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COURT FILE NUMBER	2401-15969
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LCC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.
DOCUMENT	**BENCH BRIEF OF THE CANADIAN RESPONDENTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILES DAVISON LLP Barristers and Solicitors 900, 517 – 10th Avenue S.W. Calgary, Alberta T2R 0A8 Attention: Daniel Jukes Telephone: (403) 298-0327 Facsimile: (403) 263-6840 Email: djukes@milesdavison.com File No. 57066 DKJ

BENCH BRIEF OF THE CANADIAN RESPONDENTS
COMMERCIAL LIST APPLICATION
TO BE HEARD JANUARY 17, 2025 AT 10:00 AM

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LIST OF AUTHORITIES

I. INTRODUCTION

1. This Brief is provided on behalf of the Canadian Respondents that are subject to the Amended and Restated Initial Order that was granted by the Court on November 25, 2024 (the **"ARIO"**). The Respondents are categorized and defined using the following terms:

    a. The Respondents, Angus Manor Park A2A Developments Inc., Angus Manor Park A2A GP Inc., Angus A2A GP Inc., Angus A2A Limited Partnership, Angus Manor Park A2A Limited Partnership, Angus Manor Park A2A Capital Corp., A2A Capital Services Canada Inc., and Serene Country Homes (Canada) Inc. are hereinafter referred to as the **"AMP Respondents"**.

    b. The Respondent Hills of Windridge A2A GP Inc. Hills of Windridge A2A LP, and Hills of Windridge A2A Trust are referred to hereinafter as the **"Canadian Windridge Respondents"**.

    c. Fossil Creek A2A GP Inc., Fossil Creek A2A Limited Partnership and Fossil Creek A2A Trust are referred to hereinafter as the **"Canadian Fossil Creek Respondents"**.

    d. The AMP Respondents, the Canadian Fossil Creek Respondents, and the Canadian Windridge Respondents are collectively referred to as the **"Canadian Respondents"**.

    e. The Respondents Windridge A2A Developments, LLC and Windridge A2A Fossil Creek, LLC are collectively referred to hereinafter as the **"Texas LLCs"**.

2. As the Court is aware, the Texas LLCs have retained Bennett Jones as their separate counsel in this matter. The Canadian Respondents generally adopt and support the argument of the Texas LLCs as set out in their Brief, particularly with respect to the arguments that are equally applicable to all Respondents. Accordingly, this Brief is more summary in nature, with some additional arguments applicable to the Canadian Respondents, and is best read in conjunction with and as a supplement to the Brief of the Texas LLCs.

3. The present Application follows from Court's decision to grant the ARIO on November 25, 2024. At that time, the Court gave a number of orders and directions, including but not limited to the following:

    a. An Order extending the Initial Order granted by Justice Feasby on November 14, 2024 (the "Initial Order") to December 18, 2024, albeit for a limited scope and purpose.

    b. The Court directed that the Respondents provide certain information and documents to the Monitor (the **"Required Information"**).

c. The Court concluded it did not have jurisdiction over Dirk Foo as Trustee of certain trust entities in Texas, and accordingly dismissed the Monitor's Application to add the Texas Trusts to the proceedings. The Court also confirmed it had no jurisdiction to order a restraint of the land sales in Texas[1].

d. The Court asserted that it had jurisdiction over the Texas LLCs.

e. Any relief requested by the parties not expressly decided was adjourned to be heard on December 18th, including the Respondents' motion to set aside, or alternatively stay, the Initial Order.

4. In the course of the above determinations, the Court expressly recognized in its reasons that "the concerns raised by the Respondents are legitimate"[2]. The concerns expressed by the Respondents included the following:

- The initial order was effectively granted *ex parte*, without due process.
- No Order for service *ex juris* was granted or sought.
- The evidence before the Court in the November 14th application was incorrect, misleading, and speculative.
- The Applicants represent a tiny fraction of investors, who are effectively asking the Courts to give them rights they did not bargain for, all to the prejudice of the wider body of investors.
- The properties are being marketed and sold for fair market value in arm's length transactions.
- The proceedings have the potential to seriously prejudice ongoing sale negotiations.

5. The Respondents maintain their concerns and objections are valid. In addition, the Respondents object to the lumping of all Respondents together for the purpose of finding the entire group insolvent. They are requesting this Court set aside the Initial Order and terminate the proceedings.

6. In the alternative, the Respondents are seeking a reduction of the scope of the proceedings.

7. It should be noted that the Texas LLCs have also retained separate counsel to pursue an Appeal of the Initial Order and ARIO. The Canadian Respondents are also appealing the ARIO. The parties intend to withdraw those appeals if their requested relief to set aside the Initial Order and terminate the proceedings is granted at the January 16 and 17, 2025 hearing.

[1] ARIO, pa.70; Transcript of Proceedings – p.15, lines 30 – 36
[2] Transcript of Proceedings, pa.p.7, lines 31-32

II. FACTS

8. The Canadian Respondents agree with the facts as recited in the Brief of the LLCs, and accordingly this section of the Brief will be summary in nature, while also noting some additional facts specific to the Canadian Respondents.

9. As the Court is aware, the original Applicants that initiated these proceedings are Canadian investors in 3 land projects known by the following names:

    a. Angus Manor Park ("AMP")
    b. Fossil Creek
    c. Windridge

10. The Fossil Creek and Windridge projects are controlled by trusts (the Hills of Windridge Trust and the Fossil Creek Trust, collectively the **"Texas Trusts"**) of which Dirk Foo acts as Trustee.

AMP

11. The Affidavit of Grayson Ambrose sworn December 13, 2024 provides fulsome details of the structure of the AMP project, as a supplement to his previous Affidavit sworn in these proceedings on November 21, 2024.

12. The AMP project consists of the "Essa Lands" which encompass two parcels of property, namely with the PINs being 58103-0065 LT and 58103-0059 LT. These lands were acquired for the purposes of being developed using investor funding. Investors would, if successful, benefit from a share of the increase in value of the developed lands. The success and profitability of the AMP project depended upon the expansion of the urban boundaries and the change in the zoning and land use from agricultural to residential. It is not simply a buy and flip of lands. This is a risky investment and all investors were clearly warned of the risks: *Paragraphs 9 and 23, Affidavit of Grayson James Ambrose dated December 13, 2024.*

13. The AMP project is funded by Canadian and offshore investors. Offshore Investors funded $10,100,000.00. Canadian investors funded $929,000.00 through the 1st offering, and $836,855.00 through the 2nd offering. *Paragraph 53, Affidavit of Grayson James Ambrose dated December 13, 2024.*

14. Through the 1st offering (1st OM), investors became unitholders and Limited Partners. The 1st OM is governed by two key documents: the first offering memorandum and the Limited Partnership agreement ("LP Agreement"). The LP Agreement specifically states the rights and risks of the investment. It clearly warns investors that they have limited voting rights and unitholders must rely principally on the General Partner and Administrator. It is a risky investment and there are no guarantees of success, they are not direct investment in real

estate, and it should only be purchased by persons who can afford to lose all of their investment. *Paragraph 22, Affidavit of Grayson James Ambrose dated December 13, 2024.*

15. These investors were informed that they would collectively hold no more than 26.09% of the UFIs for the Essa Lands. The general partner, Angus A2A GP Inc., (the "GP"), is vested with the authority to make virtually all decisions on behalf of the investors. The investors were passive participants. It is the development process carried out to date which resulted in the possibility of the X-Energy offer.

16. As set out in paragraphs 56 to 63 of the Affidavit of Grayson James Ambrose dated December 13, 2024, the development process continued on the limited amount of CPF that was actually raised due to the limited fundraising target met. Weston Consulting's due diligence report set out at paragraph 56 lays out the various experts that would have to be involved to get the lands to a development ready state. The only rights of the investors are a reporting rights limited to receiving the annual report: *Affidavit of Grayson Ambrose sworn December 13, 2024, paras 18 and 42*)

17. The 2nd offering (2nd OM) had a different structure. Investors would be issued bonds by Angus Manor Park A2A Capital Corp. which used proceeds to acquire the units in Angus Manor Park A2A Limited Partnership (Alberta) (the "Limited Partner"). The Limited Partner would then acquire UFIs in the Essa Lands. The reason for this arrangement is to make it qualify for Deferred Plan investments (such as RRSP, RRIF, RESTP and TFSA). Other than the structure, the 2nd OM investors had similar rights and risks as the investors of the 1st OM. Paragraph 31, Grayson James Ambrose Affidavit

18. The Concept Planning Fund was developed by Weston Consulting ("WC"). According to WC's report, the project would take around 5 to 13 years and cost around $20 Million. *Paragraph 56, Grayson James Ambrose Affidavit dated December 13, 2024.*

19. Due to regulatory changes in the Republic of Singapore and Hong Kong where most of the offshore investments are located, as well as not being able to fully sell the subscription in Canada[3], only just over half of the planned fundraising goal was achieved. Further, there have been significant delays in the approval process. As a result of the challenges faced, it was not possible to realize the development value of the Essa Lands. A decision was therefore made to sell the Essa Lands to salvage the value for the investors. *Paragraph 61, Grayson James Ambrose Affidavit dated December 13, 2024.*

20. At the time of the CCAA proceedings being commenced, there was a conditional offer from X-Energy Inc. for a total purchase price of $14 million, $11 million of which would have been paid pursuant to a vendor take-back mortgage (the **"VTB Offer"**). This was an arm's length offer following marketing by an independent and reputable realtor and brokered through a reputable and independent real estate broker: *Affidavit of Allan Lind sworn November 21, 2024, pa.6(m);*

[3] Cross-examination of Grayson Ambrose, p.33, line 22/

Affidavit of George Chambers sworn November 20, 2024; Affidavit of Neil Warshafsky sworn December 16, 2024.

21. The VTB Offer is no longer active due to the intervention of these proceedings, but the real estate and management teams wish to salvage the VTB Offer if possible: *Affidavit of Neil Warshafsky, pa.14.*

Windridge and Fossil Creek

22. The Affidavit of Allan Lind sworn December 13, 2024 (the **"Dec 13 Lind Affidavit"**) provides more fulsome details of the structure of the Windridge and Fossil Creek properties, in particular at paras. 4 - 14.

23. Alberta investors in the Windridge and Fossil Creek projects were effectively aggregated into a single entity for each project for the purpose of investing in land, those entities being the Hills of Windridge A2A LP and Fossil Creek A2A Limited Partnership (collectively, the **"Canadian LPs**").

24. The Canadian investors purchased trust units in Canadian trusts, (the Fossil Creek A2A Trust and Hills of Windridge A2A Trust, collectively, the **"Canadian Trusts"**), which in turn is the limited partner in the Canadian LPs.

25. The Canadian LPs used funds raised through the public offerings to purchase Undivided Fractional Interests ("**UFIs"**) in the lands that were initially purchased by the respective Texas LLCs.

26. At the time the Canadian LPs purchased their UFIs, they became co-owners of the respective lands for the Fossil Creek and Windridge projects. After selling to the UFI holders, the Texas LLCs ceased to have any interest in the lands, and the rights of the co-owners (being the Canadian LP and the various off-shore UFI Holders) was governed by a Restrictive Covenant that was included in the ancillary documents to the purchase: *December 13 Lind Affidavit, Exhibit "E" (the Restrictive Covenant is separately bookmarked and can be found at p.256 of 477 of the pdf.*

27. However, contrary to the suggestion of the Monitor in its 3rd Report, the rights of the UFIs in Fossil Creek and Windridge are not currently governed by the Restrictive Covenant, but rather by the Sales Trust document.

28. The Restrictive Covenant governed co-owners up to the time when the lands were conveyed to the Dirk Foo as Trustee of the Texas Trusts. After that time, the rights and interests of the parties are determined by the "Sales Trust" document. The Sales Trust document for Windridge can be found at Exhibit "E" of the Dec 13 Lind Affidavit as a separate bookmark (at p. 347 of 477). It is identical to the form of Sales Trust document that was utilized for Fossil Creek (see *Dec 13 Lind Affidavit, pa.8 in note re Exhibit G,* and Exhibit "R" to the Monitor's Third Report).

29. As contemplated by the package of sale documents signed by the UFI holders (Exhibit "E to the Dec 13 Lind Affidavit), deeds transferring title to the Texas Trusts were signed and held in escrow pending certain resolutions by Co-Owners, including a resolution confirming the conveyance to Dirk Foo as Trustee.

30. Those resolutions were passed by the vast majority of co-owners in 2014 (over 97% in the case of Windridge and over 99% in the case of Fossil Creek – *see Exhibits "I" and "J" to the Dec 13 Lind Affidavit*), with the result that the Trustee has had ownership and control of the Windridge and Fossil Creek projects since that time. The UFI holders are beneficiaries under those trust arrangements.

31. The documents sent to UFIs that resulted in the co-owners resolution was not available at the time of the Dec 13 Lind Affidavit, but have since been obtained and provided to the Monitor, along with minutes from the relevant meetings.

32. The express purpose of the Sales Trust is "to receive and convey real property on behalf of the Settlors and to distribute the Net Income . . . from the sale of real estate to the Beneficiaries." (Article One, Page 2)**.** The Sales Trust gives the Trustee broad powers (ex. Article 9, Sections A through J, Page 8) and protections (ex. Article 4, Sections F and G, p.3) regarding the ownership, development and/or sale of the property. In addition to broad powers, the Sales Trust requires a majority vote of the Settlors to replace the Trustee (Article 4, Section D, page 2) and provides the indemnity for the Trustee (including attorneys' fees) from the Trust to the full extent of the Trust assets (Article 4, Section G, p.3). The Sales Trust also incorporates the method of calculation of "Net Income" for purposes of distribution to the beneficiaries of the Sales Trust (Article 5, Page 3).

III. ISSUES

33. The central issue for the Court to determine is whether the Initial Order ought to be set aside or stayed, or whether it is otherwise appropriate to terminate these proceedings rather than extend them.

34. Key sub-issues for determination include the following:

    a. Are the Respondents "Debtor Companies" within the meaning of the CCAA?

    b. Whether these CCAA proceedings are abusive and brought for purposes beyond the scope of the Act. This issue would include a discussion of the Respondents concerns regarding a lack of due process.

c. Even if the CCAA is being used properly (which is denied), is it possible to achieve the objective or purposes of the Initial Order/Act with respect to the Texas projects?

d. Even if the CCAA is being used properly (which is denied), whether such extraordinary relief is appropriate. This issue would include a further discussion of:
   i. Whether it is appropriate to grant such relief upon the motion of a tiny fraction of investors.
   ii. Whether it is appropriate for investors to use the CCAA process to effectively assert rights that they did not bargain for.
   iii. Whether the issues complained of by the Applicants justify the relief sought, including the costs.

e. Does the non-disclosure by the US Trusts justify extension of the CCAA proceedings?

f. Should the imperfect disclosure have a significant impact on the Court's decision or any advice and direction sought by the Monitor?

g. Should the Court admit or give any weight to the evidence by the Monitor in relation to other projects that are outside the scope of the ARIO?

35. In the alternative, the issue for the Court is whether it is appropriate to reduce the scope of the proceedings by removing some or all parties and/or reducing the powers of the Monitor.

IV. LAW AND ARGUMENT

The Canadian Respondents are not "Debtor Companies" within the Meaning of the CCAA

36. The Canadian Respondents are not insolvent, and therefore not properly "Debtor Companies" within the meaning of the CCAA.

37. Section 3(1) of the CCAA states:

> **This Act applies in respect of a debtor company or affiliated debtor companies** if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed. [emphasis added].

38. Consistent with this, section 11.02 of the CCAA requires that an application for an initial order, or a subsequent order, be "in respect of a debtor company".

39. Debtor company" is defined to mean (among other things):

> **debtor company** means any company that
>
> **(a)** is bankrupt or insolvent,
>
> **(b)** has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act,* whether or not proceedings in respect of the company have been taken under either of those Acts…

40. None of the Canadian Respondents are bankrupt. "Insolvent" is not defined in the CCAA. "Insolvent person" is defined in the *Bankruptcy and Insolvency Act* as follows:

> **insolvent person** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

41. "Act of bankruptcy" within the meaning of the *Bankruptcy and Insolvency Act* are set out in section 42(1) thereof, and include (among other things that are not relevant here) at 42(1)(j), if the debtor ceases to meet his liabilities generally as they become due.

42. Justice Simard held he was satisfied that the Respondents were insolvent. However, in determining that, it seems that he simply relies on the group of the Respondents being liable for at least CDN $5 million[4].

43. With respect, the Applicants and the Court have conflated the test for the $5 million threshold with the test for whether a given respondent is a "debtor company" within the meaning of the CCAA. While the Court can look to the combined debts of the named companies to get to $5 million, that does not mean that each of the entities should be treated as having $5 million in debt for the purpose of determining whether they are insolvent.

    The above analysis is supported by the comments of the Court in *Re 8640025 Canada Inc., 2017 BCSC 303*:

[4] Transcript of Proceedings, November 25, 2024 – p.10

> [39] The petitioners submit the Act can apply to debtor companies and affiliated debtor companies only. ***Affiliation alone is not sufficient because the proposed petitioners must also be debtors within the meaning of the Act for it to apply to them***.
>
> …
>
> [48] I am not persuaded I ought to make the requested order. I generally agree with the petitioners' submissions. ***In particular, s. 3 of the Act, in my opinion, is the gateway to applying the Act to an eligible company. Unless a company is an insolvent debtor or an affiliated insolvent debtor or perhaps a partner of an insolvent debtor, it cannot get through the gate and become part of the CCAA process***. The proposed petitioners do not qualify. In my view, the Act is not applicable to them.
>
> [49] Despite the urgings of the applicants, I cannot read the reasons of Madam Justice Deschamps, in Century Services Inc. as instructing judges when, at the outset of a CCAA proceeding they are considering the application of the Act to a company, to exercise an expansive or inherent jurisdiction thereby making it applicable to a company that does not meet the test found in s. 3.
>
> [emphasis added]

44. The default judgment of approximately $3.8 million relied upon by the initial Applicants and the Court to establish insolvency relates only to the Texas LLCs.

45. With respect to the Canadian Windridge Respondents and the Canadian Fossil Creek Respondents, there is no evidence that either of these companies have any debts or liabilities at all. Indeed, these entities do not have any active business operations. They exist only for the purpose of holding investment interests and ultimately distributing any return to investors.

46. While some of the investors in the AMP project are bondholders pursuant to the second OM, those payment obligations are not yet due. It is premature to conclude they will not be paid, and in any event the bond obligation only relates to Angus Manor Park A2A Capital Corp. There is no evidence that Angus A2A Developments Inc. or any of the other AMP Respondents have any debts or liabilities.

The Proceedings Under the CCAA are Abusive and Beyond the Purposes of the Act

47. As noted in the Brief of the Texas LLCs, this appears to be an unprecedented CCAA proceeding granted on the motion of investors who are not even creditors of the subject entities.

48. In his reasons, Justice Simard rightly expressed concern that:

> There is no hint that the applicant investors have any plan for a compromise or

> arrangement of the debtors, or even a process that would lead to out of the ordinary course sales. They essentially started this action to try to stop sales and to investigate the facts…it is possible that the continuation of these proceedings…might be stretching the CCAA beyond its proper limits.[5]

49. As Justice Simard noted, there is no indication that the companies or their creditors are working towards a Plan as contemplated by the Act. As the proceedings stand, any such Plan would be entirely unworkable given:

    a. That the 3 projects encompass different companies with different projects without uniform investor groups among them; and

    b. The Texas projects are within the ownership and control of parties that this Court has already determined it cannot exercise jurisdiction over.

50. More to the immediate point, the CCAA is a restructuring statute; the Court should not permit it to be used as a fishing expedition or a means for investors with limited rights and interests to effect a wholesale takeover of management. As argued in the Brief of the Texas LLCs (at paras. 62 – 73 and paras. 84 - 86), these proceedings are inconsistent with the fundamental purposes of the CCAA.

51. It is particularly concerning that applicants sought such a novel Application of the CCAA with effectively no notice to the affected parties, including the Respondents and other investors whose interests would be impacted (and continue to be impacted).

52. As the Court is aware, the matter was originally brought before it on only two days' notice. Justice Simard's reasons acknowledge that it was essentially brought on an *ex parte* basis[6]. The Canadian Respondents are entirely in agreement with the submissions of the Texas LLCs about the importance of procedural fairness in CCAA Proceedings (see paras 74 – 83 of the Brief of the Texas LLCs).

53. In the course of bringing their novel Application on effectively no notice, it is submitted that the applicants relied on rumours and misunderstandings about the rights of investors to create a false sense of urgency. When explaining the urgency of this matter, counsel for the Canadian investor relied on the discovery of an unidentified social media Facebook post:

> So I mentioned, Sir, this is urgent. Why is it urgent? Well, recently there was a discovery by one of the consultants on a Facebook page for disgruntled investors that a notice has gone out regarding the imminent sale of the Angus Manor Park lands. That's the lands

[5] Transcript of Proceedings, p.p.7, lines 27 – 35.
[6] Transcript of Proceedings, p.4, lines 23-24.

> in Ontario. The notice is interesting. It says there will be a special resolution that needs to be voted on by co-owners. The Canadian investors have not received any notice of this sale. Now, they're not directly on title, but the GPs are who are struck from the corporate registry. They're on title. The limited partners presumably need to direct the GP in the vote. You would think they would know about this sale.
>
> *(Transcript of Proceedings, November 14, 2024, p.7, lines 24-31)*

54. However, what was not explained to the Court on November 14, 2024, is that individual Canadian investors were not entitled to vote or to receive notification about the sale. As previously discussed, the OM1 and OM2 clearly stated and warned potential investors of this in order to create efficiencies in decision making.

55. The Canadian investors, given their small individual interests in the project, were to rely on the Angus General Partners to make decisions on their behalf. It should be remembered that the investors themselves are not UFI holders; it is the two Angus limited partnerships that hold the UFIs.

56. In his November 25, 2025 decision, The Honourable Justice Simard recognized the unusual nature of these proceedings, stating:

> As the applicant investors advised the Court on November 14th, this is not a conventional CCAA proceeding. It was not commenced in the way the vast majority of these cases are, by an insolvent debtor entity who needs protection from its creditors to be able to put together a plan. It was also not commenced by creditors. It was commenced by investors ***whose rights and entitlements are unclear, based on the evidence before me presently***. [emphasis added].
>
> *(Transcript of Proceedings, November 25, 2024, p.7, lines 12-18)*

57. To the extent those rights and entitlements may have been unclear before, it is submitted this is no longer the case. It is beyond dispute that the rights of the investors who instigated this process are very limited. The "red flag" they raised about not getting notice or the opportunity to vote was in actuality a red herring.

58. The very limited nature of the rights of individual Canadian investors is not seriously disputed. With respect to AMP, the Monitor states in its Third Report (at paras 60), *inter alia*:

> The rights of the Angus Partnership Investors (as defined in the Pre-filing Report) for active participation in the Angus Manor project are limited. Pursuant to the Angus LP Agreement, unit holders of the Angus LP (the "Limited Partners") are not entitled to, among other things (i) take an active part in the business of the Angus LP; and (ii)

> transfer any of the LP Units owned by it, except as provided for in the Angus LP Agreement. Moreover, pursuant to the Angus LP Agreement, the Angus Partnership Investors irrevocably nominate Angus GP with full power of substitution as his or her agent and true lawful attorney to execute all instruments and documents on his or her behalf or in the name of the Angus LP as the Angus GP deems necessary…

59. Canadian investors invested into a passive investment with no right to stop, pause, supervise, or receive notification about the sale of lands; the CCAA process should not be used to drastically expand those rights to the detriment of other investors and stakeholders.

60. Further, even if the Facebook post accurately points to a potential sale on the horizon, this does not demonstrate urgency. Rather, it merely indicates that a sale may be pending for the AMP property, which is exactly what the investment contemplates would happen, without any requirement to notify individual investors.

61. In summary, the initial Applicants relied on misinformation and a false sense of urgency to effectively block the AMP Respondents from executing the exit that is necessary and in the best interests of the UFI holders as a whole. It would be wholly inappropriate to continue these proceedings, particularly given that there is no evidence of impropriety in that sales process (as further discussed under the extraordinary relief issue).

Fossil Creek and Windridge

62. As noted in the Brief of the Texas LLCs, it is notable that the supposed urgency stemming from the AMP sale has no bearing on the Texas projects or their investors. With respect to those projects, the Applicants further relied on erroneous information to suggest to the Court that the Texas project lands were in jeopardy and that a process would be required to manage their liquidation.

63. In making their application, the applicant investors suggested there were "multiple claims filed in the United States"[7] by offshore investors. The Affidavit of Michael Edwards references the $3.8 million judgment in favour of Global Forest (the "Global Forest Judgment"), and also notes two additional actions filed in Texas.

64. What the Edwards Affidavit fails to disclose is that the two additional actions were both dismissed with costs in favour of Mr. Foo: *Affidavit of Allan Lind sworn November 21, 2024, paras. 25 - 26 and Exhibits "E" and "F"*.

65. In addition, Mr. Edwards erroneously suggests in his Affidavit that the lawsuit is "registered" against the Windridge lands (pa.89). As explained in the Dec 13 Lind Affidavit (at paras. 24 – 28),

[7] Transcript of Proceedings, p.6, line 39.

this represents a fundamental misunderstanding of the Texas land title system, which is a recording system and not a registration system.

66. The Global Forest Judgment, which was a default judgment, is only against the Texas LLCs, and since they do not own the land, the land is not encumbered by the Judgment.

67. We respectfully submit the initial application would not have been granted had the Court had a more complete and accurate picture of the facts described above. The investor applicants should not be permitted to access the CCAA process on the back of wrong information to gain rights they never had.

68. Taken together, the proceedings themselves and the manner in which they were brought forward amount to an abuse of the CCAA process.

Is the Extraordinary Relief Sought in this Action Necessary or Appropriate?

69. Even if the Court were to conclude that this action is a proper use of the CCAA (which is denied), such extraordinary relief is not justified or warranted and will unnecessarily erode funds that would otherwise flow to the investors. This argument is equally applicable to the Applicants' alternative relief for the appointment of a Receiver.

70. As detailed below, the facts and circumstances of this case strongly militate against the continued involvement of the Monitor or any Receiver.

71. As a starting point, the initial Applicants represent only a tiny fraction of investment in the projects.

72. As noted in the Brief of the Texas LLCs (pa. 39) and by Justice Simard[8], the applicant investors represent well below 1% (closer to a tenth of one percent in fact) of the total investment in the Windridge and Fossil Creek projects.

73. Similarly, the applicant investors represent a tiny fraction of the overall investment in the AMP project. As noted in the December 13, 2024 Affidavit of Grayson Ambrose, the total funds raised for the AMP project was $11,865,885. The Applicant investors represent approximately 2.06% of the total investment (based on the total of the amount of $245,000 disclosed in the Affidavits off the 4 applicant investors who invested in AMP). Canadian investors as a whole contributed only $1,765,885.00, or less than 15% of the total project funds.

74. Counsel for the Canadian investors and offshore investors purport to now have the support of additional investors, but they remain a significant minority. For example, Ms. Picard's Third

[8] Transcript of Proceedings, November 25, 2024, p.11, lines 18 – 33..

Secretarial Affidavit reports receiving responses from 42 investors who have invested in Angus Manor for a total investment amount of $1,030,500. It is not clear from the secretarial Affidavit of Emma Lisson what amounts or investor numbers relate specifically to the AMP project.

75. Notably, while the investors that have contacted representative counsel are purportedly supportive of the process, there is no evidence that they have been informed of the costs of the process or that investors would ultimately end up footing the bill.

76. It is not appropriate to continue a process initiated by such a tiny fraction of investors, particularly given the limited rights that those investors bargained for. As touched on earlier in the Brief, the rights of individual investors are extremely limited.

77. The essential complaint of the investors is that the relevant entities have not complied with the very minimal reporting requirements that they have to UFI holders. It is noted that none of the individual investors are UFI holders. In any event, it is submitted that a lack of reporting and proper record keeping hardly justifies the extraordinary relief sought, including a complete takeover of management.

78. Furthermore, the timing of the CCAA application is particularly problematic. It has effectively interfered with the VTB Offer for the AMP lands, as well as potential sales for the Texas projects.

79. Regardless of past criticisms that might be levelled against management with respect to poor communication, record-keeping, or reporting, there does not appear to be any dispute that exiting the projects and getting some return to creditors is a reasonable and prudent decision.

80. That is precisely what management was in the process of doing prior to the initial Application. The AMP property was properly listed and marketed using reputable, arm's length realtors (Royal Lepage): *Affidavit of Allan Lind sworn November 21, 2024, pa.6(m); Affidavit of George Chambers sworn November 20, 2024*.

81. Consistent with the rights and entitlements of the UFI co-owners, the VTB offer was presented to co-owners for a vote. As detailed in the Affidavit of Grayson Ambrose (at pa.13) and the Supplementary Affidavit of Grayson Ambrose, both dated November 21, 2024, co-owners had delivered proxies giving nearly unanimous consent to the sale.

82. In his reasons for decision on November 25, 2024, Justice Simard rightly stated (at p.12, lines 15 – 18 of the Transcript) that:

> the respondents say that all of these sales or sale processes are arm's-length for fair market value and in accordance with the investors' rights and entitlements. They might be. **If they are, it may be difficult for the applicant investors to justify the continuation of these proceedings.**

83. There is no evidence that the process leading to the VTB offer was anything other than reasonable, arm's length, and for fair value. Notwithstanding this, in its Third Report, the Monitor expresses concern about how the VTB would be structured to protect the interest of the A2A investors.

84. However, the Monitor has not offered any solution as to how it would accomplish this, nor has it provided any alternate plan as to how to go about marketing the AMP property. As the Affidavits of George Chambers and Neil Warshafsky (the realtor and broker respectively) attest, VTB arrangements are prevalent with lands in the nature of the AMP lands. There are inherent risks with VTB structures, but that does not make the VTB Offer unreasonable.

85. The Monitor also jumps to the conclusion that investors are not going to receive the benefit of the interest payments under the VTB. However, in light of the explanations provided by Mr. Ambrose in his cross-examination, such a conclusion is premature. While significant amounts have been set aside to cover potential costs of administering, monitoring, or enforcing the VTB, any amounts not used would be distributed back to investors: *Cross-Examination of Grayson Ambrose*, *p.110, lines 13 – 24; p.111, lines 15 – 20, p.113, lines 13 - 15*).

86. Simply put, the continued appointment of a Monitor to conduct or oversee the sale of the AMP lands adds no value to the process; in fact it has interfered with it and added significant costs. The realtor team put in place by management is currently hard at work to salvage the VTB Offer (*Affidavit of Neil Warshafsky sworn December 16, 2024, pa.14*), but with each passing day, the chances for keeping the deal alive grow slimmer.

87. In addition, the relief sought by the initial Applicants was disproportionate and ignored other remedies that they could avail themselves of. As Justice Simard notes in his reasons[9]:

> It is one thing to say your investment is being managed poorly, and that you are not receiving any communications. There are corporate and common law remedies for that kind of wrong. It is quite another thing to say that your extremely fractional interest being ignored entitles to you freeze the totality of the investments and effectively take control of the entities out of the hands of management and directors.

88. The Alberta Court of Appeal decision in *BG International Ltd. v. Canadian Superior Energy Inc., 2009 ABCA 127* serves as a good reminder that receivership represents an extraordinary remedy of last resort. In that case, the Court of Appeal states (at paras. 16 – 17):

> **We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether**

[9] Transcript of Proceedings, November 25, 2024, p.12, line 5.

there are other remedies, short of a receivership, that could serve to protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:

> [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. **Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.** [emphasis added]

89. As Justice Simard touched upon, If the investors believe that their investment has been poorly managed or that there is company information they are entitled to, there are other remedies available to them, whether it be under corporations legislation or an action in negligence.

90. The sweeping powers provided to the Monitor are not necessary or appropriate and do not add value to the reasonable and arm's length exit process being conducted by management. The current CCAA process represents an overreach by a tiny minority of investors who had very limited rights to information in the first place, and the appointment of a Receiver would be likewise.

Non-Disclosure by US Trusts

91. At pa.150 of its Report, the Monitor states that the Respondents "intend to utilize the exclusion of the Fossil Creek Trust and the Hills of Windridge Trust from these CCAA proceedings to continue to refuse to furnish the Requested Information…".

92. With respect, this statement is unfair and implies that the Canadian Respondents have the ability to compel the Texas Trusts to provide documents and information for release to the Monitor. At the time this Court directed disclosure of documents, there may still have been

some uncertainty in the Court's mind about the investment structure and ownership of the Texas lands.

93. It is patently unfair for the Court to Order that parties disclose documents that are not within their power, and then hold it against those parties when they are unable to produce the documents. Accordingly, and for the additional reasons that follow, the failure to produce information and documents regarding the Texas projects should not have a significant bearing on the Court's analysis of whether the CCAA proceedings are appropriate or whether they should continue.

94. It is clear from the record that best efforts were made to obtain records that were in the control of the Trust entities. In fact, the documents with respect to the TRWD sale and the Fossil Creek sale were obtained by the Respondents' counsel subject to conditions imposed on their release by Texas counsel: *Dec 13 Lind Affidavit, pa.54 and Exhibit "O"*.

95. However, those conditions were never lifted, and ultimately counsel for the Texas Trusts took the position that the Trustee would not release such information.

96. While this made it impossible for the Respondents to provide certain details and documents, this decision was made by the Trustee of the Texas Trusts after consultation with legal counsel, not by the Respondent companies.

97. While there is some common management, the three projects are separate projects involving different investor groups run by separate entities. With respect, the Monitor appears to lose sight of this fact in its frequent references to the Respondents as the "A2A Group" without distinguishing between the entities or projects.

98. Although Dirk Foo may act in multiple capacities, it cannot be seriously disputed that he has separate obligations and duties, including fiduciary obligations, to the beneficiaries (i.e. the UFI holders) of the Texas Trusts of which he acts as Trustee.

99. While the Canadian Respondents would have liked to provide greater transparency on the Texas projects, the position of the Trustee of the Texas Trusts is understandable and does not appear, from the Respondents' perspective[10], to be specious or unreasonable. The Texas Trustee is in the midst of sales negotiations with a large publicly traded company (*Dec 13 Lind Affidavit, pa.49*), and insulating those negotiations as much as possible from these proceedings is a legitimate interest. Indeed, there is already evidence that a sale of the last remaining lot in the Fossil Creek lands was terminated by Bloomfield due to it being notified of these proceedings: *Dec.13 Lind Affidavit, pa.48 and Exhibit "N")*.

[10] To be clear, the Respondents do not purport at any time to be making submissions for or on behalf of the Trustee of the Texas Trusts.

100. In addition to such concerns, the effect of the November 25th disclosure Order is to require the Respondent UFIs to demand from the Trustee of the Texas Trusts information that UFIs are not entitled to.

101. The structure of the investments is designed to limit the right of individual UFI Holders to exert influence over the projects. It is submitted that such a structure is critical where there are thousands of investors who each might have their own ideas about how projects should be developed, marketed, and sold, or the level of information they should receive.

102. It is apparent that the Trustee has already spent time and resources ensuring that this structure and the rights of the parties under their agreements are respected. In this regard, the outcome of the *Nambiar* decision is instructive. As noted in the initial Affidavit of Allan Lind sworn November 21, 2024, the Court dismissed the action by Mr. Nambiar with costs payable to Mr. Foo as Trustee of the Texas Trusts in the amount of his reasonable attorney's fees (see Exhibit "E" of the November 21 Lind Affidavit).

103. The motion that led to that dismissal is included in the Dec 13 Lind Affidavit at Exhibit "M", and that document is telling. It reveals that Mr. Nambiar, a UFI holder, had sought an accounting from the Trustee of the Texas Trusts, and the motion argument makes it clear that he is not entitled to the same.

104. As part of the Trustee's arguments in Nambiar on costs, the motion states:

> Plaintiffs comprise a minute minority of the beneficiaries of the Sales Trusts. Their actions have cost each beneficiary of the Sales Trusts a portion of the fees for the defense of Plaintiffs' baseless claims.

105. This excerpt highlights the fact that any steps that need to be taken by the Trustee of the Texas Trusts effectively come out the pocket of UFI holders.

106. One might understand how it would be difficult to convince the Trustee that it is in the best interests of the beneficiaries to have their distributions eroded by legal fees and other costs associated with demands for information or actions by the Monitor or UFIs to try and tie up proceeds or insert themselves into legitimate, arm's length sales processes.

Other Non-Disclosure Concerns

107. The Respondents concede that there are deficiencies in their record keeping and reporting. This has made it difficult for the Respondents to comply with their obligations in a timely fashion, and in many cases only outdated financial information is available. In his most

recent Affidavit sworn December 31, 2024, Mr. Lind provides additional context with respect to some of the issues faced and outstanding production items.

108. However, a large volume of information has been provided, including all the relevant agreements required to understand the structure of the investments and rights of investors. Most, if not all, of what has not been provided does not exist (ex. up to date financials), cannot be found, or is in the hands of third parties to these proceedings who will not authorize its release. This is not a case of the Respondents acting in bad faith or intentionally disregarding their obligations.

109. As noted earlier, the Court rightly expressed grave doubts about whether the applicants were exceeding the limits of the CCAA's flexibility. The Act is not meant to be utilized merely as a means to learn information and compel reporting from unresponsive management.

110. The Court ordered production of information for its own benefit to help it determine certain matters that it expressed uncertainty about. While there have been some delays and issues in production, it is respectfully submitted that the Court now has sufficient information to resolve any uncertainties it previously had and to render a decision in this matter.

111. What can be confirmed with the information available is the very limited rights of a small minority of investors. The Court also ought to be satisfied that the AMP project is being marketed appropriately to arm's length purchasers. It is also abundantly clear that none of the Respondent entities have ownership or control of the Texas projects.

112. Further, any perceived deficiency in information does not take away from the larger issue that these proceedings cannot achieve their aim with respect to the Texas projects, as discussed further in the Brief of the Texas LLCs. Nor does such deficiency detract from the technical issue raised about whether the Canadian Respondents are "debtor companies".

Monitor's Comments on Other Projects

113. The Monitor's Report contains information and commentary with respect to other companies and projects that are not subject to the proceedings.

114. The Respondents submit that it would be inappropriate for the Court to consider or give any weight to this information. Firstly, such information concerns separate projects involving non-parties who have had no opportunity to respond or explain in any fashion. The AMP Respondents are not reasonably in a position to speak for other parties or other projects.

115. Moreover, the Respondents are concerned that the Monitor has disregarded Court's express instructions to only perform tasks that are necessary to carry out the ARIO, having regard to the limited scope and duration of the extension:

> As I will make clear, the monitors and its counsel's primary task over the next month will be corresponding with the respondents and preparing the comprehensive report I have requested for the December 18th hearing. Other than that, the monitor should only be carrying out the tasks that it is empowered to carry out under the initial order that are necessary.[11]

116. The Respondents submit that the Monitor opening up new investigations into projects not covered within the current proceedings goes beyond the necessary tasks under the ARIO and beyond the express limited purpose for which the extension was granted. The Monitor's actions in this regard should not be approved or condoned.

V. REMEDY SOUGHT

117. An Order setting aside the Initial Order/ARIO and terminating the CCAA proceedings.

118. In the alternative, and Order staying the Initial Order and ARIO.

119. In the further alternative, removal of one or more parties or projects from the scope of the proceedings and/or reducing the Monitors powers to observing and reporting, or such other scope of as the Court considers reasonable.

Respectfully submitted this 13th day of January, 2025

Dan Jukes, Miles Davison LLP
Co-Counsel to the Canadian Respondents

[11] Transcript of Proceedings, p.17, lines 6 – 10.

2017 BCSC 303
British Columbia Supreme Court

8640025 Canada Inc., Re

2017 CarswellBC 487, 2017 BCSC 303, [2017] B.C.W.L.D. 2155, 277 A.C.W.S. (3d) 238

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centres Inc.

Affleck J.

Heard: January 20, 2017; January 25, 2017
Judgment: January 30, 2017
Docket: Vancouver S1610905

Counsel: H.C.R. Clark, Q.C., for Petitioners 9640025 Canada Inc. (dba Teliphone Navigata-Westel Communication Inc.) and Teliphone Data Centres Inc.
M. Buttery, for Bank of Nova Scotia
J.D. Schultz, for TELUS Communications Company
D.F. Hepburn, for Secured Creditor Cascade Divide Enterprises
M.C. Verbrugge, for Bell Canada, Northwest Tel Inc., Bell Mobility Inc., and Bell Alliant Regional Communications Inc.
W. Milman, for Monitor, Ernst & Young Inc.
R.J. Argue, for Bond Capital and proposed DIP lender
A.N. Epstein, for Former Monitor, Boale Wood & Company

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Qualifying company
Two debtors were part of group of companies that provided telecommunications services in various provinces — Debtors brought petition for relief under Companies' Creditors Arrangement Act (CCAA) and obtained initial order — Six secured creditors contended debtors and three other companies in group had integrated accounting records, shared senior management, and had same controlling mind L — Secured creditors brought application for order adding three other companies to petition — Application dismissed — Section 3 of CCAA was gateway to applying CCAA to eligible company — Unless company was insolvent debtor or affiliated insolvent debtor or perhaps partner of insolvent debtor, it could not get through gate and become part of CCAA process — Record did not demonstrate other companies were insolvent, and CCAA was not applicable to them — L's alleged control did not meet test for "control" found in s. 3(2) of CCAA, which meant, in essence, control through ownership of majority of company's shares — It was not established that L had control in that sense — Also, R. 6-2(10) of Supreme Court Civil Rules precluded adding petitioners without their consent — CCAA was not intended to be applied to company that objected to coming under its constraints.
Table of Authorities
Cases considered by *Affleck J.*:

First Leaside Wealth Management Inc., Re (2012), 2012 ONSC 1299, 2012 CarswellOnt 2559 (Ont. S.C.J. [Commercial List]) — considered

Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, *(*sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Priszm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299, [2004] O.T.C. 284 (Ont. S.C.J. [Commercial List]) — followed

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 2(1) "debtor company" — considered

s. 3 — considered

s. 3(1) — considered

s. 3(1)-3(3) — referred to

s. 3(2) — considered

s. 11 — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) — considered

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009

R. 6-2(10) — considered

Words and phrases considered:

control

I do not agree that [individual]'s alleged control as the "visionary" for all the companies, including the petitioners and proposed petitioners, meets the test for control found in s. 3(2) of the [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36]. That subsection defines "control" in a manner that is consistent with the customary use of the word "control" in relation to a company, which means, in essence, control through ownership of a majority of the company's shares. I have no evidence that satisfies me [that individual] has control in that sense.

APPLICATION by six secured creditors for order adding three companies related to two debtors to petition brought by debtors under *Companies' Creditors Arrangement Act*.

***Affleck J.*:**

1 If these reasons are transcribed, I reserve the right to edit them.

2 On November 25, 2016, 8640025 Canada Inc. and Teliphone Data Centres Inc., who I will refer to as the petitioners or as the present petitioners, filed a petition pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. 36, which I will refer to as 'the *Act*", seeking, *inter alia*, an order that the *Act* applies to them and that they be entitled to file a plan of compromise or arrangement.

3 On November 30, 2016, an initial order was made which included the appointment of a monitor. A stay of proceedings pursuant to s. 11.02 of the *Act* was imposed until December 21, 2016. On that day, the stay was extended to January 20, 2017, and the initial monitor replaced with Ernst & Young Inc. Various other orders were made which are not germane to these reasons.

4 The petitioners are part of what is known as the TNW Group of Companies which provides telecommunications services in various provinces of Canada including British Columbia.

5 These reasons address an application made by six secured creditors of the petitioners to add TNW Networks Corp., Teliphone Corp., and Teliphone Canada Corp. to these proceedings as petitioners. I will refer in these reasons to the three companies as "the proposed petitioners".

6 The application to add the proposed petitioners is resisted by the present petitioners.

7 The applicants submit that the application record, including the second report of the monitor, reveals that the present and proposed petitioners have integrated accounting records, share senior management, and have the same controlling mind in Mr. Benoit Laliberté.

8 I am invited to consider the fact that the monitor's second report demonstrates the closely intertwined nature of the companies within the TNW Group, including the present petitioners and the proposed petitioners.

9 In its second report, the monitor advises, for example, that payments for the services of the present petitioners were deposited into Bank of Montreal accounts in the name of TNW Networks Corp. until late November 2016, when management of the TNW Group swept those accounts into the Bank of Nova Scotia.

10 Further the monitor reports that the proposed petitioner, TNW Networks Corp., provides what the monitor calls "all critical and functional services" to the present petitioners in respect of the operations of the TNW Group.

11 The monitor reports that it had been informed that prior to these proceedings, a plan had been formulated by the management of the TNW Group to sell the shares in the present petitioner 8640025 to TNW Networks Corp., but that plan could not be implemented in the face of these proceedings. Nevertheless, since late 2016, the companies have been operating as if the share transaction had occurred. It is submitted by the applicants that this not only indicates the integration of the companies in the TNW Group, it also may further enhance the co-mingling of the financial accounting of the present petitioners with that of the TNW Networks Corp.

12 Further, the monitor reports that there is significant management overlap of the companies within the TNW Group, with Mr. Benoit Laliberté, described as the "visionary" who oversees the affairs of the group, including its integration.

13 The monitor makes note that disentangling the accounts of the present petitioners from other companies in the TNW Group is a difficult task and that typically all of the entities with such integration would become part of that *CCAA* proceeding. Mr. Milman on behalf of the monitor however, made no submissions on this application. This may infer a position of the monitor that it may not have. The lack of submissions could be stated by saying they are generally supportive or the application should not be.

14 The monitor expresses the view that the claims process in these proceedings should commence now, but that the interconnected nature of the TNW Group makes it impossible to rely on the books and records of the present petitioners. The applicants rely on this as a further basis for adding the proposed petitioners to this *CCAA* proceeding.

15 The applicants submit that the *Act* is remedial in nature and the order they seek is intended to bring before this Court all those companies who can contribute to achieving the purpose of the *Act*. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, [1990] B.C.J. No. 2384 (B.C. C.A.), the British Columbia Court of Appeal held that the purpose of the *Act* is to facilitate the making of a compromise or arrangement between an insolvent company and its creditors to the end that the company is able to continue in business.

16 The applicants also rely on *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.). Emphasis is placed particularly on paras. 57, 58, 59, and 61, which I will read, omitting citations:

> **57** Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).
>
> **58** *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).
>
> **59** Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282 , at para. 57, *per* Doherty J.A., dissenting)
>
> . . .
>
> **61** When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

17 Section 11 of the *Act* reads:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

18 The applicants submit that s. 11 has been interpreted as conferring a wide discretion on the courts to fashion measures to further the purposes of the *Act*, even when those measures are not found in the express language of the *Act*.

19 Reference is made to *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]), in which it is said:

> [21] It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the *CCAA* would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners . . .

20 In *Priszm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.), the court emphasized *Lehndorff General Partner Ltd., Re* and observed at paras. 26 and 27:

> [26] The *CCAA* definition of an eligible company does not expressly include partnerships. However, *CCAA* courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so. See *Lehndorff, supra*, and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (S.C.J.).
>
> [27] The courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.

21 The applicants also refer to *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) at paras. 29 and 30 which read:

> [29] If an insolvent company owns a healthy asset in the form of a limited partnership does [not] the health of that asset preclude it from being joined as an applicant in a *CCAA* proceeding? In the circumstances of this case it does not. The [jurisdiction] under the *CCAA* provides that the protection of the Act may be extended not only to a "debtor company", but also to entities who, in a very practical sense, are "necessary parties" to ensure that that stay order works . . .
>
> [30] Although section 3(1) of the *CCAA* requires a court on an initial application to inquire into the solvency of any applicant, the jurisprudence also requires a court to take into account the relationship between any particular company and the larger group of which it is a member, as well as the need to place that company within the protection of the Initial Order so that the order will work effectively. On the evidence filed I had no hesitation in concluding that given the insolvency of the overall First Leaside Group and the high degree of inter-connectedness amongst the members of that group, the protection of the *CCAA* needed to extend both to the Applicants and the limited partnerships listed in Schedule "A" to the Initial Order. The presence of all those entities within the ambit of the Initial Order is necessary to effect an orderly winding-up of the insolvent group as a whole. Consequently, whether Queenston Manor General Partner Inc. falls under the Initial Order by virtue of being a "debtor company", or by virtue of being a necessary party as part of an intertwined whole, is, in the circumstances of this case, a distinction without a practical difference.

22 In essence, the applicants submit that the jurisprudence which has considered s. 11 urges judges not to be constrained by the particular words of the *Act* when considering if it is applicable to a company. It is said that this Court has jurisdiction not only to fashion a remedy which, although not expressly found in the *Act*, is a remedy which is consistent with the purposes of the *Act*, and that s. 11 clothes this Court with a broad power to apply the *Act* widely to companies intertwined with other companies, as are the proposed petitioners in the present matter.

23 Submissions were made by counsel for other parties who support the application. I will briefly describe some of those submissions, but first I will refer to subsections (1) through (3) of s. 3 of the *Act* which read:

> 3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.
>
> **Affiliated companies**

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

24 Subsection 3(1) on its face makes the *Act* applicable to a company which is a debtor or affiliated debtor company. A debtor company is defined in s. 2 of the *Act* as a company that is bankrupt or insolvent, has committed an act of bankruptcy, or has made an assignment in bankruptcy or is in the course of being wound up because of insolvency.

25 The record before me does not demonstrate that the proposed petitioners are insolvent. No party before me says otherwise. It is submitted by the applicants, however, that insolvency at this time is not necessary. Authority for this proposition is said to be found in *Stelco Inc., Re* [2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List])] 2004 CanLII 24933, in which Mr. Justice Farley of the Ontario Superior Court afforded the protection of the *Act* to a company which could not then meet the test of insolvency, but which was in serious financial difficulty. Mr. Justice Farley found it would be contrary to the purposes of the *Act* if impending solvency was not sufficient for a company to qualify to become part of the *CCAA* process. Otherwise a company in financial trouble might wait too long and the benefits of a reorganization plan sanctioned by the court would be lost.

26 It is submitted by the parties before me, who support the present application, that the proposed petitioners' affairs are so intermingled with the present petitioners' affairs, who are insolvent, that the approach taken in *Stelco Inc., Re* ought to persuade me to adopt a similar approach and find the *Act* is applicable to the proposed petitioners.

27 Allied to that submission, it is argued that even if the proposed petitioners are not affiliated companies within the meaning of the *Act*, the senior management of the TNW Group of Companies has treated them as if they are affiliated and in any event the record demonstrates senior management intends they will eventually become affiliated.

28 It is also submitted that the definition of affiliated companies in the *Act* applies in this instance because the proposed petitioners and the present petitioners are controlled by the same person.

29 Paragraph 25 of the monitor's second report reads:

Fidicuie Residence JAAM is family trust comprising of Mr. Benoit Laliberté's wife . . . and six children. As noted above this family trust effectively owns the TNW Group through its ownership of Investel.

30 Paragraph 27 of the monitor's report reads in part:

. . . that while Mr. Laliberté is not technically management of the Applicants he is the "driving force" behind these organizations and is providing direction to the Applicants and advising the Monitor on matters relating to the Applicants . . .

31 As another indication of control, the record includes a document signed only by Mr. Laliberté, where he undertakes that the petitioners, as well as Investel and TNW Networks, agree to cooperate fully with the monitor in the solicitation process.

32 Further evidence of control is said to be found in an affidavit of Sandeep Panesar. Mr. Panesar deposes that he is the chief executive officer of the petitioner 8640025. Paragraph 20 of that affidavit reads in part:

> However, I am informed by Benoit Laliberte, and do verily believe, that, if that application is unsuccessful, such that TNW is not part of the CCAA proceedings, he will obtain the execution of a replacement undertaking from Fiducie JAAM Residential (sic) Trust, TNW's shareholder.

33 Mr. Sandrelli for Telus Communications Company, submits that if I conclude that I ought not to join the proposed petitioners, I should also conclude that because of the confusion created by the intermingling of the accounts of the present petitioners with other members of the TNW Group of Companies, the petitioners should no longer be entitled to enjoy the protection of the *Act* and, therefore, the stay ought to be brought to an end, unless the petitioners take steps forthwith to bring the proposed petitioners within the proceedings.

34 In response, the petitioners reject all of the arguments in support of the application.

35 The petitioners emphasize the uncontroversial fact that the proposed petitioners are not insolvent. On the contrary, it is said they continue to meet their financial obligations. The petitioners also emphasize that the monitor accepts that the petitioners themselves are acting with due diligence and in good faith in these proceedings.

36 In response to the criticism by the applicants of the comingling of the accounting records of TNW Networks Corp. with those of the petitioners, the latter submit the monitor does not foresee that as an insuperable problem. The petitioners refer to para. 24 in the monitor's second report which reads in part:

> . . . The monitor advised management that the segregation of the Applicants books, records and accounting system from TNW Networks should happen as soon as possible to facilitate proper reporting in these proceedings and to determine the actual cash flow associated with the Applicants.

37 The petitioners accept that, although at least superficially, the application before me has some appeal, they submit that that superficial appeal cannot overcome the legal principles engaged by the application. They argue that to join the proposed petitioners would mean they may be subjected to a sales process requiring their assets to be used to pay debts which are not theirs and may prevent them paying their own creditors, much to their detriment.

38 The petitioners refer to Rule 6-2(10) of the *British Columbia Supreme Court Rules*, which provides that a person cannot be added as a petitioner without that person's consent. The petitioners submit that subrule makes sense in the present context. The petitioners ask the rhetorical question "on what basis can TNW Networks Corp. be required to seek an order that it cease to pay its creditors?" The petitioners submit the answer to that question is obvious, namely there is no such basis in law.

39 The petitioners submit the *Act* can apply to debtor companies and affiliated debtor companies only. Affiliation alone is not sufficient because the proposed petitioners must also be debtors within the meaning of the *Act* for it to apply to them.

40 The petitioners argue that it is not permissible to take the expansive approach to asserting jurisdiction advocated by the applicants. Section 11, they say, cannot properly be read to permit an assertion of jurisdiction if it does not meet the fundamental test that a company must be a debtor, as defined, before the court may include that company in the process. The petitioners accept that once the test for applicability found in s. 3 is met, only then is the innovative approach to the exercise of that jurisdiction encouraged by the jurisprudence.

41 The petitioners, like the applicants and their supporters, rely heavily on *Ted Leroy Trucking Ltd., Re.*, but the petitioners derive a different lesson from the reasons of the Supreme Court of Canada. The applicants, as I have mentioned, submit that *Ted Leroy Trucking Ltd., Re.* is authority for the proposition that the assertion of jurisdiction at the outset should be innovative. The petitioners say *Ted Leroy Trucking Ltd., Re.* says nothing about innovation in the taking of jurisdiction over a company.

42 The petitioners submit *Ted Leroy Trucking Ltd., Re.* must be read to have decided no more than its language can bear. They point, for example, to para. 61 of *Ted Leroy Trucking Ltd., Re.*, which reads in part:

> When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the [creditor] to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA* . . .

The phrase "exercising their jurisdiction" is stressed by the petitioners.

43 The petitioners submit it is not permissible to read paragraph 61 to encourage an innovative approach when a court is considering, at the initial stage of a *CCAA* proceeding, whether the *Act* is applicable to a petitioner.

44 In *Global Light Telecommunications Inc., Re*, 2004 BCSC 745 (B.C. S.C.), Mr. Justice Pitfield was asked to sanction a plan of arrangement under the *Act* approved by creditors. An issue arose as to whether a foreign company involved in that matter had assets in Canada at the time of the hearing. At that time the company had a bank account with only $45 on deposit. The petitioners rely on the following comments of Mr. Justice Pitfield at para. 17, which they say, although made in a different context than that before me, nevertheless are persuasive on the issue of the applicability of the *Act*. Mr. Justice Pitfield observed:

> . . . Certainty is required in so far as the availability of the Act is concerned. In my opinion, importing an element of discretion into the question of eligibility would diminish the effectiveness of the Act as a means of assisting in the evolution of plans of arrangement acceptable to companies and their creditors . . . If a *de minimis* standard is thought to be appropriate in determining whether a company has assets in Canada, it is for parliament to amend the *Act* accordingly. [Emphasis added.]

45 The petitioners submit the same approach ought to govern the question of whether the proposed petitioners can be found to be affiliates of the petitioners. The petitioners say it is not enough that the proposed petitioners have been treated as affiliates in some sense. The petitioners say the proposed petitioners are not actually affiliates within the meaning of the *Act* and that fact is the end of the inquiry.

46 The petitioners note that although s. 11 of the *Act* provides that the court may make any order that it considers appropriate in the circumstances, the exercise of that discretion is expressly made subject to the restrictions set out in the *Act*. These restrictions, it is argued, necessarily include the definition of a debtor company, which does not describe the proposed petitioners.

47 The petitioners respond to the applicants' submission that *Lehndorff General Partner Ltd., Re* and *First Leaside Wealth Management Inc., Re* support the applicants' position by pointing out that in those cases the court was dealing with partners of petitioners already before it. The petitioners submit *Lehndorff General Partner Ltd., Re* and *First Leaside Wealth Management Inc., Re* are not authorities supporting the application because they are distinguishable on their facts from the circumstances of the petitioners and proposed petitioners who are not partners. I will also point out that they are not examples of a petitioner being brought into the proceeding against its will.

48 I am not persuaded I ought to make the requested order. I generally agree with the petitioners' submissions. In particular, s. 3 of the *Act*, in my opinion, is the gateway to applying the *Act* to an eligible company. Unless a company is an insolvent debtor or an affiliated insolvent debtor or perhaps a partner of an insolvent debtor, it cannot get through the gate and become part of the *CCAA* process. The proposed petitioners do not qualify. In my view, the *Act* is not applicable to them.

49 Despite the urgings of the applicants, I cannot read the reasons of Madam Justice Deschamps, in *Ted Leroy Trucking Ltd., Re.* as instructing judges when, at the outset of a *CCAA* proceeding they are considering the application of the *Act* to a company, to exercise an expansive or inherent jurisdiction thereby making it applicable to a company that does not meet the test found in s. 3.

50 I treat the present application as if it was made on an initial application at the beginning of a *CCAA* proceeding when a court must determine if the Act applies to a company.

51 I do not agree that Mr. Laliberté's alleged control as the "visionary" for all the companies, including the petitioners and proposed petitioners, meets the test for control found in s. 3(2) of the *Act*. That subsection defines "control" in a manner that is consistent with the customary use of the word "control" in relation to a company, which means, in essence, control through ownership of a majority of the company's shares. I have no evidence that satisfies me Mr. Laliberté has control in that sense.

52 I am also persuaded that Rule 6-2(10) precludes adding the proposed petitioners without their consent. The benefits of that subrule in the present instance are, in my view, obvious. If the prospective petitioners could be added, despite their opposition, the court would then become engaged in reorganizing their businesses, perhaps even selling them, and probably imposing the stay contemplated by s. 11.02(2) of the *Act*. I do not accept the *Act* is intended to be applied to a company that objects to coming under its constraints.

53 In *Lehndorff General Partner Ltd., Re*, Mr. Justice Farley observed that the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. I cannot find that compelling the proposed petitioners to come within these proceedings, thereby indicating to the world that they must be insolvent and in need of reorganization and are subject to a court-ordered stay which may prevent them from paying their debts, can reasonably be said to confer benefits on them or their creditors, nor can I find it is necessary to achieve the purposes of the *Act*.

54 In my opinion, if it is ever necessary or appropriate for a court to compel a company to come within the *CCAA* process as a petitioner, over its objections, this is not one of those rare instances and counsel have not been able to point me to any example when that has been ordered.

55 I conclude the application must be dismissed. I have considered Mr. Sandrelli's submission that if the application is dismissed, the stay ought to end. At the present stage of these proceedings, I do not believe that such an order would further the purposes of the *Act*.

Application dismissed.

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KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Scala Development Consultant Ltd. v. Spirit Bay Developments Limited Partnership | 2024 BCSC 1755, 2024 CarswellBC 2812 | (B.C. S.C., Sep 24, 2024)

2009 ABCA 127
Alberta Court of Appeal

BG International Ltd. v. Canadian Superior Energy Inc.

2009 CarswellAlta 469, 2009 ABCA 127, [2009] A.W.L.D. 1936, [2009] A.W.L.D. 1973, [2009] A.J. No. 358, 177 A.C.W.S. (3d) 41, 457 A.R. 38, 457 W.A.C. 38, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156

BG International Limited (Respondent / Plaintiff) and Canadian Superior Energy Inc. (Appellant / Defendant)

R. Berger, F. Slatter, P. Rowbotham JJ.A.

Heard: March 10, 2009
Judgment: April 7, 2009
Docket: Calgary Appeal 0901-0048-AC

Counsel: V.P. Lalonde, M.A. Thackray, Q.C. for Appellant
C.L. Nicholson, M.E. Killoran for Respondent
T.S. Ellam for Interested / Affected Party, Challenger Energy Corp.
H.A. Gorman for Interested / Affected Party, Canadian Western Bank
L.B. Robinson, Q.C for Receiver, Deloitte & Touche Inc.

Subject: Corporate and Commercial; Natural Resources; Contracts; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.b Joint operating agreement
Headnote
Debtors and creditors --- Receivers — Appointment — General principles
Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.
Natural resources --- Oil and gas — Exploration and operating agreements — Joint operating agreement

Interim receiver — Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.

Table of Authorities

Cases considered:

Medical Laboratory Consultants Inc. v. Calgary Health Region (2005), 19 C.C.L.I. (4th) 161, 43 Alta. L.R. (4th) 5, 2005 ABCA 97, 2005 CarswellAlta 333, 363 A.R. 283, 343 W.A.C. 283 (Alta. C.A.) — referred to

Roberts v. R. (2002), 2002 CarswellNat 3438, 2002 CarswellNat 3439, (sub nom. *Wewaykum Indian Band v. Canada)* 2002 SCC 79, (sub nom. *Wewaykum Indian Band v. Canada)* [2003] 1 C.N.L.R. 341, (sub nom. *Wewaykum Indian Band v. Canada)* 220 D.L.R. (4th) 1, (sub nom. *Wewayakum Indian Band v. Canada)* 297 N.R. 1, (sub nom. *Wewaykum Indian Band v. Canada)* [2002] 4 S.C.R. 245, (sub nom. *Wewayakum Indian Band v. Canada)* 236 F.T.R. 147 (note) (S.C.C.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd. (1999), 178 D.L.R. (4th) 385, 1999 CarswellAlta 892, 1999 CarswellAlta 893, 247 N.R. 1, 73 Alta. L.R. (3d) 1, [2000] 1 W.W.R. 1, 250 A.R. 1, 213 W.A.C. 1, [1999] 3 S.C.R. 408, 15 P.P.S.A.C. (2d) 61 (S.C.C.) — referred to

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2

Generally — referred to

APPEAL by operator of oil well of decision appointing interim receiver.

***Per curiam*:**

1 This is an appeal of a decision appointing an interim receiver to take control of the Endeavour oil well located off the coast of Trinidad and Tobago. The appeal was dismissed following oral argument, with reasons to follow.

Facts

2 The appellant and the respondent both have an interest in the well. The appellant is the operator of the Endeavour well under the standard form joint operating agreement approved by the Association of International Petroleum Negotiators. While Challenger Energy Corp. is a party to the joint operating agreement, there is some dispute as to whether Challenger has effectively acquired a part of the appellant's interest, which would trigger its obligations.

3 There is at present a semi-submersible rig working on the well. The rig is operated by Maersk Contractors Services on behalf of the owners of the rig. All the parties agree that it is extremely important that the rig is not removed from the well, and that the well be flow tested. Maersk sent its invoice for its November operations. The respondent paid its share of the invoice to the appellant, but those funds were not forwarded to Maersk. Once the invoice became overdue, Maersk commenced the process under the drilling contract that would allow it to terminate the contract.

4 When the respondent found out that Maersk had not been paid, it became very concerned. It deposes that operating funds were not being kept in a segregated account as covenanted. It deposes that the appellant is in default of its obligations by not paying Maersk. The appellant does not dispute that Maersk has not been paid. It proposed a payment schedule to Maersk (which Maersk rejected), which is essentially an acknowledgment that payments are overdue.

5 The respondent commenced arbitration proceedings in accordance with the joint operating agreement. It then immediately applied to the Court of Queen's Bench for interim relief pending the hearing of the arbitration, as contemplated by Article 18.2 (C)(9) of the arbitration clause. The application for an interim receiver was brought on very quickly. The Canadian Western Bank, which held security over the appellant's assets, was given notice and appeared. While the appellant was also given notice of and appeared at the application, it did not have time to file an affidavit in response nor to cross examine on the respondent's affidavit. An adjournment to do that was denied, and the interim receiver was appointed on February 11th, 2009. The order protected the priority of the Canadian Western Bank, and gave second priority to the respondent's advances. This appeal was promptly launched and expedited.

Standard of Review

6 Granting a receivership order under the *Judicature Act*, R.S.A. 2000, c. J-2, involves the exercise of a discretion. The granting of the order will not be interfered with on appeal unless it is based on an error of law, or the granting of the remedy is wholly unreasonable in the circumstances: *Roberts v. R.*, 2002 SCC 79, [2002] 4 S.C.R. 245 (S.C.C.) at para. 107; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 43 Alta. L.R. (4th) 5 (Alta. C.A.) at para. 3.

Appointment of the Receiver

7 The chambers judge was motivated to appoint the interim receiver without any delay because she perceived a real risk that Maersk would remove the rig, thereby causing irreparable harm to all concerned. The respondent was prepared to advance $47 million through the receiver to complete the work on the well. The appellant argues, first, that there was no real prospect of Maersk removing the rig, and that Maersk was merely taking steps to preserve its legal rights. It is argued the chambers judge committed a palpable and overriding error in finding a real risk the rig would be removed.

8 The record shows, however, that Maersk was taking the formal steps under the drilling contract that were conditions precedent to the termination of that contract. While Maersk wrote that it would show "flexibility", that was premised on the appellant proposing an "acceptable" solution. Maersk had already rejected the appellant's payment schedule, and was resisting attempts to postpone the dispute resolution meeting that was a precondition to termination. The respondent's witness deposed that Maersk did not propose to test the well unless paid, and that Maersk preferred to move the rig to another well in Australia. He also deposed that if the rig was removed, it would take approximately one year and cost $35 million to bring in a replacement. The finding of a risk of removal of the rig made by the trial judge is supported by the record, and does not warrant appellate interference.

9 Next the appellant argues that it was denied its basic rights because it was not granted an adjournment, it was not allowed to cross examine on the respondent's affidavit, and it was not given time to file its own affidavit. Despite the presence of the appellant, the application proceeded almost as if it was an *ex parte* application. While there is substance to this complaint, it is not uncommon for interim receivers to be appointed on an *ex parte* basis, and there were remedies available to review or withdraw the order granted. Given the urgency found by the chambers judge, the method of proceeding was not, in this case, fatal. We do not find that Article 18.2 (C)(9) of the arbitration provisions, which enables electronic hearings, effectively prohibits *ex parte* procedures.

10 The appellant was asked to suggest terms on which an adjournment might be granted, but persisted in its request for an adjournment that did not address the respondent's legitimate concerns. The chambers judge was entitled to conclude that the requested adjournment could itself have led to irreparable damage to all parties.

11 We note that in the weeks that have followed since the granting of the order, the appellant has still not cross examined on the respondent's affidavit, nor has it filed an affidavit in reply. Any such evidence could have been used in an application to set aside or vary what was similar to an *ex parte* order, it could have been used on the stay application, and it would likely have been admitted on this appeal. We conclude that the appellant's objections are to some extent tactical. Even though the record may be incomplete, many of the key facts are not in dispute, and the key documents are included. A fair picture of the situation can be obtained from this record, supplemented as it has been by counsels' submissions.

12 The appellant notes that under Article 18.3 (A) of the joint operating agreement, when one party gives notice of default it is required by the contract to pay the amounts owed by the defaulting party. The appellant points out that this is a contractual obligation, and that the respondent was required to pay all outstanding amounts without seeking any more security or protection than that provided by the operating agreement. By advancing the $47 million by way of receiver's certificates, the respondent has in effect managed to enhance its position under the contract. The respondent replies that it had already paid its share of the Maersk invoice, and the clause cannot mean that it has to pay twice the amount misapplied by the appellant. It also argues that the security provided by Article 18.4 (E) of the joint operating agreement may not cover all of the money the respondent proposes to advance.

13 The default clause in the joint operating agreement provides in Article 18.4 (H) that it is not intended to exclude any other remedies available to the parties. The enhanced security collaterally obtained by the respondent through the use of receiver's certificates has not been shown on this record to create any serious prejudice to the appellant. After all, it is the appellant that is in default, and the respondent is prepared to advance significant sums to cure that default, even if it is required to do so by the contract. The chambers judge found that the appellant had been commingling joint venture funds, and that the respondent had a reasonable concern about the protection of future advances. Unlike in most receivership cases, the funds advanced under this enhanced security are to be used to pay other creditors, and would not further subordinate their interests. The security of the receiver's certificates may merely be parallel to that already provided for in the operating agreement. While the appointment of the receiver does arguably have the effect identified by the appellant, that does not make the receivership order unreasonable in the circumstances.

14 The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

15 The appellant complains that the respondent was not required to post an undertaking to pay damages if it turns out its allegations are unfounded. Filing an undertaking in these circumstances is not the usual practice in Alberta. Damages for wrongful appointment of a receiver were granted in *Royal Bank v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408 (S.C.C.) without the presence of an undertaking. We note that the respondent has paid significant sums of money on behalf of the appellant, and that the appellant would likely have a right of set-off if it obtains an award of damages against the respondent. An undertaking would add little.

Conclusion

16 We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the

interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

17 In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:

> [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

18 The chambers judge was aware of all of the points now raised by the appellant. She had a difficult job balancing the rights and interests of the parties. It is in the interests of all parties that the rig stay on the well, and that the well be flow tested. The appellant is in default. The respondent has not disputed its obligation to pay the appellant's share of operating expenses, and is quite willing to pay the $47 million required to do that. In all the circumstances it was not an unreasonable exercise of her discretion for the chambers judge to extend to the respondent the protection of receiver's certificates. The practical effect of accelerating the removal of the appellant as the operator was apparent to her. If the appellant does not have the necessary funds to cure its defaults, then its removal as operator merely accelerated the inevitable.

19 The chambers judge had to make a difficult decision in a very short period of time based on limited materials. Deference is owed to her discretionary decision to appoint a receiver. While an order short of a receivership might have been crafted, we have not been satisfied that her eventual balancing of the various rights and interests involved was unreasonable. She was primarily motivated by preserving the value of the well for the benefit of all concerned. We cannot see any error that warrants appellate interference, and the appeal is dismissed.

20 The dismissal of the appeal is not intended to limit the powers of the chambers judge or the CCAA case management judge. The receivership was to be "interim" only, and it has an internal mechanism for review. The Queen's Bench retains the ability to revoke or amend the order as circumstances dictate.

Appeal dismissed.

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