhancement, Cansearch points to its various operational invoices that comprise the Unpaid Expenses as evidence of the money, labour, or skill it expended in maintaining the relevant equipment. In other words, Cansearch contends that all of the Unpaid Expenses were incurred to enhance the value of the equipment at the Joffre Facility.

59 In regards to possession, Cansearch argues it maintained continued possession of the equipment pursuant to the clauses 601 and 603 of the Operating Agreement, which state that Cansearch held an undivided ownership interest with Regent in the whole of the Facility. Due to this undivided interest, Cansearch claims it therefore maintained possession of each of the separate components of the Joffre Facility that comprise Regent's Ownership Interest.

### 3. Possessory Lien Not Established

60 I accept that Cansearch, as operator, was obligated by the Operating Agreement to maintain the equipment at the Joffre Facility. It clearly expended some amount of money, labour, or skill in fulfilling this obligation. It may have even enhanced the value of some of the relevant equipment in the process. I also accept that Cansearch may have maintained actual or constructive and continued possession by reason of its own undivided Ownership Interest in the Joffre Facility. However, assuming that all of this is true, more is still required before Cansearch can establish a possessory lien.

61 To satisfy its onus, Cansearch must identify specifically what equipment the possessory lien covers and establish that money, labour, or skill was expended in enhancing the value of that specific equipment. Yet Cansearch has only provided a preliminary description of equipment, which the Operator's Lien was intended to cover, coupled with generalized invoices from the operation of the Joffre Facility that comprise the claimed Unpaid Expenses.

62 Cansearch's evidence and submissions provide insufficient information regarding precisely what chattel equipment its possessory lien would apply to and on what grounds. This lack of information appears to stem from Cansearch's erroneous belief that a possessory lien can be conflated with the Operator's Lien vis-à-vis the Unpaid Expenses. There are important differences, however, in both the nature and application of each type of lien. These differences prove fatal to Cansearch's current claim that it has a possessory lien over Regent's Ownership Interest.

63 First, Cansearch has failed to establish that its possessory lien covers the entirety, or even part of, Regent's Ownership Interest. Section 2 of the *PLA* is clear that a possessory lien only covers chattels. Yet the Operating Agreement's definition of a Functional Unit suggests, without more, that Regent's Ownership Interest includes both real and personal property. Cansearch cannot claim a possessory lien over any part of Regent's Ownership Interest without first identifying the specific chattels that such a lien would cover.

64 Second, as evidence of the chattels that would be covered by the lien, Cansearch has provided only the Operating Procedure's description of what equipment should have been included on-site at the time of the Joffre Facility's construction. There is no evidence, however, as to what equipment was situated at the Joffre Facility at the time Regent's debt arose, that the debt arose from money or services expended on the identified equipment or that equipment's current configuration and use. For example, Appendix II to Exhibit "A" includes reference to an Inlet Separator package "constructed on a single skid and enclosed in a heated, illuminated building". This description is insufficient, however, to establish whether there is still a skid-mounted separator on-site at the Joffre Facility and, if so, the current configuration and use of that inlet separator. The same holds true for the compressors, dehydrators and sales gas pipelines.

65 Third, there is insufficient evidence as to whether the described equipment at the Joffre Facility remains a chattel or has become a fixture or improvement. Instead, Cansearch relies on *Gauntlet Energy Corp., Re* (2003), 49 C.B.R. (4th) 219, 2003 CarswellAlta 1885 (Alta. Q.B. [In Chambers]), leave to appeal refused 2004 ABCA 20 (Alta. C.A.), as authority for the proposition that any separator or compressor package mounted on a skid at the Joffre Facility qualifies as a chattel. Such a bald proposition, however, based on a factually distinguishable case, is of little assistance to this Court. This is especially so in view of the case law that has developed for distinguishing between chattels and fixtures.

66 Determining whether a chattel has become a fixture is a question of fact that depends on the circumstances of each case: *AMIC Mortgage Investment Corp. v. Investors Group Trust Co.* (1985), 62 A.R. 174, 1985 ABCA 173 (Alta. C.A.) (CanLII) at para 4 [*Amic Mortgage*]. It is a question of intention determined objectively because, depending on the facts, even the slightest degree of annexation or attachment may result in a chattel becoming a fixture. Further, in assessing the purpose of annexation, the purposes to which the premises are applied may also be a relevant consideration: *Amic Mortgage* at para 11, citing *Haggert v. Brampton (Town)* (1897), 28 S.C.R. 174 (S.C.C.) at 180, 1897 CanLII 14.

67 In other words, the question is whether the specific equipment referenced by Cansearch was intended to be or became part of the land on which the Joffre Facility is situated. Depending on the facts, the equipment referenced by Cansearch could have been intended to be either fixtures at law or to remain chattels at law. Cansearch has adduced insufficient evidence for this Court to make such a determination. For example, the description that the dump line from the Inlet Separator "ties into a . . . covered steel above ground storage tank", is suggestive of connectivity to the land. The description of the compressors suggests connectivity through inlet and outlet piping. The description of the dehydrators suggests connectivity to a vent tank.

68 Fourth, Cansearch's argument that it has a valid possessory lien also fails to recognize that such a lien would not appear to cover all of the Unpaid Expenses. Section 6 of the *PLA* is clear that a possessory lien cannot extend over a general balance owed by an owner of chattels. Cansearch is therefore required to identify the work it has done or money it spent to enhance the specific chattel and at the cost. There is insufficient evidence here to satisfy this requirement.

69 The only evidence Cansearch has adduced regarding enhancement and its cost are the invoices for the Unpaid Expenses. Cansearch contends these invoices establish it expended money and services to enhance the value of the on-site equipment at the Joffre Facility, as well as the amount it expended in doing so. However, these invoices contain insufficient detail regarding precisely what contract services Cansearch provided. For example, many charges are merely labelled as "Engineering & Supervision"; "Road Usage Fees"; "Overhead"; "AEUB Administration Fees". As permitted by the Accounting Procedure, some of the Unpaid Expenses may also include payment of acquisition of subsurface rights and related bonus costs, lease, license or permit deposits, rentals, renewal or extension fees and royalties. Cansearch itself in its brief identified that some of the Unpaid Expenses were for land rental expenses, property taxes, lease operating expenses, completion expenses and an equalization payment.

70 There is an important distinction between services related to general operational activities and those specifically related to performing work to enhance the value of chattels. Expenses for work or services relating to non-chattel items are unlikely to be expenses covered by a possessory lien, such as those identified in this case as being for land lease costs, roadway rentals, property taxes, royalty payments etc. In short, Cansearch's generalized expenses are not enough to establish entitlement to a possessory lien because there is insufficient evidence to substantiate that the Unpaid Expenses represent money or services provided to enhance the value of specific identified chattels. Rather, much of the Unpaid Expenses appear to be part of the general balance due from Regent to Cansearch for its operational activities.

71 In the result, based on the evidence before this Court, I find that Cansearch has failed to meet its onus to prove entitlement to a possessory lien over Regent's Ownership Interest. In the result, Cansearch has not established that it has a possessory lien that would give its Unpaid Expenses first priority claim to the proceeds from the sale of Regent's Ownership Interest in the Joffre Facility.

## V. Conclusion

72 I find that Cansearch's Operator's Lien does not have first priority claim as against the Regent estate. It is both possible and advisable to register an operator's lien pursuant to section 35 of the *PPSA*. Cansearch failed to do so and, as a result, its Operator's Lien is merely an unperfected security interest which is subordinate to ATB's GSA.

73 I further find that Cansearch has failed to prove entitlement to a possessory lien pursuant to sections 2, 5, and 6 of the *PLA*. It may very well be possible that Cansearch, as operator, is entitled to a possessory lien over certain component equipment

at the Joffre Facility. However, Cansearch has adduced insufficient evidence to show precisely what money, labour, or skill it expended in enhancing the value of specifically identified chattels which formed part of Regent's now-sold Ownership Interest.

74 For these reasons, I dismiss Cansearch's application with costs to the Receiver. If an agreement on costs cannot be reached between the parties, then they may speak to costs within 30 days from the date of this decision.

*Application dismissed.*

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2016 ONSC 6459

Ontario Superior Court of Justice [Commercial List]

Essar Steel Algoma Inc., Re

2016 CarswellOnt 16408, 2016 ONSC 6459, 272 A.C.W.S. (3d) 471, 41 C.B.R. (6th) 298

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ESSAR STEEL ALGOMA  
INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA)  
ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA (Applicants)

Newbould J.

Heard: October 6, 2016

Judgment: October 17, 2016

Docket: CV-15-11169-00CL

Counsel: Jeremy Opolsky, Alexandra Shelley, for Port of Algoma Inc.

Stephen J. Weisz, for GIP Primus, LP

John A. MacDonald, for Deutsch Bank AG

Ashley Taylor, for Applicants

Clifton Prophet, Nicholas Klug, for Monitor

L. Joseph Latham, for Ad Hoc Committee of Essar Algoma Noteholders

Massimo Starnino, Debra McKenna, for USW, Local 2724

Lou Brzezinski, for USW, Local 2251

Karenn Ensslen, for Retirees

Jeremy Nemers, for City of Sault St. Marie

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.b Effect of arrangement](#)

Debtors and creditors

[VII Receivers](#)

[VII.7 Actions involving receiver](#)

[VII.7.c Actions by debtor in receivership](#)

**Headnote**

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Miscellaneous

Payment of creditor — Creditor brought motion for order that debtor make payment of post-filing amounts owing and all future payments coming due under cargo handling agreement, and for administrative charge over assets of debtor — Debtor-in-possession lenders raised issue regarding unpaid US\$19.8 million promissory note made by creditor to debtor that was assigned to E Ltd., which was indirect parent company of both creditor and debtor — Creditor's motion was dismissed on grounds that it was premature to order debtor to make further payments under cargo handling agreement until set-off issue was determined — Monitor was authorized to commence oppression proceedings concerning creditor's transactions — Creditor brought further

motion for order that debtor make payments due under cargo handling agreement — Motion dismissed — Certain arguments raised by creditor were made on first motion and could not be raised again — Other arguments raised by creditor were available to be made on first motion and were not properly before court — Validity of agreements between creditor and debtor were subject of related party proceedings — To permit creditor to effectively shut down operations of debtor would be completely contrary to interests of all stakeholders.

Debtors and creditors --- Receivers — Actions involving receiver — Actions by debtor in receivership

Creditor brought motion for order that debtor make payment of post-filing amounts owing and all future payments coming due under cargo handling agreement, and for administrative charge over assets of debtor — Debtor-in-possession lenders raised issue regarding unpaid US\$19.8 million promissory note made by creditor to debtor that was assigned to E Ltd., which was indirect parent company of both creditor and debtor — Creditor's motion was dismissed on grounds that it was premature to order debtor to make further payments under cargo handling agreement until set-off issue was determined — Monitor was authorized to commence oppression proceedings concerning creditor's transactions — Creditor brought further motion for order that debtor make payments due under cargo handling agreement — Motion dismissed — Certain arguments raised by creditor were made on first motion and could not be raised again — Other arguments raised by creditor were available to be made on first motion and were not properly before court — Validity of agreements between creditor and debtor were subject of related party proceedings — To permit creditor to effectively shut down operations of debtor would be completely contrary to interests of all stakeholders.

#### Table of Authorities

##### Cases considered by *Newbould J.*:

*Aetna Financial Services Ltd. v. Feigelman* (1985), [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, [1985] 2 W.W.R. 97, 56 N.R. 241, 32 Man. R. (2d) 241, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145, 1985 CarswellMan 19, 1985 CarswellMan 379 (S.C.C.) — followed

##### Statutes considered:

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44

Generally — referred to

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

Generally — referred to

s. 11.01 [en. 2005, c. 47, s. 128] — considered

s. 11.01(a) [en. 2005, c. 47, s. 128] — considered

MOTION by creditor for order that debtor make payments due under cargo handling agreement.

#### *Newbould J.*:

1 On June 29, 2016 I dismissed a motion by Port of Algoma Inc. (Portco) for orders (i) that Essar Algoma (Algoma) make payment of the post-filing amounts now owing and all future payments coming due under a Cargo Handling Agreement, and (ii) for an administrative charge over the assets of Algoma million to secure the obligations of Algoma to Portco.

2 At the hearing of that motion there were issues raised by the DIP lenders regarding the unpaid US \$19.8 million promissory note made by Portco to Algoma that was assigned to Essar Global Fund Limited (EGFL), the indirect parent company of both Algoma and Portco. The DIP lenders asserted that there was an equitable set-off issue that would have to be dealt with and that it was premature to deal with the Portco motion for payment under the Cargo Handling Agreement until that equitable set-off issue was dealt with.

3 The Monitor in its report had expressed concerns regarding the entire Portco Transaction and the preceding recapitalization of Algoma that took place in 2014 under the CBCA and expressed the view that the Portco motion for payment under the Cargo Handling Agreement could not be determined in isolation and must be linked to a full understanding of both the Portco Transaction and the preceding recapitalization. The Monitor stated that the ability of Portco to rely on the release contained in the assignment and assumption agreement regarding the Portco promissory note and the applicability of set-off rights in relation



to amounts due under the promissory note and the Cargo Handling Agreement might be affected by the views of the Court concerning the overall context of the Portco Transaction and the recapitalization.

4 At the conclusion of my decision on the Portco motion I stated:

[29] I agree with the DIP lenders that it is premature to make an order at this stage requiring Algoma to make any further payments under the Cargo Handling Agreement and I decline to make such an order or to order any security to be provided to Portco. The Portco motion is dismissed without prejudice to it being brought back on after the set-off issue is determined. The parties are directed to confer as to the most appropriate way to quickly deal with the set-off issue and the other issues raised by the Monitor. If there is no agreement, a conference is to be held during the first week of July to settle how to deal with the issues.

5 Not a whole lot has changed although the amount of payments not made to Portco is approaching the amount of the unpaid Portco promissory note. Portco however says that the parties have not quickly conferred as to the most appropriate way to deal with the set-off or other issues and that it is now entitled to raise all of the issues that it raised on its first motion. It blames the other side for the delay.

6 I cannot say that Algoma, the Monitor or the DIP lenders have let things slide. It was the Monitor's view that the validity of the Portco Transaction could well affect the equitable set-off issue on the Portco note and that the Portco motion could not be determined in isolation but must be linked to a full understanding of both the Portco Transaction and the recapitalization. At a 9:30 conference after the first decision, there was a discussion to the effect that the set-off issue should be looked at together with the review of the Portco Transaction.

7 There was nothing to prevent Portco from applying earlier for a determination of the equitable set-off point on the Portco note, if it thought it could be determined in isolation and that the other parties were dragging their feet.

8 On September 26, 2016 an order was made authorizing and directing the Monitor to commence an oppression proceeding (the "Related Party Proceeding") in relation to the Portco Transaction and certain other Related Party Transactions identified in the Monitor's Sixteenth Report. The order directs the Monitor to commence those proceedings by October 21, 2016. The DIP lenders and the Monitor remain of the view and have contended that determinations concerning the relief now sought in the Portco motion cannot be made until the Related Party Proceedings have been dealt with.

9 I must say that when I stated that the first Portco motion was dismissed without prejudice to it being brought back on after the set-off issue was determined, it was not intended to enable Portco to raise anew those issues that had been decided against it. It was intended to permit Portco to come back if it succeeded on the set-off point or the issues raised by the Monitor. Portco however continues to raise issues already decided against it.

10 Portco again raises section 11.01 of the CCAA that prevents parties in a CCAA proceeding from being forced to perform a contract without payment after a stay order. The section provides:

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

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

11 Portco raised this section on its first motion. I held against Portco and said:

[20] Portco says that under the Cargo Handling Agreement, it is responsible for providing to Algoma the cargo handling services required on the Port property. It says that if Algoma does not pay it for those services, it will mean that Portco is obliged to provide the services without being paid, contrary to section 11.01(a). I do not agree. The persons providing the services are not Portco employees but employees of Algoma. Under the Shared Services Agreement, Algoma provides all of the services as may be necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. Those services are paid for by Algoma.

12 Portco raises the same argument again. It is not open to Portco to do so. It has been decided against Portco and there was no appeal from that decision. In any event, I am not persuaded that anything has changed regarding how the port is operated.

13 As in the first motion, Portco contends that while it is Algoma that provides the employees under the Shared Services Agreement, it is Portco that manages and directs the provision of the services. That is not what the evidence is. There is no management or direction given by Portco to Algoma. Portco has no operating management at all. It is insolvent. As stated in my prior decision, under the Shared Services Agreement it is Algoma that provides all of the services as may be necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. Mr. Dwivedi has been the CEO of Portco since May 2015. He acknowledged in his affidavit that as a result of the Shared Services Agreement, Algoma provides Portco with employees "who attend to cargo handling, logistics and other operations for Portco."

14 Portco now raises other arguments as to why section 11.01(a) requires payment under the Cargo Handling Agreement. I see this as no more than coming up with arguments that it could have raised in its first motion when it relied on that section. Litigation like this in piecemeal is not permitted. When relying on a section and having lost, it is not open to a party to come back and say that there are further arguments why that section requires the result the party was looking for in the first place.

15 Portco says now that under the Master Purchase and Sale Agreement, Algoma sold the Port assets, including the docks, to Portco and under the Lease Agreement leased to Portco the real property upon which the Port is located. Portco contends that the rights granted to Algoma in the Cargo Handling Agreement to the use of the Port facilities and equipment (i.e. mechanical conveyors) are properly classified as providing a license for the use of Portco's property.

16 This argument should have been made the first time. I will comment on it but in doing so do not accept that it is properly before me. It is not.

17 The Cargo Handling Agreement states that Algoma has non-exclusive access to a number of things described as the Cargo Handling Facilities. That was obviously necessary because it is Algoma under the Shared Services Agreement that is to provide all of the services as may be necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. There is no mention in the Cargo Handling Agreement of any licence from Portco to Algoma, and it has an entire agreements clause.

18 Portco argues that a licence is merely a right that allows a licensee to do some act upon the land that would otherwise constitute a trespass. Thus it says the right of access to Algoma to the Portco facilities that were leased to Portco amounts to a licence that should be paid for. I do not agree. In the lease from Algoma to Portco, it expressly reserves to Algoma in section 6.2 the right to enter the Portco premises, including the docks, to exercise its access rights under the Cargo Handling Agreement. Algoma is required under the Shared Service Agreement to provide the services required by the Cargo Handling Agreement. There can be no issue of any trespassing.

19 The argument of Portco essentially suggests that it is some independent supplier of premises or goods which amount to a licence granted to Algoma and should be treated as such in considering the various agreements and CCAA provisions. But Portco is not at arm's length. It and Algoma are controlled by the same Essar entity and the Portco transactions in 2014 were not arms' length transactions between Algoma and Portco. They were undertaken to put cash in the hands of Algoma. The parent of each, EGFL, refuses to pay on the Portco promissory note assigned to it as part of the Portco transaction that is now under attack.

20 Whether in these circumstances Portco should be looked at as a party to be protected by section 11.01(a), assuming it were open to Portco to continue arguing that issue, cannot be divorced from the Related Party Proceeding being brought by the Monitor. The entire Portco transaction will be looked at through the lens of an oppression proceeding. I would not order the payment of amounts due under the Cargo Handling Agreement in the face of those proceedings.

21 Portco again argues as it did in its prior motion that the Initial Order must be interpreted to require the payments under the Cargo Handling Agreement to be made to Portco and that otherwise the result would be an impermissible ignoring of the provisions in section 11.01(a) of the CCAA. The argument is based on its interpretation of paragraph 10 of the Initial Order of language "for greater certainty" the debtors shall continue to pay Portco. I dealt with this thoroughly in my previous decision

in paragraphs 13 to 18. The provisions of the DIP financing and the terms of the Initial Order made clear that money could not be paid without the consent of the DIP lenders, and that has not changed.

22 Portco argues that to permit Algoma not to make payments under the Cargo Handling Agreement is in effect obtaining execution before judgment. By November 2016 (the exact date is contested) Algoma will have withheld as much money under the Cargo Handling Agreement as the entire amount of the Portco promissory note that EGFL has refused to pay. To continue to permit Algoma not to pay any further amount will be an execution before judgment.

23 I understand the force of the argument and the colourful language used by Estey J. in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.) ("litigious blackmail") in dealing with the then relatively new remedy of *mareva* injunctions. I have serious doubts about the use of the concept of execution before judgment in the context of a CCAA proceeding. While the action of the Monitor will be an oppression action, it is still under the auspices of a CCAA proceeding in which there is a stay of proceedings, just as was the breach of contract case by Cliffs against Algoma. We are not dealing with a claim in which the only interests are a plaintiff and defendant as is the case with a typical *mareva* injunction case. We are dealing with attempts to have a debtor, in this case Algoma, survive to see another day under a new owner. There must be choices made as to who gets paid and who does not. As the Monitor says, these are often tough choices but a balance must be made between the debtor and its stakeholders and the party claiming payment.

24 In this case, the Monitor has expressed the view that additional cash requirements, including those which would arise from the resumption of payments under the Cargo Handling Agreement, will increase risks to Algoma's projected liquidity. I do not read that statement, as counsel for GIP Primus suggests, to mean that the Monitor is saying the payments can be made without difficulty. There were already serious risks to Algoma's liquidity.

25 Portco asks that if it is not entitled to payment under the Cargo Handling Agreement because the DIP lenders will not consent to it, then an order should be made varying the provisions of the Initial Order to permit Portco to cease operation of the Portco facilities and cease performance under the agreements with Algoma, and that for that purpose there should be a lift of the stay of proceedings to permit Portco to pursue its remedies for breach of agreement.

26 I would not make such orders. First of all, as stated, the validity of the agreements is to be dealt with in the Related Party Proceedings. To permit Portco to effectively shut down the operations of Algoma would be completely contrary to the interests of all stakeholders, not the least of which are the employees and retirees, none of whom have supported the position of Portco on this motion. Such an order would have the effect of giving Portco complete control of this entire proceeding. That may be the wishes of its Essar parent who has in the past indicated an interest in acquiring all of the assets in the CCAA sales process, albeit now as a non-qualified bidder, but it is not in the interests of the majority of the stakeholders. As well, Portco has said it has no money and whatever it receives from Algoma under the Cargo Handling Agreement has gone straight to its lender GIP Primus. In those circumstances nothing would be achieved for Portco in being able to stop Algoma personnel from operating the Portco facilities.

27 Portco also has contained argument in its factum that equitable set-off on the Portco promissory note is not available to Algoma. This issue is not properly before me and I am not prepared to deal with it divorced from the proceedings to be started by the Monitor.

28 The motion is dismissed.

*Motion dismissed.*