COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1703-0237AC
TRIAL COURT FILE NUMBER:	1703-12327
REGISTRY OFFICE:	EDMONTON
PLAINTIFF/APPLICANT:	Her Majesty the Queen in Right of Canada
STATUS OF APPEAL:	APPELLANT
DEFENDANT/RESPONDENT:	Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., and 1919209 Alberta Ltd.
STATUS ON APPEAL:	RESPONDENT
DEFENDANT/RESPONDENT:	Ernst & Young Inc. (in its capacity as Monitor, and not in its personal capacity)
STATUS ON APPEAL:	RESPONDENT
DEFENDANT/RESPONDENT:	Business Development Bank of Canada
STATUS ON APPEAL:	RESPONDENT
DOCUMENT:	**FACTUM**

Appeal from the Decision of
The Honourable Madam Justice J.E. Topolniski
Dated the 11th day of September, 2017
Filed the 5th day of October, 2017

FACTUM OF THE RESPONDENT, ERNST & YOUNG INC. IN ITS CAPACITY AS COURT-APPOINTED MONITOR WITH EXPANDED POWERS, AND NOT IN ITS PERSONAL CAPACITY OF EACH OF CANADA NORTH GROUP INC. (NOW 667402 ALBERTA LTD.), CANADA NORTH CAMPS INC. (NOW 18512398 ALBERTA LTD.), 816956 ALBERTA LTD., 1371047 ALBERTA LTD. AND 1919209 ALBERTA LTD.

4164-3870-7733.v3

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Overview

1) It is well established that "insolvency law is an indispensable component of commercial economies" which plays "a broad social and economic role in overall economic planning; the survival of financially distressed firms and the economic activity that they generate are in themselves important objectives of the system"[1].

2) The role of the Court in proceedings under the *Companies' Creditors Arrangement Act*[2] (the "CCAA") is to "supervise and move the process to the point where the creditors approve a compromise or it becomes evident that the attempt is doomed to fail. Typically, this requires balancing multiple interests"[3]. These interests include those of the Crown for claims under the Fiscal Statutes (as defined in both the Crown and BDC Factums).

3) The Honourable Court is being asked to address the conflict between the legislative scheme created by the CCAA and the statutory deemed trust provisions of the Fiscal Statutes.

4) BDC correctly states that this appeal raises important questions as to whether the Fiscal Statutes and the CCAA place limitations on the CCAA Court's ability to grant Priming Charges (as defined in BDC's Factum) in priority to the deemed trusts arising pursuant to the Fiscal Statues. In upholding the ability of the Court to grant the Priming Charges, Topolniski J. correctly interpreted the relevant statutory provisions and in doing so she respected both statutory regimes while fairly and properly balancing the interest of the parties.

5) Accordingly, it is respectfully submitted that Crown's appeal in this case ought to be dismissed for the reasons given by Topolniski J. in the Court below.

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[1] *Rescue! The Companies' Creditors Arrangement Act (2nd Edition)*, 2013 at pg. 5 [Tab A, Monitor's Book of Authorities]

[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") [Tab C, Appellant's Book of Authorities, Volume 1]

[3] *Canada North Group Inc. (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 (the "Canada North Decision"), at para. 21 [Tab E, BDC's Book of Authorities, Volume 1]

PART 1 - FACTS

6) This Respondent, Ernst & Young Inc., in its capacity as Court-appointed Monitor of Canada North Group Inc. (now 667402 Alberta Ltd. (hereinafter "CNG")) Canada North Camps Inc. (now 18512398 Alberta Ltd. (hereinafter "Camps")), Campcorp Structures Ltd. ("Campcorp"), DJ Catering Ltd. ("DJ"), 816956 Alberta Ltd., 1371047 Alberta Ltd. and 1919209 Alberta Ltd. (collectively for the purpose of this Factum, the "Debtors") and not in its personal capacity (the "Monitor") accepts the facts as set out in Part 1 of the Crown's Factum, and paragraph 7 of BDC's Factum.

7) There are however, additional facts, which add context to these proceedings.

8) At the time of the application for the Initial Order, the Debtors swore to $35,272,693.00 in secured debt (exclusive of mortgage loans) and $6,000,000.00 in unsecured debt[4].

9) The Revised Projected Cashflow statement submitted to the Court with the Proposed Monitor's Report indicated that over the time period of the initial stay period (30 days), the Debtors would have a shortfall of approximately $400,000.00 in cash from operations indicating a need for interim financing to support ongoing operations[5]. The Debtors had lost the support of their primary secured lender, Canadian Western Bank ("CWB") and were faced with a competing receivership application.

10) Only two of the Debtors were subject to deemed trust claims under the Fiscal Statutes: Camps and Campcorp. The Initial Order granted Priming Charges over all of the Debtors' assets.

[4] First Affidavit of Shayne McCracken sworn June 28, 2017, paras. 41 & 42 [Tab A, pg. M7, Monitor's Extracts of Key Evidence]

[5] Proposed Monitor's Report of July 4, 2017, Exhibit 2 [Pg. R156 , BDC's Extracts of Key Evidence]

11)A Plan of Arrangement was not submitted to creditors. On March 20, 2018, the Court made an Order approving the sale of certain operating camp assets to a third-party purchaser (hereinafter the "Camp Transaction")[6].

12)By Order of the Court dated April 20, 2018, the Court provided further direction with respect to the Camp Transaction and ordered that upon closing of the Camp Transaction, the Monitor's powers would be expanded, the names of CNG and Camps would be changed and Campcorp and DJ would be removed from the proceedings[7].

13)The Camp Transaction closed effective April 21, 2018[8]. When the Camp Transaction closed, the Interim Lender's Charge and the Administration Charge had been increased significantly (to $3,500,000.00 and $950,000.00 respectively) and were fully utilized[9]. From the Camp Transaction proceeds, the Monitor has paid in full the deemed trust claims of the Crown and the Priming Charges[10].

PART 2 – GROUNDS OF APPEAL

14)The Monitor agrees with the grounds of appeal as set forth in each of the Appellant and BDC Factums.

PART 3 – STANDARD OF REVIEW

15)The Monitor concurs that the standard of review is correctness.

PART 4 – ARGUMENT

16)The Monitor fully supports and agrees with the arguments of BDC in its Factum.

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[6] Amended Order Increasing Administration Charge, Approving Plan of Arrangement under Section 193 of the *Business Corporations Act* (Alberta) and the Subsequent Sale of Certain Camp Assets granted by Justice S.D. Hillier on March 20, 2018, filed March 28, 2018 [Tab B, Monitor's Extracts of Key Evidence]
[7] Order Approving Winterburn Sale, Assigning Litigation, Expanding Powers of Monitor, Removing Certain Parties as Applicants, Authorizing Name Changes of Certain Applicants and Extending the Stay of Proceedings granted by Justice K.G. Nielsen on April 20, 2018, filed April 20, 2018 [Tab C, Monitor's Extracts of Key Evidence]
[8] Monitor's Fifteenth Report, para. 11 [Tab D, Pg. M81, Monitor's Extracts of Key Evidence]
[9] Monitor's Fifteenth Report, para. 28 [Tab D, pg. M86 Monitor's Extracts of Key Evidence]
[10] Monitor's Fifteenth Report, para. 28(e), (h), and (i) [Tab D, pg. M86-M87, Monitor's Extracts of Key Evidence]

17)This Factum will address the following:

a) The issue of the necessity for the Priming Charges and the appropriateness of the priority granted to them in this case; and

b) The issue of the Crown holding all Respondents harmless in respect of the costs of the proceeding given that this case is now, essentially, a test case for the Crown.

A. The Need for Priming Charges and the Subjugation of the Fiscal Statutes to the CCAA Regime

18)The purpose of the CCAA is to permit the Debtor to continue to carry on business and attempt to avoid the social and economic consequences of liquidating its assets and ceasing to operate. Case after case has reiterated that this is the primary purpose of the legislation[11].

19)As Topolniski J. correctly observes in paragraphs 100 to 105 of the Canada North Decision:

a) 75% of restructurings require the aid of interim lenders;

b) The ability to provide a Priming Charge for interim lending is a key aspect of any debtor's ability to attempt a work out with its creditors, while providing the interim lender with an incentive and a guarantee that funds advanced in the course of a restructuring will be recovered;

c) Without the Priming Charge for the interim lender, financing would simply end and so too would the potential for positive CCAA outcomes;

d) The charge in favour of directors is important with the intention to keep the directors engaged in the business in times of financial difficulty; and

e) The Priming Charge for administrative fees is critical to a successful restructuring. It is the only protection the Monitor, as a Court officer, has to ensure that its accounts will be paid. While debtor counsel has the option of

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[11] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 15 [Appellant's Book of Authorities, Volume 1, pg. 128] as one example

resigning when accounts go unpaid, the Monitor has no such luxury and as a Court officer must see the proceeding through to completion or failure and would needs Court approval to be relieved of that duty[12].

20)There is no doubt that in this case the Priming Charges were essential to the Debtors' survival. Insufficient cash was being generated from their operations. The Interim Lender's Charge and the Administration Charge were each expanded and fully utilized. The resulting expenditures, however, sustained the Debtors through to the closing of the Camp Transaction, which had the positive effect of allowing the operating business to continue with a purchaser saving jobs, and resulted in proceeds sufficient to retire the Priming Charges and the deemed trust debts owing to the Crown. Liquidation of the remaining assets continues.

21)Topolniski J. correctly held that the 2009 amendments codifying and elaborating on the Priming Charges illustrated Parliament's intention that secured creditors' interests could be eroded if the Court was satisfied of the need. She also correctly noted that had Parliament wanted to limit the Court's ability to give priority to these charges, it could have done so expressly as Iacobucci J. noted in the *Sparrow* decision[13]. Parliament chose not to do so in respect of the Priming Charges.

22)As noted by BDC in its Factum at paragraphs 49-52, notwithstanding the Crown's submissions, the Fiscal Statutes are clearly subjected to the CCAA regime. They are not excluded from the CCAA.

23)Section 37(2) of the CCAA only address the continuing existence of the deemed trust. It simply indicates that subsection (1) does not apply in respect of amounts deemed to be held in trust under the applicable sections of the Fiscal Statutes.

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[12] Canada North Decision, paras. 100-105 [Tab E, BDC's Book of Authorities, Volume 1]

[13] *Royal Bank of Canada v. Sparrow Electric Corp.* (1997) 1 SCR 411 at pg. 45, para. 112 [Tab N, Appellant's Book of Authorities, Volume 2]

24)The CCAA also does not require the Crown be paid in priority to all others. In that regard it:

a) Subjects the Crown to the stay of proceedings. However, it provides for the automatic lifting of the stay in favour of the Crown, without more, where the Debtors default in the making of payments to the Crown after the Initial Order is made (other creditors do not enjoy such rights);

b) Prevents compromise of the Crown claims by class vote and directs that no Plan or Arrangement or Compromise ("Plan") may be made unless the Plan provides for payment in full to the Crown of deemed trust amounts (plus penalties and interest) within six (6) months of sanction of the Plan[14]; and

c) Therefore allows the possibility for a Plan to provide that debts of all other creditors can be addressed and paid within six (6) months, before payment to the Crown under any such Plan.

25)The Monitor agrees with BDC that to accede to the Crown's arguments would be to ignore the system created by the operation of the CCAA in conjunction with the Fiscal Statutes. What the Crown is asserting is that the Court has no jurisdiction whatsoever to grant Priming Charges over the Crown's deemed trust under the Fiscal Statutes. Topolniski J. correctly declined to follow that line of reasoning. Her interpretation fully upholds the purpose of the CCAA proceedings, gives full effect to the insolvency law system and still honours the purpose of the deemed trusts in the Fiscal Statutes. The Court's interpretation appropriately honours the balancing of interests.

B. Test Case and Costs – The Crown Must Bear the Burden

26)The Crown's deemed trust claims under the Fiscal Statutes have been paid as have claims under the Priming Charges. The Initial Order establishing the priorities as between the deemed trust under the Fiscal Statutes and the Priming Charges is still in existence.

[14] CCAA, supra note 2, section 6 [Tab C, Appellant's Book of Authorities, Volume 1]

27)Slatter J., in granting a leave to appeal, did note that this case may present an occasion where the Court should adjudicate even if the issues are potentially moot. He left the issue of costs to the panel hearing the Appeal.

28)The Monitor agrees that the issues that are before the Court are live issues in almost every insolvency matter coming before the Courts where Priming Charges are at issue. The practice, and the CCAA Courts hearing those matters, will benefit from clarity on the interpretation of the interplay between the Fiscal Statutes and the CCAA.

29)However, as BDC notes in its Factum at paragraph 72, the Crown has brought this as a test case on what is now a moot point. While interests are engaged, and the outcome of the case has far reaching potential impacts on the practice, the Crown ought to be responsible for BDC's and the Monitor's costs regardless of the outcome as the remaining creditor body ought not be required to bear the burden where the Crown's claims has been paid. It is important to remember that by virtue of the priority Administration Charge granted in the Initial Order, the Monitor's costs of participating in this Appeal and any potential award of costs against it, despite this moot nature of this Appeal, will only serve to reduce the amounts available for distribution to creditors in these CCAA proceedings if the Crown is not required to indemnify and hold the Estate harmless. The Monitor respectfully submits that it is not just or equitable that these creditors bear the financial burden of the Crown proceeding with this test case Appeal.

30)In *Re: Stelco Inc.*[15], the Appellant CAFO Inc. ("CAFO") elected to run a moot appeal as a test case. The Court noted that while Stelco no longer had an interest in the litigation, it made a Representation Order requiring CAFO to pay the costs of the appeal on a substantial indemnity basis and appointed counsel to oppose CAFO's arguments[16].

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[15] *Re: Stelco Inc.*, 2005 Carswell Ont. 1537 [Tab B, Monitor's Book of Authorities]
[16] *Re: Stelco Inc.*, para. 5, supra note 21 [Tab B, Monitor's Book of Authorities]

31)While representative counsel is not required in this case, a direction that the Crown pay the costs of the appeal regardless of result is appropriate. Such a direction was supported by this Court in *PricewaterhouseCoopers Inc. v. Canada (Superintendent of Bankruptcy)*[17] where the Superintendent of Bankruptcy sought leave to appeal a decision involving the interpretation of a provision of the *Bankruptcy and Insolvency Act* ("BIA"). The amount in question was nominal and the decision to proceed with the appeal was focused on establishment of a precedent, not on actual recovery of funds. Leave was granted on the condition that the Superintendent agree to pay certain costs of the appeal.

32)This Court should take the same approach in the present circumstances.

PART 5 – RELIEF SOUGHT

33)The appeal of the Crown should be dismissed for the cogent and correct reasons given by Topolniski J.

34)Costs of this proceeding on a full indemnity basis regardless of outcome.

Estimate of time required for oral argument: 45 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of July, 2018.

DUNCAN CRAIG LLP
Per:

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Darren R. Bieganek, QC
Counsel for Ernst & Young Inc., in its capacity as Court-appointed Monitor with Expanded Powers, and not in its personal capacity of each of Canada North Group Inc. (now 667402 Alberta Ltd.), Canada North Camps Inc. (now 18512398 Alberta Ltd.), 816956 Alberta Ltd., 1371047 Alberta Ltd. and 1919209 Alberta Ltd.

[17] *PricewaterhouseCoopers Inc. v Canada (Superintendent of Bankruptcy)*, 2008 ABCA 412 [Tab C, Monitor's Book of Authorities]

TABLE OF AUTHORITIES OF THE RESPONDENT
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	LEGISLATION
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