COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	**2401-0341AC**
TRIAL COURT FILE NUMBER:	**2401 09247**
REGISTRY OFFICE:	**Calgary**
APPLICANT:	**Henenghaixin Corp.**
STATUS ON APPEAL:	Appellant
STATUS ON APPLICATION:	Applicant
RESPONDENTS:	**Long Run Exploration Ltd. and Calgary Sinoenergy Investment Corp.**
STATUS ON APPEAL:	Respondents
STATUS ON APPLICATION:	Respondents

Registrar's Stamp

DOCUMENT: **MEMORANDUM OF ARGUMENT OF FTI CONSULTING CANADA INC., IN ITS CAPACITY AS MONITOR OF LONG RUN EXPLORATION LTD. AND CALGARY SINOENERGY INVESTMENT CORP.**

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

Torys LLP
4600, Eighth Avenue Place East
525 - 8th Avenue SW
Calgary, AB T2P 1G1

Attention: Kyle Kashuba
Telephone: (403) 776-3744
e-mail: kkashuba@torys.com

Special Counsel to the Monitor, FTI Consulting Canada Inc.

and

CONTACT INFORMATION FOR ALL OTHER PARTIES:

Field LLP
400, 444 - 7th Avenue SW
Calgary, AB T2P 0X8

Attention: Douglas Nishimura / Trevor Batty
Telephone: (403) 260-8500
e-mail: dnishimura@fieldlaw.com / batty@fieldlaw.com

Counsel for Henenghaixin Corp.

Bennett Jones LLP
4500, Bankers Hall East
855 - 2nd Street SW
Calgary, AB T2P 4K7

Attention: Kelsey Meyer
Telephone: (403) 298-3323
e-mail: meyerk@bennettjones.com

Counsel for the Monitor, FTI Consulting Canada Inc.

Blake, Cassels & Graydon LLP
3500, Bankers Hall East
855 - 2nd Street SW
Calgary, AB T2P 4J8

Attention: Kelly J. Bourassa
Telephone: (403) 260-9697
e-mail: kelly.bourassa@blakes.com

Counsel for China Construction Bank Toronto Branch

And to the Service List

Table of Contents

I. Introduction

1. The Respondent, FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor ("**Monitor**") of Long Run Exploration Ltd. ("**Long Run**") and Calgary Sinoenergy Investment Corp. ("**Sinoenergy**", and together with Long Run, the "**Debtors**"), opposes the application for leave to appeal submitted by Henenghaixin Corp. ("**H Corp**") under s. 13 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**"). H Corp's application is opposed because: there exists appellate court authority on the questions proposed to be considered; no appealable errors of law or fact have been identified; H Corp's economic position is unaffected by the outcome of this application; and the application jeopardizes an arrangement that shields Albertans from the economic consequences of an oil and gas company's bankruptcy.

II. Statement of Facts

2. Long Run, an oil and gas company headquartered in Calgary, Alberta, is a wholly owned subsidiary of Sinoenergy. On January 31, 2017, Long Run (as borrower) and Sinoenergy (as guarantor) entered into a secured credit agreement with China Construction Bank Toronto Branch ("**CCB**"). CCB's security interest is registered at the Alberta Personal Property Registry.

3. On February 28, 2020, H Corp commenced an action against Tianzhou Deng, Xiaobo Deng, Michael Lam (collectively, the "**Individual Defendants**") and the Debtors in the Court of King's Bench of Alberta (Action No. 2001-03353, the "**Action**"). H Corp plead that the Individual Defendants, by way of, *inter alia*, breach of fiduciary duty, fraud, misrepresentation, and unjust enrichment, diverted approximately $44 million from H Corp to the Debtors. Since February 2020, H Corp's claim has been only partially litigated and

discovery has not yet commenced.[1]

4. On July 4, 2024, CCB obtained an initial order that granted the Debtors protection under the CCAA. The initial order stayed the Action against the Debtors. A Court-approved sale and investment solicitation process followed, which resulted in a single qualified offer being made for Long Run by Hiking Group Shandong Jinyue International Trading Corporation ("**Hiking**").[2] Hiking advanced $2 million of debtor-in-possession ("**DIP**") financing to Long Run and is authorized to advance a further $5 million.

5. On November 21, 2024, the Court of King's Bench of Alberta approved an arrangement involving Hiking and the Debtors. The arrangement enables Long Run to continue as a going concern, thereby giving the corporation an opportunity to: discharge its secured debt to CCB (approximately $350 million); pay outstanding municipal taxes (approximately $13.6 million); discharge pre-filing liabilities to freehold surface and mineral lease holders; continue employing approximately 116 individuals; sustain ongoing relationships with creditors and suppliers; and discharge its environmental liabilities (approximately $453 million).

6. The arrangement involves the cancellation of Long Run's existing shares and the issuance of new shares to a subsidiary of Hiking.[3] These new shares will be held free and clear of Long Run's pre-filing liabilities except for those that are expressly retained.[4] The retained liabilities include Long Run's substantial environmental liabilities and secured indebtedness to CCB.[5] The Liabilities that are not retained will be transferred to a Creditor Trust administered by the

[1] Memorandum of Argument of the Proposed Appellant, Henenghaixin Corp. [H Corp Memo] at para 21.
[2] *Long Run Exploration Ltd (Re)*, 2024 ABKB 710 [*Re Long Run*] at para 2.
[3] *Ibid*.
[4] *Ibid* at para 4.
[5] *Ibid*.

Monitor.[6] Given H Corp's status as an unsecured creditor, its claim will be transferred to the Creditor Trust. This will be accomplished by substituting the Creditor Trust for Long Run as a defendant in the Action. Should H Corp eventually succeed in the Action, regardless of whether Long Run continues as a going concern under the arrangement, at least one of the defendants will be insolvent (i.e. the Creditor Trust if the arrangement is implemented, or Long Run's empty estate in the case of liquidation). The arrangement does not impact H Corp's ability to recover damages from the other defendants in the Action.

III. Issue

7. The Monitor's submission is limited to the issue of whether H Corp has satisfied the test for obtaining leave to appeal pursuant to s. 13 of the CCAA.

IV. Law and Argument

8. This Court considers four factors when deciding whether to grant leave to appeal the discretionary decision of a supervising judge under s. 13 of the CCAA: (i) whether the point on appeal is of significance to the practice; (ii) whether the point raised is of significance to the action itself; (iii) whether the appeal is *prima facie* meritorious; and (iv) whether the appeal will unduly hinder the progress of the action.[7] This Court should generally be cautious in granting leave to appeal in CCAA proceedings and considerable deference ought to be afforded to the Chamber Judge's decision.[8] An examination of the four factors justifies dismissing H Corp's application for leave to appeal.

i. Is the Point on Appeal of Significance to the Practice?

---

[6] *Ibid*.
[7] See e.g. *Liberty Oil & Gas Ltd (Re)*, 2003 ABCA 158 [*Liberty*] at paras 15–16; *Trican Well Service Ltd v Delphi Energy Corp*, 2020 ABCA 363 [*Trican*] at paras 9–10; *NewGrange Energy Inc v Invico Diversified Income Limited Partnership*, 2024 ABCA 244 [*NewGrange*] at para 11.
[8] *NewGrange*, *supra* note 7, at para 13.

9. The presence of appellate court authority on the questions proposed to be considered on appeal militates against granting leave in this case.[9] *Montréal (City) v Deloitte Restructuring Inc.*, 2021 SCC 53 ("***Montréal***") details how contingent claims involving fraud are to be evaluated in CCAA proceedings. Section 19(2)(d) of the CCAA prohibits any claim relating to any debt or liability resulting from obtaining property by false pretences or fraudulent misrepresentation from being dealt with by a compromise or arrangement unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that claim has voted for the acceptance of the compromise or arrangement. To discharge the burden of proving such a claim, the creditor must establish on a balance of probabilities the elements of fraudulent misrepresentation.[10]

10. In the Action, H Corp plead that, by way of, *inter alia*, breach of fiduciary duty, fraud, misrepresentation, and unjust enrichment, the Individual Defendants diverted approximately $44 million from H Corp to the Debtors. Consequently, H Corp has a contingent claim arising from an alleged fraud. Having been instructed by Parliament and the Supreme Court of Canada ("**SCC**") on how to evaluate a contingent claim involving fraud within a CCAA proceeding, the Chambers Judge had no choice but to summarily evaluate H Corp's claim.

11. While ancillary to the application for appeal, it is worthwhile to briefly discuss the law of constructive trusts. It is well established that equitable relief, such as a constructive trust, is available only if the remedies offered at law are inadequate.[11] In a case such as H Corp's, the

---

[9] *Liberty*, *supra* note 7, at para 17.
[10] *Montréal (City) v Deloitte Restructuring Inc.*, 2021 SCC 53 at para 25 (the elements are: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; and (iv) the false representation was made to obtain property or a service).
[11] Albert H Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts*, 9th ed (United States: Thomson Reuters, 2019) [Oosterhoff on Trusts] at 719.

first remedy to consider is always a monetary award, and in most cases that will be sufficient.[12] Where a monetary award is sufficient, there is no need for equitable relief.[13] A proprietary remedy in the form of a constructive trust may be available if the property in question is unique or special, such that no measure of damages will allow the plaintiff to acquire a substitute in the marketplace.[14] This requirement for the property to be unique, such that the plaintiff has a "special attachment" to the property, may explain why proprietary relief is unusual in purely commercial contexts (such as exists in the Action).[15]

12. Over four years of litigation, H Corp has failed to identify any special or unique property to which it would have a "special attachment". The property that H Corp alleges was misappropriated by the Individual Defendants' fraud is money: a fungible thing lacking the uniqueness required for equitable relief. Even if H Corp's allegations of fraud are ultimately proven, the probability that a court will exercise its equitable jurisdiction to construct a trust over Long Run's property is *de minimis* given the weight of precedent militating against such a remedy in this context. Consequently, H Corp, at best, occupies the position of an unsecured creditor in relation to Long Run.

13. There is no point of law that is of significance to practitioners arising from this appeal that has not already been addressed by an appellate court in this country.

ii. Is the Point Raised of Significance to the Action Itself?

14. This appeal is of great significance to Long Run's other creditors and stakeholders, but of

[12] *Kerr v Baranow*, 2011 SCC 10 at para 47; *Moore v Sweet*, 2018 SCC 52 [*Moore*] at para 89.
[13] *Peter v Beblow*, [1993] 1 SCR 980 [*Peter*] at 988, 997.
[14] Oosterhoff on Trusts, *supra* note 11, at 719; see also *Soulos v Korkontzilas*, [1997] 2 SCR 217 at para 45 (test for constructive trust in context of for breach of fiduciary duty: plaintiff must show legitimate reason for seeking proprietary remedy); *Moore, supra* note 12, at para 91 (test for constructive trust in context of unjust enrichment: a personal remedy would be inadequate).
[15] *Peter*, *supra* note 13 at 1024; Oosterhoff on Trusts, *supra* note 11, at 719.

little significance to H Corp.

15. The only alternative put forward to Long Run's restructuring under the CCAA is liquidation. As the Chambers Judge noted, Hiking has stated in no uncertain terms that it will not proceed with its rescue of Long Run if the terms of the restructuring are materially altered.[16] The Chambers Judge found Hiking's position to be reasonable.[17] Consequently, if the transaction is overturned or modified, the only alternative for Long Run is bankruptcy.[18]

16. Suppose Long Run is restructured pursuant to the Chamber Judge's order and H Corp succeeds in the Action. H Corp will have recourse against the Individual Defendants and the insolvent Creditor Trust. However, if the Chamber Judge's order is modified, then Hiking will withdraw its support and Long Run will be liquidated. Long Run's mammoth environmental liabilities (approximately $453 million), coupled with the super priority afforded to the Orphan Well Association ("**OWA**"), means that a liquidation will result in a loss for all stakeholders.[19] In this case, H Corp will have recourse against the Individual Defendants and Long Run's empty estate. Consequently, this appeal is of little significance to H Corp: regardless of the outcome, it is left suing a judgment-proof defendant.

17. While this appeal will not change H Corp's economic position, the same cannot be said for Long Run's other creditors and stakeholders. Long Run's survival may benefit: its secured creditors; the municipalities that are owed taxes; the freehold surface and mineral lease holders who have pre-filing liabilities; the approximately 116 employees and contractors who

[16] *Re Long Run*, *supra* note 2, at para 90.
[17] *Ibid*.
[18] *Ibid* at paras 15, 42, 95–96.
[19] *Re Long Run*, *supra* note 2, at paras 15, 95-96; see also *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5.

will continue being employed; the creditors and suppliers who will maintain their relationships with Long Run; and the OWA, which benefits from not assuming substantial environmental liabilities. From the perspective of these creditors and stakeholders, H Corp's appeal is of great significance: it jeopardizes jobs, deprives Long Run's other creditors of a chance to recover their debts, and leaves taxpayers on the hook.

iii. Is the Appeal *Prima Facie* Meritorious?

18. H Corp's application for leave to appeal lacks merit because the likelihood that the appeal will ultimately succeed is extremely low.[20] This is because H Corp has failed to identify any appealable error made by the Chambers Judge. The standard of review applied to the discretionary decision of a supervising judge is highly deferential.[21] Absent an error in principal of law, a palpable and overriding error of fact, or the clearly unreasonable exercise of discretion, the Chamber Judge's decision should not be interfered with.[22]

19. First, the Chambers Judge did not err in law by requiring H Corp to prove its contingent claim involving fraud on a summary basis. Section 19(2)(d) of the CCAA directed the Chambers Judge to evaluate claims relating to debts or liabilities arising from fraud in a particular manner; the SCC in *Montréal* detailed what that particular manner is. The Chambers Judge correctly applied the law to the facts. H Corp submits that the burden of disproving its own claim involving fraud ought to be shouldered by Long Run's other creditors.[23] This is contrary to how provable claims are established under either the CCAA or the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3: each creditor must prove its own claim. To reverse the onus

[20] *Mudrick Capital Management LP v Lightstream Resources Ltd.*, 2016 ABCA 401 at para 51.
[21] *Trican*, *supra* note 7, at para 11; *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10 at paras 53–54.
[22] *Trican*, *supra* note 7, at para 11; *Liberty*, supra note 7, at para 19.
[23] H Corp Memo, *supra* note 1, at para 21.

would permit unscrupulous creditors to bog down insolvency proceedings by alleging fraud and then requiring the other parties to rebut such claims. H Corp's submission is at odds with controlling precedent from the SCC and, if adopted, would produce an absurd result whereby the allegation of fraud by one creditor would put every other creditor on the hook to disprove that claim.

20. Second, the Chambers Judge committed no palpable and overriding error of fact. A palpable error is one that is obvious.[24] H Corp has not identified a single obvious error of fact. The Chambers Judge engaged in a thorough review of the purported evidence of fraud presented to him and his reasons make clear that he understood the limitations of that evidence.[25] The Chambers Judge accepted that the evidence lends direct support to a case of fraud or misrepresentation on the part of certain Individual Defendants.[26] However, he concluded that the evidentiary record did not suggest that the fraud was committed by the Individual Defendants in their capacity as the controlling minds of Long Run.[27] H Corp conflates the Chamber Judge's refusal to prefer its interpretation of the evidence with a failure to apprehend the evidence.[28]

21. An overriding error is one that would affect the outcome of the case.[29] By H Corp's own admission, even if the Chambers Judge did commit an obvious error, that error would not have changed the outcome, as H Corp was not capable of proving its claim on a summary

[24] *Benhaim v St-Germain*, 2016 SCC 48 [*Benhaim*] at para 38.
[25] *Re Long Run*, *supra* note 2, at para 61–71.
[26] *Ibid* at para 65.
[27] *Ibid* at paras 69–70.
[28] H Corp Memo, *supra* note 1, at paras 23(e), 23(f), 23(g).
[29] *Benhaim*, *supra* note 24, at para 38.

basis, as required by s. 19(2)(d) of the CCAA and *Montréal*.[30]

22. Third, there is no evidence that the Chambers Judge was unreasonable in his exercise of discretion. The very nature of a CCAA proceeding requires the Chambers Judge to balance a multiplicity of divergent interests.[31] Achieving such a balance is a delicate task requiring a clear understanding of all the interests at stake, the effects of the plan on all stakeholders, and the effects of the alternative to restructuring on those stakeholders.[32] H Corp has not identified a single instance of the Chamber Judge unreasonably exercising the discretion conferred upon him. Consequently, this Court should not lightly intervene in the Chamber Judge's balancing of interests.[33]

iv. Will the Appeal Unduly Hinder the Progress of the Action?

23. H Corp did not apply for a stay of the Chamber Judge's order approving the arrangement. Consequently, the arrangement will close when Hiking is able to transfer money out of China.[34] Hiking has taken a significant risk providing an insolvent corporation with $2 million in the hope that it may continue as a going concern. Certainty in commercial transaction is paramount: the spectre of the arrangement being unwound will increase uncertainty and dampen Hiking's enthusiasm. This will make any future injection of capital less likely, thereby risking Long Run's rehabilitation (Hiking is authorized to provide an additional $5 million of DIP financing). Jeopardizing such an arrangement is contrary to the CCAA's remedial purpose, which includes providing a means by which the devastating social and

[30] H Corp Memo, *supra* note 1, at para 23(d).
[31] *Trican*, *supra* note 7, at para 13.
[32] *Ibid*.
[33] *Ibid*.
[34] See Seventh Report of FTI Consulting Canada Inc., in its capacity as Monitor of Long Run Exploration Ltd. and Calgary Sinoenergy Investment Corp. (13 January, 2025) at para 25.

economic effects of bankruptcy may be avoided by reorganizing the financial affairs of debtor corporations.[35] An appeal would consequently hinder the progress made by the Chamber Judge's order.

V. Conclusion

24. H Corp has failed to convincingly engage with the four factors this Court considers when determining whether to grant leave to appeal under s. 13 of the CCAA. Further, any modification to the Chamber Judge's order that alienates Hiking will result in Long Run's liquidation. The economic consequences of a liquidation will be considerably worse for Long Run's other creditors and stakeholders: the mammoth environmental liabilities coupled with the super priority afforded to the OWA means that a liquidation will result in a loss for all creditors and stakeholders.

25. It is unfortunate that, as a consequence of this restructuring, H Corp is reduced to suing a judgment-proof defendant: the Creditor Trust. However, if Long Run were to be liquidated, then H Corp would likewise be reduced to suing a judgment-proof defendant: Long Run's empty estate.

VI. Relief Sought

26. The Monitor requests that this Court dismiss H Corp's application for leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF JANUARY, 2025.

TORYS LLP

Per: Signed by: kyle kashuba 9F325D797120433...

Kyle Kashuba
Special Counsel for FTI Consulting Canada Inc.

[35] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 59.

Table of Authorities