Registrar's Stamp

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	2001-0213AC
	2001-0211AC
TRIAL COURT FILE NUMBER:	2001-05482
REGISTRY OFFICE:	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36, as amended
	AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.
APPLICANTS:	JERRY SHANKOWSKI and 945411 ALBERTA LTD.
STATUS ON APPEAL:	APPELLANTS
STATUS ON APPLICATION:	APPLICANTS
RESPONDENTS:	JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.
STATUS ON APPEAL:	RESPONDENTS
STATUS ON APPLICATION:	RESPONDENTS
OTHER PARTIES:	FTI CONSULTING CANADA INC., MANTLE MATERIALS GROUP, LTD., RBEE AGGREGATE CONSULTING LTD., J.R. PAINE & ASSOCIATES LTD., FIERA PRIVATE DEBT FUND VI LP, BY ITS GENERAL PARTNER INTEGRATED PRIVATE DEBT FUND GP INC., FIERA PRIVATE DEBT FUND V LP BY ITS GENERAL PARTNER INTEGRATED PRIVATE DEBT FUND GP INC., ACTING IN ITS CAPACITY AS COLLATERAL AGENT FOR AND ON BEHALF OF AND FOR THE BENEFIT OF FUND VI, ATB FINANCIAL, QUEST DISPOSAL & RECYCLING INC., MUNICIPAL DISTRICT OF BONNYVILLE NO. 87, ELLISDON INDUSTRIAL, BANK OF MONTREAL, 848875 ALBERTA LTD.

	CARRYING ON BUSINESS AS AL'S CONTRACTING, 1577248 ALBERTA LTD., AZAD TRUCKING LTD., AZAN TRANSPORT LTD., TD EQUIPMENT FINANCE CANADA, 541466 ALBERTA LTD. (O/A JLG BALL ENTERPRISES), BUDGET LANDSCAPING AND CONTRACTING LTD., FOUNTAIN TIRE (BONNYVILLE) LTD., STAHL PETERBILT INC., EDMONTON KENWORTH LTD., CANADIAN AGGREGATE RESOURCE CORPORATION, CATERPILLAR FINANCIAL SERVICES LIMITED, ROYAL BANK OF CANADA, FORD CREDIT CANADA LEASING, BANK OF MONTREAL - TRANSPORTATION FINANCE, KOMATSU INTERNATIONAL (CANADA) INC., WELLS FARGO EQUIPMENT FINANCE, VFS CANADA INC., CANADIAN WESTERN BANK LEASING INC. - BROKER BUYING CENTRE, STRONGCO LIMITED PARTNERSHIP, SMS EQUIPMENT INC., ENTERPRISE FLEET MANAGEMENT CANADA INC., AND MATT SILVER TRUCKING
STATUS ON APPEAL:	OTHER PARTIES (NOT PARTIES TO APPEAL)
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DOCUMENT:	**MEMORANDUM OF ARGUMENT OF THE RESPONDENTS, JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.**
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I. INTRODUCTION

1. This Memorandum of Argument is submitted by JMB Crushing Systems Inc. ("**JMB**") and 2161889 Alberta Ltd. ("**216**", and with JMB, the "**JMB Respondents**") in this proceeding under the *Companies' Creditors Arrangement Act,* RSC 1985 c C-36, as amended (the "**CCAA**") in response to an application filed by Jerry Shankowski and 945411 Alberta Ltd. (collectively, "**Shankowski**") for leave to appeal the Mantle Order and the Reverse Vesting Order (as defined in the Shankowski Memorandum of Argument filed November 6, 2020) of the Honourable Justice K.M. Eidsvik (the "**CCAA Judge**") dated October 16, 2020.

2. The Orders sought to be appealed approve the sale of the core assets of the JMB Respondents to Mantle Materials Group, Ltd. ("**Mantle**") and the vesting of all remaining assets and liabilities of JMB (the "**Remaining JMB Assets**" and the "**Remaining JMB Liabilities**", respectively) into 216, while preserving the rights of all claims to the Remaining JMB Assets that existed at the time of vesting into 216.

3. The Mantle Order and the Reverse Vesting Order (collectively, the "**Vesting Orders**") are critical pieces of the plan of arrangement in respect of the JMB Respondents (the "**Plan**")[1] sanctioned by the CCAA Judge on October 16, 2020 (the "**Sanction Order**"). The Sanction Order has not been appealed to this Court.

4. The Plan provides for a going-concern restructuring of JMB's business and the continued employment of its remaining employees and contractors, and provides some recoveries for all Affected Creditors (as defined in the Plan). This is the very purpose of the CCAA. Shankowski asks this Court to set aside the product of lengthy negotiations between JMB's most significant economic stakeholders in favour of Shankowski's position that a single provision in a supply contract (the "**Supply Contract**") between the Municipal District of Bonnyville No. 87 (the "**MD**") and JMB creates a trust in favour of Shankowski (the "**Trust Issue**").

5. The Trust Issue is currently the subject of an application pending before the CCAA Judge and has not yet been heard and determined.

[1] Affidavit of Blake Elyea sworn December 4, 2020 ("**Elyea Affidavit**"), para 15, Exhibit "D"

6. By way of its proposed appeal, Shankowski seeks to have this Court to set aside the proper exercise of discretion on issues of mixed fact and law by the CCAA Judge, who has overseen the CCAA proceedings from their commencement. The CCAA Judge has appropriately balanced the interests of all stakeholders in determining the Vesting Orders were appropriate, fair and reasonable, and her exercise of discretion in granting the Vesting Orders should not be disturbed.

7. With its leave application, Shankowski is asking this Court to give him a second chance; he is seeking to make arguments now that he could have made prior to the granting of the Vesting Orders, but did not. With respect, this cannot be a proper use of this Court's leave process. Accordingly, JMB asserts Shankowski's application should be denied.

II. FACTS

8. On or about November 1, 2013, JMB entered into the Supply Contract with the MD, whereby JMB would provide aggregate to the MD for its discretionary use.[2]

9. JMB has a royalty agreement with Shankowski with respect to the extraction of aggregate from the land owned by Shankowski (the "**Royalty Agreement**").[3]

10. On May 1, 2020, JMB and its wholly owned subsidiary, 216, were granted an initial order pursuant to the CCAA (the "**Initial Order**"). In support of the Initial Order, the JMB Respondents relied upon the Affidavit of Jeff Buck sworn April 16, 2020 (the "**Buck Affidavit**"), which disclosed the existence and purpose of the Supply Contract, and which is available on the Monitor's website.[4]

11. On May 20, 2020, the CCAA Judge granted an Order (the "**Lien Claims Process Order**") approving a process to address the validity of any builders' lien claims associated with any work done or materials furnished with respect to the Supply Contract.[5] Following the Lien Claims Process Order, counsel for Shankowski was advised of the Lien Claims Process Order and

[2] Elyea Affiavit, para 4
[3] Elyea Affiavit, para 4
[4] Elyea Affiavit, para 5
[5] Affidavit of Jerry Shankowski sworn November 6, 2020 and filed in Appeal No. 2001-0213AC, Exhibit "C"

Shankowski filed a lien claim pursuant to same, without having made any inquiries as to the Supply Contract or its terms.[6]

12. On June 26, 2020, Shankowski served an unfiled Application and Affidavit (the "**Shankowski Lien Removal Application**") seeking the removal of two liens that had been registered against title to Shankowski's land (the "**Shankowski Land Liens**"). The Shankowski Land Liens had been filed by two subcontractors for amounts owed for work done by them for JMB relating to the Supply Contract.[7]

13. On or about July 27, 2020, the Monitor issued a Determination Notice to Shankowski pursuant to the Lien Claims Process Order denying his lien claim.[8] Shankowski subsequently served application materials to appeal the Determination Notice (the "**Lien Determination Appeal**").[9]

14. On September 28, 2020, Mantle and the Monitor (on behalf of the JMB Respondents) executed an asset purchase agreement (the "**Mantle APA**", with the contemplated transaction being the "**Mantle Transaction**").[10] In contemplation of closing the Mantle Transaction, Mantle and Shankowski entered into an Amended Aggregate Agreement, pursuant to which, *inter alia*: (i) the Royalty Agreement was amended to vest JMB's right, title and interest in the Royalty Agreement in Mantle on the closing of the Mantle Transaction; (ii) Shankowski consented to the vesting of the Royalty Agremeent pursuant to the Mantle Order; and (iii) Shankowski required that Mantle or JMB take steps to remove the Shankowski Land Liens from title to Shankowski's land. The Amended Aggregate Agreement was executed as of October 15, 2020.[11]

15. In anticipation of executing the Amended Aggregate Agreement, JMB served materials on October 9, 2020 for an application to discharge the Shankowski Land Liens (the "**Lien Removal Application**"). Those materials included the Affidavit of Jason Panter sworn October 9, 2020 (the "**Panter Affidavit**"), which appended the Supply Contract as an exhibit. The Lien Removal Application was scheduled to be heard on October 16, 2020 at the same time as the applications

[6] Elyea Affidavit, para 8
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] Elyea Affidavit, para 9
[11] Elyea Affidavit, para 12, Exhibit "B"

for, *inter alia*, the Vesting Orders and the Sanction Order (collectively, the "**October 16th Applications**"). All application materials for the October 16th Applications were served on the service list by October 1, 2020, which included Shankowski.[12]

16. On October 16, 2020, the Vesting Orders, among others, were granted by the CCAA Judge.[13]

17. The Mantle Order: (a) approves the Mantle Transaction; (b) vests in Mantle all of the JMB Respondents' right, title and interest in and to the assets as set out in the Mantle APA (the "**Acquired Assets**") free and clear of and from any and all interests, including liens and trusts; and (c) for the purpose of determining the nature and priority of Claims, the net proceeds from the sale of the Acquired Assets stand in the place and stead of the Acquired Assets from and after the closing of the Mantle Transaction.[14] The Acquired Assets consist of: (a) the Lands in and around the 16 aggregate pits included in the Acquired Assets; (b) the Acquired Aggregate together with the associated surface material leases, royalty agreements and regulatory approvals; (c) an unpermitted parcel of real property owned by JMB which contains aggregate reserves; (d) certain customer contracts; (e) the office equipment and the lands and premises at JMB's leased Bonnyville yard; (f) a minority interest in Atlas Aggregates, which has access to aggregate pits and reserves; and (g) the business, books and records associated with these assets.[15]

18. Specifically. the Acquired Assets do not include the funds currently held in the estate of JMB (the "**Estate Funds**"), or those held by FTI Consulting Canada Inc. in its capacity as Monitor of JMB pursuant to the Lien Claims Process Order (the "**Holdback Funds**"). Rather, the Estate Funds and Holdback Funds are included in the Remaining JMB Assets (as defined in the Reverse Vesting Order), all of which are being vested in 216.[16]

[12] Elyea Affidavit, para 11
[13] Elyea Affidavit, para 13
[14] Affidavit of Jerry Shankowski sworn November 6, 2020 and filed in Appeal No. 2001-0213AC, Exhibit "A"
[15] Elyea Affidavit, para 15
[16] *Ibid.*

19. Under section 1 of the Mantle APA, accounts receivable owing to JMB, which includes the Estate Funds and the Holdback Funds, are "Excluded Assets". Excluded Assets in turn are included in the definition of Remaining JMB Assets.[17]

20. Under paragraph 4(a) of the Reverse Vesting Order, all of JMB's right, title and interest in the Remaining JMB Assets are vested in 216, subject to, *inter alia*, all liens, trusts or other interests, which interests continue to attach to the Remaining JMB Assets and continue to have the same nature and priority that they previously held. Further, under paragraph 4(b) of the Reverse Vesting Order, 216 holds the Remaining JMB Assets, and any proceeds thereof, in trust for those persons to whom the Remaining JMB Liabilities are owed. Pursuant to paragraph 4(c) of the Reverse Vesting Order, the Remaining JMB Liabilities are vested in 216.[18] For clarity, the Remaining JMB Liabilities include any claims of Shankowski against JMB to the extent that those claims are established. The current creditors of 216 have no access to the Remaining JMB Assets.

21. The Lien Removal Application was also heard and granted on October 16, 2020 (the "**Lien Removal Order**"). Counsel for Shankowski attended the proceedings on October 16, 2020, having brought an Application seeking similar relief on behalf of Shankowski on that date, and made submissions to the Court in respect of same.[19]

22. It was not until counsel for Shankowski was preparing for the Lien Determination Appeal after the Lien Removal Order and Vesting Orders had been granted, that he reviewed the Supply Contract and advised that he would be seeking an adjournment of the Lien Determination Appeal to seek a declaration of trust on the basis of paragraph 26 of the Supply Contract.[20]

23. On November 6, 2020, Shankowski filed an application seeking various relief against the JMB Respondents, including: (i) an order vacating the Vesting Orders; (ii) an order setting aside the Amended Aggregate Agreement; (iii) an order declaring that paragraph 26 of the Supply Contract constitutes a trust in his favour (the "**Trust Issue Application**"); and (iv) an order adding counsel for the JMB Respondents and the Monitor as respondents to the application (the

[17] *Ibid.*
[18] *Ibid.*
[19] Elyea Affidavit, para 14
[20] Affidavit of Jerry Shankowski sworn November 6, 2020 and filed in Appeal No. 2001-0211AC, paras 5 & 6

"**Proposed Respondents**") and requiring the Proposed Respondents to indemnify Shankowski for any trust monies not available from JMB (the "**Proposed Respondents Application**").[21]

24. On November 27, 2020, the CCAA Judge heard the applications to vacate the Vesting Orders and set aside the Amended Aggregate Agreement. The CCAA Judge will release her decision on December 7, 2020.[22]

25. Although Shankowski brought the Trust Issue Application on the same grounds as the proposed appeal, it is not scheduled to be heard by the CCAA Judge until December 7 and 8, 2020. The Proposed Respondents Application is scheduled to be heard on January 12, 2020.[23]

26. The Mantle Transaction, which has not closed, was the only transaction of significance to come out of the lengthy sale and investment solicitation process, and only the transfer of specific licences remains to be completed prior to closing.[24] If the Mantle Transaction fails to close, the JMB Respondents will likely be put into receivership.[25]

III. ISSUES

27. There are two issues before this Court: (i) whether to grant leave to appeal the Vesting Orders; and (ii) whether a stay of the Vesting Orders should be granted pending appeal.

28. The JMB Respondents respectfully submit that the relief sought by the proposed appeal is moot, and therefore the tests for leave to appeal and the imposition of a stay are not met.

IV. ARGUMENT

A. The Proposed Appeal Does Not Meet the Test for Leave

29. Appeals of CCAA decisions can proceed only with leave of the CCAA court or a judge of the court to which the appeal lies.[26]

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[21] Elyea Affidavit, para 16
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] *Companies' Creditors Arrangement Act*. RSC 1985, c C-36, as amended, s. 13 **[Tab 1]**

30. Leave to appeal in CCAA proceedings should only be granted "sparingly". Courts apply a four-part test in deciding whether leave to appeal should be granted: (a) whether the point on appeal is of significance to the practice; (b) whether the point raised is of significance to the proceeding itself; (c) whether the appeal is *prima facie* meritorious; and (d) whether the appeal will unduly hinder the progress of the action.[27]

31. Leave to appeal will not be granted unless the Applicant can demonstrate that "the CCAA Court erred in principle or exercised its discretion unreasonably."[28]

32. The test for leave to appeal is particularly stringent where, as here, the order under appeal involves the exercise of a CCAA judge's discretion. One of the principal functions of a CCAA judge is to balance the interests of stakeholders during the reorganization process. It is often inappropriate to consider one exercise of discretion by the CCAA judge in isolation from other exercises of such discretion in balancing these various interests.[29]

33. Appellate courts will be particularly reluctant to intervene in plan sanction decisions, as they are matters of "mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere."[30]

34. In this proposed appeal, Shankowski asks this Court to set aside the Vesting Orders, which hollows out the entire Plan and renders it useless. The CCAA Judge granted the Vesting Orders and the Sanction Order after considering the facts and balancing the various interests of stakeholders. The CCAA Judge has overseen JMB's CCAA proceedings since the Initial Order and has presided over all but one of the subsequent hearings, and is therefore very aware of the competing interests of stakeholders in the CCAA proceedings.

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[27] *BMO Nestbitt Burns v Bellatrix Exploration Ltd.*, 2020 ABCA 264 at paras 7-8 **[Tab 2]**; *Liberty Oil & Gas Ltd. (Re)*, 2003 ABCA 158 ("*Liberty*") at para 16 **[Tab 3]**; *Canadian Airlines Corp. (Re)*, 2000 ABCA 149 ("*Canadian Airlines*") at para 34 **[Tab 4]**

[28] *9354-9186 Quebec inc v Callidus Capital Corp.*, 2020 SCC 10 ("*Callidus*") at paras 53-54 **[Tab 5];** *Re Smoky River Coal Ltd.*, 1999 ABCA 179 at para 61 **[Tab 6]**

[29] *Callidus* at paras 53-54**[Tab 5]**

[30] *Liberty* at paras 19-20 **[Tab 3]**

35. Leave will generally only be granted in a CCAA proceedings if the proposed appeal raises issues of "significance to the practice", or on which there is no clear authority. In addition, the proposed appeal should be prima facie meritorious.[31]

36. Contrary to Shankowski's submission, the JMB Respondents did disclose the existence and purpose of the Supply Contract to the Court and stakeholders as part of the Buck Affidavit. In addition, a copy of the Supply Contract was provided to Shankowski as part of the materials in support of the Lien Removal Application, to which Shankowski was a party and specifically required be brought as a condition of the Amended Aggregate Agreement.

37. Shankowski at all times had the ability and means to argue the Trust Issue prior to or at the October 16th hearing. Shankowski had the opportunity to raise the Trust Issue and the alleged significance of the Supply Contract with the CCAA Judge prior to the granting of the Vesting Orders. Shankowski did not do so, and with respect, it was not the responsibility or obligation of the JMB Respondents to make such submissions on Shankowski's behalf.

38. In any event, the proposed appeal is without merit. The Vesting Orders do not prejudice Shankowski with respect to the Trust Issue or in any other way. The Mantle Order does not vest the Estate Funds or the Holdback Funds in Mantle. As noted above, the Estate Funds and Holdback Funds are Excluded Assets that will be vested in 216 pursuant to the Reverse Vesting Order and will be available as Remaining JMB Assets against which rights, remedies and recourses the Unaffected Creditors will continue and be uncompromised and unaffected by the Plan.

39. The Plan only affects the Affected Creditors (as defined in the Plan) through the arrangement of the Affected Claims (as defined in the Plan) as against JMB only and not the Unaffected Creditors (as defined in the Plan). Shankowski is an Unaffected Creditor and the Unaffected Creditors are not affected by the Plan.

40. As the Vesting Orders in fact preserve Shankowski's claims against the Remaining JMB Assets, including the Estate Funds and the Holdback Funds, the proposed appeal is without merit. Setting aside the Vesting Orders will render the Plan useless, thereby negatively affecting all stakeholders of the JMB Respondents in favour of one stakeholder, Shankowski, whose interests

[31] *Canadian Airlines* at para 35 **[Tab 4]**

are unaffected by the terms of the Vesting Orders themselves. With respect, this outcome would be in direct contradiction of the intent and purpose of the CCAA.

41. To the extent that Shankowski is proposing to appeal the Vesting Orders on the basis of the Trust Issue, or that the Proposed Respondents somehow owe a duty to Shankowski as a potential beneficiary of the alleged trust, the Trust Issue Application and the Proposed Respondents Application address those issues. These applications are properly before the CCAA Judge and have not yet been heard and determined. Accordingly, any proposed appeal on the basis of these issues is premature at best.

42. Given the effect of an appeal of the Vesting Orders on the Plan, the overall proceedings will come to a halt pending the determination of the appeal. The Mantle Transaction will be unable to close, and the careful balancing of interests sought to be achieved by the CCAA Judge in granting the Vesting Orders and the Sanction Order will be unnecessarily disrupted.

43. Accordingly, the JMB Respondents respectfully submit that leave to appeal the Vesting Orders should not be granted.

B. The Test for a Stay of the Vesting Orders Has Not Been Met

44. To obtain a stay, it is trite law that the moving party must demonstrate that: (i) there is a serious question to be determined on the appeal; (ii) the moving party will suffer irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay.[32]

45. As set out above, there is no serious question to be determined on the proposed appeal. Although Shankowski has cast the issue as one of disclosure, the material facts were disclosed to Shankowski in advance of the Vesting Orders being granted, and in any event, for the reasons set out above, the Vesting Orders do not prejudice Shankowski or his claims against JMB (as vested in 216 against the Remaining JMB Assets). Put another way, Shankowski does not lose any rights that he would otherwise have as a result of the Vesting Orders.

46. Given that there is no prejudice to Shankowski, he cannot demonstrate (and in fact, has not demonstrated) that he will suffer irreparable harm if a stay is not granted. The Remaining JMB

[32] *Essar Steel Algoma Inc. (Re)*, 2016 ONCA 274 at para 27 **[Tab 7]**

Assets against which he can assert his claims are unaffected by the Vesting Orders. As one of the Unaffected Creditors, Shankowski's claims are specifically preserved by the Reverse Vesting Order and the Plan.

47. Finally, the balance of convenience favours the JMB Respondents and all their other stakeholders. Should the Vesting Orders be stayed and the Plan delayed, there is a significant risk that the Mantle Transaction will not close and the JMB Respondents will be put into receivership.

48. Accordingly, the JMB Respondents respectfully submit that the application for a stay of the Vesting Orders be denied.

V. PART III – RELIEF SOUGHT

49. The JMB Respondents respectfully request that the within Applications be dismissed with costs on an enhanced basis.

Estimate of time required for the oral argument: 30 minutes

GOWLING WLG (CANADA) LLP

Per: Caireen E. Hanert

VI. TABLE OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended, s. 13
2. *BMO Nestbitt Burns v Bellatrix Exploration Ltd.*, 2020 ABCA 264
3. *Liberty Oil & Gas Ltd. (Re)*, 2003 ABCA 158
4. *Canadian Airlines Corp. (Re)*, 2000 ABCA 149
5. *9354-9186 Quebec Inc v Callidus Capital Corp.*, 2020 SCC 10
6. *Re Smoky River Coal Ltd.*, 1999 ABCA 179
7. *Essar Steel Algoma Inc. (Re)*, 2016 ONCA 274

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

Most Recently Cited in: Trican Well Service Ltd v. Delphi Energy Corp, 2020 ABCA 363, 2020 CarswellAlta 1843 | (Alta. C.A., Oct 15, 2020)

R.S.C. 1985, c. C-36, s. 13

s 13. Leave to appeal

Currency

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

Amendment History
2002, c. 7, s. 134

Currency
Federal English Statutes reflect amendments current to November 25, 2020
Federal English Regulations are current to Gazette Vol. 154:23 (November 11, 2020)

End of Document

TAB 2

2020 ABCA 264
Alberta Court of Appeal

BMO Nesbitt Burns Inc. v. Bellatrix Exploration Ltd.

2020 CarswellAlta 1262, 2020 ABCA 264, [2020] A.W.L.D. 2721, 320 A.C.W.S. (3d) 540, 81 C.B.R. (6th) 161

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c.C-36, as amended And in the Matter of the Plan of Compromise or Arrangement of Bellatrix Exploration Ltd.

BMO Nesbitt Burns Inc., operating as BMO Capital Markets (Applicant) and Bellatrix Exploration Ltd. (Respondent) and National Bank of Canada, as agent (Respondent) and Borden Ladner Gervais LLP (Interested Party / Monitor)

Jo'Anne Strekaf J.A.

Heard: June 23, 2020
Judgment: July 13, 2020
Docket: Calgary Appeal 2001-0115-AC

Counsel: C.C.J. Feasby, Q.C., E.E. Paplawski, for Applicant
R.J. Chadwick, C. Defcours, for Respondent, Bellatrix Exploration Ltd.
E.W. Halt, Q.C., K.J. Bourassa, J. Reid, J. Jang, for Respondent, National Bank of Canada

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Company entered protection under Companies' Creditors Arrangement Act — Sale was arranged by sale advisor, however, price ultimately was considerably less than had been initially anticipated and was insufficient to pay out first lien creditors — First lien creditors objected to payment of advisor's fee from cash on hand — Order blocking payment to sale advisor being made in priority to amounts owing to first creditors pursuant to priority scheme in initial order was granted — Security for completion fee for sale was found to rank behind that of first lien lenders — Sale advisor brought application for leave to appeal — Application dismissed — Appeal was not prima facie meritorious — Trial judge properly interpreted terms of initial order — Matter did not raise important legal issue that was of significance to practice generally.
Table of Authorities
Cases considered by *Jo'Anne Strekaf J.A.*:
Bellatrix Exploration Ltd (Re) (2020), 2020 ABQB 348, 2020 CarswellAlta 1018 (Alta. Q.B.) — considered
Blue Range Resource Corp., Re (1999), 1999 CarswellAlta 809, 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — considered
Canadian Airlines Corp., Re (2000), 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to
Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta. C.A.) — followed
Mudrick Capital Management LP v. Lightstream Resources Ltd. (2016), 2016 ABCA 401, 2016 CarswellAlta 2416, 43 C.B.R. (6th) 175 (Alta. C.A.) — considered

(g) Seventh — Sale Advisor Transaction Fee Charge.

4 The Sale Advisor found a purchaser and a Sale and Vesting Order approving the sale of substantially all of Bellatrix's assets was granted on May 8, 2020 (the Transaction). The price, however, was considerably less than had been initially anticipated and was insufficient to pay out the First Lien Creditors. When the First Lien Creditors became aware that Bellatrix intended to pay the Completion Fee of $2.75 million to the Sale Advisor by paying that amount from cash on hand into escrow five days prior to the closing of the Transaction (as contemplated in the Engagement Letter), they applied for an order blocking the payment being made in priority to the amounts owing to them pursuant to the priority scheme set out in paragraph 42 of the Initial Order.

5 The application judge determined that the security for the Completion Fee ranked behind that of the First Lien Lenders and, accordingly, Bellatrix could not pay the Completion Fee to the Sale Advisor before the First Lien Lenders were fully paid.

6 The application judge rejected the Sale Advisor's argument that the distinction between the "Work Fee" and "Completion Fee" was intended to provide extra protection for payment of the Completion Fee and, because Bellatrix had cash on hand to pay the fee, there was no need to resort to the priority scheme in paragraph 42 of the Initial Order.

Test for Leave to Appeal

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

(1) Whether the point on appeal is of significance to the practice;

(2) Whether the point raised is of significance to the action itself;

(3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) Whether the appeal will unduly hinder the progress of the action.

8 "An appellate court should exercise its power sparingly, when asked to intervene in issues which arise in *CCAA* proceedings": *Blue Range Resource Corp., Re*, 1999 ABCA 255 (Alta. C.A.) at para 3. Decisions of a supervising chambers judge are accorded considerable deference and will be interfered with only if the judge acted unreasonably, erred in principle, or made a manifest error: *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178 (Alta. C.A.) at para 3. The applicant must point to an error on a question of law, or a palpable and overriding error in findings of fact or in the exercise of discretion: *Canadian Airlines Corp., Re*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) at paras 28-29.

Analysis

9 The Sale Advisor seeks leave to appeal on the question of whether the Sale Advisor or the First Lien Lenders (both of whom are key participants in the *CCAA* proceedings) are entitled to the $2.75 million held in trust by the Monitor. That is a question of significance in the ongoing *CCAA* proceedings, and the resolution of that question, should leave be granted, would not unduly delay those proceedings. I am, therefore, satisfied that the second and fourth factors in the test for leave to appeal are met in this case.

10 The key considerations on this application are the first and third factors of the test.

11 The Sale Advisor submits first, that the appeal is meritorious, and second, that it is of significance to the practice generally because the Initial Order is based on the template order that is used for all *CCAA* proceedings in Alberta.

12 With respect to the merit of the appeal, the Sale Advisor argues that the application judge's interpretation of the Initial Order conflated the obligation to make ongoing payments and the charges granted to secure such payment obligations, and that this is an error of law, reviewable on the correctness standard. The Sale Advisor further submits that the decision introduces

TAB 3

2003 ABCA 158
Alberta Court of Appeal

Liberty Oil & Gas Ltd., Re

2003 CarswellAlta 684, 2003 ABCA 158, [2003] A.J. No. 615, 122 A.C.W.S. (3d) 976, 44 C.B.R. (4th) 96

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

AND IN THE MATTER OF LIBERTY OIL & GAS LTD.

LEXXOR ENERGY INC. and LIBERTY OIL & GAS LTD. (Appellants) and RICHTER, ALLAN & TAYLOR INC., MONITOR OF LIBERTY OIL & GAS LTD. (Respondents)

Witmann J.A.

Heard: April 23, 2003
Judgment: May 14, 2003
Docket: Calgary Appeal 0301-0038-AC

Counsel: G. Brian Davison for Various Unsecured Creditors
Larry B. Robinson for Appellants, Lexxor Energy Inc.. Liberty Oil & Gas Ltd.
Geoffrey D. Baker for Rick Martin
Frank R. Dearlove for Respondents, Richter, Allan & Taylor Inc., Monitor of Liberty Oil & Gas Ltd
Peter S. Jull, Q.C. for Various Unsecured Creditors

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
Purchaser acquired oil and gas company after its plan of arrangement under Companies Creditors' Arrangement Act was accepted by creditors — As was customary in industry company did not receive payment for previous month's production until following month — Dispute arose between unsecured creditors and purchaser as to amounts attributable to post-petition period between February 25, 2002 and July 23, 2002 — Purchaser took position that matching principle of accounting was inapplicable and that plan indicated that only cash received during post-petition period would be used to pay excluded claims — Monitor took position that revenues and expenses during period should be matched, which would result in post-petition trade creditors being paid in full and unsecured creditors receiving greater percentage of cash proceeds — Chambers judge approved monitor's position — Purchaser brought application for leave to appeal — Application dismissed — Decision of supervising chambers judge contained no demonstrable or arguable error — Chambers judge adopted monitor's interpretation of fundamental accounting concept for purposes of revenue recognition during post-petition period — Recognition in terms of revenue is specialized term pursuant to Canadian Institute of Chartered Accountants Handbook, where it is defined as "process of including item in financial statements of entity" — Recognition has particular application to revenue in terms of timing of it — Chambers judge did not err in ordering application of fundamental accounting concept to revenue recognition and measurement as recommended in detail by monitor.
Table of Authorities
Cases considered by *Witmann J.A.*:

> Indeed, in my view, his order distorts the matching principle and could well result in a clawback or a diversion of funds from the unsecured creditor or the estate back to Lexxor contrary to the spirit and intent of my order of January the 24th and, indeed, as I see it, contrary to the proper meaning of the plan of arrangement itself.
>
> So I order and direct that the form of order to be used in the circumstances is the form of order agreed to by the majority of the parties.

The Test for Leave to Appeal

14 Leave to appeal is available under the *CCAA* by virtue of s. 13. Sections 13 and 14(1) state as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.
>
> 14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

15 The test for granting leave, as articulated in this Court, involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties: *Canadian Airlines Corp., Re* (2000), 261 A.R. 120, 2000 ABCA 149 (Alta. C.A. [In Chambers]), ("*Resurgence #1*") at para 6; *Smoky River Coal Ltd., Re*, 1999 ABCA 62 (Alta. C.A.) at para. 22; *Canadian Airlines Corp., Re* (2000), 266 A.R. 131, 2000 ABCA 238 (Alta. C.A. [In Chambers]) ("*Resurgence #2*") at para. 19; *Multitech Warehouse Direct Inc., Re*, [1995] A.J. No. 663 (Alta. C.A.) at para. 3; (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.), at 63.

16 The four factors subsumed in an assessment whether the criterion is present are:

> (1) Whether the point on appeal is of significance to the practice;
>
> (2) Whether the point raised is of significance to the action itself;
>
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) Whether the appeal will unduly hinder the progress of the action: *Resurgence #1* at para. 7; *Resurgence #2* at para. 19.

17 The first factor may be influenced by whether there is appellate authority on the question proposed to be considered on appeal: *Resurgence #1* at para. 33. It is also interpreted broadly to include not only in the insolvency practice but the industry involving the claimant: *CIBC World Markets Inc. v. Blue Range Resources Corp.* (2001), 281 A.R. 172 (Alta. C.A.) at para. 1. It was argued by the unsecured creditors that the point on appeal had no significance to the insolvency practice because it involved an interpretation of the terms of a specific plan of arrangement. Therefore, it was not a point of significance in the sense used. Perhaps. But the timing of payment for oil and gas production in relation to the *CCAA* period may be of significance to the practice.

18 The second factor - whether the point raised is of significance to the action itself - is conceded. In argument before me, Lexxor asserted that the proper application of the matching principle would result in a clawback of over a million dollars but Lexxor proposed to cap the clawback at a million dollars in any event of the result. The unsecured creditors indicated that the broader import of the matching principle as put forward by Lexxor would indeed have that result. So it is of significance to the parties.

19 The third factor involves a consideration as to whether there appears to be an error in principle of law or a palpable and overriding error of fact or that the exercise of discretion by a supervising *CCAA* judge has been exercised improperly, such as by taking into consideration irrelevant factors or failing to consider relevant factors: *Resurgence #1* at para. 41-42. Lexxor's

counsel argued strenuously that the alleged misstatement of the matching principle was an error of law, subject to the standard of review of correctness. The other parties submitted that there was no error of law or principle, that the interpretation of the Plan and the adoption of the Monitor's proposal was at most an error of mixed law and fact or the exercise of discretion by the supervising judge. I agree.

20 The standard of review that would govern the appeal is to be considered: *Resurgence #2* at para. 42; *Resurgence #1* at para. 28-29. Ancillary to these considerations are indications that a supervising chambers judge under the *CCAA* should be accorded considerable deference. Their decisions will be interfered with only in the event of unreasonable acts, errors in principle or manifest errors: *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 3. It has also been stated that an appellate court scrutinizing leave applications under the *CCAA* should exercise its powers sparingly, that a supervising *CCAA* judge has an ongoing management process similar to that of a judge making orders during a trial: *Blue Range Resource Corp., Re*, 1999 ABCA 255 (Alta. C.A.) at para. 3; *Smoky River Coal Ltd., Re* at para. 62. Finally, the four factors are to be assessed in the context of determining whether the criterion has been met by ascribing appropriate weight to each of the elements of the general criterion: *Resurgence #1* at para. 46.

Application in this Case

21 Central to the issue proposed for appeal is the impact of the application of the matching principle either as propounded by Lexxor or as propounded by the Monitor. The issue is not whether the matching principle is to be applied in accordance with generally accepted accounting principles. It is whether Hart, J. erred in law in approving the Monitor's proposed application of the matching principle in his Sixth Report. In my view, he did not. No details were articulated as to what the error complained of was. Only that the words "generally accepted accounting principles" were absent from the formal order actually settled on when they were, in fact, included in the reasons. It is clear from the quotation from the Monitor's Sixth Report what Hart, J. had in mind. He said what he had in mind when he settled the minutes of the order. He, in effect, approved the Monitor's version of the matching principle, i.e. the recognition of revenue during the *CCAA* period and its availability to satisfy excluded claims. Neither the Monitor nor Hart, J. intended to extend "the matching principle" beyond revenue recognition. In other words, there was no intent to derive a new accounting from February 25 to July 23 on a full accrual basis according to the version put forward by Lexxor.

22 Whether the appeal would unduly hinder the progress of the action was not strenuously argued. Apparently, an interim distribution can be made and there must be some delay because there is another contingent claim brought by one Martin which remains outstanding and which will delay a final distribution in any event. I am prepared to proceed on the basis that this factor would not and does not influence the decision to grant leave.

Conclusion

23 What is fatal to the applicant's position here is the absence of any demonstrable or, with respect, arguable error in the decision of the supervising chambers judge. He did not pronounce on the matching principle as if he were writing a chapter of the *Canadian Institute of Chartered Accountants* ("*CICA Handbook*") in setting out generally accepted accounting principles. What he did do was adopt the Monitor's interpretation of fundamental accounting concepts for the purposes of revenue recognition during the *CCAA* period. Recognition in terms of revenue is a specialized term pursuant to the *CICA Handbook* at 1000.41 where it is indicated that "recognition is the process of including an item in the financial statements of an entity". It has a particular application to revenue in terms of the timing of it: See s. 3400 revenue .06, .07 of the *CICA Handbook*.

24 Generally accepted accounting principles are defined at paragraph 1000 .59, .60, .61 of the *CICA Handbook* including departure and applicability. That terminology would not be helpful in a general sense to the resolution of the dispute between the parties here. The particular application of a fundamental accounting concept in terms of revenue recognition and measurement, as recommended in detail by the Monitor, is what is relevant, and that is what Hart, J. ordered.

25 The application for leave to appeal is denied.

Application dismissed.

TAB 4

2000 ABCA 149
Alberta Court of Appeal [In Chambers]

Canadian Airlines Corp., Re

2000 CarswellAlta 503, 2000 ABCA 149, [2000] A.W.L.D. 563, [2000] A.J. No. 610, 19 C.B.R. (4th) 33, 225 W.A.C. 120, 261 A.R. 120, 80 Alta. L.R. (3d) 213, 97 A.C.W.S. (3d) 844

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c.B-15., as amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Resurgence Asset Management LLC, Applicant and Canadian Airlines Corporation and Canadian Airlines International Ltd., Respondents

Wittmann J.A.

Heard: May 18, 2000
Judgment: May 29, 2000
Docket: Calgary Appeal 00-18816

Proceedings: (May 12, 2000), Doc. Calgary 0001-05071 [Alta. Q.B.]

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

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.4 Appeals
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
Applicant was unsecured creditor of C Corp. — Board appointed by A Corp. caused C Corp. to commence proceedings under CCAA under which A Corp. stood to gain substantial benefits — Proposed plan of compromise and arrangement filed under Act — Order made that classification of creditors not be fragmented to exclude A Corp. as separate class from applicant in terms of unsecured creditors, that A Corp. be entitled to vote on plan pursuant to s. 6 of Act, that there be no separation of unsecured creditors of two divisions of C Corp. for voting purposes, and that votes in respect of claims assigned to A Corp. be recorded and tabulated separately for purpose of consideration in application for court approval of plan — Applicant brought application for leave to appeal that order — Application dismissed — Decisions of supervising judge under Act entitled to considerable deference — Person seeking leave to appeal required to show error in principle of law or palpable and overriding error of fact — Exercise of discretion by reviewing judge not subject to review so long as discretion exercised judicially — Reviewing judge made no error of law — Applicant failed to make out prima facie meritorious case — Granting of leave would likely unduly hinder progress of action — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6.

succeed, and it votes as a member of the unsecured creditors class with Air Canada, Air Canada can control the vote of the unsecured creditors.

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

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

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

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

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

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

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

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

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

42 This element has at its root the purpose of the *CCAA*; the role of the supervising judge; the need for a timely and orderly resolution of the matter; and the effect on the interests of all parties pending a decision on appeal. The comments of McFarlane,

TAB 5

Most Negative Treatment: Check subsequent history and related treatments.

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.
Neil A. Peden, for Appellants / Interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Geneviève Cloutier, Clifton P. Prophet, for Respondent, Callidus Capital Corporation
Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

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

Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers

Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.

The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances,

given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from s. 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a

continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple, un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune

erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

Le financement temporaire est un outil souple qui peut revêtir différentes formes, et le financement d'un litige par un tiers peut constituer l'une de ces formes. Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le mieux placé pour répondre. En l'espèce, il n'y avait aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs, le juge surveillant a estimé que l'AFL était juste et raisonnable. Bien que le juge surveillant n'ait pas examiné à fond chacun des facteurs énoncés à l'art. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, cela ne constituait pas une erreur en soi. Il était manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Le juge surveillant a eu raison de conclure que l'AFL ne constituait pas un plan d'arrangement puisqu'il ne proposait aucune transaction visant les droits des créanciers. La charge super-prioritaire qu'il a accordée au prêteur ne convertissait pas l'AFL en plan d'arrangement en subordonnant les droits des créanciers. Par conséquent, il n'a pas commis d'erreur dans l'exercice de sa discrétion, aucune intervention n'était justifiée et l'ordonnance du juge surveillant devrait être rétablie.

Table of Authorities

Cases considered by *Wagner C.J.C., Moldaver J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — referred to

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — referred to

Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) (2018), 2018 QCCS 1040, 2018 CarswellQue 1923 (C.S. Que.) — referred to

BA Energy Inc., Re (2010), 2010 ABQB 507, 2010 CarswellAlta 1598, 70 C.B.R. (5th) 24 (Alta. Q.B.) — referred to

Blackburn Developments Ltd., Re (2011), 2011 BCSC 1671, 2011 CarswellBC 3291, 27 B.C.L.R. (5th) 199 (B.C. S.C.) — referred to

Boutiques San Francisco inc., Re (2003), 2003 CarswellQue 13882 (C.S. Que.) — referred to

Bridging Finance Inc. v. Béton Brunet 2001 inc. (2017), 2017 CarswellQue 328, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.) — referred to

Canada Trustco Mortgage Co. v. R. (2005), 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, *(*sub nom. *Canada Trustco Mortgage Co. v. Canada)* 2005 D.T.C. 5523 (Eng.), *(*sub nom. *Hypothèques Trustco Canada v. Canada)* 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, *(*sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.)* 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 61 B.C.L.R. (4th) 334, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 258 B.C.A.C. 187, 434 W.A.C. 187 (B.C. C.A.) — referred to

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

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

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

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

54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Edgewater Casino Inc., Re*, 2009 BCCA 40, 305 D.L.R. (4th) 339 (B.C. C.A.) ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

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

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

B. Callidus Should Not Be Permitted to Vote on Its New Plan

56 A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

TAB 6

1999 ABCA 179
Alberta Court of Appeal

Smoky River Coal Ltd., Re

1999 CarswellAlta 491, 1999 ABCA 179, [1999] 11 W.W.R. 734, [1999] A.J. No. 676, 12 C.B.R. (4th) 94, 175 D.L.R. (4th) 703, 197 W.A.C. 326, 237 A.R. 326, 71 Alta. L.R. (3d) 1

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

In the Matter of Smoky River Coal Limited, Allstate Insurance Company, Allstate Life Insurance Company, Security Life of Denver Insurance Company, Indiana Insurance Company, Peerless Insurance Company, Pacific Life Insurance Company, AH (Michigan) Life Insurance Company, Northern Life Insurance Company, Reliastar Life Insurance Company, Modern Woodmen of America, Phoenix Home Life Mutual Insurance Company, American International Life Assurance Company of New York, and Phoenix American Life Insurance Company, Petitioners/not Parties to the Appeal;

Luscar Ltd. and Consol of Canada Inc., Appellants and Smoky River Coal Limited, Respondent/Debtor and Canadian National Railway Company, Respondent/Creditor

Picard, Hunt, McIntyre JJ.A.

Heard: April 13, 1999
Judgment: June 9, 1999 *
Docket: Calgary Appeal 99-18164

Proceedings: affirming (January 27, 1999), Doc. Calgary 9801-10214 (Alta. Q.B.); refused reconsideration or rehearing (August 16, 1999), Doc. Calgary Appeal 99-18164 (Alta. C.A.)

Counsel: *R.B. Davison, Q.C.*, and *J.H. Hockin*, for the appellants.
D.R. Haigh, Q.C., and *B.T. Beck*, for the respondent Smoky River Coal.
W.E. Cascadden, for Neptune Bulk Terminals.
T.M. Warner, for the respondent Canadian National Railway.
D.W. Mann, for the petitioners.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Alternative dispute resolution
III Relation of arbitration to court proceedings
III.3 Stay of court proceedings
III.3.b Discretion of court to grant stay
Alternative dispute resolution
III Relation of arbitration to court proceedings
III.3 Stay of court proceedings
III.3.c Whether matter within terms of arbitration clause

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court
Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.s On appeal
Civil practice and procedure
XXIII Practice on appeal
XXIII.19 Miscellaneous

Headnote

Arbitration --- Relation to other proceedings — Stay of court proceedings — Discretion of court to grant stay

Relationship among respondent corporation, appellant shareholders and other corporate shareholder was governed by shareholders' agreement, which provided that disputes would be arbitrated — Petition was filed to place corporate shareholder under protection of Companies' Creditors Arrangement Act ("CCAA") when allegations of breach of contractual obligations were brought against it by appellants — Stay of all actions ordered against corporate shareholder — Corporate shareholder brought motion to prohibit arbitration — Appellants brought cross-motion for stay of corporate shareholder's motion pursuant to s. 15 of Commercial Arbitration Act ("CAA") — Chambers judge dismissed appellants' motion, finding that corporate shareholder's insolvency, appointment of monitor and role of court under CCAA made shareholders' agreement void, preventing stay under s. 15 of CAA — Appellants appealed — Appeal dismissed — Chambers judge had authority under s. 11 of CCAA to order stay of arbitration proceedings, as arbitration is "proceeding" under s. 11 — Appellants were creditors for purposes of CCAA, as it could be said they claimed right to property in corporate shareholder's possession — Even if appellants were not creditors, words of s. 11(4) of CCAA were sufficiently expansive to support discretion exercised by chambers judge — Chambers judge's reasons for stay, which included view that arbitration would compromise process under CCAA, indicated he properly exercised discretion under s. 11(4) — Even if chambers judge erred in interpreting s. 15 of CAA, outcome of case would not change since CCAA would prevail over provincial Act in case of conflict — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11(4) — Commercial Arbitration Act, R.S.B.C. 1996, c. 55, s. 15.

Table of Authorities

Cases considered by *Hunt J.A.*:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) — considered

Cadillac Fairview Inc., Re (1995), 30 C.B.R. (3d) 17 (Ont. Gen. Div. [Commercial List]) — considered

Cadillac Fairview Inc., Re (January 29, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]) — considered

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339 (Ont. Gen. Div.) — considered

Central Capital Corp., Re (1995), 29 C.B.R. (3d) 33, 22 B.L.R. (2d) 210 (Ont. Gen. Div. [Commercial List]) — considered

Central Capital Corp., Re (1996), 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88, 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, *(*sub nom. *Royal Bank v. Central Capital Corp.)* 88 O.A.C. 161 (Ont. C.A.) — referred to

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]) — considered

Farm Credit Corp. v. Holowach (Trustee of), 86 A.R. 304, 59 Alta. L.R. (2d) 279, 51 D.L.R. (4th) 501, [1988] 5 W.W.R. 87, 68 C.B.R. (N.S.) 255 (Alta. C.A.) — applied

Farm Credit Corp. v. Holowach (Trustee of), 100 A.R. 395 (note), 66 Alta. L.R. (2d) xlvii, [1989] 4 W.W.R. lxx, 73 C.B.R. (N.S.) xxvii, 60 D.L.R. (4th) vii, 102 N.R. 236 (note) (S.C.C.) — referred to

Gaz métropolitain Inc. v. Wynden Canada Inc. (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) — applied

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, *(*sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

Kaverit Steel & Crane Ltd. v. Kone Corp., 85 Alta. L.R. (2d) 287, 40 C.P.R. (3d) 161, 87 D.L.R. (4th) 129, 120 A.R. 346, 8 W.A.C. 346, [1992] 3 W.W.R. 716, 4 C.P.C. (3d) 99 (Alta. C.A.) — applied

58 A related case is *Re T. Eaton Co.* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.). Dylex (not a creditor of T. Eaton but an operator of stores in malls where T. Eaton was the anchor tenant) applied to amend a *CCAA* stay order so that it could exercise rights pursuant to its leases. Those leases permitted Dylex to alter the lease terms if T. Eaton ceased to operate in the shopping centres. Houlden J.A. denied the motion, noting that, if such rights were accorded to Dylex, there might be other tenants who would make the same claim. This would likely increase the claims of landlords against T. Eaton and seriously impact its re-structuring plan. He took account of T. Eaton's position as a large employer and purchaser from suppliers. At 295-96, without extensive analysis, he opined that s. 11 and the inherent jurisdiction of the Court gave him the power to make orders against non-creditor third parties when their actions would potentially prejudice the success of the plan. I acknowledge that it is not clear that his order had the effect of altering contractual rights permanently, since, depending on the outcome of the re-organization proceedings, at a future time the tenants might still be able to exercise their rights under the leases. In this regard, the situation was akin to that in *Norcen*.

59 In *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), the debtor company was permitted to terminate its leases in shopping malls, as part of its restructuring program. Farley J. viewed s. 11 as giving the court the inherent jurisdiction, in the interim between the filing and the approval of a plan, to "fill in gaps in [the] legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan" (p. 110).

60 To summarize, the language of s. 11(4) is very broad. The *CCAA* must be interpreted in a remedial fashion. Cases support the view that third-party rights may be affected by a stay order, although there are none where the third-party rights appear to have been affected in quite the same way as those of the Appellants as a result of this order. I am satisfied, nevertheless, that the *CCAA* gives the chambers judge the discretion to make the impugned order. It remains to consider whether he properly exercised that discretion.

2. Did the Chambers Judge Properly Exercise his Discretion under s. 11(4) of the CCAA?

61 The fact that an appeal lies only with leave of an appellate court (s. 13, *CCAA*) suggests that Parliament, mindful that *CCAA* cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

62 A similar opinion was expressed by Macfarlane J.A. in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]). In considering whether to grant leave to appeal, he observed at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made....
>
> Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A.

63 The Appellants point to cases where a specific issue arising under the *CCAA* has been sent for resolution to a forum other than the *CCAA* court. In each of those cases, however, it has been determined that resolution in the other forum would promote the objectives of the *CCAA*. In each such case, moreover, the *CCAA* judge has retained control over the impact of the outside determination.

64 For example, in *Re Philip's Manufacturing Ltd.* (1991), 9 C.B.R. (3d) 1 (B.C. S.C.), the debtor company's landlord alleged that its leases were about to expire since the company had not given requisite notice. The judge noted that it was essential to the reorganization plan that the company be able to remain in the leased premises. He permitted the landlord to pursue proceedings under the *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54. But that legislation contained a summary procedure for determining the issue at hand (whether the landlord was entitled to a writ of possession). The judge, moreover, maintained some control over the process by ordering that, if an order of possession was granted, it would be stayed for as long as the *CCAA* stay, "to be

TAB 7

2016 ONCA 274
Ontario Court of Appeal

Essar Steel Algoma Inc., Re

2016 CarswellOnt 5758, 2016 ONCA 274, 265 A.C.W.S. (3d) 838, 36 C.B.R. (6th) 56

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., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA, Applicants

E.E. Gillese J.A., In Chambers

Heard: April 13, 2016
Judgment: April 15, 2016
Docket: CA M46326 (M46297)

Counsel: Lou Brzezinski, Alexandra Teodorescu, for Moving party, United Steelworkers Union Local 2251
Ashley John Taylor, Lee Nicholson, for Applicants
David Rosenblat, for Deutsche Bank, DIP Lenders and the Term Lenders
Clifton P. Prophet, for Monitor, Ernst & Young Inc.
Massimo Starnino, Debra McKenna, for United Steelworkers Union Local 2724

Subject: Civil Practice and Procedure; Insolvency; Public; Labour

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.ii Contractual rights

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights

Applicant came under protection of Companies' Creditors Arrangement Act (CCAA) — Applicant was in middle of sale and investment solicitation process — There were approximately 3,000 unresolved grievances of employees of applicant represented by union — Motion to obtain court approval of grievance claims procedure was granted — Order provided for streamlined grievance claim procedure with goal of having claims determined by conclusion of sale and investment solicitation process — Union brought motion for leave to appeal order — Union brought motion to stay order pending disposition of its leave to appeal order — Motion dismissed — Granting stay was not in interests of justice — It appeared unlikely that leave would be granted — It was well-settled that grievances were caught by stay made in CCAA proceedings and that CCAA judge had power to establish procedure for resolving matters which parties had previously agreed to have resolved by arbitration — Appeal would unduly hinder progress in CCAA proceeding — It was difficult to accept that irreparable harm would flow if stay was not granted — There was no question that workload and resulting stress and strain was real and created problems for full and proper discharge of all union obligations, but such problems did not amount to irreparable harm — Granting stay motion would lead to greater harm to applicants and other stakeholders in CCAA proceeding, including union as stay would delay determination of grievance claims.

Table of Authorities

Cases considered by *E.E. Gillese J.A., In Chambers*:

of the meeting. There is some dispute about what next occurred. On one version, Local 2251 agreed to the continuation of the meeting without it being present. On the other version, Deputy Chief Arbitrator refused to adjourn the meeting, Local 2251 walked out of the meeting and refused to re-attend. There is no question, however, that the meeting continued without Local 2251's participation.

22 In a report delivered to the parties on April 4, 2016, Deputy Chief Arbitrator Mitchell reiterated that the Chief Arbitrator and Deputy Chief Arbitrator have directed a modified approach to the grievance claims procedure that is less onerous than that which is provided for in the Order. Among other things, the modified approach does not require Local 2251 to provide a 250-word summary of each grievance in the list that it is to prepare.

23 A number of executive members of Local 2251 are working full-time to complete the list but, consequently, are unable to perform other day-to-day tasks critical to the operation of the union.

24 Algoma has agreed to allow Local 2251 to pull four workers from the shop floor to assist in drafting the list.

25 As of April 6, 2016, 36 of 48 grievances filed by Local 2724 and its members have been consensually resolved under the grievance claims procedure provided for in the Order. It is expected that the remaining grievances will be resolved well before August 31, 2016.

The Notice of Motion for Leave to Appeal

26 On March 29, 2016, Local 2251 served its notice of motion for leave to appeal the Order. An amended notice was filed on April 1, 2016.

The Test for Granting a Stay

27 To obtain a stay, it is trite law that the moving party must demonstrate that:

1. there is a serious question to be determined on the appeal, should leave be granted;

2. it will suffer irreparable harm if the stay is not granted; and

3. the balance of convenience favours granting the stay.

See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

28 In applying this test, the overall focus must be on whether a stay is "in the interests of justice": *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (Ont. C.A. [In Chambers]), at p. 677.

1. Serious Question

29 The threshold to satisfy the first limb of the test is generally low, in that the court is required to make a preliminary assessment of the merits to determine that the appeal is neither frivolous nor vexatious: *RJR MacDonald*, at pp. 337-338.

30 However, where - as in the present case - leave to appeal is required, the moving party must demonstrate that there is at least a "reasonable prospect" that leave will be granted: *Vandenberg v. Desjardine*, 2016 ONSC 1968 (Ont. S.C.J.), at para. 14.

31 Moreover, leave to appeal is to be granted only sparingly in CCAA proceedings and only where there are serious and arguable grounds: *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2012 ONCA 10, 90 C.B.R. (5th) 141 (Ont. C.A.), at para. 6. At para. 6 of *Innovation Capital*, this court states that in determining whether the grounds of the proposed appeal are sufficient and arguable, it considers whether:

1. the point on the proposed appeal is of significance to the practice;

TAB 8