COURT OF APPEAL OF ALBERTA

Clerk's Stamp

COURT OF APPEAL FILE NUMBER	2001-0211 AC 2001-0213 AC
TRIAL COURT FILE NUMBER / ESTATE NUMBERS	2001-05482
REGISTRY OFFICE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. AND 2161889 ALBERTA LTD.
APPLICANT	JERRY SHANKOWSKI and 945411 ALBERTA LTD.
STATUS ON APPEAL STATUS ON APPLICATION	APPELLANTS APPLICANTS
RESPONDENTS	JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.
STATUS ON APPEAL STATUS ON APPLICATION	RESPONDENTS RESPONDENTS
DOCUMENT	**MONITOR'S MEMORANDUM OF ARGUMENT (LEAVE TO APPEAL)**
APPELANT'S ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Sean Collins / Pantelis Kyriakakis / Nathan Stewart Tel: 403-260-3500 Fax: 403-260-3501 Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca

CONTACT INFORMATION FOR ALL OTHER PARTIES:

JERRY SHANKOWSKI AND 945411 ALBERTA LTD.
Hajduk Gibbs LLP
#202 – 118 Street NW
Edmonton, AB T5K 1Y4
Richard D. Hajduk, Rodger C. Gibbs, and Misty McTaggert
r.hadjuk@hajdukandgibbs.com
r.gibbs@hajdukandgibbs.com
m.mctaggert@hajdukandgibbs.com

JMB CRUSHING SYSTEMS INC. AND 2161889 ALBERTA LTD.
Gowling WLG (Canada) LLP
1600, 421 – 7th Avenue SW
Calgary, AB T2P 4K9
Tom Cumming, Caireen E. Hanert, and Stephen Kroeger
tom.cumming@gowlingwlg.com
caireen.hanert@gowlingwlg.com
stephen.kroeger@gowlingwlg.com

FIERA PRIVATE DEBT FUND VI LP, BY ITS GENERAL PARTNER INTEGRATED PRIVATE DEBT FUND GP INC. AND FIERA PRIVATE DEBT FUND V LP BY ITS GENERAL PARTNER INTEGRATED PRVIATE DEBT FUND GP INC., ACTING IN ITS CAPACITY AS COLLATERAL AGENT FOR AND ON BEHALF OF AND FOR THE BENEFIT OF FUND VI
Miller Thomson LLP
Suite 5800, 40 King Street West
Toronto, ON M5H 3S1
Kyla Mahar
kmahar@millerthomson.com

ATB FINANCIAL
Dentons Canada LLP
2500 Stantec Tower
10220 – 103 Avenue NW
Edmonton, AB T5J 0K4
Tom Gusa
tom.gusa@dentons.com

AND TO: BALANCE OF SERVICE LIST

TABLE OF CONTENTS

I. INTRODUCTION

1. This Memorandum of Argument is submitted by FTI Consulting Canada Inc., in its capacity as the court-appointed monitor (the "**Monitor**") of JMB Crushing Systems Inc. ("**JMB**") and 2161889 Alberta Ltd. ("**216**", JMB and 216 are collectively referred to as, the "**Companies**"), in response to certain applications filed by Jerry Shankowski ("**Jerry**") and 945411 Alberta Ltd. ("**945**", Jerry and 945 are collectively referred to as, "**Shankowski**" or the "**Applicants**") seeking leave to appeal the Reverse Vesting Order (the "**RVO**") and the Order (Amended and Restated Mantle Sale Approval and Vesting Order) (the "**SAVO**"), both granted on October 16, 2020. The SAVO and RVO form a critical part of the Mantle Transactions (as defined below) and, as a result, the proposed meritless appeal threatens to derail the Mantle Transactions.

2. Shankowski's materials state the following proposed grounds of appeal: (i) the Chambers Justice "erred in law or in mixed law and fact in granting the impugned Orders based on the non-disclosure by JMB and 216 and their Counsel of paragraph 26 of the [Bonnyville] Contract …"; (ii) the RVO and SAVO constitute a plan of arrangement which was not properly approved; and, (iii) the RVO and SAVO will prejudice Shankowski's trust and lien claims.

3. The appeal sought by Shankowski is remarkable given that Shankowski: (i) has not appealed the Sanction Order (as defined below), which concerns the actual Plan (as defined below); (ii) was served with notices of application (collectively, the "**October 16 Application**") seeking approval of the RVO and SAVO more than two weeks prior to the hearing; (iii) did not oppose the October 16 Application, despite being present; and, (iv) will suffer no prejudice, whatsoever, as the RVO does not substantively affect creditors' claims and the SAVO is a straightforward approval and vesting order.

4. No palpable and overriding error, being the applicable standard of review, has been identified. Instead, Shankowski alleges that material facts (the Bonnyville Contract), were not disclosed. This is inaccurate. The Affidavit of Jerry Shankowski, sworn on November 6, 2020 (the "**Shankowski Affidavit**"), states:

> "the first time that JMB, the Counsel for JMB, the Monitor or Counsel for the Monitor or any other person **disclosed a copy of the Contract between JMB and the MD of Bonnyville referred to in the Eidsvik May 20 Order was when an unfiled copy of the Affidavit of Jason Panter ("Panter") was provided to [Shankowski's counsel] on October 9, 2020**, and that **he did not read and review the Contract until the evening of October 17, 2020** …"[1]

II. FACTS

Mantle Transactions

5. The Monitor and Sequeira Partners, in its capacity as sales agent, carried out the terms of the court-approved sale and investment solicitation process (the "**SISP**").[2] Mantle Materials Group Ltd.'s ("**Mantle**") wining bid evolved into the Amended and Restated Asset Purchase Agreement, dated September 28, 2020 (the "**Mantle APA**").

6. The Mantle APA, *inter alia*, contemplates: (a) the sale of the Acquired Assets (as defined in the Mantle APA); (b) a joint plan of arrangement under the CCAA and the *Business Corporations Act* (British Columba) (the "**Plan**"): (i) compromising certain secured creditors' claims; and, (ii) cancelling and transferring various equity interests in JMB to Mantle; and, (c) the granting of: (i) the SAVO, to transfer the Acquired Assets; (ii) the RVO, to transfer the Remaining JMB Assets and Remaining JMB Liabilities (as defined in the RVO) without prejudicing existing

[1] Affidavit of Katie Doran, sworn on December 4, 2020 ["**KD Aff**."] at Exhibit "I", the Affidavit Jerry Shankowski, sworn on November 6, 2020, at para. 4(a) ["**Nov. 6 Shankowski Affidavit**"].

[2] See KD Aff., *supra* at Exhibit "N", the Monitor's Brief of Law and Argument at first instance, at paras. 4-6 ["**Monitor's Brief**"].

creditors; (iii) a Plan Sanction Order (the "**Sanction Order**") approving the Plan; and, (iv) an Assignment Order (pursuant to section 11.3 of the CCAA), approving the transfer and assignment of certain material contracts to Mantle (collectively, the "**Mantle Transactions**").[3]

Service of Application Materials and Related Disclosure

7. Beyond being made available upon request, the existence of the Bonnyville Contract was disclosed numerous times, including: (i) the Affidavit of Jeff Buck, sworn on April 16, 2020; (ii) the Order - Lien Claims - MD of Bonnyville, granted on May 20, 2020 (the "**Bonnyville Order**"); (iii) the Affidavit of Jeff Buck, sworn on May 20, 2020; and, (iv) the Affidavit of Jason Panter, sworn on October 9, 2020, which referenced and exhibited the entire Bonnyville Contract.[4]

8. Regarding service of the Bonnyville Contract, the Shankowski Affidavit states:

> "***I am advised by [counsel] and do verily believe*** that the first time that [counsel] **received a copy of the Contract was by service of an unfiled copy of the Affidavit of Jason Panter sworn October 9, 2020**, in relation to the applications to discharge builders' liens from the lands of myself and 945411, **but [counsel] did not notice the terms of the Contract at that time** and particularly paragraph 26 and the definitions of "Product" and "Services" until the night of October 16, 2020…"[5]

The RVO

9. The RVO is a necessary part of the Mantle Transactions, as: (i) it monetizes approximately

[3] KD Aff., *supra* at Exhibit "L", the Seventh Report of the Monitor, dated September 30, 2020, at paras. 4(d), 16, 37(c)(ii)-(iii), 37(f), 37(g)(ii) ["**Seventh Report**"]. See also the Plan of Arrangement, attached as Appendix "A" to the Seventh Report, at paras. 1.1(p), 1.1(pp), 4.1(a)-(e) ["**Plan**"]. The Mantle Transactions are structured to occur in the following order: (a) ***first***, the vesting of the Acquired Assets in Mantle, the assumption of certain secured debt, and the payment of the Mantle APA purchase price; (b) ***second***, the Reverse Vesting Order shall take effect; and, (iii) ***third***, the limited Plan shall become effective, assuming it receives the necessary votes: Plan, *supra* at ss. 2.2, 2.3, 5.1.

[4] KD Aff., *supra* at Exhibit "E", the Affidavit of Jeff Buck, sworn on April 16, 2020 at para. 33(a); KD Aff., *supra* at Exhibit "F", the Affidavit of Jeff Buck, sworn on May 20, 2020 at para. 6; KD Aff., *supra* at Exhibit "B", Order - Lien Claims - MD of Bonnyville, issued on May 20, 2020 at para. 3(c); KD Aff., *supra* at Exhibit "G", Affidavit of David Howells, sworn on May 29, 2020 at para. 2; Affidavit of Jason Panter, sworn on October 9, 2020, at Exhibit "C".

[5] Nov. 6 Shankowski Affidavit, *supra* at para. 5.

$40 million of paid up capital and preserves regulatory permits which may not be immediately transferable; and, (ii) a traditional plan of arrangement to achieve similar objectives is not viable in the current circumstances. The relevant provisions of the RVO state:

> 4. **[…]** (a) **all of JMB's right, title and interest in and to the Remaining JMB Assets shall vest absolutely in the name of 216, but shall remain subject to any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, […] or other claims, whether contractual**, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise… **(all of which are collectively referred to as the "Remaining JMB Encumbrances"), all of which shall continue to attach to the Remaining JMB Assets and to any and all proceeds of the Remaining JMB Assets (any such proceeds being the "Remaining JMB Proceeds") and to secure the payment and performance of any Remaining JMB Liabilities secured thereby, with such Remaining JMB Encumbrances and Remaining JMB Liabilities having the same nature and priority as against the Remaining JMB Assets and their Remaining JMB Proceeds as they had immediately prior to the transfer and vesting**; **[…]**
>
> (c) any and all **Remaining JMB Liabilities** (including, for greater certainty, the Remaining ATB Debt and Remaining Fiera Debt) **shall be transferred to and vest absolutely in 216 and 216 shall be deemed to have assumed and become liable for such Remaining JMB Liabilities** up to and solely to the extent of the Remaining JMB Assets and the Remaining JMB Proceeds, and subject to the Initial Order and any other applicable Order in these proceedings, the JMB Creditors (including, for greater certainty, ATB and Fiera) **will have all of the rights, remedies, recourses, benefits and interests against 216 up to and solely to the extent of the Remaining JMB Assets, which immediately prior to the Reverse Vesting they had against JMB, and the nature of the Remaining JMB Liabilities, including, without limitation, their amount, priority, and secured or unsecured status, shall not be affected or altered as a result of their transfer to and vesting in 216**; **[…]**
>
> (d) **[…]** (ii) **any JMB Creditor that prior to the Effective Time had a valid right or claim against JMB under or pursuant to any Remaining JMB Liability shall no longer have such right or claim against JMB but shall have an equivalent Remaining JMB Liability claim against 216 in respect of the Remaining JMB Liability** up to and as against 216's interests in the Remaining JMB Assets, from and after the Effective Time in its place and stead, **and nothing in this Order limits, lessens, extinguishes, or alters the Remaining JMB Liability claimed by any such JMB Creditor as against 216 up to and to the extent of the Remaining JMB Assets and the Remaining JMB Proceeds**; **[…]**[6]

[6] KD Aff., *supra*, at Exhibit "D", the Reverse Vesting Order, at paras. 4(a), 4(c), 4(d)(ii).

The SAVO

10. The following factors, among others, were raised in connection with the approval of the SAVO: (i) the Mantle APA arose from a comprehensive court-approved SISP; (ii) the Mantle APA was the highest and best bid received; (iii) the price to be paid for the Mantle Assets represents the highest and best price that can be obtained in the current circumstances; and, (iv) the Mantle APA is supported by ATB and Fiera; who will suffer a significant shortfall as a result of same.[7]

The Set Aside Application

11. On November 27, 2020, the CCAA Court heard an application, by Shankowski, seeking to set aside the SAVO and RVO (the "**Set Aside Application**"), on substantially the same grounds as currently alleged. As part of the related materials, the Shankowski Affidavit states:

> Prior to October 16, 2020, **I did not believe that 945411 had any possibility of recourse, as an unsecured creditor, to any arrear's amounts owing to it other than as a potential claimant under the lien hold back fund established pursuant to the Eidsvik May Order. Had the existence of the trust created under paragraph 26 of the Contract been disclosed to me by JMB, I would not have entered into the Amended Assignment Agreement, unless all of the arrears had been cured**…[8]

12. A decision concerning the Set Aside Application is expected on December 7, 2020.

III. ISSUE

13. The issue before this Honourable Court is whether Shankowski should be granted leave to appeal the RVO and the SAVO. If leave to appeal is granted, this Court must then consider

[7] KD Aff., *supra*, at Exhibit "K", Fourth Report of the Monitor, dated August 25, 2020 at paras. 13(e), 15, 17; Seventh Report, *supra*, at paras. 18(a)-(d), 20, 38(d)-(i), 49, 54, Confidential Appendix "B" (Summary of Phase 2 SISP Bids).

[8] Nov. 6 Shankowski Affidavit, *supra*, at para. 29.

whether to grant a stay pending such appeal, as addressed in a separate Memorandum of Argument.

IV. LAW

14. Section 13 of the CCAA requires that leave to appeal be obtained from the judge appealed from or of the court to which the appeal lies, prior to commencing an appeal of a CCAA Order. [9]

15. Leave to appeal in CCAA proceedings is granted where there are serious and arguable grounds that are of real and significant interest to the parties, taking the following into account, whether: (i) the point on appeal is of significance to the practice; (ii) the point raised is of significance to the action itself; (iii) the appeal is *prima facie* meritorious or frivolous; and, (iv) the appeal will unduly hinder the progress of the action.[10] In most cases, the last two factors should be given the most weight.[11] In assessing these factors consideration will be given to the applicable standard of review that would govern the proposed appeal.[12]

V. ARGUMENT

(A) Leave to Appeal The CCAA Court's Discretionary Orders Should Not be Granted.

16. Leave to appeal the CCAA Court's discretionary SAVO and RVO should not be granted in the present circumstances. In matters of mixed fact and law and the exercise of judicial discretion, as in the current circumstances, the applicable standard of review is palpable and overriding error.[13] Specifically, "[a]n appellate court should exercise its power sparingly, when

---

[9] *Companies' Creditors Arrangement Act*, RSC 1986, c. C-36 a s. 13 ["**CCAA**"].

[10] *Bellatrix Exploration Ltd v BP Canada Group ULC*, 2020 ABCA 178 [***Bellatrix***] at para. 16.

[11] *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149 at para. 45 [***Resurgence***].

[12] *Third Eye Capital v B.E.S.T. Active 365 Fund*, 2020 ABCA 160 at para. 9, citing *Re Liberty Oil & Gas Ltd*, 2003 ABCA 158 (CanLII) at para. 20 [***Liberty***].

[13] *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII) at paras. 27, 36; *Third Eye*, *supra* at paras. 23-25, 36.

asked to intervene in issues which arise in CCAA proceedings".[14] Further, "[d]ecisions 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."[15]

17. The CCAA Justice's decision to grant the RVO and SAVO was an exercise of discretion, under Sections 11 and 36 of the CCAA.[16] Shankowski's proposed appeal raises no issues or concerns regarding any extricable legal issues or with respect to the legal test applied. Justice Eidsvik has, to date, granted 23 of 24 Orders within the CCAA proceedings and was well placed to exercise the CCAA Court's discretion during the October 16 Application.

18. Shankowski now seeks to replace this exercise of discretion by appealing Orders which ***do not*** affect Shankowski's trust/lien claims[17] and despite all relevant materials being served at least seven (7) days beforehand. The applicable standard of review, palpable and overriding error, is not met. Shankowski's only remaining stated purpose for the proposed appeal is to renegotiate payment terms with Mantle; however, buyer's remorse is not an appropriate ground of appeal.

(B) <u>The Four-Part Leave to Appeal Test Is Not Met in the Circumstances.</u>

(i) <u>The Proposed Appeal Is Not of Significance to the Practice</u>

19. The proposed appeal is not of significance to the practice. Significance is gauged by whether the issue subject to appeal only has relevance to the parties involved or deals with an issue

---

[14] *Duke Energy Marketing Limited Partnership v Blue Range Resource Corporation*, 1999 ABCA 255 at para. 3.

[15] *BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264 at para. 8. See also, *Trican Well Service Ltd v Delphi Energy Corp*, 2020 ABCA 363 at paras. 11-13 [***Trican***].

[16] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at footnote 3 [***Callidus***].

[17] The Monitor continues to hold approximately $1.85 million in trust under the Bonnyville Order. See KD Aff., *supra* at Exhibit "M", Tenth Report of the Monitor, dated November 20, 2020, at paras. 18-19 ["**Tenth Report**"].

of significant interest to the industry.[18] The evidence is clear: (i) Shankowski was served with the Bonnyville Contract seven (7) days before the October 16 Application; and, (ii) Shankowski failed to review same. The proposed appeal's only remaining purpose (as the SAVO/RVO do not affect trust/lien claims) is as leverage to obtain a better deal with Mantle. An appeal concerning a party's failure to review materials or for such collateral purpose is not important to the practice.

(ii) The Proposed Appeal Is Not of Significance to the Action

20. The proposed appeal is of no significance to the action nor Shankowski because neither the SAVO nor RVO determine or compromise Shankowski's trust or lien claims.

(iii) The Proposed Appeal Is Not *Prima Facie* Meritorious

21. The *prima facie* merit test is not a rubber stamp. Specifically, this Court has stated that:

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

(a) The RVO and SAVO Are Not a Plan of Arrangement

22. Neither the RVO nor the SAVO are a plan of arrangement. A plan of arrangement must, at least, contemplate "some compromise of creditors' rights", such as compromising a creditor's indebtedness or legal rights.[20] There is a substantive requirement for the final resolution of the claims at issue. As a result, Courts which have granted reverse vesting orders have held that the

[18] *West Edmonton Mall Property Inc v Duncan & Craig*, 2001 ABCA 40 at para. 10; *Liberty*, *supra* at para. 17.

[19] *Resurgence*, *supra*, at paras. 34-35.

[20] *Callidus*, *supra* at para. 101. See also paras. 28, 102.

jurisdiction to grant such orders exists under Sections 11 and/or 36 of the CCAA,[21] rather than those relating to plans of arrangement. The RVO is formulated to *prevent* the compromise of claims and preserve claimants' rights. The SAVO is a straightforward approval and vesting order.

23. This Court recently confirmed that a "channelling" provision, which directs claims to the proceeds of an insurance policy and caps such claims to the corresponding proceeds, does not constitute a "compromise".[22] The RVO neither compromises any claims nor applies any cap.

24. The Quebec Court of Appeal, in *Nemaska Lithium*, recently dismissed an application seeking leave to appeal a reverse vesting order on the basis that it constituted a plan of arrangement. The application seeking leave was dismissed as the proposed appeal: (i) would delay the CCAA proceedings; (ii) was being used as a "bargaining tool"; and, (iii) granting leave would prejudice a going concern transaction.[23] All such factors are present and applicable here.

(b) Shankowski Had Notice and Full Disclosure of All Material Facts

25. Shankowski's allegations that a material agreement was not disclosed are without merit. Viewed in context, Shankowski's proposed appeal: (i) relates to the Bonnyville Contract, which has no bearing on the SAVO or RVO; (ii) is not affected by the SAVO or RVO; (iii) only appears to affect Shankowski's side deal with Mantle; and, (iii) is contrary to Shankowski's own evidence, which confirms service and disclosure of the Bonnyville Contract.

(c) The RVO and SAVO Were Properly Granted

[21] See the Monitor's Brief, *supra*, at paras. 26-29, 31-32, and the decisions cited therein.

[22] *Trican*, *supra* at paras. 21-23.

[23] Judgment, issued November 11, 2020, in the matter of *Nemaska Lithium Inc et al.*, District of Montreal, Court File No: 500-09-029177-201, 500-09-029190-204 (500-11-057716-199) (QCCA) at paras. 3-5, 8, 11-16, 19-20, 22, 26-28, 33-36, 38-42, 44.

26. While not stated as a ground of appeal, the appropriate legal tests and relevant facts were considered by the CCAA Court in granting the RVO and SAVO. Approval of the RVO and SAVO was an exercise of judicial discretion and is subject to appeal on the standard of overriding and palpable error; which Shankowski has failed to demonstrate.

(iv) The Proposed Appeal Will Unduly Hinder Progress of the Action

27. Even where all other criterion are met, leave to appeal will be denied if it would unduly hinder the CCAA proceedings. The onus is on the party seeking leave to appeal to establish, by affirmative evidence, that the proposed appeal will not do so.[24]

28. The proposed appeal will unduly hinder the progress of the CCAA proceedings. The RVO and SAVO, are conditions precedent to both the Plan and the Mantle APA. Without the SAVO and RVO, the Mantle Transactions cannot close.[25] The Companies have limited cash on hand to fund operations until closing.[26] As such, timing and closing are serious concerns.

VI. RELIEF SOUGHT

29. The Monitor respectfully requests that this Honourable Court: (i) dismiss Shankowski's application for leave to appeal; and, (ii) grant costs against Shankowski.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of December, 2020.

McCarthy Tétrault LLP
Per: *"McCarthy Tétrault LLP"*
Sean Collins / Pantelis Kyriakakis / Nathan Stewart
Counsel for FTI Consulting Canada Inc., in its capacity as the court-appointed Monitor of JMB Crushing Services Inc. and 2161889 Alberta Ltd.

[24] *Resurgence*, *supra*, at paras. 41-45.

[25] Plan, *supra*, at para. 7.1(c); Seventh Report, *supra*, at Confidential Appendix "F", the Mantle APA, at para. 5.3(a).

[26] Tenth Report, *supra* at paras. 23, 26, and Appendix "A".

Table of Authorities

1. *Bellatrix Exploration Ltd v BP Canada Group ULC*, 2020 ABCA 178;
2. *Duke Energy Marketing Limited Partnership v Blue Range Resource Corporation*, 1999 ABCA 255;
3. *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149;
4. *Third Eye Capital v B.E.S.T. Active 365 Fund*, 2020 ABCA 160;
5. *Re Liberty Oil & Gas Ltd (Companies' Creditors Arrangement Act)*, 2003 ABCA 158;
6. *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII);
7. *BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264;
8. *Trican Well Service Ltd v Delphi Energy Corp*, 2020 ABCA 363;
9. *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10;
10. *West Edmonton Mall Property Inc v Duncan & Craig*, 2001 ABCA 40;
11. *Liberty Oil & Gas Ltd (Companies Creditors Arrangement Act)*, 2003 ABCA 158;
12. Judgment, issued November 11, 2020, in the matter of *Nemaska Lithium Inc et al.*, District of Montreal, Court File No: 500-09-029177-201, 500-09-029190-204 (500-11-057716-199) (QCCA).

TAB 1

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-029177-201, 500-09-029190-204
(500-11-057716-199)

DATE: November 11, 2020

BEFORE THE HONOURABLE GENEVIÈVE MARCOTTE, J.A.

***IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT OF*:**

N° : 500-09-029177-201

VICTOR CANTORE
APPLICANT – Objecting Party
v.

NEMASKA LITHIUM INC.
and
NEMASKA LITHIUM WHABOUCHI MINE INC.
and
NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC.
and
NEMASKA LITHIUM P1P INC.
and
NEMASKA LITHIUM INNOVATION INC.
RESPONDENTS – Debtors
and
PRICEWATERHOUSECOOPERS INC.
IMPLEADED PARTY – Monitor
and
INVESTISSEMENT QUÉBEC
and
THE PALLINGHURST GROUP
and
OMF FUND II (K) LTD.
OMF FUND II (N) LTD.

and
FMC LITHIUM USA CORP.
and
BRIAN SHENKER
IMPLEADED PARTIES – Impleaded parties

***IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF*:**

N° : 500-09-029190-204

BRIAN SHENKER
APPLICANT – Impleaded party
v.

NEMASKA LITHIUM INC.
and
NEMASKA LITHIUM WHABOUCHI MINE INC.
and
NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC.
and
NEMASKA LITHIUM P1P INC.
and
NEMASKA LITHIUM INNOVATION INC.
RESPONDENTS – Debtors
and
PRICEWATERHOUSECOOPERS INC.
IMPLEADED PARTY – Monitor
and
INVESTISSEMENT QUÉBEC
and
THE PALLINGHURST GROUP
and
OMF FUND II (K) LTD.
OMF FUND II (N) LTD.
and
FMC LITHIUM USA CORP.
IMPLEADED PARTIES – Impleaded parties
and
VICTOR CANTORE
IMPLEADED PARTY – Opposing creditor

JUDGMENT

[1] I am tasked with the determination of two applications for leave to appeal of a judgment rendered on October 15, 2020 by the Superior Court of Québec, district of Montreal (the honourable Louis J. Gouin) which approved a transaction and issued a reverse vesting order pursuant to sections 11 and 36 of the *Companies' Creditors Arrangement Act (CCAA)*.[1]

[2] The CCAA proceedings were commenced in December 2019 with respect to the debtor companies (the "Nemaska entities") which are involved in the development of a lithium mining project in Quebec

[3] In January 2020, the CCAA judge approved an uncontested sale or investment solicitation process (« SISP ») which led to the acceptance of an offer submitted by impleaded parties Investissement Québec, the Pallinghurst Group and OMG Fund II (K) Ltd. and OMG Fund II (N) Ltd (« Orion »), in the form of a bid that was made subject to the condition that a reverse vesting order (RVO) be issued.

[4] The proposed RVO provides for the acquisition by the impleaded parties of the shares of Nemaska entities free and clear of the claims of creditors which are transferred along with unwanted assets[2] to a newly incorporated non-operating company, as part of a pre-closing reorganization.

[5] The RVO allows the purchaser to continue to carry on the operations of the Nemaska entities in a highly regulated environment by maintaining their existing permits, licences, authorizations, essential contracts and fiscal attributes. It is essentially a credit bid whereby the shares of the Nemaska entities are acquired in return for the assumption of the secured debt[3].

---

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

2 They essentially consist of residual cash defined as follows in the Accepted bid:

> 38. The Residual Cash is comprised of: (i) the cash still on hand as at the closing date (to be determined and subject to adjustments), the amount of US$7M from the US$20M escrowed funds held in respect of the Livent litigation (plus accrued interest on US$20M), an amount under the Directors and Officers (the «**D&O**») trust of approximately $2M, less (ii) the sum of $12M to be retained by New Nemaska Lithium to cover its assumption of the secured claim of JMBM.

3 The Accepted bid provides for the following consideration:

> 36. The Accepted Bid is submitted as a credit bid and the full amount of the Orion Secured Claim is used as such by the Bid Group as consideration.

[6] Applicant Victor Cantore (Cantore) is a shareholder of Nemaska and a creditor of royalties (a 3% net smelter return royalty on all metals), following the sale of his original mining titles to the Nemaska entities in 2009.

[7] Cantore filed an application to have the Court recognize his "*bene esse* real rights" on the mining titles which the parties agreed to debate at a later date and have temporarily carved out of the proposed RVO.

[8] Cantore nonetheless formally objected to the approval of the RVO, raising multiple grounds of contestation, including the CCAA judge's lack of authority to grant a vesting order for anything other than a sale or disposition of assets, the impossibility under the CCAA for debtor companies to emerge from CCAA protection outside a compromise or arrangement, the violation of securities laws and the improper release stipulated in favour of directors and officers without prior approval from creditors.

[9] Applicant Brian Shenker ("Shenker") is a shareholder of Nemaska Lithium Inc. Along with other shareholders, he filed an *Application to declare certain claims as exempt and to permit the filing of certain claims in late September 2020*, namely against Nemaska entities' directors and officers for negligent misrepresentations.

[10] While the application had not been heard by the CCAA judge at the time of the approval hearing, Shenker was allowed to make oral submissions regarding the granting of releases in favour of the directors and officers in the context of the proposed RVO.

[11] Notwithstanding the Cantore objections and the Shenker representations, the CCAA judge approved the RVO following a 9 day hearing.

[12] In his reasons, the CCAA judge reviewed the context of the transaction in detail and insisted on the purpose and efficiency of the RVO to maintain the going concern operations of the debtor companies, while also emphasizing that it is not up to the courts to dictate the terms and conditions to be included in the offer which stems from the uncontested SISP order.

[13] He also reiterated that the approval of the RVO pursuant to s. 36 CCAA is subject to determining:

---

37. The consideration offered under the Accepted Bid includes (i) the assumption by New Nemaska Lithium of the Orion Secured Claim ($134,500,000); (ii) the assumption by New Nemaska Lithium of the Johnson Matthey Battery Materials Ltd. («**JMBM**») secured claim ($12,000,000); (iii) the assumption of various liabilities and obligation (including the Livent obligations and all of the Debtors' obligations under the Chinuchi Agreement from the closing onwards) and (iv) the transfer to Residual Nemaska Lithium of Nemaska Lithium's cash on hand on closing, subject to certain adjustments (the «**Residual Cash**») and any Excluded Assets.

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently;
- The efficacy and integrity of the process followed;
- The interests of the parties; and
- Whether any unfairness resulted from the process.[4]

[14] He considered that these criteria had been met and found the issuance of the RVO to be a valid use of his discretion, insisting that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[15] In coming to this conclusion, the CCAA judge relied extensively on the principles recently set out by the Supreme Court in the matter of *9354-9186 Quebec inc. c. Callidus Capital Corp.*[5] namely:

> 1. The evolution of CCAA proceedings and the important role of the CCAA supervising judge;
>
> 2. The remedial objectives of Canadian insolvency laws to provide timely, efficient and impartial resolution of a debtor's insolvency, preserve and maximize the value of a debtor's assets, ensure fair and equitable treatment of the claims against a debtor, protect the public interest, and balance the costs and benefits of restructuring or liquidating the debtor company;
>
> 3. The priority afforded by the CCAA to « "avoid [ing] the social and economic losses resulting from the liquidation of an insolvent company" by facilitating the reorganization and survival of the pre-filing debtor company, as a going concern;
>
> 4. The CCAA judge's wide discretion pursuant to s. 11 of the CCAA with a view to furthering the remedial objectives of the CCAA while keeping in mind three "baseline considerations," which the applicant has the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence.

[16] After reviewing the Monitor's report and uncontradicted testimony, the CCAA judge dismissed the Cantore objections and concluded that the Nemaska entities had acted in

---

4 *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742, para.34-35.
5 *9354-9186 Quebec inc. c. Callidus Capital Corp.[Callidus]*, 2020 CSC 10, para. 38-52, 67-68.

good faith and with the required diligence, and that the approval of the RVO was the best possible outcome in light of the alternatives, being : (i) the realization of the rights held by secured creditors, (ii) the suspension of the restructuring process to attempt a new SISP at a high cost with an uncertain outcome in an uncertain market that had previously been thoroughly canvassed and had led to a single acceptable bid, or (iii) the bankruptcy of the debtor companies.

[17] He underlined the catastrophical impact of these alternatives on all stakeholders being the employees, creditors, suppliers, the Cree community and local economies.

[18] As far as the various arguments raised by Cantore are concerned, the CCAA judge pointed out that his attorney had conceded that his client would not have continued to oppose the RVO if his *sui generis* rights had been settled and incorporated into an offer to be approved by the Court.

[19] The CCAA judge dismissed Cantore's argument regarding the Court's limited authority to grant a vesting order, stating that the terms « *Sell or otherwise dispose of assets outside the ordinary course of business* » under subsection 36 (1) CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*.[6]

[20] He insisted that this would be particularly appropriate, where the proposed RVO brings an outcome to creditors more favourable than the alternatives and where available tax attributes contribute to significantly improve the offer, to eventually bring a greater distribution to the creditors.

[21] The CCAA judge also insisted on the fact that the expungement of real rights was contemplated by subsection 36(6) and was a necessary condition to the implementation of a solution, and served to prevent a veto on the part of the holders of those real rights.

[22] The CCAA judge further held that the offer did not constitute a plan of arrangement subject to prior creditor approval and that the residual companies would be submitting a plan of arrangement to the remaining creditors for a vote once the first step, being the acquisition of the Nemaska shares by the impleaded parties, is accomplished.

[23] He dismissed the argument of a potential violation of the applicable securities laws, insisting on the fact that the issue had become moot, given the written confirmation obtained from a representative of the Autorité des marchés financiers that they would not

---

6 See Supra note 5.

object to the interpretation of *Regulation 61-101 respecting Protection of Minority Security Holders in Special Transactions*[7] proposed in the context of the RVO.

[24] He dismissed the argument related to an « impermissible disguised substantive consolidation » of the Nemaska entities and the alleged lack of approval of a consolidation plan, insisting on the fact that the offer had been made by the impleaded parties in response to a SISP process which had not been contested and clearly contemplated the purchase of all or part of the assets of the debtor companies.

[25] Additionally, the CCAA judge held that the release in favour of the directors and officers of the debtor companies contained in the RVO was qualified in such a manner so as to protect the rights of shareholders and creditors whose claim is based on Section 5.1 (2) of the CCAA.

[26] Moreover, he concluded that Cantore's sui generis real rights were being fully protected by the reserve set out under the RVO and he dismissed his proposition that the proposed transaction was not fair and reasonable or that the Monitor had acted in a partial or improper manner, given the serious efforts put forward to salvage the operations of the companies, the rigorous SISP process carried out and the fact that the offer at issue was the only acceptable and serious bid received and that it allowed the mining project operations to resume.

[27] Lastly, he insisted on the urgency to approve the RVO and the fact that that any additional delay would work to the detriment of the impleaded parties as well as the debtor companies, their employees and suppliers, the Cree community and their local economies.

[28] In the applications for leave to appeal, Applicants Cantore and Shenker both argue that the CCAA judgment is flawed, in that the CCAA judge did not have the power to approve a transaction which is structured in such manner as to allow the debtor companies to emerge from CCAA protection free and clear of their pre-filing obligations outside the confines of a plan of compromise or arrangement and without the benefit of an approval by the required majority of creditors.

[29] Both Applicants add that the CCAA judge also erred in approving the broad releases in favour of third parties, including the directors and officers, outside the context of a plan of arrangement and without first determining whether they were fair, reasonable and necessary to the restructuring and whether they could prejudice creditor rights.

---

7 V-1.1, r. 33.

[30] In addition Cantore raises essentially the same arguments which were previously dismissed by the CCAA judge, being that:

1. The pre-filing obligations were essentially "novated" by the Court and consolidated (without prior determination of the need for such consolidation), and were illegally transferred to third parties without prior creditor consent;

2. The CCAA judge erred in law by approving the transaction and issuing the RVO on the basis of evidence given by the Monitor who was not neutral nor impartial;

3. The CCAA judge focused exclusively on the outcome of the proposed transaction which he qualified to be the "best and only alternative available in the circumstances", while failing to give any meaningful consideration to creditor rights.

4. The CCAA judge approved a transaction that violates applicable securities law, more precisely the minority shareholder approval requirements.

5. The CCAA erred in granting provisional execution and failed to support this order with sufficient reasons relating to the nature and the extent of the harm which could be suffered.

[31] In order to obtain leave to appeal a judgment pursuant to section 13 CCAA, the Applicants must demonstrate that they satisfy the following four-pronged test in that:

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

2. The point is of significance to the action or proceedings;

3. The appeal is prima facie meritorious;

4. The appeal will not unduly hinder the progress of the proceedings[8].

[32] Such leave is only granted sparingly given the nature of the powers afforded the CCAA judge.

---

[8] See *Bridging Finance inc c. Béton Brunet 2001 inc.*, 2017 QCCA 138 para. 14 and 15 (per Kasirer, J.A., in chambers); *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665, para. 4 (per Hilton, J.A., in chambers).

[33] All parties agree that RVOs are a novelty and that, until now, they have only been granted by consent. They also agree that a delimitation of powers of the CCAA judge under section 11 of the *CCAA* where the RVO transaction is contested by certain creditors is a point of principle which could be of interest to the practice and could, in certain circumstances, justify granting leave to appeal[9].

[34] They claim, however, that in the particular context of the transaction, such leave should not be granted as it will serve to hinder the progress of the CCAA proceedings in a context where the great majority of creditors will be prejudiced.

[35] As underlined by the CCAA judge, the only determination that the courts are asked to make is whether or not to approve the RVO, without having the power to dictate its terms:

> [16] L'offre Orion/IQ/Pallinghurst est soumise au Tribunal telle que déposée, et il ne revient pas au Tribunal d'indiquer aux Offrants quels termes et conditions doivent en faire partie.
>
> [17] Le choix du Tribunal est le suivant : il approuve ou il refuse l'Offre Orion/IQ/Pallinghurst.

[36] Certain issues raised in appeal do appear to qualify as being significant to the practice of insolvency. This is particularly the case regarding the issue of the scope of authority of the CCAA supervising judge in the context of an order that is not strictly limited to the "sale or disposition of assets" provided for under section 36 (6) CCAA, which, according to the Applicants, results in an outcome that would normally form part of an arrangement subject to prior approval by the creditors. There is also an issue of principle raised regarding the granting of broad third party releases (that are not limited to the transaction itself), outside the confines of an arrangement and without determining their appropriateness and submitting same to the required vote of creditors.

[37] There is however reason to question the merit of the appeal in the particular context of the file. The CCAA judge's comments on Cantore's approach in the file (notwithstanding the parties' agreement to postpone the debate regarding the expungement of his "*bene esse* real rights" in the mining claims), provide the context in which his arguments are being advanced and somewhat affect their legitimacy:

> [30] Le report de ce débat, lequel avait essentiellement pour but que la Demande Cantore ne soit plus un obstacle à l'obtention urgente de l'approbation par le Tribunal de l'Offre Orion/IQ/Pallinghurst, dans la

---

[9] *Aviva Cie d'assurance du Canada c. Béton Brunet 2001 inc.*, 2016 QCCA 1837, para. 16.

mesure où le Tribunal était disposé à aller dans ce sens, n'a pas mis fin à l'opposition du Créancier Cantore à la Demande pour ODI, loin de là.

[31] Ainsi, le Créancier Cantore a continué à prétendre que le Tribunal n'avait tout simplement pas l'autorité et la compétence pour accueillir la Demande pour ODI sauf, par contre, si elle incluait aussi un règlement de la Demande Cantore qui serait alors approuvé par le Tribunal.

[32] Tel que discuté ci-après, il est apparu clairement au Tribunal, tout au long de l'audition, que le Créancier Cantore, par les arguments qu'il présentait, ne prenait nullement en considération ce qui avait été décidé par l'Ordonnance SISP, la Toile de fond de la Demande pour ODI.

[33] Tout était décortiqué à la pièce par le Créancier Cantore, isolé du portait global, loin de ce que le Tribunal avait déjà autorisé.

[34] **À plusieurs occasions, le Tribunal a eu l'étrange impression que l'opposition du Créancier Cantore était un exercice de négociation avec les Débitrices et les Offrants, portant ainsi ombrage à la légitimité des arguments qu'il avançait.**

[35] À un tel point tel que, le 8 octobre 2020 05 :19, le Tribunal a fait parvenir un courriel aux procureurs présents à l'audition, mentionnant, entre autres, ce qui suit :

> [...]
>
> I ask you all to be practical and don't take a legal position in front of the Court on this issue, or any other issue**, as a bargaining tool.**
>
> [...]
>
> [Emphasis added]

[38] As it turns out[10], the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at $8,160 million out of a total value of provable claims of $200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would

---

[10] In May 2020, Cantore delivered to the Monitor 5 proofs of claims which were disallowed in part by the Monitor by way of a Notice of Revision or Disallowance dated October 22, 2020, leaving an outstanding provable claim of $8,160,000. Cantore has since filed an application to appeal from the Monitor's revision or disallowance of a claim dated October 29, 2020.

be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

[39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in first instance.

[40] That being said, the applicants have also failed to convince me that their appeal will not hinder the progress of the proceedings and that it is not purely strategic (insofar as Applicant Cantore is concerned) or theoretical (insofar as Applicant Shenker is concerned).

[41] Serious concerns were raised at the hearing regarding the fact that the RVO may be compromised if the closing (which has already been postponed on more than one occasion since the acceptance of the offer in June 2020) cannot take place as determined in the RVO by December 31, 2020. These concerns are compounded by the risk of a potential cash depletion as contemplated by the Monitor (in his Ninth Monitor's Report) at a monthly rate of $2.5 to $3 million. As well, the Monitor deems it unlikely that an alternative or any other new plan of arrangement could generate a distribution to unsecured creditors in the range currently estimated in the RVO (between $6 million and $14 million).

[42] This makes the leave to appeal a risky proposition that could turn into the potential "catastrophy" that the CCAA judge referred to in his reasons, one in which all stakeholders, including creditors, employees, suppliers, the Cree community and the local economies stand to lose. In such event, the rights being debated even if important may become theoretical.

[43] As far as Shenker is concerned, while the issues that he proposes to raise with respect to overreaching third party releases are not devoid of merit, granting leave is likely to seriously prejudice creditors, with limited gains to be had on the part of shareholders whose rights remain entirely subordinated to those of the creditors.[11] If the manner of constituting the releases makes them invalid or unopposable, then Shenker, and any other party with a claim against directors, may still have a recourse.

---

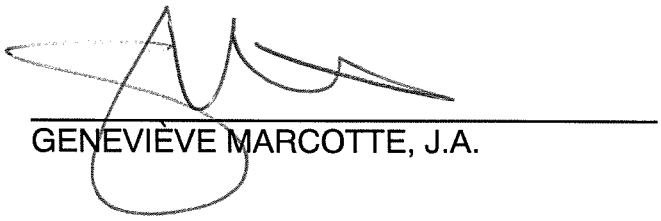
[11] As highlighted by the CCAA judge during a management hearing held on September 18 2020 as reproduced at paragraph 37 of the judgment:

> De plus, le Tribunal tient à répéter que dans un contexte d'insolvabilité, tel que dans la présente affaire, les intérêts économiques des Actionnaires, si tant est que de tels intérêts existent encore, sont entièrement subordonnés à ceux de tous les créanciers des Débitrices, et ce, jusqu'à ce que ces créanciers aient été entièrement payés, ce qui n'est nullement envisagé dans le présent dossier et n'a, semble-t-il, jamais été envisagé par qui que ce soit. Il s'agit d'un principe fondamental en la matière et qui ne doit jamais être perdu de vue.

THEREFORE, THE UNDERSIGNED:

[44] **DISMISSES** the applications for leave to appeal;

[45] **THE WHOLE**, with legal costs.



GENEVIÈVE MARCOTTE, J.A.

Mtre Dimitrios Maniatis
ACCENT LÉGAL
Mtre Tom Provost
MLT AIKINS
For Applicant and impleaded party Victor Cantore

Mtre Neil Peden
Mtre Bogdan Catanu
WOODS
For Applicant Brian Shenker

Mtre Alain Tardif
Mtre Gabriel Faure
Mtre François Alexandre Toupin
Mtre Patrick Boucher
McCARTHY TÉTRAULT
For Respondents

Mtre C. Jean Fontaine
Mtre Nathalie Nouvet
STIKEMAN ELLIOT
For impleaded party Pricewaterhousecoopers inc.

Mtre Luc Morin
NORTON ROSE FULLBRIGHT CANADA
For impleaded party Investissement Québec

Mtre Denis Ferland
DAVIES WARD PHILLIPS & VINEBERG
For impleaded party The Pallinghurst Group

Mtre Christopher Richter
Mtre Marie-Ève Gingras
SOCIÉTÉ D'AVOCATS TORYS
For impleaded party OMF Fund II (K) Ltd. and OMF Fund II (N) Ltd.

Mtre Kevin Mailloux
Mtre François Gagnon
BORDEN LADNER GERVAIS
For impleaded party FMC Lithium USA Corp.

Date of hearing: November 2, 2020