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| **COURT OF APPEAL FILE NUMBER** | |
| **TRIAL COURT FILE NUMBER** | 2401-02664 |
| **COURT** | COURT OF KING'S BENCH OF ALBERTA |
| **REGISTRY OFFICE:** | CALGARY |
| | IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c C-36, as amended<br><br>AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF LYNX AIR HOLDINGS CORPORATION AND 1263343 ALBERTA INC. dba LYNX AIR |
| **APPLICANTS** | EDMONTON REGIONAL AIRPORTS AUTHORITY, HALIFAX INTERNATIONAL AIRPORT AUTHORITY, THE CALGARY AIRPORT AUTHORITY, VANCOUVER AIRPORT AUTHORITY, and WINNIPEG AIRPORTS AUTHORITY INC. |
| **RESPONDENTS** | LYNX AIR HOLDINGS CORPORATION and 1263343 ALBERTA INC. dba LYNX AIR |
| NOT PARTIES TO THE APPEAL (MONITOR) | FTI CONSULTING CANADA |
| **DOCUMENT** | **BOOK OF AUTHORITIES** |

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File No.: 156416.1001

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CANADA

CONSOLIDATION

CODIFICATION

# Companies' Creditors Arrangement Act

# Loi sur les arrangements avec les créanciers des compagnies

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

L.R.C. (1985), ch. C-36

Current to June 20, 2024

Last amended on April 27, 2023

À jour au 20 juin 2024

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damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

1997, c. 12, s. 124; 2007, c. 36, s. 67.

immeuble de la compagnie débitrice constitue une réclamation, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

1997, ch. 12, art. 124; 2007, ch. 36, art. 67.

### Disclosure of financial information

**11.9 (1)** A court may, on any application under this Act in respect of a debtor company, by any person interested in the matter and on notice to any interested person who is likely to be affected by an order made under this section, make an order requiring that person to disclose any aspect of their economic interest in respect of a debtor company, on any terms that the court considers appropriate.

### Divulgation de renseignements financiers

**11.9 (1)** Sur demande de tout intéressé sous le régime de la présente loi à l'égard d'une compagnie débitrice et sur préavis de la demande à tout intéressé qui sera vraisemblablement touché par l'ordonnance rendue au titre du présent article, le tribunal peut ordonner à cet intéressé de divulguer tout intérêt économique qu'il a dans la compagnie débitrice, aux conditions que le tribunal estime indiquées.

### Factors to be considered

**(2)** In deciding whether to make an order, the court is to consider, among other things,

**(a)** whether the monitor approved the proposed disclosure;

**(b)** whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company; and

**(c)** whether any interested person would be materially prejudiced as a result of the disclosure.

### Facteurs à prendre en considération

**(2)** Pour décider s'il rend l'ordonnance, le tribunal prend en considération, notamment, les facteurs suivants :

**a)** la question de savoir si le contrôleur acquiesce à la divulgation proposée;

**b)** la question de savoir si la divulgation proposée favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie débitrice;

**c)** la question de savoir si la divulgation proposée causera un préjudice sérieux à tout intéressé.

### Meaning of *economic interest*

**(3)** In this section, ***economic interest*** includes

**(a)** a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest;

**(b)** the consideration paid for any right or interest, including those referred to in paragraph (a); or

**(c)** any other prescribed right or interest.

2019, c. 29, s. 139.

### Définition de *intérêt économique*

**(3)** Au présent article, ***intérêt économique*** s'entend notamment :

**a)** d'une réclamation, d'un contrat financier admissible, d'une option ou d'une hypothèque, d'un gage, d'une charge, d'un nantissement, d'un privilège ou d'un autre droit qui grève le bien;

**b)** de la contrepartie payée pour l'obtention, notamment, de tout intérêt ou droit visés à l'alinéa a);

**c)** de tout autre intérêt ou droit prévus par règlement.

2019, ch. 29, art. 139.

### Fixing deadlines

**12** The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

R.S., 1985, c. C-36, s. 12; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 2004, c. 25, s. 195; 2005, c. 47, s. 130; 2007, c. 36, s. 68.

### Échéances

**12** Le tribunal peut fixer des échéances aux fins de votation et aux fins de distribution aux termes d'une transaction ou d'un arrangement.

L.R. (1985), ch. C-36, art. 12; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 2004, ch. 25, art. 195; 2005, ch. 47, art. 130; 2007, ch. 36, art. 68.

### Leave to appeal

**13** Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from

### Permission d'en appeler

**13** Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la

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.

R.S., 1985, c. C-36, s. 13; 2002, c. 7, s. 134.

présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards.

L.R. (1985), ch. C-36, art. 13; 2002, ch. 7, art. 134.

### Court of appeal

**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.

### Cour d'appel

**14 (1)** Cet appel doit être porté au tribunal de dernier ressort de la province où la procédure a pris naissance.

### Practice

**(2)** All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

R.S., 1985, c. C-36, s. 14; 2002, c. 7, s. 135.

### Pratique

**(2)** Tous ces appels sont régis autant que possible par la pratique suivie dans d'autres causes devant le tribunal saisi de l'appel; toutefois, aucun appel n'est recevable à moins que, dans le délai de vingt et un jours après qu'a été rendue l'ordonnance ou la décision faisant l'objet de l'appel, ou dans le délai additionnel que peut accorder le tribunal dont il est interjeté appel ou, au Yukon, un juge de la Cour suprême du Canada, l'appelant n'y ait pris des procédures pour parfaire son appel, et à moins que, dans ce délai, il n'ait fait un dépôt ou fourni un cautionnement suffisant selon la pratique du tribunal saisi de l'appel pour garantir qu'il poursuivra dûment l'appel et payera les frais qui peuvent être adjugés à l'intimé et se conformera aux conditions relatives au cautionnement ou autres qu'impose le juge donnant la permission d'en appeler.

L.R. (1985), ch. C-36, art. 14; 2002, ch. 7, art. 135.

### Appeals

**15 (1)** An appeal lies to the Supreme Court of Canada on leave therefor being granted by that Court from the highest court of final resort in or for the province or territory in which the proceeding originated.

### Appels

**15 (1)** Un appel peut être interjeté à la Cour suprême du Canada sur autorisation à cet effet accordée par ce tribunal, du plus haut tribunal de dernier ressort de la province ou du territoire où la procédure a pris naissance.

### Jurisdiction of Supreme Court of Canada

**(2)** The Supreme Court of Canada shall have jurisdiction to hear and to decide according to its ordinary procedure any appeal under subsection (1) and to award costs.

### Juridiction de la Cour suprême du Canada

**(2)** La Cour suprême du Canada a juridiction pour entendre et décider, selon sa procédure ordinaire, tout appel ainsi permis et pour adjuger des frais.

### Stay of proceedings

**(3)** No appeal to the Supreme Court of Canada shall operate as a stay of proceedings unless and to the extent ordered by that Court.

### Suspension de procédures

**(3)** Un tel appel à la Cour suprême du Canada n'a pas pour effet de suspendre les procédures, à moins que ce tribunal ne l'ordonne et dans la mesure où il l'ordonne.

### Security for costs

**(4)** The appellant in an appeal under subsection (1) shall not be required to provide any security for costs, but, unless he provides security for costs in an amount to be fixed by the Supreme Court of Canada, he shall not be awarded costs in the event of his success on the appeal.

### Cautionnement pour les frais

**(4)** L'appelant n'est pas tenu de fournir un cautionnement pour les frais; toutefois, à moins qu'il ne fournisse un cautionnement pour les frais au montant que fixe la Cour suprême du Canada, il ne lui est pas adjugé de frais en cas de réussite dans son appel.

**Tercon Contractors Ltd.** *Appellant*

*v.*

**Her Majesty The Queen in Right of the Province of British Columbia, by her Ministry of Transportation and Highways** *Respondent*

and

**Attorney General of Ontario** *Intervener*

**Indexed as: Tercon Contractors Ltd. *v.* British Columbia (Transportation and Highways)**

**2010 SCC 4**

File No.: 32460.

2009: March 23; 2010: February 12.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Contracts — Breach of terms — Tender — Ineligible bidder — Exclusion of liability clause — Doctrine of fundamental breach — Province issuing tender call for construction of highway — Request for proposals restricting qualified bidders to six proponents — Province accepting bid from ineligible bidder — Exclusion clause protecting Province from liability arising from participation in tendering process — Whether Province breached terms of tendering contract in entertaining bid from ineligible bidder — If so, whether Province's conduct fell within terms of exclusion clause — If so, whether court should nevertheless refuse to enforce the exclusion clause because of unconscionability or some other contravention of public policy.*

The Province of British Columbia issued a request for expressions of interest ("RFEI") for the design and construction of a highway. Six teams responded with submissions including Tercon and Brentwood. A few months later, the Province informed the six proponents

**Tercon Contractors Ltd.** *Appelante*

*c.*

**Sa Majesté la Reine du chef de la Colombie-Britannique, représentée par le ministère des Transports et de la Voirie** *Intimée*

et

**Procureur général de l'Ontario** *Intervenant*

**Répertorié : Tercon Contractors Ltd. *c.* Colombie-Britannique (Transports et Voirie)**

**2010 CSC 4**

N° du greffe : 32460.

2009 : 23 mars; 2010 : 12 février.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

*Contrats — Inexécution — Appel d'offres — Soumissionnaire inadmissible — Clause de non-responsabilité — Principe d'inexécution fondamentale — Appel d'offres lancé par la province pour la construction d'une route — Demande de propositions tenant seulement six entreprises pour admissibles — Acceptation par la province de la proposition d'un soumissionnaire inadmissible — Clause de non-recours protégeant la province contre toute responsabilité découlant de la participation à l'appel d'offres — La province s'est-elle rendue coupable d'inexécution du contrat issu de l'appel d'offres en considérant la proposition d'un soumissionnaire inadmissible? — Dans l'affirmative, son comportement tombait-il sous le coup de la clause de non-recours? — Dans l'affirmative, un tribunal devrait-il néanmoins refuser de faire respecter la clause en raison de son iniquité ou pour quelque autre atteinte à l'ordre public?*

La province de la Colombie-Britannique a lancé une demande d'expression d'intérêt (« DEI ») pour la conception et la construction d'une route. Elle a reçu six soumissions, dont celles de Tercon et de Brentwood. Quelques mois plus tard, la province a fait savoir aux

a result of how the Province proceeded, the very premise of its own RFP process was missing, and the work was awarded to a party who could not be a participant in the RFP process. That is what Tercon is complaining about. Tercon's claim is not barred by the exclusion clause because the clause only applies to claims arising "as a result of participating in [the] RFP", not to claims resulting from the participation of other, ineligible parties. Moreover, the words of this exclusion clause, in my view, are not effective to limit liability for breach of the Province's implied duty of fairness to bidders. I will explain my conclusion by turning first to a brief account of the key legal principles and then to the facts of the case.

2. Legal Principles

[64] The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. The approach adopted by the Court in *M.J.B.* is instructive. The Court had to interpret a privilege clause, which is somewhat analogous to the exclusion clause in issue here. The privilege clause provided that the lowest or any tender would not necessarily be accepted, and the issue was whether this barred a claim based on breach of an implied term that the owner would accept only compliant bids. In interpreting the privilege clause, the Court looked at its text in light of the contract as a whole, its purposes and commercial context. As Iacobucci J. said, at para. 44, "the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties."

[65] In a similar way, it is necessary in the present case to consider the exclusion clause in the RFP in light of its purposes and commercial context as well as of its overall terms. The question is whether the exclusion of compensation for claims resulting

pouvait faire naître un « contrat A ». La province a donc ignoré le fondement même de sa propre DP et elle a attribué le marché à une entreprise non admise à y prendre part. C'est ce dont Tercon lui fait grief. La clause de non-recours ne fait pas obstacle au recours de Tercon, car elle ne s'applique qu'à l'indemnisation demandée [TRADUCTION] « pour [l]a participation à la DP », et non au recours qui fait suite à la participation d'une autre entreprise, elle inadmissible. De plus, le texte de la clause ne limite pas selon moi la responsabilité de la province pour le manquement à son obligation tacite de faire preuve d'équité à l'égard des soumissionnaires. Je m'explique en exposant brièvement les principes juridiques essentiels, puis en les appliquant aux faits de l'espèce.

2. Les principes juridiques

[64] Le principe fondamental d'interprétation applicable en l'espèce veut qu'une clause contractuelle ne doive pas être considérée isolément mais en harmonie avec les autres et à la lumière de son objet et du contexte commercial dans lequel elle s'inscrit. La démarche suivie dans l'arrêt *M.J.B.* est éclairante. La Cour devait y interpréter une clause de réserve qui s'apparentait quelque peu à la clause de non-recours qui nous intéresse. La clause de réserve stipulait que le marché ne serait pas nécessairement attribué au soumissionnaire le moins disant ni même attribué du tout. La question était celle de savoir si elle faisait obstacle à une action en justice pour non-respect de la clause tacite voulant que le propriétaire n'accepte que les soumissions conformes. Pour l'interpréter, la Cour examine son libellé au vu du contrat dans son ensemble, de son objet et de son contexte commercial. Le juge Iacobucci conclut au par. 44 : « . . . la clause de réserve n'est qu'une condition du contrat A et elle doit être interprétée de façon à s'harmoniser avec le reste du dossier d'appel d'offres. Agir autrement, ce serait saper le reste de l'entente entre les parties. »

[65] De même, il faut en l'espèce examiner la clause de non-recours de la DP à la lumière de son objet et du contexte commercial dans lequel elle s'inscrit, ainsi que de l'ensemble de ses conditions. Il faut se demander si l'exclusion de toute

**Sattva Capital Corporation (formerly Sattva Capital Inc.)** *Appellant*

*v.*

**Creston Moly Corporation (formerly Georgia Ventures Inc.)** *Respondent*

and

**Attorney General of British Columbia and BCICAC Foundation** *Interveners*

**Sattva Capital Corporation (anciennement Sattva Capital Inc.)** *Appelante*

*c.*

**Creston Moly Corporation (anciennement Georgia Ventures Inc.)** *Intimée*

et

**Procureur général de la Colombie-Britannique et BCICAC Foundation** *Intervenants*



**Indexed as: Sattva Capital Corp. *v.* Creston Moly Corp.**

**2014 SCC 53**

File No.: 35026.

2013: December 12; 2014: August 1.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

**Répertorié : Sattva Capital Corp. *c.* Creston Moly Corp.**

**2014 CSC 53**

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1er août.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Arbitration — Appeals — Commercial arbitration awards — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price shares for payment of finder's fee and entering into arbitration — Leave to appeal arbitral award sought pursuant to s. 31(2) of the Arbitration Act — Leave to appeal denied but granted on appeal to Court of Appeal — Appeal of award dismissed but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in granting leave to appeal — What is appropriate standard of review to be applied to commercial arbitral decisions made under Arbitration Act — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31(2).*

*Contracts — Interpretation — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price the shares for payment of finder's fee and entering into arbitration — Whether arbitrator reasonably construed contract*

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

*Arbitrage — Appels — Sentences arbitrales commerciales — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation et recours à l'arbitrage — Autorisation d'appel de la sentence arbitrale demandée en application de l'art. 31(2) de l'Arbitration Act — Rejet initial de la demande d'autorisation d'appel, qui est accueillie à l'issue d'un appel devant la Cour d'appel — Rejet de l'appel interjeté de la sentence infirmé par la Cour d'appel — La Cour d'appel a-t-elle accordé à tort l'autorisation d'appel? — Quelle est la norme de contrôle applicable aux sentences arbitrales commerciales rendues sous le régime de l'Arbitration Act? — Arbitration Act, R.S.B.C. 1996, ch. 55, art. 31(2).*

*Contrats — Interprétation — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation*

that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[61] Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

(d) *Application to the Present Case*

[62] In this case, the CA Leave Court granted leave on the following issue: "Whether the Arbitrator erred in law in failing to construe the whole of the Finder's Fee Agreement . . ." (A.R., vol. I, at p. 62).

[63] As will be explained below, while the requirement to construe a contract as a whole is a question of law that could — if extricable — satisfy the threshold requirement under s. 31 of the *AA*, I do not think this question was properly extricated in this case.

[64] I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15). If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

[65] However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed,

ou qui auraient raisonnablement dû l'être des deux parties à la date de signature du contrat ou avant celle-ci; par conséquent, le risque que des éléments d'une fiabilité douteuse soient invoqués ne se pose pas.

[61] Selon une certaine jurisprudence et des auteurs, la règle d'exclusion de la preuve extrinsèque serait un anachronisme ou, à tout le moins, d'application restreinte vu la myriade d'exceptions dont elle est assortie (voir par exemple *Gutierrez c. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), par. 19-20; Hall, p. 53-64). Dans le cadre du présent pourvoi, il suffit de dire que la règle d'exclusion de la preuve extrinsèque ne s'oppose pas à la présentation d'une preuve des circonstances entourant le contrat pour l'interprétation de ce dernier.

d) *Application au présent pourvoi*

[62] En l'espèce, la Cour d'appel a accordé l'autorisation d'appel relativement à la question suivante : [TRADUCTION] « L'arbitre a-t-il commis une erreur de droit en n'interprétant pas l'entente relative aux honoraires d'intermédiation dans son ensemble . . . ? » (d.a., vol. I, p. 62)

[63] Comme nous le verrons, l'obligation d'interpréter le contrat dans son ensemble est une question de droit susceptible, si on pouvait l'isoler, de satisfaire au critère minimal exigé à l'art. 31 de l'*AA*. À mon avis, cette question n'a pas été isolée comme il se doit en l'espèce.

[64] Je reconnais qu'il est un principe fondamental de l'interprétation contractuelle selon lequel le contrat doit être interprété dans son ensemble (McCamus, p. 761-762; Hall, p. 15). Si l'arbitre n'a pas tenu compte de la stipulation relative au « plafond », comme le prétend Creston, il n'a alors pas interprété l'entente dans son ensemble, car il en a négligé une clause précise et pertinente. Voilà une question de droit qui pourrait être isolée de la conclusion mixte de fait et de droit.

[65] Or, il semble que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

# In the Court of Appeal of Alberta

**Citation: Shaw GMC Pontiac Buick Hummer Ltd. v. Polaris Explorer Ltd., 2009 ABCA 390**

**Date:** 20091214
**Docket:** 0901-0056-AC
**Registry:** Calgary



**Between:**

**Shannon Galichowski and the same Shannon Galichowski in her capacity as Administrator of the Estate of Russell Galichowski and in her capacity as Next Friend of Megan Rose Galichowski, an infant and Joseph Galichowski and Sonja Galichowski**

Not Parties to the Appeal
(Plaintiffs)

**Shaw GMC Pontiac Buick Hummer Ltd.**

Appellant (Defendant)

- and -

**Polaris Explorer Ltd.**

Respondent (Defendant)

- and -

**The Public Trustee as nominal Administrator Ad Litem of the Estate of John Scott MacDonald**

Not a Party to the Appeal
(Defendant)

---

**The Court:**

**The Honourable Madam Justice Elizabeth McFadyen**
**The Honourable Mr. Justice Peter Martin**
**The Honourable Mr. Justice J. D. Bruce McDonald**

---

**Memorandum of Judgment**

Appeal from the Judgment by
The Honourable Madam Justice E. A. Hughes
Dated the 25th day of September, 2008
Filed on the 18th day of February, 2009
(Docket:0601-13351)

[13] In his argument, counsel for the respondent states that the appellant would be vicariously liable for any negligence of the lessor [*sic* lessee] or operator of the vehicle citing section 187(1) of the *Traffic Safety Act*, R.S.A. 2000, c. T-6[1]. As such, the appellant Shaw GMC is a proper party to the action.

[14] Counsel went on to argue that the appellant as the owner of the vehicle in question "was attempting to shift any and all liability arising from the use and occupation of the leased vehicle onto the lessor Respondent thereby shifting all the risk to the Respondent".

## VI. Standard of Review

[15] Contractual interpretation is a question of law and is reviewed on the correctness standard: *Double N Earthmovers v. Edmonton*, 2005 ABCA 104, 363 A.R. 201 at para. 16, aff'd, 2007 SCC 3, [2007] 1 S.C.R. 116.

## VII. Analysis

[16] The respondent Polaris was MacDonald's employer and MacDonald was acting within the course and scope of his employment at the time of the accident. As such, under general principles of master-servant law, Polaris as the employer is vicariously liable to the injured third parties for the losses caused by the negligence of its employee MacDonald.

[17] The parties do not disagree on the applicable legal principles. However, they differ on the application of the principles on the facts of this case.

[18] The general rules of contractual interpretation are summarized in Fridman, *Law of Contract in Canada*, 5th ed. (Toronto: Carswell, 2006) at 454-462:

> **The canons of construction for written documents**
> (i) Where there is no ambiguity in a written contract it must be given its literal meaning.
>
> (ii) Words must be given their plain, ordinary meaning, at least unless to do so would result in absurdity.

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[1]The actual provision that would govern this type of situation is section 187(2) of the *Traffic Safety Act* and not section 187(1).

> (iii) The contract should be construed as a whole, giving effect to everything in it if at all possible.
>
> (iv) In cases of doubt, as a last resort, language should always be construed against the grantor or the promisor under the contract; *verba fortius accipiuntur contra proferentem.*
>
> (v) The *ejustem generis* rule.

[19] Fridman goes on to discuss exclusion clauses at 518:

> Once [an exclusion clause] is included in the contract ... it now seems clear that the courts regard it with critical, even, it might be said, a jaundiced eye. They will approach the interpretation of such a clause strictly, applying the ordinary rules of construction.

[20] An often cited case is the Judicial Committee of the Privy Council decision in *Canada Steamship Lines Ltd. v. The King*, [1952] 2 D.L.R. 786, [1952] A.C. 192.

[21] In that case, the Crown's employees, by their negligence, brought about a destructive fire but the Crown as lessor failed in its attempt to shift its liability onto the lessee despite an indemnity provision in the lease that provided:

> 17. That the lessee shall at all times indemnify and save harmless the lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or thing done or maintained by virtue hereof, or the exercise of any manner of rights arising hereunder.

[22] *Canada Steamship Lines* was concerned with exemption of liability from the party's own misconduct. This is not the case here at all. Rather what the appellant Shaw GMC is attempting to do, as between two corporations that are both vicariously liable to the third parties for MacDonald's negligence, is to allocate ultimate liability to Polaris as MacDonald's employer and not to itself as the owner of the vehicle.

[23] In *Prudential Assurance Co. Ltd. v. Walwyn, Stodgell, Cochran, Murray Ltd.* (1985), 50 O.R. (2d) 609, the Ontario Court of Appeal dealt with the landlord's right to reimbursement based upon section 6.06 of the lease which provided as follows:

# Court of Queen's Bench of Alberta

**Citation: Bighorn (Municipal District No. 8) v Bow Valley Waste Management Commission, 2013 ABQB 723**

**Date:** 20131205
**Docket:** 0801 11124
**Registry:** Calgary



Between:

**Municipal District of Bighorn No. 8**

Plaintiff

- and -

**Bow Valley Waste Management Commission**

Defendant

**Corrected judgment:** A corrigendum was issued on March 5, 2014; the corrections have been made to the text and the corrigendum is appended to this judgment.

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**Reasons for Judgment**
**of the**
**Honourable Mr. Justice R.J. Hall**

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## Introduction

[1] The within matter involves the interpretation of a term contained within a Sale and Purchase Agreement dated December 10, 1999 (the "Agreement") entered into between the Plaintiff, the M.D. of Bighorn No. 8 (the "MD") and the Defendant Bow Valley Waste Management Commission (the "Commission"). The Agreement transferred ownership of a Class III Landfill from the MD to the Commission.

> be resolved by lengthy inquiries as to what was fair in light of what happened before, during and after the making of a contract.

[10] The Ontario Court of Appeal decision in *Dumbrell v Regional Group of Companies Inc.* [2007] OJ No 298, 2007 ONCA 59, is often quoted in relation to interpretation of contracts. The Court stated, at para 49:

> On the approach taken in *Eli Lilly, supra*, the focus is on the meaning of the words used in the contract. Evidence of the subjective intention of the parties has "no independent place" in the interpretive process: *Eli Lilly*, at para 54; see also Staughton, "How do the Courts Interpret Commercial Contracts?", *supra* at 304-306; *Investors Compensation Scheme Ltd. v West Bromwich Building Society*, [1998] 1 ALL E.R. 98 at 114-115 (H.L.).

[11] And at para 54:

> A consideration of the context in which the written agreement is made is an integral part of the interpretive process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity. To find ambiguity, one must come to certain conclusions as to the meanings of the words used. A conclusion as to the meaning of words used in a written contract can only be properly reached if the contract is considered in the context in which it was made: see McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 710-11.

[12] It is clear that the words of one provision in a contract must not be read in isolation but should be considered in harmony with the rest of the contract and in light of the purposes in commercial context: *Tercon Contractors Ltd. v B.C. Transportation and Highways* [2010] SCJ No 4.

[13] Guidance is also obtained from the Ontario Court of Appeal decision in *Scanlon v Castlepoint Development Corp.*, 1992 Carswell Ont 633 at para 88:

> The agreement with which we are concerned is a negotiated commercial document which should be construed in accordance with sound commercial principles and good business sense. To the extent that it is possible to do so, it should be construed as a whole and effect should be given to all of its provisions. The provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof: *Hillis Oil & Sales Ltd v Wynn's Canada Ltd.*[1986] 1 SCR 57 at p 66. The court should strive to give meaning to the agreement and "reject an interpretation that would render one of its terms ineffective": *National Trust Co v Mead* [1990] 2 SCR 410 at p 425.

[14] This statement from *Scanlon* was referenced with approval by the Alberta Court of Appeal in *Sunderji v Germain Residences Ltd.*, 2012 ABCA 389.

[15] A fundamental term of contractual interpretation is that the intention of the parties is to be determined as at the time the contract is made: *Davidson v Allelix Inc*, 1991 CarswellOnt 933,

**Scanlon v. Castlepoint Development Corporation et al.**
**[Indexed as: Scanlon v. Castlepoint Development Corp.]**

**11 O.R. (3d) 744**
**[1992] O.J. No. 2692**
**Action No. C9007**

**Court of Appeal for Ontario,**
**Morden A.C.J.O., Goodman and Robins JJ.A.**
**December 17, 1992**



* Application for leave to appeal to the Supreme Court of Canada filed February 12, 1993 and submitted to the court March 17, 1993.

Real property -- Condominium -- Agreement of purchase and sale -- Construction -- Relying on force majeure provision, vendor of unit unilaterally extending closing date -- Definition of closing date not referring to force majeure clause -- Contra proferentem rule not applying -- Vendor entitled to extend closing.

Sale of land -- Agreement of purchase and sale -- Construction -- Relying on force majeure provision, vendor of condominium unit unilaterally extending closing date -- Definition of closing date not referring to force majeure clause -- Contra proferentem rule not applying -- Vendor entitled to extend closing.

In September 1988, S signed an agreement to purchase from C Corp. a luxury condominium unit on the 37th floor of a 47- storey project to be constructed in Metropolitan Toronto. The form of the agreement was prepared by C. Corp. By assignment of the agreement, B Ltd. succeeded C Corp. as vendor.

Time was of the essence, and para. 1(b) of the agreement defined "closing date" or "closing" as "the 4th day of November, 1991 or as extended by Paragraph 13(d)". Under para. 13(d), the purchaser was to occupy the unit "if the unit is substantially completed sufficient to permit occupancy on closing but the declaration and description have not been registered"; and under this paragraph, the occupancy was to be on certain terms and conditions including the term that "the closing date shall be extended to a date 20 days after notice in writing is given by the Vendor's solicitors to the Purchaser or his Solicitor that the declaration and description have been registered". Paragraph 22 of the agreement was a force majeure clause and stated that if the completion of the unit or the common units was delayed for several listed matters or "by means of any other cause of any kind whatsoever whether or not beyond control of the Vendor, the Vendor shall be permitted extensions of time from time to time for completion and the Closing Date shall be extended accordingly".

In February 1989, B Ltd. began construction but experienced delays because of unexpected soil conditions with the result that on May 31, 1991, B Ltd. notified S that the new closing date for

> Vendor, the Vendor shall be permitted extensions of time from time to time for completion and the Closing Date shall be extended accordingly. If the Vendor is unable to complete the Unit and close this transaction within such extended time or times for closing, all monies paid hereunder by the Purchaser other than any occupancy fees, shall be returned to him and this Agreement shall be null and void. If the unit is substantially completed by the Vendor on or before Closing or any extension thereof as aforesaid, this transaction shall be completed on such date notwithstanding that the Vendor has not fully completed the Unit or the common elements and the Vendor shall complete such outstanding work within a reasonable time after Closing, having regard to weather conditions and the availability of labour and materials. In any event the Purchaser acknowledged that failure to complete the common elements on or before Closing shall not be deemed to be a failure to complete the Unit. . . . . .
>
> 25. This offer when accepted shall constitute a binding contract of purchase and sale and time shall in all respects be of the essence hereof.

The Applicable Rules of Construction

Before considering the contractual provisions which are in dispute, I remind myself of certain well-established rules of construction applicable to the issue at hand. The agreement with which we are concerned is a negotiated commercial document which should be construed in accordance with sound commercial principles and good business sense. To the extent that it is possible to do so, it should be construed as a whole and effect should be given to all of its provisions. The

provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof: Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd., [1986] 1 S.C.R. 57 at p. 66, 25 D.L.R. (4th) 649 at p. 655. The court should strive to give meaning to the agreement and "reject an interpretation that would render one of its terms ineffective": National Trust Co. v. Mead, [1990] 2 S.C.R. 410 at p. 425, 71 D.L.R. (4th) 488 at p. 499.

The court is "to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract": Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co. , [1980] 1 S.C.R. 888 at p. 901, 112 D.L.R. (3d) 49 at p. 58; see also McClelland & Stewart Ltd. v. Mutual Life Assurance Co. of Canada, [1981] 2 S.C.R. 6 at p. 19, 125 D.L.R. (3d) 257 at p. 259. In searching for the intention of the parties, the court should give particular consideration "to the terms used by the parties, the context in which they are used and . . . the purpose sought by the parties in using these terms": Frenette v. Metropolitan Life Insurance Co. , [1992] 1 S.C.R. 647 at p. 667, 89 D.L.R. (4th) 653 at p. 666.

In the event that the court is unable to resolve a contradiction or ambiguity in the terms of a contract, the language of the contract will be construed against its author in accordance with the contra proferentem rule: Consolidated- Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co. , supra, at p. 901 S.C.R., p. 58 D.L.R. "[T]he rule is . . . one of general application whenever . . . there is an ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording": Hillis Oil & Sales v. Wynn's Canada , supra, at pp. 68-69 S.C.R., p. 657 D.L.R. However, resort is to be had to the contra proferentem rule "only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document": Reliance Petroleum Ltd. v. Stevenson, [1956] S.C.R. 936 at p. 953, 5 D.L.R. (2d) 673 at p. 686; Consolidated- Bathurst, supra, at p. 901 S.C.R., p. 58 D.L.R.

With those general principles in mind, I turn to the issue which is the basis of this appeal.

Does the agreement of purchase and sale permit Bramalea to extend the time for completion or substantial completion of the respondent's unit to September 14, 1992, and to extend the closing date accordingly?

In answering this question it is essential to bear in mind that the subject matter of this agreement is the purchase and sale of a proposed residential condominium unit, and that a transaction of this nature is subject to the Condominium Act . Before title can be transferred from the vendor to the purchaser and the transaction can be "closed", as that term is normally understood in real estate transactions, the vendor is obliged under the Act to register a declaration and description of the property. The condominium registration process inevitably creates a delay between the time some or all of the units in a given project are ready for occupancy and the time the developer is able to deliver a registrable transfer of title and "close" the transaction. In Albrecht v. Opemoco Inc. (1991), 5 O.R. (3d) 385 at p. 392, 85 D.L.R. (4th) 289 at p. 295, I had occasion to describe the manner in which agreements of purchase and sale of proposed condominium units have generally been structured in this province in contemplation of the delays produced by the complexity of the registration process:

# Court of Queen's Bench of Alberta

**Citation: 956126 Alberta Ltd v JMS Alberta Co Ltd, 2020 ABQB 718**

**Date:** 20201119
**Docket:** 1403 01013
**Registry:** Edmonton



Between:

**956126 Alberta Ltd.**

Plaintiff

- and -

**JMS Alberta Co Ltd.**

Defendant

- and -

**JMS Alberta Co Ltd. and Myung Goan Kim**

Plaintiffs by Counterclaim

- and -

**956126 Alberta Ltd. and Jae Soo Doh**

Defendants by Counterclaim

transferred and Mr. Kim did not tell him the title needed to transfer to enable him to obtain third party lender financing.

[71] JMS contends the title was to unconditionally and immediately transfer once the 13th payment was made and that 956 failed to do so, relieving JMS from any obligation to make the final payment. Mr. Kim's affidavit evidence was that 956 "did not transfer title to me as was required under the [Purchase Agreement] after the required payments were made" and that this "affected my ability to obtain financing, along with the contamination."

[72] 956 submits that if the contractual language is ambiguous, extrinsic evidence should be considered to resolve the ambiguity, including the communications between the parties' lawyers (as their agents).

[73] When interpreting a contract, the overriding concern is to determine "the [objective] intent of the parties and the scope of their understanding": ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 47 [***Sattva***]; ***Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada***, 2006 SCC 21 at para 27; ***Tercon Contractors Ltd v British Columbia (Minister of Transportation & Highways)***, 2010 SCC 4 at paras 64-65.

[74] As explained in ***Sattva*** at para 47, the Court must:

> ... read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

[75] Contracts are not created in a vacuum. For a commercial contract, the business purpose underlying the agreement and sound commercial principles are important. Ascertaining contractual intention can be difficult when looking at words in isolation since words alone do not have an immutable and absolute meaning. The meaning of words is often derived from surrounding circumstances and contextual factors, including the purpose of the agreement and the nature of the relationship created by it: ***Sattva*** at paras 47-48.

[76] The words of a provision must not be read in isolation; they should be considered in harmony with the balance of the contract. If possible, effect must be given to all terms of the contract: ***Bighorn (Municipal District No. 8) v Bow Valley Waste Management Commission***, 2013 ABQB 723 at paras 12-13, aff'd on other grounds 2015 ABCA 127.

[77] In ***BG Checo International Ltd v British Columbia Hydro and Power Authority***, [1993] 1 SCR 12, 1993 CanLII 145 at 24, the majority of the Supreme Court of Canada wrote:

> Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective. In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term.

[78] The question to ask is whether conflicting or inconsistent terms can be interpreted as a whole rather than choosing between the two.

[79] In contrast, an ambiguity arises in a contract when the words are reasonably capable of more than one meaning: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***,

# In the Court of Appeal of Alberta

**Citation: Bellatrix Exploration Ltd v BP Canada Energy Group ULC, 2020 ABCA 178**

**Date:** 20200501
**Docket:** 2001-0039-AC
**Registry:** Calgary



**Between:**

**Bellatrix Exploration Ltd.**

Applicant
(Appellant)

- and -

**BP Canada Energy Group ULC**

Respondent
(Respondent)

- and -

**Borden Ladner Gervais LLP**

Interested Party
(Monitor)

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**Reasons for Decision of**
**The Honourable Madam Justice Jo'Anne Strekaf**

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Application for Permission to Appeal

**Test for Leave**

[16] 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 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.

[17] "An appellate court should exercise its power sparingly, when asked to intervene in *CCAA* proceedings": *Duke Energy Marketing Limited Partnership v Blue Range Resource Corporation*, 1999 ABCA 255 at para 3 (*Blue Range 1999*).

**Positions of the parties**

[18] The applicant submits that the grounds raised involve questions of law, reviewable on a correctness standard. It argues that the *CCAA* judge misinterpreted the definition of "derivatives agreement" by failing to give appropriate weight to the requirement that it be a "financial agreement". There was no consideration of whether the Contract served an "important financial purpose" for the respondent. He further erred in holding that the definition of "derivatives agreement" applied to contracts that do not stipulate a fixed price, and in not finding that the solvent party entered into other transactions to meet the requirement that there be "recurrent dealings".

[19] The respondent submits that the proposed grounds of appeal involve findings of mixed fact and law that are entitled to deference on appeal. In any event, the *CCAA* judge correctly interpreted the *Regulations*.

**Analysis**

***1) Significance to the practice***

[20] The proposed grounds of appeal raise questions about the requirements for contracts to qualify as eligible financial contracts that are exempt from disclaimer under the *CCAA*. At issue is the interpretation and application of the phrases "financial agreement", "derivatives agreement" and "the subject of recurrent dealings in the over-the-counter commodities market".

[21] All of this language was introduced in 2007 when the *CCAA* was amended and the *Regulations* passed. There has been no appellate consideration of these provisions since that time.

The previous appellate decisions that considered the meaning of "eligible financial contract" did so in the context of prior legislation, which contained different language and referred to "forward commodity contracts": see *Blue Range Resource Corp (Re)*, 2000 ABCA 239*; Re Androscoggin Energy LLC* (2005), 195 OAC 51. The *Calpine* decision that was considered by the *CCAA* judge also predated the 2007 amendments.

[22] Unresolved issues of statutory interpretation are relevant when considering this factor: *Re Kerr Interior Systems Ltd*, 2008 ABCA 291 at para 9; *Blue Range 1999* at para 5.

[23] The disclaimer of contracts can have a significant impact on *CCAA* proceedings and is a significant issue in insolvency practice generally. I note that an identical definition of "eligible financial contracts" appears in the *Bankruptcy and Insolvency Act* and the *Winding-Up and Restructuring Act*, as well as the *CCAA*.

[24] The lack of appellate authority on the interpretation of the provisions introduced in 2007 that identify when contracts may be exempt from disclaimer in *CCAA* proceedings supports granting leave.

***2) Significance to the action***

[25] This factor involves consideration of whether the appeal is significant both to the parties raising the issue and to the *CCAA* proceedings as a whole: *Gauntlet Energy Corporation (Re)*, 2004 ABCA 20, 49 C.B.R. (4th) 225 at para 11.

[26] The value or cost of the disclaimer, depending upon which party's perspective this is viewed from, is estimated at $14.5 million. This represents approximately 10% of the applicant's annualized revenue. Disclaiming the Contract would reduce the applicant's projected annualized loss by 50%. This could affect the options for compromise or arrangement that are available in the *CCAA* proceeding.

[27] The determination of whether the Contract is an eligible financial contract that can be disclaimed is, accordingly, significant to the *CCAA* proceedings.

***3) Merits of the appeal***

[28] The applicant must demonstrate that the appeal is sufficiently meritorious "to justify delaying the ultimate disposition of the issue under review": *Mudrick Capital Management LP v Lightstream Resources Ltd.*, 2016 ABCA 401 at para 51. The standard is not onerous; the appeal must be arguable and not frivolous.

[29] I am satisfied that the applicant has met this threshold.

**Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149**

Date: 20000529
Docket: 00-18816

IN THE COURT OF APPEAL OF ALBERTA

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THE HONOURABLE MR. JUSTICE WITTMANN IN CHAMBERS

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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED;
AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT (ALBERTA) S.A. 1981, c.B-15., AS AMENDED, Section 185
AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION and CANADIAN AIRLINES INTERNATIONAL LTD.

BETWEEN:

RESURGENCE ASSET MANAGEMENT LLC

Applicant

- and -

CANADIAN AIRLINES CORPORATION
and CANADIAN AIRLINES INTERNATIONAL LTD.

Respondents

[Note: An erratum was filed on June 5, 2000; the corrections have been made to the text and the erratum is appended to this judgment.]

APPLICATION FOR LEAVE TO APPEAL THE ORDER
OF THE HONOURABLE MADAM JUSTICE M. S. PAPERNY
DATED THE 12th DAY OF MAY, 2000

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**MEMORANDUM OF DECISION**

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[43] In that case, it appears that McFarlane, J.A. was satisfied that the first three elements of the criteria had been met, i.e. that there "may be an arguable case for the petitioners to present to a panel of this court on discrete [sic] questions of law".

[44] It was argued before me that an appeal would give rise to an uncertainly of process and a lack of confidence in it; that the creditors, or some of them, may be inclined to withdraw support for the Plan that would otherwise be forthcoming, but for the delay. None of the parties tendered affidavit evidence on this issue.

[45] Nowhere in any of the authorities has the issue of onus in meeting the elements the general criterion been prominent. I am of the view that the onus is on the applicant. That onus would include the applicant producing at least some evidence on the fourth element to shift the onus to the respondents, even though it involves proving a negative, i.e. that there will not be any material adverse impact as the result of the delay occasioned by an appeal. That evidence is lacking in this case. It is lacking on both sides but the respondents do not have an initial onus in this regard. Therefore, I find that the fourth element has not been established by the applicant.

[46] The last step in a proper analysis in the context of a leave application is to ascribe appropriate weight to each of the elements of the general criterion and decide over all whether the test has been met. In most cases, the last two elements will be more important, and ought to be ascribed more weight than the first two elements. The last two elements here have not been met while the first two arguably have. In the result, I am satisfied that the applicant has not met the threshold for leave to appeal on the basis of the authorities, and I am therefore denying the application.

**CONCLUSION**

[47] The application for leave to appeal the Decision is dismissed on the basis that there is no *prima facie* meritorious case and that the granting of leave would likely unduly hinder the progress of the action.

APPLICATION HEARD on May 18, 2000

MEMORANDUM FILED at Calgary, Alberta
this 29th day of May, 2000

WITTMANN J.A.

# In the Court of Appeal of Alberta

**Citation: Third Eye Capital v B.E.S.T. Active 365 Fund, 2020 ABCA 160**

**Date:** 20200427
**Docket:** 2001-0077-AC
and 2001-0078-AC
**Registry:** Calgary



**Between:**

Action No. 2001-0077-AC

**Third Eye Capital Corporation**

Applicant

- and -

**B.E.S.T. Active 365 Fund LP, B.E.S.T. Total Return Fund Inc.
and Tier One Capital Limited Partnership**

Respondents

- and -

**ACCEL Energy Canada Limited
and ACCEL Canada Holdings Limited**

Respondents

**And:**

Action No. 2001-0078-AC

**B.E.S.T. Active 365 Fund LP, B.E.S.T. Total Return Fund Inc.
and Tier One Capital Limited Partnership**

Applicant

- and -

**Third Eye Capital Corporation**

[7] The chambers judge made two findings that are the subject matter of the applications for leave to appeal. The first finding is that the BEST GORs were security interests and not interests in land. That finding is the subject of BEST's leave to appeal application. The second finding is that knowledge is irrelevant to a determination of priority under s 95 of the *MMA*. That finding is the subject of TEC's leave to appeal application.

**Test for Leave to Appeal**

[8] The test for granting leave under s 13 of the *CCAA* 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": *Re Liberty Oil & Gas Ltd*, 2003 ABCA 158 at para 15 and the cases cited therein. The four factors subsumed in that criterion are set out in *Liberty* at para 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.

[9] Assessment of these factors requires consideration of the standard of review that would govern the appeal, if leave were granted: *Liberty* at para 20.

[10] In considering the merits of the appeal, a full examination is not necessary – the applicant must only establish they have an arguable case, which is one that is not frivolous: *Kenroc Building Materials Co Ltd v Kerr Interior Systems Ltd*, 2008 ABCA 291 at para 11; *Mudrick Capital Management LP v Lightstream Resources Ltd*, 2016 ABCA 401 at paras 51-52.

[11] In oral argument, the parties focussed their submissions on the first and third factors of *Liberty*. All parties concede the fourth factor is not an issue in that TEC is currently the only bidder for the ACCEL Entities' assets in the *CCAA* proceedings. Thus, any delay that would impact the sale of those assets would prejudice only TEC.

**BEST Application for Leave to Appeal**

*Background*

[12] The Monitor and the ACCEL Entities asked the chambers judge to accelerate her determination of these applications to assist in providing certainty to potential purchasers and/or investors respecting the nature of the assets offered for sale.

[13] The ACCEL Entities sought a finding that the BEST GORs are not interests in land but rather security for payment or performance and, therefore, do not run with the land. TEC supported ACCEL's application. The chambers judge granted ACCEL's application, holding that the BEST