COURT OF APPEAL FILE NO. CA49489
M&M Business Group, L.P. v NextPoint Financial, Inc.
Respondent's Factum

COURT OF APPEAL

ON APPEAL FROM the order of Madam Justice Fitzpatrick of the Supreme Court of British Columbia pronounced on October 31, 2023

BETWEEN:

M&M BUSINESS GROUP, L.P., MUFEED HADDAD and MIKE BUDKA

APPELLANT

AND:

NEXTPOINT FINANCIAL, INC. AND THOSE PARTIES LISTED ON SCHEDULE "A"

RESPONDENTS
(PETITIONERS)

AND:

FTI CONSULTING CANADA INC., FIRST CENTURY BANK, N.A., BASEPOINT, DRAKE ENTERPRISES LTD., FRONTEIR CAPITAL GROUP LTD., CHILMARK ADMINISTRATIVE LLC, TMI TRUST COMPANY, CMB TAX SERVICE, LLC, and HIS MAJESTY THE KING IN RIGHT OF CANADA

RESPONDENTS

RESPONDENT'S FACTUM

BasePoint

Counsel for the Appellants,
M&M Business Group, L.P., Mufeed Haddad, and Mike Budka

William L. Roberts, Laura L. Beven, Sarah B. Hannigan

Counsel for the Respondents,
NextPoint Financial, Inc. and those parties listed on Schedule "A"

Jeffrey D. Bradshaw, Samantha Arbor, Colin D. Brousson

Lawson Lundell LLP
Suite 1600 – 925 West Georgia Street
Vancouver, BC V6C 3L2

Email: wroberts@lawsonlundell.com
lbevan@lawsonlundell.com
shannigan@lawsonlundell.com

Counsel for the Respondent,
BasePoint

Mary Buttery, K.C., Marc Wasserman,
David Rosenblat, Emily Paplawski

Osler, Hoskin & Harcourt LLP
First Canadian Place
Suite 6200 – 100, 1 King Street W
Toronto, ON M5X 1B8

Osler, Hoskin & Harcourt LLP
Suite 3000, Bentall 4
1055 Dunsmuir Street
Vancouver, BC V7X 1K8

Email: mbuttery@osler.com
mwasserman@osler.com
drosenblat@osler.com
epaplawski@osler.com

DLA Piper (Canada) LLP
Suite 2700 – 1133 Melville Street
Vancouver, BC V6E 4E5

Email: jeffrey.bradshaw@dlapiper.com
samantha.arbor@dlapiper.com
dannis.yang@dlapiper.com
colin.brousson@dlapiper.com

Counsel for the Respondent,
Chilmark Administrative LLC

Evan Cobb, Jennifer Stam,
Scott Boucher

Norton Rose Fulbright Canada LLP
Suite 3000 – 222 Bay Street
P.O. Box 53
Toronto, ON M5K 1E7

Email:
evan.cobb@nortonrosefulbright.com
jennifer.stam@nortonrosefulbright.com
scott.boucher@nortonrosefulbright.com

Counsel for the Respondent,
Drake Enterprises Ltd.

Martin C. Sennott, Sherri Evans

Boughton Law
Suite 700 – 595 Burrard Street
P.O. Box 49290
Vancouver, BC V7X 1S8

Email: msennott@boughtonlaw.com
sevans@boughtonlaw.com

Counsel for the Respondent,
First Century Bank, N.A.

Lance Williams, Ashley Bowron,
Jenna Clark

McCarthy Tetrault LLP
745 Thurlow Street
Vancouver, BC V6E 0C5

Email: lwilliams@mccarthy.ca
abowron@mccarthy.ca
jkrclark@mccarthy.ca
sdanielisz@mccarthy.ca

Counsel for the Respondent,
Frontier Capital Group Ltd.

Steve Weisz, Heidi Esslinger

Cozen O'Connor LLP
Suite 1100 – 333 Bay Street
Toronto, ON M5H 2R2

Email: sweisz@cozen.com
hesslinger@cozen.com

Counsel for the Respondent,
HMTK in Right of Canada

Aminollah Sabzevari, Mihai Beschea,
Khanh Gonzalez

Department of Justice Canada
Suite 900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Email: aminollah.sabzevari@justice.gc.ca
mihai.beschea@justice.gc.ca
khanh.gonzalez@justice.gc.ca

Counsel for the Respondent,
TMI Trust Company

David E. Gruber

Bennett Jones LLP
Suite 2500 – 666 Burrard Street
Vancouver, BC V6C 2X8

Email : gruberd@bennettjones.com

Counsel for the Monitor,
FTI Consulting Canada Inc.

Kibben Jackson, Lisa Hiebert

Fasken Martineau DuMoulin LLP
Suite 2900 – 550 Burrard Street
Vancouver, BC V6C 0A3

Email: kjackson@fasken.com
lhiebert@fasken.com

The Monitor

Craig Munro, Tom Powell, Huw Parks,
Paul Bishop, Michael Clark

FTI Consulting Canada Inc.
Suite 1450, P.O. Box 10089
701 West Georgia Street
Vancouver, BC V7Y 1B6

Email: craig.munro@fticonsulting.com
tom.powell@fticonsulting.com
huw.parks@fticonsulting.com
paul.bishop@fticonsulting.com
michael.clark@fticonsulting.com

CMB Tax Service LLC

Jeffrey P. Serbus, Cindy L. Serbus

CMB Tax Service, LLC
209 Converse Drive
Jacksonville, NC 28546

Email: serbus@coastalnet.com

Schedule “A”

1. Next Point Financial, Inc.

2. NPI Holdco LLC

Liberty Tax Entities

1. LT Holdco, LLC

2. LT Intermediate Holdco, LLC

3. SiempreTax+ LLC

4. JTH Tax LLC

5. Liberty Tax Holding Corporation

6. Liberty Tax Service Inc.

7. JTH Financial, LLC

8. JTH Properties 1632, LLC

9. Liberty Credit Repair, LLC

10. Wefile, LLC

11. JTH Tax Office Properties, LLC

12. LTS Software LLC

13. JTH Court Plaza, LLC

14. 360 Accounting Solutions, LLC

15. LTS Properties, LLC

Community Tax Entities

16. CTAX Acquisition LLC

17. Community Tax Puerto Rico LLC

18. Community Tax LLC

LoanMe Entities

19. NPLM Holdco LLC

20. MMS Servicing LLC
21. LoanMe, LLC
22. LoanMe Funding, LLC
23. LM Retention Holdings, LLC
24. LoanMe Stores LLC
25. LM BP Holdings, LLC
26. InsightsLogic LLC
27. LM 2020 CM I SPE, LLC

TABLE OF CONTENTS

TABLE OF CONTENTS 7
OVERVIEW 8
PART I - STATEMENT OF FACTS 10
A. The CCAA Proceeding and the RVO 10
B. The Appellants 12
PART II - ISSUES ON APPEAL 13
PART III - ARGUMENT 14
A. Test for Leave to Appeal 14
B. No Significance to the Practice 15
C. No Significance to the Action Itself 16
D. Appeal is Not *Prima Facie* Meritorious 18
E. An Appeal Will Hinder the Progress of the Proceeding 21
PART IV - NATURE OF ORDER SOUGHT 23
APPENDICES: LIST OF AUTHORITIES 24

OVERVIEW

1. The respondent, BasePoint ("**BasePoint**" or the "**Purchaser**"), opposes the appellants' application. The appellants seek leave to appeal from the October 31, 2023 order of Madam Justice Fitzpatrick, in her capacity as supervising judge in this proceeding under the *Companies Creditors' Arrangement Act* ("**CCAA**"). The order, which took the form of a reverse vesting order (the "**RVO**"), gives effect to a sale transaction (the "**Transaction"**) by means of which the Purchaser will acquire the business of the Petitioners on a going-concern basis while preserving its key licenses and contracts and regulatory requirements. The appellants' contracts with certain of the Petitioners (the "**ADAs**") have not been assumed by the Purchaser.

2. BasePoint submits that there is no merit to this leave application. The proposed appeal seeks to second-guess several discretionary decisions of the experienced CCAA judge who has had carriage of this proceeding since July 2023. It raises no legal issues of any significance to the parties or the practice. The appeal itself has no merit. The appellants merely want to change the deal negotiated by the Purchaser with the Petitioners for their benefit, without legal basis and at significant risk to the entire restructuring. The proposed appeal can only cause delay and inject significant uncertainty into this restructuring at a critical juncture, to the detriment of numerous stakeholders.

3. Based on all the evidence and the opinion of the Monitor, the CCAA judge, in her discretion, determined that the Transaction Agreement, which designated the ADAs as "Excluded Contracts", should be approved as the best available option to restructure the Petitioners' businesses as a going-concern. In so doing, she further exercised her discretion to determine that sufficient notice of the proceedings had been provided and that the material costs that would be required to serve the full RVO materials on all unsecured creditors were not justified in the circumstances. These are exactly the type of discretionary decisions by a supervising CCAA judge that deserve the highest deference from an appellate court.

4. BasePoint does not deny that the appellants are prejudiced by the outcome of this CCAA proceeding. However, this prejudice is no different from that experienced by all of the other unsecured creditors whose contracts or liabilities are not being assumed by the

Purchaser and who will receive no recoveries. This is not a result of the RVO structure – in fact, the appellants do not challenge the RVO structure at all, except as it affects their interests. It is the result of the value of the Petitioners' business, as definitively determined by the outcome of an exhaustive court-approved marketing process. The result would be the same even if the Transaction had taken the form of a traditional asset sale and vesting order.

5. This application should therefore be denied. The Transaction, as negotiated by the parties, must close. The RVO must be recognized by the United States Bankruptcy Court as a condition to such closing and before the existing debtor-in-possession ("**DIP**") financing runs out in December. The Transaction must also close in order for the Liberty Tax business to resume serving customers as the busy tax preparation season ramps up, thereby giving effect to this going-concern restructuring.

PART I - STATEMENT OF FACTS

A. The CCAA Proceeding and the RVO

6. The Petitioners, under the ownership of NextPoint Financial Inc., ("**NPI**") carry on several lines of business involving tax preparation (Liberty Tax) and tax debt resolution (Community Tax) in Canada and in the United States.[1] They sought and received the protection of an initial order under the CCAA on July 25, 2023, as subsequently amended (the "**Initial Order**"). The CCAA proceedings were recognized under Chapter 15 of the United States Bankruptcy Code by the United States Bankruptcy Court for the District of Delaware (the "**Chapter 15 Proceedings**").[2]

7. BasePoint is the largest secured creditor of NextPoint, being owed approximately CDN $285 million. Together with Drake Enterprises Ltd. (another secured lender to the Petitioners), BasePoint also provided interim financing (the "**Interim Facility**"). In that capacity, BasePoint and Drake collectively advanced approximately CDN $25 million to finance this restructuring, as secured by a priority charge and approved under the Initial Order.[3]

8. The Petitioners will run out of cash to carry on their operations by mid to late December. No further financing is available under the Interim Lending Facility. The Petitioners' businesses therefore cannot continue past that date unless the RVO is upheld and the Transaction can close.

9. The Transaction is the product of a sale and investment solicitation process (the "**SISP**") that was approved by the British Columbia Supreme Court (the "**CCAA Court**") by order dated July 25, 2023. The SISP order was subsequently recognized in the Chapter 15 Proceedings. Pursuant to the SISP, the assets of the Petitioners were extensively and exhaustively marketed.[4]

10. At the conclusion of the SISP, BasePoint's credit bid was determined by the

---

[1] Monitor's Pre-Filing Report, para. 10.
[2] Monitor's First Report, paras. 1 to 4.
[3] Monitor's Pre-Filing Report, paras. 30-32.
[4] The details regarding the steps taken to market the Petitioners' businesses are set out in the Monitor's Fourth Report at para. 20.

Petitioners, with the approval of the Monitor, to be the best available option that would see the Petitioners' restructured businesses (the Liberty Tax and the Community Tax lines) continue as a going concern.[5] No bidder was prepared to pay a purchase price that could fully satisfy the secured claims of BasePoint and the other priority claims, including the priority charges granted to facilitate the CCAA proceeding, let alone provide surplus proceeds from which unsecured creditors could obtain recoveries.

11. The Transaction was initially structured as an asset purchase with a traditional vesting order. The ADAs were not among the contracts that the Purchaser was prepared to assume under this initial structure.

12. It subsequently became apparent that the Petitioners' businesses depended on numerous key licenses and contracts, as well as certain other regulatory permits or requirements. None of these business-critical licenses or contracts could be easily transferred, nor could the Purchaser easily obtain new licenses or contracts within a reasonable timeframe to allow the business to continue uninterrupted. As a result, the Transaction was restructured as a reverse-vesting order.[6]

13. The CCAA Court approved the Transaction, as set out in the Transaction Agreement, among NPI and certain subsidiaries (the "**NextPoint Entities**") and the Purchaser. Under the RVO, as is typical, all of the right, title and interest in certain excluded assets and liabilities are to be vested absolutely in a Canadian and a US residual company (the "**ResidualCos**"), depending on whether they arise in a Non-US NextPoint Entity or US NextPoint Entity. At the same time, the NextPoint Entities are wholly released from any claims or obligations in relation to the excluded assets and liabilities, including the "Excluded Contracts". The ADAs are listed as Excluded Contracts in the Transaction Agreement.

14. The change in structure from a traditional vesting order to the RVO did not change the substance of the Transaction. In particular, it did not change the decision by the Purchaser that it was not prepared to assume the ADAs. As the Monitor notes in its Supplement to the Fifth Report, the impact on the ADAs was the same under the RVO

---

[5] Monitor's Fourth Report at paras. 21-22.
[6] Monitor's Fourth Report, paras. 26-27.

structure as under an asset transaction – i.e. the ADAs would not be acquired and there would be no recovery for any claims arising from the disclaimer or non-fulfillment of those agreements.[7]

B. The Appellants

15. The appellants are referred to as "Area Developers". Pursuant to the ADAs entered into by the appellants with certain of the Petitioners involved in the Liberty Tax line of business, the appellants market and provide services to Liberty Tax franchises in particular territories in exchange for certain fee and royalty-sharing entitlements.[8]

16. On October 27, 2023, the Petitioners, in consultation with the Monitor, determined that it was necessary and appropriate to issue disclaimer notices to the Area Developers. Three Area Developers, through counsel, have filed a notice of application to challenge these disclaimers as they relate to four ADAs. The hearing of these objections is scheduled to occur on December 18 and 19, 2023.[9]

17. The ADAs are also at issue in this leave application. It is the Area Developers' position that the portion of the RVO that vests their ADAs in the US ResidualCo as "Excluded Contracts" should be set aside and the Purchaser required to assume their ADAs. In aid of this argument, the appellants claim that they did not receive service of the materials in support of the approval of the RVO by the CCAA judge.

18. The appellants received specific notice of these CCAA Proceedings and had actual notice of the RVO hearing, even though they were not served with the full materials in support of the RVO. Nonetheless, they did not appear to make submissions at the RVO hearing. Instead, the appellants objected to the recognition of the RVO in the Chapter 15 Proceeding at the initial hearing on November 6, 2023. The recognition hearing has now been deferred until Monday December 11, 2023.[10] Recognition of the RVO in the Chapter 15 Proceeding is a condition to closing the Transaction.

---

[7] Supplement to the Monitor's Fifth Report, para. 15.

[8] See Affidavit of Brian Ashcraft, sworn November 27, 2023 for a full description of the ADAs.

[9] Supplement to the Monitor's Fifth Report, paras. 5, 7 and 12.

[10] Supplement to the Fifth Report, para. 6.

PART II - ISSUES ON APPEAL

19. The only issue on this application is whether leave to appeal should be granted.

PART III - ARGUMENT

A. Test for Leave to Appeal

21. Under section 13 of the CCAA, an appeal from an order made under the CCAA lies only with leave from the Court of Appeal or a judge of the Court of Appeal.[11]

22. The test for leave to appeal in a CCAA proceeding is well-established and is as follows:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point raised is of significance to the action itself;

(c) whether the appeal is *prima facie* meritorious; and

(d) whether the appeal will unduly hinder the progress of the action.[12]

23. The appellants correctly recognize that leave to appeal in a CCAA proceeding is to be granted only sparingly. Leave to appeal is granted only where there are serious and arguable grounds of appeal that are of real and significant interest to the parties and the practice.[13]

24. The stringent application of this test in CCAA proceedings accords with the legislative purpose underlying section 13 of the CCAA, which is to ensure that most CCAA decisions are made by the supervising judge, with appellate interference occurring in only the clearest cases.[14] The requirement for leave to appeal furthers the objects and purpose of the CCAA by facilitating the resolution of disputes with minimal delay and reinforcing the finality of orders made by the supervising judge.[15]

25. The test is applied particularly stringently where the appeal involves a discretionary

---

[11] CCAA, s. 13.

[12] *Edgewater Casino Inc. (Re)*, 2009 BCCA 40 at para. 17 ("*Edgewater*"); *1296371 B.C. Ltd. v. Domain Mortgage Corp*., 2022 BCCA 331 at para. 16 (Chambers).

[13] *Laurentian University of Sudbury (Re)*, 2021 ONCA 199 at para. 19 ("*Laurentian University*"). See also *Edgewater* at para. 18.

[14] *Cineplex Odeon Corp. (Re),* (2001), 24 CBR (4th) 201, 2001 CanLII 32746 (ON CA) at paras. 7-8, citing *Luscar Ltd. v. Smoky River Coal Limited*, 1999 ABCA 179.

[15] *Essar Steel Algoma Inc., Re*, 2016 ONCA 138 at para. 20, citing *Hurricane Hydrocarbons Ltd. v. Komarnicki,* 2007 ABCA 361 at paras. 14-15.

decision of the CCAA judge, which is deserving of a very high degree of deference. As the Supreme Court of Canada has recently recognized, "[a]ppellate courts must be careful not to substitute their own discretion in place of the supervising judge's."[16] The supervising CCAA judge, who has had carriage over the entire proceeding, has a unique understanding of the proceeding and of the balancing of interests required.[17]

26. BasePoint submits that the test for leave to appeal is not satisfied here.

B. No Significance to the Practice

27. The issues raised by the appellants have no significance to the practice under the CCAA generally. As the Ontario Court of Appeal has held, where the decision appealed from amounts to a fact-specific exercise of a supervising judge's discretion, it is not of broader significance to the insolvency practice.[18]

28. Essentially, by seeking to set aside the aspect of the RVO that applies to their ADAs, the appellants invite this Court to second-guess the discretionary decision by the CCAA Judge in approving the Transaction Agreement, as negotiated and in granting the RVO. The appellants also challenge the related discretionary determination not to require full service of the RVO materials on all unsecured creditors whose contracts would not be assumed and who stood to recover nothing in this CCAA Proceeding.

29. The appellants raise no legal issues whatsoever regarding the nature of RVOs, the legal test for granting an RVO, or even the appropriateness of the RVO in the current circumstances. They argue only that the RVO should not apply to their ADAs.[19]

30. The only purported legal issue of significance to the practice that is cited by the appellants relates to the entitlement of particular parties to service of full materials in a CCAA proceeding.[20] However, whether a particular party should have received full service of the materials supporting a particular CCAA application raises no issues of

---

[16] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 ("*Callidus*") at para. 53.

[17] *Callidus* at paras. 47, 54, citing *Edgewater* at para. 20.

[18] *U.S. Steel Canada Inc., Re,* 2017 ONCA 99 at para. 7

[19] Appellants' Factum, para. 2: "their agreements should not be included in the obligations and liabilities that are cleansed or "vested off"".

[20] Appellants' Factum, para. 8.

significance to CCAA practice. There is no provision of the CCAA that requires service of materials to all unsecured creditors, regardless of the cost and despite the lack of incremental benefit to those parties. The appellants have not cited any such provision.

31. As submitted below, the appellants had notice of the CCAA proceedings, as well as notice of the RVO hearing. The CCAA judge was fully briefed regarding the service issue. She was provided with uncontested evidence regarding the material costs to effect full service of the RVO materials on all unsecured creditors, as well as the likely delays involved in doing so. The CCAA judge was also aware that the CCAA proceedings themselves had been widely publicized and that notices of various steps in the proceeding had been provided to affected parties.

32. The CCAA judge was also well aware of the fact that the Transaction did not generate sale proceeds sufficient to provide recoveries for unsecured creditors. By definition, therefore, all the unsecured creditors whose contracts or liabilities were not being assumed by the Purchaser were prejudiced. Incurring the costs and delay to effect full service on all unsecured creditors and an opportunity for such creditors, including the appellants, to object to the RVO or their treatment under it, could not change that fact. This had been amply confirmed by the results of the SISP.

33. In the specific circumstances before her, based on all the relevant considerations as well as the opinion of the Monitor, the CCAA judge exercised her discretion to determine that the costs to effect full service of the RVO materials on all unsecured creditors was not justified. This discretionary decision is entitled to the highest deference on appeal. Even if this Court might have exercised its discretion differently, there is no basis for appellate interference. Nor does the exercise of such discretion based on the circumstances of this particular case raise any issue that has general significance to practice under the CCAA.

C. No Significance to the Action Itself

34. There is no doubt that the ability of the Transaction to close before the DIP financing matures and the Petitioners run out of cash and before tax season gets fully underway, is of critical significance to this CCAA Proceeding as a whole. It is equally critical to preserve the court date for recognition of the RVO in the Chapter 15

Proceedings, without which the Transaction cannot close. The relief requested by the appellants is antithetical to these objectives.

35. While there is also no doubt that the appellants' appeal is of significance to their own interests and that they allege material prejudice to those interests, the appellant is seeking relief that will create delay in the closing of the Transaction, not to mention introducing significant uncertainty with respect to the ability of that Transaction to close at all. In essence, the appellants seek to change the negotiated deal for their own benefit. This is significant to the CCAA Proceeding only in the sense that granting the requested relief jeopardizes the entire going-concern restructuring to the detriment of numerous other stakeholders.

36. This is exactly the kind of jockeying for favourable treatment by a single creditor that is actively discouraged under the CCAA.[21] It is also the opposite of the type of significance to the CCAA proceeding that can support an appeal to this Court.

37. The appellants have sought to craft their requested relief in a manner that disguises the implications of what they are asking. They do not object to the RVO itself. They simply want more favourable treatment under the RVO. In other words, they do not want the RVO to apply to them. The appellants' position fails to recognize that the Transaction was negotiated as a package. It is not possible to surgically remove the ADAs from the Excluded Contracts while having no impact at all on the rest of the Transaction. The appellants are asking to change the whole deal that the Purchaser agreed to.

38. This issue does not arise from the RVO structure. Whether the Transaction took the form of an RVO or of a traditional vesting order to give effect to an asset sale, the Purchaser did not intend to assume the ADAs.

39. The fact that the appellants may be left with an unsecured damages claim against an entity that has no assets is the product of the insolvency of the Petitioners and the outcome of the SISP, not of any unfairness perpetrated specifically against the appellants. In this respect, the appellants are no more prejudiced than any of the other unsecured

---

[21] See, for example, *Re Calpine Canada Energy Limited*, 2007 ABCA 266 (Chambers) at para. 38.

creditors whose contracts or liabilities have not been assumed.

40. Since the issues raised by the appellants are significant only to themselves, and not to the CCAA Proceeding as a whole, this element of the test for leave is not satisfied.

D. Appeal is Not *Prima Facie* Meritorious

41. As submitted above, discretionary decisions of a supervising CCAA judge are entitled to the highest level of deference on appeal. This is a factor that militates against granting leave to appeal, as the grounds for interfering with an exercise of discretion on appeal are especially limited in the CCAA context.[22]

42. As this Court held in *Port Capital*:

> Where leave is sought to appeal a discretionary order, the third factor [of the appeal's *prima facie* merit] requires an assessment of "whether there is an arguable case that the chambers judge erred in principle, made an order that is not supported by the evidence, or whether the order appealed will result in an injustice": *Hagwilneghl v. Canadian Forest Products Ltd.,* 2011 BCCA 478 at para. 31. The appellants must establish a reasonable possibility that a division of the Court of Appeal would grant the appeal on its merits: *Webb v. Canada (Attorney General)*, 2019 BCCA 288 at para. 15.[23]

43. The decisions of the CCAA judge regarding service of the RVO materials and regarding the approval of the RVO were both purely discretionary and inherently dependent on the circumstances in play, including the prejudice to unsecured creditors whose contracts were not being retained. Despite the appellants' assertion to the contrary, the supervising judge was "steeped in the intricacies of the CCAA proceedings" and had an "intimate knowledge of the reorganization process".[24] If leave were to be granted, an appeal would only engage this Court in an exercise of second guessing the careful balance reached by the CCAA judge. Such an exercise is not permissible.[25]

---

[22] *Edgewater* at paras. 19-20.

[23] *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.*, 2021 BCCA 319 at para. 47.

[24] *Callidus* at para. 54, citing *Edgewater* at para. 20.

[25] *Callidus*, at paras. 53, 54, 107 and 108.

44. With respect to the issue of notice and service, on their own evidence, the appellants have known about the CCAA proceeding since July 2023.[26] Despite this awareness, they have not come forward to request to be added to the service list, nor have they appeared at any stage to make submissions, to inquire about the proposed treatment of their contracts, or to object to any relief sought.[27] The first time they appeared in these insolvency proceedings was to object to the recognition of the RVO in Delaware.

45. The appellants did have notice of the CCAA Proceeding and of the RVO hearing. BasePoint relies upon the responding factum of the Petitioners for the details regarding the notice provided to the appellants.

46. The appellants argue that they should have been served with the full materials in support of the RVO hearing. The decision that the costs of serving all of the unsecured creditors were not justified in the circumstances was within the CCAA judge's discretionary authority, based on evidence. Even if leave to appeal were granted on this point, this Court could not lightly interfere with this determination.

47. In any event, even if the appellants should have been served with the materials in support of the RVO (which is denied), it could have made no difference to the outcome. Even if leave to appeal is granted on this point and even if the part of the RVO involving their ADAs is set aside, there is no legal basis on which the appellants could compel the Purchaser to assume their contracts under the Transaction Agreement. Nor can the Purchaser be compelled to close the Transaction on that basis.

48. On the terms of the ADAs, which are largely identical, the appellants' consent to an assignment of those agreements by Liberty Tax is not required.[28] The appellants are also not parties to the Liberty Tax franchise agreements. They are only intermediaries between the franchisor (Liberty Tax) and the franchisees. There is nothing on the face of the ADAs that would require the Purchaser to retain them together with the Liberty Tax franchise agreements.

49. Based on vague allegations of extra-contractual statements, the appellants assert

---

26 Affidavit of Mufeed Haddad, sworn November 21, 2023, para. 25.
27 Supplement to the Fifth Report, para. 17.
28 Affidavit of Brian Ashcraft, sworn November 27, 2023, para. 10.

that their ADAs are "perpetual", akin to an "annuity". The express terms do not support that characterization. Even if it is correct – and they have already argued and lost this point on a number of occasions in the US, where state laws govern the ADAs[29] -- this characterization would not prevent the assignment of those agreements to US ResidualCo, or a disclaimer or the non-performance of those agreements in the context of an insolvency proceeding. Any resulting breach of the ADAs would, at best, give rise to an unsecured damages claim in circumstances where there are no recoveries for unsecured claims.

50. The appellants' request for relief in relation to their ADAs fundamentally undermines the deal embodied in the Transaction Agreement and implemented in the RVO. The CCAA judge approved the Transaction Agreement and granted the RVO in reliance on all the evidence. In addition, the CCAA Judge had the benefit of the Monitor's opinion that the Transaction Agreement represented the highest and best offer available for the business and assets of the Petitioners and was in the best interests of the Petitioners' stakeholders.[30]

51. The Monitor also opined that the business of the Petitioners had been extensively marketed and that the SISP was fair and transparent. The Monitor further indicated that the terms of the Transaction Agreement were "fair and reasonable in consideration of the market value of the purchased assets…".[31] The Monitor did not conclude that certain stakeholders were not prejudiced by the RVO. The Monitor recognized that stakeholders whose contracts were not being retained by the Purchaser would suffer no greater prejudice under the RVO structure than they would suffer in an asset transaction.[32] All of this was before the CCAA judge at the RVO hearing.

52. It is well-established that the Monitor's judgment, as court officer, is entitled to considerable deference by the CCAA Court.[33] The approval of the RVO by the CCAA

---

[29] Affidavit of Brian Ashcraft, sworn November 27, 2023, paras. 16 and 17.
[30] Monitor's Fourth Report, para. 25.
[31] Monitor's Fourth Report, para. 24(a), (b) and (d).
[32] Monitor's Fourth Report, para. 27(c); Supplement to the Fifth Report, para. 14.
[33] See, for example, *North American Tungsten Corporation Ltd. (Re),* 2016 BCSC 12 at para. 30.

Judge was therefore justified and, in any event, is entitled to deference on appeal.

53. The appellants purport not to challenge the approval of the RVO itself, but only those aspects of the RVO that affect them. However, this sophistry does not change the fact that, if leave is granted, the appellants' challenge undermines the deal embodied in the Transaction Agreement and the RVO and therefore would require this Court to second-guess the CCAA Judge's discretionary decision in approving the Transaction Agreement and granting the RVO.

54. The proposed appeal is devoid of merit and this element of the test therefore does not support granting leave to appeal.

E. An Appeal Will Hinder the Progress of the Proceeding

55. Even where any or all criteria for leave to appeal are satisfied (which they are not here), this Court may still deny leave to appeal if the appeal would unduly hinder the progress of the CCAA proceeding. The party seeking leave must establish, through affirmative evidence, that the proposed appeal will not do so.[34]

56. As the Alberta Court of Appeal held in *Canadian Airlines,* this element of the test must be considered in light of the delay involved in prosecuting, hearing and deciding the appeal, as well as in light of any hindrance that an appeal may cause by distracting from the restructuring or jeopardizing the debtor's ability to reorganize its affairs. It is necessary to consider the interests of all stakeholders, along with the underlying objectives of the CCAA.[35]

57. There can be no question that the proposed appeal will hinder the progress of the proceeding by causing delay and injecting uncertainty regarding the viability of the restructuring at a critical juncture. The appellants' unfounded assertions that there was "no urgency" to the CCAA judge's decision in granting the RVO[36] are belied by all the

---

[34] *Resurgence Asset Management LLC v. Canadian Airlines Corporation,* 2000 ABCA 149 at para. 45 ("*Canadian Airlines*").

[35] *Canadian Airlines* at paras. 41-42; *Laurentian University,* at paras. 22, 39; *Edgewater* at paras. 21-22; *North American Tungsten Corporation v. Global Tungsten and Powders Corp*., 2015 BCCA 426 at paras. 41-45.

[36] Appellants' Factum, para. 56.

facts, including the agreement by the case management judge to expedite this application.

58. In the circumstances of this restructuring, any delay has the potential to jeopardize the closing of the Transaction and to adversely impact the ability of the Petitioners to restructure at all. Moreover, the appeal itself has the potential to derail a negotiated deal to the detriment of numerous stakeholders.

59. The Monitor has recognized and it cannot be disputed that the Liberty Tax line of business is highly seasonal, with the majority of its business being conducted during the tax season of December 15 to April 30.[37] Given the lack of available cash to operate the business and the pending maturity of the DIP facility, the Transaction must close promptly in order for the Liberty Tax business to move forward into its busiest (and most lucrative) season.

60. Moreover, the Transaction cannot close unless the recognition of the RVO in the Chapter 15 Proceeding takes place. If the recognition hearing in Delaware does not proceed on December 11, 2023, as currently scheduled, the closing of the Transaction could be delayed indefinitely.

61. Equally, as long as the status of the Excluded Contracts under the Transaction Agreement remains uncertain, the Purchaser cannot be required to close the Transaction.

---

[37] Monitor's Pre-Filing Report, para. 11.

PART IV - NATURE OF ORDER SOUGHT

62. For all of the reasons above, BasePoint requests that the appellants' application for leave to appeal be denied.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 27 day of November 2023.

Mary Buttery, K.C.
Counsel for the Respondent, BasePoint

APPENDICES: LIST OF AUTHORITIES

Authorities	**Page # in factum**	**Para # in factum**
Case Law		
1296371 B.C. Ltd. v. Domain Mortgage Corp., 2022 BCCA 331 (Chambers)	7	22
9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10	8, 11	25, 43
Cineplex Odeon Corp. (Re), (2001), 24 CBR (4th) 201, 2001 CanLII 32746 (ON CA)	7	24
Edgewater Casino Inc. (Re), 2009 BCCA 40	7, 8, 11, 14	22, 23, 25, 41, 43, 56
Essar Steel Algoma Inc., Re, 2016 ONCA 138	7	24
Hurricane Hydrocarbons Ltd. v. Komarnicki, 2007 ABCA 361	7	24
Laurentian University of Sudbury (Re), 2021 ONCA 199	7, 14	23, 56
Luscar Ltd. v. Smoky River Coal Limited, 1999 ABCA 179	14	56
North American Tungsten Corporation Ltd. (Re), 2016 BCSC 12	13	52
North American Tungsten Corporation v. Global Tungsten and Powders Corp., 2015 BCCA 426	14	56
Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd., 2021 BCCA 319	11	42
Re Calpine Canada Energy Limited, 2007 ABCA 266 (Chambers)	10	36

Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149	14	55, 56
U.S. Steel Canada Inc., Re, 2017 ONCA 99	8	27
Legislation		
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 13	7	21