COURT FILE NUMBER:	1703 12327
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
	AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. AND 1919209 ALBERTA LTD.
DOCUMENT	**<u>BRIEF OF ARGUMENT AND AUTHORITIES OF STAHELI CONSTRUCTION CO. LTD.</u>**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	G. Brian Davison, Q.C. DLA Piper (Canada) LLP Barristers and Solicitors 1000, 250 2 St. S.W. Calgary, AB T2P 0C1 Phone: 403-294-3590 Fax: 403-776-8864 File No.: Susy Trace DLA Piper (Canada) LLP Barristers and Solicitors 1201 Scotia Tower 2 10060 Jasper Avenue Edmonton, AB T5J 4E5 Phone: 780-429-6831 Fax: 780-428-1066 Email: susy.trace@dlapiper.com

Application scheduled to be heard on June 21, 2018 at 10:00 AM.

CENTRE OF EDMONTON
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I. INTRODUCTION

The Proof of Claim

1. 506221 Alberta Ltd. ("**506**"), now Staheli Construction Co Ltd. ("**Staheli**") by virtue of an amalgamation (506 and Staheli being collectively referred to as "**Staheli**") did not receive notice of the Claims Process Order granted in these proceedings on December 6, 2017 (the "**Claims Process Order**"), and did not receive from the Monitor, Ernst & Young Inc. (the "**Monitor**") a Claims Package prior to the Claims Bar Date.

2. After receiving the Claims Package from the Monitor on March 23, 2018, Staheli promptly completed and filed its Proof of Claim with the Monitor on March 27, 2018 (the "**Proof of Claim**").

3. Staheli did not otherwise have knowledge of the Claims Process Order, or the implications thereof; it would be unfair to Staheli to extinguish its claim utilizing a process it did not have notice of.

4. The Staheli Proof of Claim pertains to a mortgage that was registered at the Land Titles Office against the Certificate of Title to the Winterburn Lands (as hereinafter defined), and therefore all interested persons to these Proceedings had notice of the substance of Staheli's Claim.

5. No party is prejudiced by Staheli's Proof of Claim being filed beyond the Claims Bar Date since its claim, at all material times, has been a matter of public record, no distributions have been made to creditors entitled to be paid from the proceeds of sale of the Winterburn Lands, and no Plan of Arrangement has been formulated or voted upon.

Legal fee reserve request by BDC

6. This Application is not about whether there are fundamental legal issues or important policy issues at stake; it is about who ought to bear the costs of resolving such legal and policy issues.

7. If this Honourable Court grants Business Development Bank of Canada's ("**BDC**") request, it is very likely that it will be the creditors who will ultimately bear such costs despite not receiving any benefit from CRA's appeal of the Topolniski Decision (the "**Appeal**").

8. Staheli is a secured creditor of 1371047 Alberta Ltd. ("**137**"), one of the Debtors in these proceedings.

9. CRA's Claim does not apply to property owned by 137; therefore it does not operate to prime Staheli's claim. Moreover, the CRA Claim has now been repaid in full. The priority of CRA's Claim has never been relevant to Staheli's Claim.

10. BDC, in its capacity as Interim Lender (as defined in the Initial Order granted in these proceedings on July 5, 2017 (the "**Initial Order**")), no longer has a vested interest in these proceedings since it has also been repaid in full.

11. Any remaining status BDC has as creditor in these Proceedings is independent of its role as Interim Lender; and respectfully, this status does not support the position that BDC ought to have its legal fees paid by other stakeholders in continuing to respond to the Appeal.

12. At this stage in the Proceedings, finding that the Debtors must continue to indemnify BDC for its legal costs in participating in the Appeal will only serve to dilute the security of other creditors, and diminish their recovery.

13. Ordering the Debtors (and effectively the creditors) to "foot the bill" of BDC's legal costs in continuing to respond to the Appeal is not commercially reasonable in the circumstances, and unfair, since there is zero tangible benefit to, most especially, Staheli.

14. BDC's request is beyond the scope and purpose of interim financing in *CCAA* proceedings generally, and is beyond the scope of the purpose of the interim financing granted in these proceedings specifically since the question of priority of the Interim Lender's Charge to the restructuring or potential liquidation of the Debtors is now moot.

15. The indemnity provisions contained in the Letter of Offer (as amended) granted to BDC by the Debtors do not support the relief sought by BDC, since any liability that BDC might now incur in responding to the Appeal, in light of being repaid, is voluntary. Indeed, BDC, in its capacity as Interim Lender in these Proceedings will not suffer any liability if it chooses to abandon its response to the Appeal.

16. Put another way, the only possibility that BDC will incur any further liability in continuing to respond to the Appeal is if it chooses to.

17. BDC has options short of utilizing its status as Interim Lender to coerce the Debtors, and thereby Staheli and other creditors to pay its legal fees in responding to the Appeal, including seeking the agreement of the other parties to appoint an alternate lead respondent or continuing to respond to the Appeal at its own cost.

18. Interim lenders ought not be given carte blanch power to take steps for esoteric purposes and have such steps paid for by debtors and stakeholders in *CCAA* proceedings. BDC's continued involvement in the Appeal, on the dime of the Debtors, will unnecessarily inflate the costs of these Proceedings, and will very likely decrease creditor recovery without any tangible return. This is not consistent with any policy objective of the *CCAA* and not in the interests of Staheli or other creditors.

II. <u>FACTS</u>

19. The procedural history of these Proceedings and the Appeal is set out in the Monitor's Fifteenth Report to the Court filed on June 11, 2018 (the "**Monitor's Fifteenth Report**"), and the Bench Brief of Business Development Bank of Canada in Support of Application for Payment of costs of CRA appeal ("**BDC's Bench Brief**").

20. Unless otherwise defined in this Brief, terms with initial capital letters are defined in the Monitor's Fifteenth Report, the Initial Order, the Claims Process Order or BDC's Bench Brief.

<u>Staheli's Claim</u>

21. 506 amalgamated with Staheli on July 1, 2014.

- Affidavit of Glen Staheli Affirmed on June 15, 2018 (the "**Staheli Affidavit**") at para 3, Exhibit "A"

22. 506 sold the following lands to Canada North Structures Inc. ("**Structures**") on or about November 30, 2011:

PLAN 8622655
BLOCK E
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA:5.66 HECTARES (13.99 ACRES) MORE OR LESS
(the "**Winterburn Lands**").

- Staheli Affidavit at paras 4 & 5, Exhibit "B"

23. The purchase price was paid by way of an initial down payment in the amount of $100,000.00, and the remaining amount was payable over time and secured by a vendor take back mortgage, securing the Winterburn Lands for up to the principal sum of $5,600,000.00, plus interest and costs as between a solicitor and client (the "**Mortgage**"). At all material times, the Mortgage was registered as a first financial charge against the Winterburn Lands.

- Staheli Affidavit at paras 6-8, Exhibits "C" & "D"

24. The Mortgage was later amended to *inter alia*, acknowledge that Structures sold its interest in the Winterburn Lands to 137, and that 137 assumed Structures' obligations under the Mortgage.

- Staheli Affidavit at paras 11-13, Exhibit "E"

25. As at March 27, 2018, there is outstanding, due and owing to Staheli the principal amount of $4,757,345.23, plus interest from and after March 27, 2018 at the rate of 5% per annum, which equates to $649.28 per day, all of which is secured to Staheli pursuant to the Mortgage (the "**Staheli Claim**").

26. The Claim's Process Order required that Claimants file a Proof of Claim with the Monitor on or before the Claims Bar Date, or such later date as the Monitor may agree in writing or as otherwise directed by the Court.

- Claims Process Order at paras 18 & 19 and appended to Exhibit "F" of the Staheli Affidavit

27. The Monitor was directed to send a Claims Package to all known Claimant's with a Claim as evidenced by the books and records of the Canada North Group within five Business Days of the date of the Claims Process Order.

- Claims Process Order at para 11 and appended to Exhibit "F" of the Staheli Affidavit

28. Despite the Mortgage being registered against the Winterburn Lands at the Land Titles Office, Staheli was not provided notice of the Claims Process Order, and was not sent a Claims Package until the Monitor sent a letter to Staheli on March 23, 2018.

- Staheli Affidavit at para 15, Exhibit "F"

29. The Monitor advised Staheli that the reason it was not provided notice of the Claims Process Order or sent a Claims Package was that Staheli was not included on the service list.

- Staheli Affidavit at para 16

30. Staheli was not aware of the Claims Process Order or the necessity to file a Proof of Claim in these Proceedings until it received a letter from the Monitor on March 23, 2018.

- Staheli Affidavit at para 17

31. In response to the letter from the Monitor, Staheli completed and filed its Proof of Claim regarding Staheli's Claim on March 27, 2018.

- Staheli Affidavit at para 18

Financing the Appeal

32. The Monitor has advised that CRA's Claim did not capture property held by 137.

33. At all material times, Structures and then 137 were the registered owner of the Winterburn Lands.

- Staheli Affidavit at para 13 and Exhibit "D"

34. As a result CRA's Claim never had priority over Staheli's Claim.

35. The Debtors were authorized and empowered to borrow under a credit facility (the terms and conditions of which are set forth in the Letter of offer referred to in the French Affidavit) from BDC, **"in Order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures"** up to a certain amount that was increased by Court Order from time-to-time in these Proceedings (*emphasis added*) (the "**Interim Financing**").

- Initial Order at paras 31-32, **[TAB 1]**

36. Any obligations arising from Interim Financing incurred on or after the date of the Initial Order were secured by the Interim Lender's Charge, which was granted priority over all "security interests, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise in favour of any person, and subject only to the Administration Charge.

- Initial Order at paras 34, 42, 44 & 46, **[TAB 1]**

37. Therefore, while CRA's Claim never had priority over Staheli's Claim, the Interim Lender's Charge, to the extent of indebtedness secured thereby, does.

38. In response to the Monitor's request for payout information related to the Interim Financing, BDC requested that the Monitor set aside a reserve for future legal fees in the amount of $225,000.00, to be paid from funds held in trust by the Monitor for the purpose of paying BDC's legal fees and costs in responding to the Appeal (the "**BDC Future Legal Cost Reserve**").

- Fifteenth Report of the Monitor at paras 60-61

39. With the exception of the BDC Future Legal Cost Reserve, BDC, as Interim Lender was repaid in full on May 28, 2018, including legal fees incurred by BDC in relation to the Interim Facility (and presumably not in relation to BDC's legal fees incurred in its capacity as creditor of the Debtors independent of its role as Interim Lender) in these Proceedings in the amount of $215,761.71.

- Fifteenth Report of the Monitor at para 64; Affidavit of Russell French, sworn June 12, 2018 (the "**French Affidavit**"), at para 20

40. The Monitor paid CRA's Claim in full on or about May 30, 2018.

- French Affidavit at para 21

41. BDC in its capacity as Interim Lender has been paid in full.

42. Recently the Monitor's powers were expanded to, *inter alia*, manage operate and carry on the business of the Debtors.

- Amended Order Approving Winterburn Sale, Assigning Litigation, Expanding Power of Monitor, Removing

Certain Parties as Applicants, Authorizing Name Changes of Certain Applicants and Extending the Stay of Proceedings dated April 20, 2018, **[TAB 2]**

43. The Monitor indicates that it requires additional time to "address the matters identified to date, realize on the balance of the Remaining Applicants assets, resolve and determine the allocation of the costs of the *CCAA* proceedings, distribute funds to creditors, and bring these proceedings to an end".

- Fifteenth Report of the Monitor at para 66

44. It is clear then that goal of these proceedings is no longer to restructure the Debtors, but to liquidate their assets. In this scenario, if this Honourable Court grants BDC's requests, it is likely that the creditors will ultimately bear the costs of BDC's legal fees in continuing to respond to the Appeal.

45. The Appeal involves the determination of who has priority over the Debtor's assets as between the CRA Claim and the Interim Lender's Charge, none of which, at this time, will operate to further erode Staheli's security position.

46. However, there is a real risk that Staheli's security position will further erode if this Honourable Court grants BDC's request.

47. The Monitor, in response to BDC's request for the BDC Future Legal Cost Reserve, applied to this Honourable Court for advice and directions on whether it is appropriate to set aside the BDC Future Legal Cost Reserve from the assets of the Debtors.

III. ISSUES

48. For convenience and consistency, this Brief will generally address the two issues articulated by BDC in the BDC Bench Brief with minor modifications, after first dealing with the issue raised in Staheli's Application filed on June 18, 2018 being:

a) Ought this Honourable Court direct that the Claims Process Order not operate to bar or extinguish Staheli's Claim and that the same should be adjudicated in accordance with such Order as though it was filed prior to the Claims Bar Date?

b) Are the Debtors (and by extension the creditors of the Debtors) required to indemnify or otherwise pay BDC for the BDC Costs, notwithstanding the repayment of the Interim Facility?

c) Are the BDC Costs secured by the Interim Lender's Charge?

IV. LAW AND ANALYSIS

(a) It is equitable in the circumstances that this Honourable Court direct that the Claim's Process Order does not operate to extinguish Staheli's Claim.

49. The Alberta Court of Appeal set out the applicable criteria to consider when deciding whether to allow a claimant to file a late claim notwithstanding having previously ordered a claims bar date:

"26 Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional."

- *Blue Range Resource Corp., Re*, 2000 ABCA 285 ("***Blue Range***") at paras 26 & 27, **[TAB 3]**; leave to appeal to the SCC denied in *Blue Range Resource Corp., Re,* [2001] SCR viii, **[TAB 4]**

50. Justice Romaine articulated the test for deciding if permitting the late claim will cause prejudice as "whether creditors by reason of the late claim lost a realistic opportunity to do anything that they otherwise might have done".

- *BA Energy Inc., Re* 2010 ABQB 507 ("***BA Energy***") at para 47, **[TAB 5]**

51. The applicant seeking permission from the Court to file a late claim must explain the reason for missing a claims bar date. Whether or not to permit the late filing of a claim is an equitable consideration, taking into account the specific circumstances of each case.

- *BA Energy* at para 41, **[TAB 5]**

52. The Court must also assess whether the applicant creditor was acting in good faith, and that a claimant will be found to have acted in good faith "if it submits its claim as soon as it becomes aware of the situation".

- *Royal Bank v. Cow Harbour Construction Ltd.*, 2011 ABQB 223 ("***Cow Harbour***") at paras 32-33, **[TAB 6]**

53. The following principles can be gleaned from the case law to assist in determining whether prejudice will result if a late claim is permitted:

a) timing of the late claim is a key factor when considering prejudice to the debtors and other interested parties; *Blue Range* at para 36, **[TAB 3]**; *BA Energy* at para 49, **[TAB 5]**; *Cow Harbour* at para 39, **[TAB 6]**;

b) it is irrelevant to the analysis that other creditors may receive less money if the late claim is permitted; *Blue Range* at para 40, **[TAB 3]**; *BA* Energy at para 47, **[TAB 5]**; Cow *Harbour* at para 41, **[TAB 6]**; and

c) the awareness of the late claim by other creditors, the debtor corporations and the monitor is an indication that no prejudice will be suffered if the late claim is permitted to be filed. *Blue Range*, at para 39, **[TAB 3]**; *Cow Harbour* at para 42, **[TAB 6]**.

54. If a distribution has been made to creditors prior to the late claim being filed, the Court may be less inclined to permit its filing.

- *Cow Harbour* at para 39, **[TAB 6]**

55. Where notice of a Claims Process Order is not delivered to a known claimant, publication of a notice of such order in a newspaper is not sufficient notice unless it is shown that such known claimant saw such publication.

- *Ivorylane Corp. v. Country Style Realty Ltd.*, [2004] O.J. No. 2662 (Ont. SCJ) ("***Ivorylane***") at paras 44-46 **[TAB 7]**

56. Staheli cannot be said to have been "laying in the weeds". The delay in filing Staheli's Proof of Claim was caused by Staheli not receiving the Claim's Package from the Monitor and not otherwise being aware of the requirement to file the Proof of Claim. Similar to the facts of *Cow Harbour*, Staheli gained no advantage in filing its Proof of Claim late.

- Staheli Affidavit at paras 16 & 17; *Cow Harbour* at para 29, **[TAB 6]**

57. No one will suffer prejudice if this Honourable Court directs that Staheli's Claim is not extinguished by the Claims Process Order since:

   a) Staheli's Claim was discoverable by a simple search of the Land Titles Office, which all interested creditors, and the Monitor would have had the ability to do. Therefore it is likely that other creditors were aware that Staheli had a claim respecting the Winterburn Lands;

   b) The proceeds from the Winterburn Lands have not yet been distributed; and

   c) There has been no Plan of Arrangement formulated or voted upon by the creditors.

58. Staheli acted in good faith in immediately completing and serving its Proof of Claim after receiving from the Monitor the March 23, 2018 letter requesting that Staheli complete and file its proof of claim.

- Staheli Affidavit, at para 18, Exhibit "G"

59. It is equitable in the circumstances that this Honourable Court direct that Paragraph 22 of the Claims Process Order does not operate to bar or extinguish Staheli's Claim, and that the same be adjudicated in accordance with the Claims Process Order as though it was filed on or before the Claims Bar Date as defined in the Claims Process Order.

(b) The Debtors, and by extension the creditors are not required to indemnify or otherwise pay the BDC Costs

<u>The Indemnity Provisions do not support an order that the Debtors must pay the BDC Costs</u>

60. BDC asserts that although the Interim Financing has been repaid, the Debtor's indemnity obligations arising from the First Indemnity Provision, the Second Indemnity Provision and the Other Costs Provision (collectively the "**Indemnity Provisions**") remain extant since there remains a possibility that BDC will incur future liabilities that engages its legitimate commercial interests.

61. Since BDC has been repaid in full, and since the BDC Costs are voluntary, the Indemnity Provisions do not support BDC's position that the Debtors ought to pay the BDC Costs.

62. First, BDC asserts that the Second Indemnity Provision supports its position in allowing BDC to continue to require the Debtors to pay all legal costs incurred by BDC in exercising its rights under the Letter of Offer so long as the Debtors remain indebted to BDC.

63. Although the Debtors have repaid the Interim Financing in full, they remain indebted to BDC, presumably for loans or advances incurred prior to the Initial Order.

- BDC Bench Brief at para 48

64. The *CCAA* is clear that the Interim Lender's Charge cannot secure an obligation incurred prior to an order for interim financing is made.

- *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ("***CCAA***") s.11.2, **[TAB 8]**

65. Given the clear wording of the *CCAA*, BDC cannot point to pre-filing liabilities of the Debtors to support its argument that the Debtors obligations arising under the Interim Financing do not extinguish until BDC is repaid pre-filing indebtedness. These are distinct obligations which is made clear by s.11.2 of the *CCAA*.

66. Second, BDC refers to a 2014 United States Bankruptcy Court (N.D.) Texas decision, *Douglas Brickley, Chapter 11 Trustee v. Scattered Corporation and Leon A Greenblatt* ("***Douglas Brickley***') as an example where a debtor was ordered to pay the legal fees and expenses incurred by an interim lender where such amounts did not benefit the estate.

- BDC Bench Brief p. 27, **[TAB 3]**

67. However, in *Douglas Brickley,* the interim lender was sued by the trustee of the debtor for breaching a debtor in possession financing agreement. Here the interim lender was compelled to defend the action brought by the trustee, or risk having judgment entered against it in default.

68. In other words, the interim lender in *Douglas Brickley* had no meaningful choice but to expend legal costs in defending itself, and relied upon its indemnity provision to seek payment of its legal fees.

69. This is distinguishable from the facts before this Honourable Court in that BDC has the option of declining to participate in the Appeal, or participating in the Appeal at its own cost. BDC will incur no additional liability if it declines to continue to participate in the Appeal, therefore negating the necessity of having to rely upon the Indemnity Provisions, and very possibly, the wallets of the Staheli and other creditors in these Proceedings.

70. It is unfair to look to the assets of Debtors to fund legal costs and expenses that are optional, especially where such legal fees and costs will result in no tangible benefit to the estate, and could very likely result in the creditors recovering less.

71. Moreover, BDC's position ought to be discouraged by this Honourable Court as a matter of principle to recognize that costs of *CCAA* proceedings should not be unnecessarily inflated by the taking of steps so clearly not necessary to the remaining stakeholder in the Proceedings.

72. Originally, the Court of Appeal appointed Canada North Group as lead responded in the Appeal, unless counsel to the parties agreed otherwise.

- *Canada v. Canada North Group Inc*, 2017 ABCA 363 at para 6, **[TAB 9]**

73. According to the French Affidavit, an alternate agreement was reached by the parties and BDC has now assumed the role as lead respondent.

- French Affidavit at para 11

74. Now that BDC as Interim Lender is paid in full, it is able to ask someone else to assume the role of lead respondent if BDC does not want to incur the BDC Costs.

75. Since BDC, as Interim Lender is not compelled to respond to the Appeal, and will suffer no loss if it stands down, it is not necessary for it to incur any further legal costs in defending the Appeal, and therefore ought not be able to point to the Indemnity Provisions to cover its legal costs in defending the Appeal.

76. BDC asserts that it is of general importance to it to have the issues under consideration in the Appeal resolved, since it could impact other outstanding interim financing loans. While the Appeal indeed raises important legal issues relevant to lenders, trustees and insolvency practitioners, this is not a basis to force the Debtors, or their creditors to bear the cost.

(c) The BDC Costs ought not be secured by the Lender's Charge?

<u>The Order sought by BDC will not achieve the remedial purpose of the CCAA</u>

77. Orders granted in *CCAA* proceedings ought to reflect the remedial purpose of the *CCAA*.

78. The Honourable Justice Topolniski provided the following summary of the approach to interpreting and applying the *CCAA*:

> "The Court's function during the *CCAA* proceedings 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.
>
> ..
>
> In interpreting the *CCAA*, the Court is to employ a hierarchical approach, and consider and, if necessary, resolve the underlying policies at play.

- *Canada North Group Inc (Companies' Creditors Arrangement act)* 2017 ABQB 550 at paras 21 &24, **[TAB 10]**

79. The Supreme Court of Canada has held that when exercising its authority under the *CCAA*, the Court ought to inquire whether the order sought advances the policy objectives of the *CCAA*:

> "The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* --- avoiding the social and economic losses resulting from liquidation of an insolvent company".

- *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para 70, **[Tab 11]**

80. BDC is not seeking a declaration that there are legal and policy issues of importance to interim lenders generally, or even to the Debtors, or the stakeholders specifically. Rather, the fundamental issue before this Honourable Court is who should have to pay for the resolution of such legal and policy considerations.

81. It is respectfully submitted that asking the Debtor's, and very likely the creditors to pay the BDC Costs, when BDC will suffer no financial harm in declining to continue to respond to the Appeal, and when the Monitor is currently winding down the Proceedings without seeking to formulate a Plan of Compromise, is not in harmony with the remedial purpose of the *CCAA*.

82. Since at this stage BDC is no longer being called upon to "keep the lights on", it is contrary to the interests of the creditors to be asked to risk allowing their security to further erode in order to pay for the Appeal, the outcome of which will have no tangible benefit to the Debtors, the creditors or the Proceedings.

<u>The Order Sought by BDC does not accord with the purpose of interim financing and ought not be given priority status over other creditors by the Interim Lender's charge granted in the Initial Order</u>

83. The Initial Order authorized and empowered the Debtors to borrow from BDC, **<u>"in Order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures"</u>** (*emphasis added*).

84. BDC, as Interim Lender has been repaid in full and is no longer required in these Proceedings.

85. It is respectfully submitted that BDC's request to have its legal fees paid by the Debtors now that it is no longer at risk of not being made whole as a result of the Appeal, is not contemplated by the wording of the Initial Order since it is not related to a capital expenditure and is not a working capital requirement.

86. While creditors can reasonably expect that an interim financing charge may dilute their security, and that such interim financing charge will secure the interim lender's legal fees arising in relation to the interim loan, they ought to also be able to expect that the advances secured by such borrowings will be used for a purpose related to the proceedings, and not to secure steps taken that clearly have no relation to the debtor's expenses, costs of the restructuring or indebtedness owing under the interim loan.

87. A recent Saskatchewan Court of Appeal decision articulates the purpose of interim financing in *CCAA* proceedings:

> "37 Pursuant to s. 11.2(1) of the *CCAA*, a debtor corporation may apply to the court at any stage of the proceedings for interim financing. As Dr. Janis Sarra explains, "interim financing" refers primarily to the working capital that the debtor corporation requires in order to continue operating during restructuring proceedings, as well as to finance the costs of the *CCAA* process (Rescue! The Companies' Creditors Arrangement Act at 197). **<u>The underlying premise of interim financing is that it is a benefit to all stakeholders "as it allows the debtor to protect going-concern value while it attempts to devise a plan of compromise or arrangement acceptable to creditors" (at 197).</u>** Interim financing is generally granted to ensure the debtor corporation can continue its essential operations, such as "keeping the lights on" and paying employees, while it undergoes the *CCAA* proceedings." (*emphasis added)*

- *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36 ("***Industrial Properties***") at para 37, **[TAB 12]**

88. Although the Court was considering an application for interim financing at the beginning of *CCAA* proceedings, the principles articulated in *Industrial Properties* are helpful to the matters under consideration in this Application since the Interim Financing has been repaid in full, and therefore considering at this stage of the Proceedings the appropriateness of relying upon the Interim Lender's Charge granted in the Initial Order to secure the BDC Costs (that have not yet been incurred) is a fair exercise of this Honourable Court's discretion.

89. Clearly, paying the BDC Costs will not benefit Staheli, the creditors or the Debtors.

90. In *Industrial Properties*, the Saskatchewan Court of Appeal overturned the lower Court's decision authorizing the debtor corporation to obtain interim financing concurrently with the granting of an initial order.

91. The Court held that in determining whether it is appropriate to grant interim financing, the Court must consider the factors in s.11.2(4) of the *CCAA*:

"Interim financing

Factors to be considered

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

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in <u>paragraph 23(1)</u>(b), if any."

- *CCAA* s.11.2(4), **[TAB 8]**

92. It was held that where there is steadfast opposition from creditors to proposed interim financing, the Court ought to give factor 11.2(4)(d) of the *CCAA* emphasized consideration. Since the financing sought was not required to "preserve the status quo or maintain the respondents' essential operations", the request for interim financing, and therefore a priority charge was not appropriate.

- *Industrial Properties* at paras 44-45, **[TAB 12]**

93. The Debtors do not require BDC to assume the role of lead respondent and incur legal costs in defending the Appeal, or for any other purpose.

94. The Interim Lender's Charge, to the extent of future liabilities incurred is not necessary.

95. Moreover, it is respectfully submitted that with the exception of 11.2(4)(g), none of the factors enumerated in s.11.2(4) support the granting of BDC's request, and therefore, that this Honourable Court ought not Order that the Interim Lender's Charge secures BDC's Costs.

96. It is not fair, equitable, consistent with the purpose of Interim Financing or consistent with the policy considerations underpinning the *CCAA* to grant interim lenders carte blanche power to access the resources of debtors (and the security of its creditors) for the purpose of pursing a course of action that is neither mandatory or necessary to the proceedings, particularly where the interim financer is itself no longer required in such proceedings.

V. CONCLUSION

97. For all of the reasons stated above, Staheli respectfully requests that this Honourable Court grant an Order

a) Directing that the Staheli Proof of Claim be filed not withstanding that it was submitted for filing beyond the Claims Bar Date, and that it be adjudicated in accordance with the terms of the Claims Process Order as though it was filed prior to the Claims Bar Date; and

b) Ordering and Directing that BDC's legal fees incurred in responding to the Appeal are not payable by the Debtors and are not secured by the Interim Lender's Charge.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th DAY OF JUNE, 2018

DLA PIPER (CANADA) LLP

Per: ______________________________

BRIAN DAVISON Q.C. and SUSY M. TRACE
SOLICITORS FOR STAHELI CONSTRUCTION CO. LTD.

Table of Authorities

1. *CCAA* Initial Order granted on July 5, 2018 and filed July 6, 2018
2. Amended Order Approving Winterburn Sale, Assigning Litigation, Expanding Power of Monitor, Removing Certain Parties as Applicants, Authorizing Name Changes of Certain Applicants and Extending the Stay of Proceedings granted and filed on April 20, 2018
3. *Blue Range Resource Corp., Re*, 2000 ABCA 285
4. *Blue Range Resource Corp., Re*, leave to appeal to the SCC denied [2001] SCR viii
5. *BA Energy Inc., Re* 2010 ABQB 507
6. *Royal Bank v. Cow Harbour Construction Ltd.,* 2011 ABQB 223
7. *Ivorylane Corp. v. Country Style Realty Ltd.*, [2004] O.J. No. 2662 (Ont. SCJ)
8. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, S.11.2
9. *Canada v. Canada North Group Inc*, 2017 ABCA 363
10. *Canada North Group Inc (Companies' Creditors Arrangement act)* 2017 ABQB 550
11. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60
12. *Industrial Properties Regina Limited v. Copper Sands Land Corp.,* 2018 SKCA 36

TAB 1

Clerk's Stamp

COURT FILE NUMBER	1703 12327
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
	AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD. and 1371047 ALBERTA LTD.
DOCUMENT	**CCAA INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Stephanie A. Wanke Spencer Norris DLA Piper (Canada) LLP 1201 Scotia Tower 2 10060 Jasper Avenue Edmonton AB T5J 4E5 T 780.429.6822 F 780.702.4379

JUDICIAL CENTRE OF EDMONTON
FILED
JUL 06 2017
Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: **July 5, 2017**

NAME OF JUDGE WHO MADE THIS ORDER: **The Honourable Justice K.G. Nielsen**

LOCATION OF HEARING: **Edmonton, Alberta**

UPON the application of Canada North Camps Inc., D.J. Catering Ltd., Campcorp Structures Ltd., Canada North Group Inc., 816956 Alberta Ltd. and 1371047 Alberta Ltd. (the "**Applicants**"); **AND UPON** having read the Originating Application, the Affidavit of Shayne McCracken sworn June 28, 2017, filed, the Confidential Supplemental Affidavit of Shayne McCracken, unfiled, the Affidavit of Jessie Taha sworn June 29, 2017, the Affidavit of Russell French, sworn June 29, 2017, the Supplemental Affidavit of Shayne McCracken sworn July 4, 2017, the Affidavit of Service sworn by Lynnette Goodwin, filed, and the Pre-filing Report of the proposed Monitor, filed July 4, 2017; **AND UPON** reading the filed consent of Ernst & Young Inc. to act as Monitor; **AND UPON NOTING** that the Court of Queen's Bench in Bankruptcy granted orders in each of the following bankruptcy proceedings commenced under Part III of the *Bankruptcy and Insolvency Act*: 24-2266739, 24-2266736, 24-2266726, and 24-2266743 that those proceedings may be taken up and continued under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-35 ("***CCAA***"); **AND UPON** hearing from counsel for the Applicants, counsel for Canadian Western Bank, counsel for Business Development Bank of Canada, counsel for Ernst & Young Inc., **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. The Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:

   (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property; and

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. To the extent permitted by law, the Applicants shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

   (b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

6. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in

the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

7. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

8. Until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the

period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicants is hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicants shall subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph 33), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding $**100,000** in any one transaction or $**500,000** in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and

(c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

11. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such

landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliates the lease governing such leased premises in accordance with section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

12. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of their obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

13. Until and including **August 3, 2017**, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants, the parties listed in Schedule "**A**" attached hereto, or the Monitor (collectively, the "**Stay Parties**"), or affecting the Business or the Property, arising out of or in connection with any right, remedy or claim of any person against the Applicants in connection with any indebtedness, indemnity, liability or obligation of any kind whatsoever of the Applicants under contract, statute or otherwise, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by indemnity, guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any person to advance a claim for contribution, indemnity or otherwise, with respect to any matter, action cause or chose in action, whether existing at present or commenced in future, which indebtedness , indemnity, liability or obligation is derivative of the primary liability of the Applicants, except with leave of this Court, and any and all such Proceedings currently under way against or in respect of

(viii) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;

(ix) oversee and direct the preparation of cash flow statements and to assist in the dissemination of financial and other information in these proceedings;

(x) receive, collect and take possession of all monies and accounts now owed or hereafter owing to any one or more of the Remaining Applicants, including proceeds payable pursuant to sales of Property;

(xi) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property or business of the Remaining Applicants, whether in the Monitor's name or in the name and on behalf any one or more of the Remaining Applicants;

(xii) initiate, prosecute and continue the prosecution of any and all proceedings on behalf of one or more of the Remaining Applicants and to settle or compromise any such proceedings or claims. For greater certainty, such authority shall include the ability to represent the Remaining Applicants in any negotiations or mediation with respect to such claims of the Remaining Applicants. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceedings;

(xiii) exercise any rights which the Remaining Applicants may have;

(xiv) provide instruction and direction to the advisors of the Remaining Applicants;

(xv) make any distribution or payments required under any Order in these proceedings; and

(xvi) exercise any other incidental rights or powers which the Remaining Applicants may have, including rights or powers available to the Remaining Applicants under the terms of the Initial Order and the Companies' Creditors Arrangement Act as applicable, as deemed reasonable and appropriate by the Monitor.

19. No provision in this Order is intended to appoint the Monitor as an officer, director or employee of any of the Remaining Applicants. Additionally, nothing in this Order shall constitute or be deemed to constitute the Monitor as a receiver, assignee, liquidator, or receiver and manager of any of the Remaining Applicants or a successor employer and that any distributions made to creditors of the Remaining Applicants and any actions taken by the Monitor in furtherance to the directions given in this Order or previous Orders will be deemed to have been made by the Remaining Applicants, as applicable.

20. The Remaining Applicants, and their current and former shareholders, officers, directors, agents and representatives shall fully co-operate with the Monitor in the exercise of its powers and discharge of its duties and obligations under this Order or any other Order of the Court.

21. The Monitor shall continue to have the benefit of all of the protections and priorities as set out in the Initial Order and any such protections and priorities shall apply to the Monitor in fulfilling its duties under this Order or in carrying out the provisions of this Order.

ASSIGNMENT OF GRAND RAPIDS ACCOUNTS RECEIVABLE AND RELATED CLAIMS

22. Effective as of the filing of the Camp Monitor's Certificate, any and all right, title and interest:

are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order.

NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT

18. Notwithstanding anything else contained in this Order, no creditor of the Applicants shall be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 16 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. The Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of **$150,000**, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs **44** and **46** herein.

22. Notwithstanding any language in any applicable insurance policy to the contrary:

(a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

(b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph **21** of this Order.

APPOINTMENT OF MONITOR

23. Ernst & Young, Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business and financial affairs and the Applicants (defined below) with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination to the Interim Lender and its counsel on a monthly basis of financial and other information as agreed to between the Applicants and the Interim Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, as agreed by the Interim Lender;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) advise the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Applicants' Property, Business and financial affairs or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

25. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation.

26. The Monitor shall provide any creditor of the Applicants and the Interim Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

27. The Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

28. The Monitor, counsel to the Monitor, the CRO, its counsel, if any, and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings including the costs incurred by them in the commencement of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on at least a monthly basis.

29. The Monitor and its legal counsel shall pass their accounts from time to time.

30. The Monitor, counsel to the Monitor, the CRO (defined below) and its counsel, if any, and the Applicants' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $**500,000**, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs **44** and **46** hereof.

INTERIM FINANCING

31. The Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from Business Development Bank of Canada (the "**Interim Lender**") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $**1,000,000** unless permitted by further order of this Court.

32. Such credit facility shall be on the terms and subject to the conditions set forth in the letter of offer between the Applicants and the Interim Lender dated June 29, 2017 (the " **Letter of Offer**") attached as Exhibit "A" to the Supplemental Affidavit of Shayne McCracken sworn July 4, 2017.

33. The Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Letter of Offer or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the Interim Lender under and pursuant to the Letter of Offer and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

34. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Definitive

Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall have the priority set out in paragraphs **44** and **46** hereof.

35. Notwithstanding any other provision of this Order:

(a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge or upon the Maturity Date (as defined in the Letter of Offer), the Interim Lender, upon **3** days notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Letter of Offer, Definitive Documents and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the Interim Lender to the Applicants against the obligations of the Applicants to the Interim Lender under the Letter of Offer, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) except for the charges provided in paragraphs **44** and **46** hereof, the Applicants are prohibited from granting any additional liens, charges, security interests or any other encumbrances upon any of the assets, property or undertakings of the Applicants, without the prior written consent of the Interim Lender;

(d) the Applicants are prohibited from any further borrowing, without the prior written consent of the Interim Lender;

(e) the Interim Lender is authorized (but not obligated) to effect such registrations, filings and recordings wherever the Interim Lender in its discretion deems appropriate the Letter of Offer and Definitive Documents;

(f) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

36. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**").

CHIEF RESTRUCTURING OFFICER

37. The Applicants are directed to immediately hire R.e.l. group inc., as Chief Restructuring Officer (the "**CRO**") substantially in accordance with the terms of the draft engagement letter attached as Exhibit "C" to the Affidavit of Shayne McCracken sworn July 4, 2017.

38. The CRO shall:

(a) oversee and advise the Applicants with respect to the restructuring of the Applicants;

(b) evaluate potential restructuring, sale, refinancing and capitalization alternatives that may be available to the Applicants;

(c) assist the Applicants, as necessary, with respect to the marketing and sale of any assets or parts of the business of the Applicants;

(d) assist the Applicants in negotiating and implementing potential refinancing and capitalization alternatives;

(e) provide general commercial advice with respect to the Applicants' long term strategic planning, as requested;

(f) develop of strategies to manage the current liquidity issues facing the Applicants including a review of the current 13 week cash projections and any periodic updates together with supporting information as required;

(g) assist the Applicants as necessary, or, at the request of the Applicants, represent the Applicants in negotiations and discussions with third parties, including creditors, suppliers, customers and other stakeholders, in respect of the restructuring;

(h) assist with the provision of information to and communications with the Monitor, secured lenders, the Interim Lender and other stakeholders, including with respect to ongoing financial reporting;

(i) develop a communications strategy for the Applicants in connection with the restructuring and assist in the management of communications with the secured lenders, unsecured creditors and other key stakeholders;

(j) in conjunction with the Monitor, advise the Applicants in their development of the Plan and any amendments to the Plan;

(k) in conjunction with the Monitor, assist the Applicants, to the extent required by the Applicants, in their dissemination to the Interim Lender and its counsel on a monthly basis of financial and other information as agreed to between the Applicants and the Interim Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender;

(l) in conjunction with the Monitor, advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the Interim Lender;

(m) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Applicants' Property, Business and financial affairs or to perform its duties arising under this Order;

(n) report to this Court at such times and intervals as the CRO may deem appropriate; and

(o) perform such other duties as are required to carry out the powers and obligations conferred upon the CRO by this Order or any further Order of this Court.

39. The Applicants and its shareholders, officers, directors, employees, agents, representatives and former shareholders, officers, employees, agents and representatives, shall co-operate fully with the CRO in the exercise of its powers and discharge of its duties and obligations.

40. Notwithstanding anything in this Order, the CRO shall not be considered an officer or director of the Applicants, as those terms are used in the *Business Corporation Act* (Alberta), and shall only have the obligations and liabilities as expressly set out in this Order or subsequent order of the Court in this proceeding.

41. The CRO shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its party. Nothing in this Order shall derogate from the protections afforded the CRO by the CCAA or any applicable legislation.

VALIDITY AND PRIORITY OF CHARGES

42. The priorities of the Directors' Charge, the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of **$500,000**);

Second – Interim Lender's Charge (to the maximum amount of **$1,000,000**); and

Third – Directors' Charge (to the maximum amount of **$150,000).**

43. The filing, registration or perfection of the Directors' Charge, Administration Charge or the Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be

valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

44. Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

45. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, Administration Charge or the Interim Lender's Charge, unless the Applicants also obtains the prior written consent of the Monitor, the Interim Lender and the beneficiaries of the Directors' Charge and Administration Charge, or further order of this Court.

46. The Directors' Charge, Administration Charge, the Letter of Offer, the Definitive Documents and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, including the Letter of Offer or the Definitive Documents, shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which they are a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the Applicants entering into the Letter of Offer, or execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicants pursuant to this order, including the Letter of Offer or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

47. Any interested Person may apply to this Court on notice to any other party likely to be affected, for an order to allocate the Administration Charge, the Interim Lender's Charge and the Directors' Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

48. The Monitor shall (i) without delay, publish in the National Post and the Edmonton Journal for one (1) business day a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

49. The Applicants and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Applicants' creditors or other interested Persons at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor shall establish and maintain a website in respect of these proceedings at **www.documentcentre.eycan.com** and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders or other materials filed in these proceedings by or behalf of the Monitor, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

SEALING ORDER

50. The Confidential Supplemental Affidavit of Shayne McCracken sworn on June 28, 2017 (the "**Sealed Documents**") shall be sealed on the Court file until the termination of the proceedings, notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*. The Sealed Documents shall be kept confidential and shall not form part of the public record, but rather shall be placed, separate and apart from all contents in the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order.

GENERAL

51. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

52. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, both the CRO and the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.

53. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

54. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

55. Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

56. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

57. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of Queen's Bench of Alberta

Schedule "A"

1995708 Alberta Ltd.

Campcorp USA Inc.

Canada North Group LP Holdings Ltd.

Heart Lake Canada North Group GP Ltd.

Pease River Lodge Limited Partnership

Bonnyville Lodge GP Ltd.

Bonnyville Lodge Limited Partnership

Canada North Group Inc.

HML Lodge GP Ltd.

HML Lodge Limited Partnership

Heart Lake CNC Limited Partnership

Kilometer 147 GP Ltd.

Kilometer 147 Limited Partnership

Peace River Lodge GP Ltd.

1919209 Alberta Ltd.

Carma Software Systems Inc.

McCracken Group Inc.

0790528 B.C. Ltd.

Spallumcheen Estates Ltd.

Morningstar Golf Club Ltd.

Bigstone Tansi GP Inc.

Bigstone Tansi LP

Paul McCracken

Shayne McCracken

TAB 2

hereby certify this to be a true copy of the original.

Clerk of the Court

JUDICIAL CENTRE OF EDMONTON
FILED
APR 2 0 2018
Clerk of the Court of Queen's Bench

COURT FILE NO.	1703 12327
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
	AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. and 1919209 ALBERTA LTD.
DOCUMENT	**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**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

MILLER THOMSON LLP
Barristers and Solicitors
2700, Commerce Place
10155-102 Street
Edmonton, AB, Canada T5J 4G8
Phone: 780.429.1751 Fax: 780.424.5866

Lawyer: Stephanie A. Wanke
Email: swanke@millerthomson.com
File No.: 230560.1

DATE ON WHICH ORDER WAS PRONOUNCED: **April 20, 2018**

LOCATION OF HEARING: **Edmonton, AB**

NAME OF JUDGE WHO MADE THIS ORDER: **The Honourable Justice K.G. Nielsen**

UPON THE APPLICATION of Canada North Camps Inc. ("**CNC**"), D.J. Catering Ltd. ("**DJ**"), Campcorp Structures Ltd. ("**Campcorp**"), Canada North Group Inc. ("**CNGI**"), 816956 Alberta Ltd. ("**816**"), 1371047 Alberta Ltd. ("**137**") and 1919209 Alberta Ltd. ("**191**") (collectively, the "**Applicants**"), **AND UPON** having read the Initial Order granted in these proceedings on July 5, 2017 (the "**Initial Order**"), the Eleventh Report of the Monitor, Ernst & Young Inc., (the "**Monitor**"), filed March 12, 2018; the Confidential Supplement to the Eleventh Report of the Monitor dated March 12, 2018, unfiled (the "**Confidential Supplement to the Eleventh Report**"); the unfiled Replacement Schedule C to the Confidential Supplement to the 11th Report ("**Confidential Replacement Schedule**"); the Twelfth Report of the Monitor, filed April 10, 2018; the Confidential Supplement to the Twelfth Report of the Monitor dated April 9, 2018, unfiled (the "**Confidential Supplement to the Twelfth Report**"); the Thirteenth Report of the Monitor, filed April 11, 2018, and the Confidential Supplement to the Thirteenth Report of the Monitor (the "**Confidential Supplement to the Thirteenth Report**"), dated April 11, 2018, unfiled; the Fourteenth

Report of the Monitor dated and filed April 13, 2018; and the Affidavit of Service of Gillian Cameron to be filed;

AND UPON NOTING that the shares of Campcorp and DJ and the rights to the names "Canada North Camps" and "Canada North Group" are being sold as part of the Camp Transaction, as defined in the Order granted in these proceedings on March 20, 2018 (the "**Camp Transaction Order**"); AND UPON BEING ADVISED that, the current directors of CNC, CNGI, 816, 137, and 191 (collectively, the "**Remaining Applicants**") wish to resign effective the closing of the Camp Transaction;

AND UPON hearing from counsel for the Applicants, counsel for Canadian Western Bank, counsel for the Monitor and such other counsel as were present, IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of application for this Order and its supporting materials is hereby abridged to time actually given and service thereof is deemed good and sufficient and this application is property returnable as of the date of this Order.

EXTENSION OF STAY

2. The Stay Period as referred to and defined in paragraph 13 of the Initial Order is hereby extended to and including July 31, 2018

SALE OF WINTERBURN PROPERTY

3. 137 is hereby authorized to sell the property legally described as

   Plan 8622655
   Block E
   Excepting Thereout All Mines and Minerals
   Area: 5.66 Hectares (13.99 Acres) More or Less

   (the "**Winterburn Property**")

   pursuant to the terms of the Offer to Purchase and Interim Agreement made between 137 and 2007062 Alberta Ltd. (or its nominee) (the "**Purchaser**") dated February 17, 2018 and appended as Schedule "D" to the Confidential Supplement to the Eleventh Report and amended by the Purchaser Condition Removal and Second Amending Agreement dated March 23, 2018 (collectively, the "**Purchase Agreement**") and appended to Schedule "A" of the Confidential Supplement to the Twelfth Report (collectively, the "**Winterburn Transaction**").

4. 137 is hereby authorized and approved to, without further Order of this Court:

   (a) take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Winterburn Transaction or for the conveyance of the Winterburn Property to the Purchaser; and

   (b) agree with the Winterburn Purchaser to such minor amendments to the Purchase Agreement as may be required to facilitate closing, subject to the approval of the Monitor.

5. Upon the delivery of a Monitor's certificate to the Winterburn Purchaser (or its nominee) substantially in the form set out in Schedule "A" hereto (the "**Monitor's Certificate**"), all of 137's right, title and interest in and to the Winterburn Property shall vest absolutely in the name of the Purchaser free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, caveats, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured,

unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing:

(a) any encumbrances or charges created by the Initial Order;

(b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta) or any other personal property registry system; and

(c) those Claims listed on Schedule "B" hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, caveats, easements and restrictive covenants listed on Schedule "C") (the "**Permitted Encumbrances**"); and,

for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Winterburn Property are hereby expunged and discharged as against the Winterburn Property.

6. Upon the delivery of the Monitor's Certificate, and upon the filing of a certified copy of this Order, together with any applicable registration fees, the Registrar of Land Titles of Alberta (the "**Registrar**") is hereby authorized, requested, and directed to cancel the existing Certificate of Title No. 132 082 619 for the Winterburn Property and to issue a new Certificate of Title for the Winterburn Property in the name of the Purchaser (or its nominee), and to register such transfers, discharges, discharge statements of conveyances, as may be required to convey clear title to the Winterburn Lands to the Purchaser (or its nominee), which Certificate of Title shall be subject only to the Permitted Encumbrances.

7. This Order shall be registered by the Registrar notwithstanding the requirements of section 191(1) of the *Land Titles Act*, RSA 2000, c.L-7 and notwithstanding that the appeal period in respect of this Order has not elapsed, which appeal period is expressly waived.

8. For the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Winterburn Property (to be held by the Monitor) shall stand in the place and stead of the Winterburn Property, and from and after the delivery of the Monitor's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Winterburn Property with the same priority as they had with respect to the Winterburn Property immediately prior to the sale, as if the Winterburn Property had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

9. The Winterburn Purchaser shall, by virtue of the completion of the Winterburn Transaction, have no liability of any kind whatsoever in respect of any Claims against 137 or the Winterburn Property.

10. Immediately after the closing of the Winterburn Transaction, the holders of the Permitted Encumbrances shall have no claim whatsoever against the Monitor or 137.

11. The Monitor is to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof to the Purchaser (or its nominee).

12. Notwithstanding:

(a) The pendency of these proceedings;

(b) Any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of 137 and any bankruptcy order issued pursuant to any such applications; and

(c) Any assignment in bankruptcy made in respect of 137.

the vesting of the Winterburn Property the Winterburn Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of 137 and shall not be void or voidable by creditors of 137, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

13. 137, the Monitor, the Purchaser and any other interested party, shall be at liberty to apply for further advice, assistance and directions as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Winterburn Transaction.

ORDERS ANCILLARY TO CLOSING THE RESTRUCTURING TRANSACTION

14. Pursuant to the Plan of Arrangement (the "**Plan**") attached to and approved by the Camp Transaction Order, on filing of the Pre-Closing Transaction Monitor's Certificate (as defined in the Camp Transaction Order):

(a) The DJ Transferred Assets (as defined in the Plan) and the DJ Claims (as defined in the Plan) shall transfer to and be assumed by CNGI and the DJ Claims will attach to the DJ Transferred Assets with the same priority as they had with respect to the DJ Transferred Assets immediately prior to the transfer, as if the DJ Transferred Assets had not transferred and remained in the possession or control of DJ. DJ shall thereafter be free and clear of all DJ Claims whatsoever, except the Permitted DJ Claims (as defined in the Plan). For the purposes of the *Income Tax Act* and the *Excise Tax Act*, the fair market value of the DJ Transferred Assets is deemed to be nil. For the purposes of the *Income Tax Act* and the *Excise Tax Act*, the discounted value of the DJ Claims and is deemed to be nil; and

(b) The CSL Transferred Assets (as defined in the Plan) and the CSL Claims (as defined in the Plan) shall transfer to and be assumed by CNGI and the CSL Claims will attach to the CSL Transferred Assets with the same priority as they had with respect to the CSL Transferred Assets immediately prior to the transfer, as if the CSL Transferred Assets had not transferred and remained in the possession or control of CSL. CSL shall thereafter be free and clear of all CSL Claims whatsoever, except the Permitted CSL Claims (as defined in the Plan). For the purposes of the *Income Tax Act* and the *Excise Tax Act*, the fair market value of the CSL Transferred Assets is deemed to be nil. For the purposes of the *Income Tax Act* and the *Excise Tax Act*, the discounted value of the CSL Claims and is deemed to be nil.

15. Upon the filing of the Camp Monitor's Certificate, as defined in the Camp Transaction Order, and effective only from the date of such filing:

(a) Campcorp and DJ shall be removed as Applicants from these proceedings and shall no longer be subject to the Initial Order or any subsequent Orders in these proceedings;

(b) CNG shall change its name to 667402 Alberta Ltd. and CNC shall change its name to 18512398 Alberta Ltd.;

(c) The Style of Cause in these proceedings shall be amended:

(i) to amend the names of each of CNG and CNC to their respective numbers as set out in paragraph 15(b) above; and

(ii) to delete Campcorp and DJ; and

(d) The resignations of each of Paul McCracken and Shayne McCracken as directors of each of the Remaining Applicants shall be deemed to be accepted by each of the Remaining Applicants and the Alberta Registrar of Corporations is directed to reflect their resignation in the corporate records for each of Campcorp and DJ.

EXPANSION OF MONITOR'S POWERS

16. Upon the filing of the Camp Monitor's Certificate, as defined in the Camp Transaction Order, and effective only from the date of such filing, the Monitor's powers are expanded as set out in this Order.

17. Nothing in this Order shall derogate from the powers of the Monitor as provided for in the Initial Order or subsequent Orders in this Action.

18. In addition to the powers and duties of the Monitor set out in the Initial Order, and without altering in any way the limitations and obligations of the Remaining Applicants because of these proceedings, or prior orders of the Court in these proceedings, the Monitor be and is hereby authorized and empowered to do any of the following with respect to the Remaining Applicants where the Monitor considers it necessary or desirable:

(a) preserve, protect and maintain control of the Remaining Applicants' remaining real property, personal property, books, records, and documents (paper and electronic) (collectively "Property"), and any and all proceeds, receipts and disbursements arising out of or from the Property or any parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(b) manage, operate and carry on the business of the Remaining Applicants, including, without limitation, completing the sale of the Winterburn Property;

(c) take all steps and actions the Monitor, on behalf of the Remaining Applicants, considers necessary or desirable in these proceedings including, without limitation:

(i) entering into any agreements;

(ii) incurring obligations in the ordinary course of business;

(iii) retaining or terminating employees;

(iv) ceasing to carry on all or any part of the business;

(v) marketing any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Monitor, in its discretion, may deem appropriate;

(vi) subject to the terms of the Initial Order, selling, conveying, transferring, leasing or assigning the Property or any part or parts thereof out of the ordinary course of business of the Remaining Applicants;

(vii) applying for any Vesting Order or other Orders necessary to convey the Property or any part of parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.

(viii) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;

(ix) oversee and direct the preparation of cash flow statements and to assist in the dissemination of financial and other information in these proceedings;

(x) receive, collect and take possession of all monies and accounts now owed or hereafter owing to any one or more of the Remaining Applicants, including proceeds payable pursuant to sales of Property;

(xi) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property or business of the Remaining Applicants, whether in the Monitor's name or in the name and on behalf any one or more of the Remaining Applicants;

(xii) initiate, prosecute and continue the prosecution of any and all proceedings on behalf of one or more of the Remaining Applicants and to settle or compromise any such proceedings or claims. For greater certainty, such authority shall include the ability to represent the Remaining Applicants in any negotiations or mediation with respect to such claims of the Remaining Applicants. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceedings;

(xiii) exercise any rights which the Remaining Applicants may have;

(xiv) provide instruction and direction to the advisors of the Remaining Applicants;

(xv) make any distribution or payments required under any Order in these proceedings; and

(xvi) exercise any other incidental rights or powers which the Remaining Applicants may have, including rights or powers available to the Remaining Applicants under the terms of the Initial Order and the Companies' Creditors Arrangement Act as applicable, as deemed reasonable and appropriate by the Monitor.

19. No provision in this Order is intended to appoint the Monitor as an officer, director or employee of any of the Remaining Applicants. Additionally, nothing in this Order shall constitute or be deemed to constitute the Monitor as a receiver, assignee, liquidator, or receiver and manager of any of the Remaining Applicants or a successor employer and that any distributions made to creditors of the Remaining Applicants and any actions taken by the Monitor in furtherance to the directions given in this Order or previous Orders will be deemed to have been made by the Remaining Applicants, as applicable.

20. The Remaining Applicants, and their current and former shareholders, officers, directors, agents and representatives shall fully co-operate with the Monitor in the exercise of its powers and discharge of its duties and obligations under this Order or any other Order of the Court.

21. The Monitor shall continue to have the benefit of all of the protections and priorities as set out in the Initial Order and any such protections and priorities shall apply to the Monitor in fulfilling its duties under this Order or in carrying out the provisions of this Order.

ASSIGNMENT OF GRAND RAPIDS ACCOUNTS RECEIVABLE AND RELATED CLAIMS

22. Effective as of the filing of the Camp Monitor's Certificate, any and all right, title and interest:

(a) of CNC and Heart Lake Canada North Group GP ("**Heart Lake**") to accounts receivable pursuant to or arising from the Services Agreement No. 4600005905 made between Grand Rapids Pipeline Limited Partnership ("**Grand Rapids**") and Heart Lake effective November 4, 2014;

(b) of CNC, 137 and Wandering River Properties Ltd. ("**Wandering River**") to accounts receivable pursuant to or arising from the Lease Agreement made among 137, Wandering River and Grand Rapids effective October 1, 2014;

(c) of Heart Lake, 137 and Wandering River in and to the proceedings of the Court of Queen's Bench of Alberta Action No. 1701 – 16910 (the "**Grand Rapids Action**") in addition to all claims of whatsoever nature or kind which 137 now has or may have hereafter in relation to the Grand Rapids Action, including, but not limited to, any and all rights to collect and receive any amounts awarded pursuant to a judgment or any benefits that may arise from a settlement of the Grand Rapids Action

are assigned and transferred over to DJ.

23. Upon filing of this Camp Monitor's Certificate:

(a) the Clerk of the Court of Queen's bench is hereby authorized and directed to amend the style of cause of the Grand Rapids Action to substitute DJ as Plaintiff for Heart Lake, Wandering River and 137; and

(b) DJ is hereby permitted and authorized to take up and continue proceedings in the Grand Rapids Action in its own name and at its own expense.

TRANSFER OF CNRL ACCOUNTS RECEIVABLE AND RELATED CLAIMS

24. The parties to the Camp Transaction are authorized to amend the Camp Transaction so that Campcorp's right, title, and interest in and to its accounts receivable with Canadian Natural Resources Limited ("**CNRL**") arising from services and materials provided to or in connection with building of CNRL's North Kirby Camp and Wooden House Camp stay with Campcorp and are not removed from Campcorp prior to the shares of Campcorp being sold as part of the Camp Transaction.

FOREIGN ASSISTANCE

25. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order.

NO PROCEEDINGS AGAINST THE MONITOR

26. No proceeding or enforcement process in any court or tribunal, shall be commenced or continued against the Monitor except with the written consent of the Monitor or with leave of this Court.

SEALING THE CONFIDENTIAL REPLACEMENT SCHEDULE, CONFIDENTIAL SUPPLEMENTS TO THE ELEVENTH, TWELFTH AND THIRTEENTH REPORT

27. The Confidential Replacement Schedule, the Confidential Supplements to the, Eleventh, Twelfth and Thirteenth Report shall be sealed on the Court file until further order of this Court, notwithstanding Division 4 of Part 6 of the Alberta Rules of Court.

28. The Clerk of this Honourable Court shall file the Confidential Replacement Schedule, the Confidential Supplements to the Eleventh, Twelfth and Thirteenth Report in sealed envelopes that set out the style of cause of these proceedings and states that:

THIS ENVELOPE CONTAINS CONFIDENTIAL MATERIALS FILED BY ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor of CANADA NORTH GROUP INC., et al. THE CONFIDENTIAL MATERIALS ARE SEALED PURSUANT TO AN ORDER ISSUED BY JUSTICE K. D. Nielsen ON April 20, 2018 UNTIL FURTHER ORDER OF THIS COURT.

APPROVAL OF REPORTS AND ACTIVITIES

29. The Tenth to and including the Fourteenth Reports of the Monitor, and any Confidential Supplements and Schedules prepared in connection therewith, and the activities of the Monitor outlined therein, are hereby approved provided, however, that only the Monitor in its personal capacity and only with respect to its own personal liability shall be entitled to rely upon or utilize in any such approval.

"K. G. Nielsen"

J.C.Q.B.A.

SCHEDULE A

Form of Monitor's Certificate

COURT FILE NUMBER	1703 12327
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	Edmonton
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. and 1919209 ALBERTA LTD.
DOCUMENT	**Monitor's Certificate**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DUNCAN CRAIG LLP Suite 2800, 10060 Jasper Avenue Edmonton, Alberta T5J 3V9 Attn: Darren R. Bieganek, QC Phone: 780.441.4386 Fax: 780.428.9683 Email: dbieganek@dcllp.om

RECITALS

A. Pursuant to an Order of the Honourable Justice K.G. Nielsen of the Court of Queen's Bench of Alberta, Judicial District of Edmonton (the "Court") dated July 5, 2017, Ernst & Young Inc. was appointed as the Monitor of CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. and 1919209 ALBERTA LTD. (collectively, the "**Debtor**").

B. Pursuant to an Order of the Court dated April 20, 2018, the Court approved the sale transaction (the "**Winterburn Transaction**") contemplated by an agreement of purchase and sale (the "**Winterburn Sale Agreement**") made between 137 and 2007062 Alberta Ltd. or nominee (the "**Winterburn Purchaser**") dated February 17, 2018 and appended as Schedule "D" to the Confidential Supplement to the 11th Report of Ernst & Young Inc. in its capacity as Monitor of the Applicant (the "**Monitor**") dated March 12, 2018 and subsequently amended by the Purchaser Condition Removal and Second Amending Agreement dated March 23, 2018 and appended to Schedule "**A**" of the Confidential Supplement to the Twelfth Report of the Receiver dated April 9, 2018, which provided for the vesting in the Winterburn Purchaser (or its nominee) of 137's right, title and interest in and to the land and improvements (the "**Winterburn Property**") described in the Winterburn Sale Agreement which vesting is to be effective with respect to the Winterburn Property upon the delivery by the Monitor to the Winterburn Purchaser of a certificate confirming (i) the payment by the Winterburn Purchaser of the Purchase Price for the Winterburn Property; (ii) that the conditions to Closing as set out in sections 5 and 6 of the Winterburn Sale Agreement have been satisfied or waived by 137, the Monitor and the Winterburn Purchaser; and (iii) the Winterburn Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Winterburn Sale Agreement.

THE MONITOR CERTIFIES the following:

1. The Winterburn Purchaser (or its nominee) has paid and 137 has received the Purchase Price for the Winterburn Property payable on the Closing Date pursuant to the Winterburn Sale Agreement;

2. The conditions to Closing as set out in sections 5 and 6 of the Winterburn Sale Agreement have been satisfied or waived by 137, the Monitor and the Winterburn Purchaser (or its nominee); and

3. The Transaction has been completed to the satisfaction of the Monitor.

4. This Certificate was delivered by the Monitor at **[Time]** on **[Date]**.

Ernst & Young Inc., in its capacity as Monitor of the Debtor and not in its personal capacity.

Per:________________________

Name:

Title:

SCHEDULE B

Winterburn Encumbrances

1. Registration 102 253 454: Caveat re: Lease Interest in favour of Experienced Equipment Sales & Rental registered on July 21, 2010.

2. Registration 112 394 192: Mortgage in favour of 506221 Alberta Ltd. registered on December 7, 2011.

3. Registration 162 322 778: Mortgage in favour of Northland Mortgage & Investment Corporation registered on November 16, 2016.

4. Registration 162 322 779: Caveat re: Assignment of Rents and Leases in favour of Northland Mortgage & Investment Corporation registered on November 16, 2016.

5. Registration 172 101 430: Mortgage in favour of Canadian Western Bank registered on April 27, 2017.

SCHEDULE C

Winterburn Permitted Encumbrances

1. Registration 022 349 944: Caveat re Lease in favour of TM Mobile Inc. registered on September 17, 2002.

TAB 3

Most Negative Treatment: Check subsequent history and related treatments.

2000 ABCA 285
Alberta Court of Appeal

Blue Range Resource Corp., Re

2000 CarswellAlta 1145, 2000 ABCA 285, [2000] A.J. No. 1232, [2001] 2 W.W.R. 477, 100 A.C.W.S. (3d) 956, 193 D.L.R. (4th) 314, 234 W.A.C. 138, 271 A.R. 138, 87 Alta. L.R. (3d) 352

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended; and in the matter of Blue Range Resources Corporation; Enron Canada Corp., and the Creditor's Committee (Appellants/Appellants) and National Oil-well Canada Ltd. et al. (Respondents/Respondents)

Russell, Sulatycky, Wittmann JJ.A.

Heard: June 15, 2000
Judgment: October 24, 2000
Docket: Calgary Appeal 99-18564, 99-18565, 99-18566, 99-18567, 99-18568, 99-18569, 99-18570, 99-18571, 99-18802

Proceedings: affirmed *Blue Range Resource Corp., Re* (1999), 1999 CarswellAlta 1053, 251 A.R. 1 (Alta. Q.B.)

Counsel: *A. Robert Anderson* and *Scott J. Burrell*, for Enron Canada Corp. and Creditors' Committee.
S. Collins, for TransAlta Utilities Corporation.
D.W. Dear, for Rigel Oil & Gas Ltd.
D. Mann, for Barrington Petroleum Ltd. and PetroCanada Oil & Gas.
K.E. Staroszik, for Founders Energy Ltd.
J.N. Thom, for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.3 Arrangements
    XIX.3.b Approval by court
      XIX.3.b.iv Miscellaneous

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.5 Miscellaneous

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — Claims bar date was set during which creditors could prove claims — Notices of claim filed after claims bar date by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission

to file or amend claims after expiry of claims bar date — Applications were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed — Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by Court — Miscellaneous issues
Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — Claims bar date was set during which creditors could prove claims — Notices of claim filed after claims bar date by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission to file or amend claims after expiry of claims bar date — Applications were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed — Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Wittmann J.A.*:

Allen v. Sir Alfred McAlpine & Sons Ltd., [1968] 2 Q.B. 229, [1968] 1 All E.R. 543 (Eng. C.A.) — applied

Cohen, Re (1956), 19 W.W.R. 14, 3 D.L.R. (2d) 528, 36 C.B.R. 21 (Alta. C.A.) — considered

Hogan v. Kolisnyk, [1983] 3 W.W.R. 481, 25 Alta. L.R. (2d) 17, 43 A.R. 17 (Alta. Q.B.) — considered

Kuziw v. Kucheran Estate, 2000 ABCA 226 (Alta. C.A.) — considered

Lethbridge Motors Co. v. American Motors (Can.) Ltd. (1987), 53 Alta. L.R. (2d) 326, 20 C.P.C. (2d) 11, 79 A.R. 321, 40 D.L.R. (4th) 544 (Alta. C.A.) — considered

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73 (B.C. S.C.) — distinguished

Mount James Mines (Que.) Ltd., Re (1980), 28 O.R. (2d) 271, 33 C.B.R. (N.S.) 227, 110 D.L.R. (3d) 80 (Ont. Bktcy.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R.

(3d) 265 (B.C. C.A. [In Chambers]) — considered

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership (1993), 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn.) — considered

Smoky River Coal Ltd., Re, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — considered

Specialty Equipment Cos. Inc., Re (1993), 159 B.R. 236 (U.S. Bankr. N.D. Ill.) — considered

W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada (1979), 9 Alta. L.R. (2d) 232, 19 A.R. 196, [1980] I.L.R. 1-1210 (Alta. Dist. Ct.) — considered

312630 British Columbia Ltd. v. Alta Surety Co., 30 C.C.L.I. (2d) 165, 10 B.C.L.R. (3d) 84, [1995] 10 W.W.R. 100, 23 C.L.R. (2d) 273, 61 B.C.A.C. 208, 100 W.A.C. 208 (B.C. C.A.) — applied

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — considered

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

s. 6 — considered

s. 12(2)(a)(iii) — referred to

Insurance Act, R.S.A. 1980, c. I-5
s. 205 — referred to

s. 211 — referred to

s. 385 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — considered

R. 244(4) [en. Alta. Reg. 234/94] — considered

Federal Rules of Bankruptcy Procedure (U.S.)
Generally — referred to

R. 9006(b)(1) — considered

APPEAL by creditor EC Corp. and creditors committee from judgment reported at (1999), 251 A.R. 1 (Alta. Q.B.), permitting creditors to file notices of claim, or amended claims, after expiry of claims bar date.

The judgment of the court was delivered by *Wittmann J.A.*:

Introduction

1 The *Companies' Creditors Arrangement Act*, R.S.A. 1985, c. C-36, as amended ("*CCAA*"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

2 In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the *CCAA* distribution.

Facts

3 Blue Range sought and received court protection from its creditors under the *CCAA* on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P.01, A.B.P.06). Under this procedure $270,000,000 in claims were filed.

4 The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

5 The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result? (A.B.928).

Judgment Below

6 The chambers judge found that the applicable section of the *CCAA*, s. 12(2)(iii) did not mandate a claims procedure. He stated that preserving certainty in the *CCAA* process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non- compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a *CCAA* proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

7 Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the *United States Bankruptcy Code*, *Federal Rules of Bankruptcy Procedure*, for Chapter 11 Reorganization Cases, ("*U.S. Bankruptcy Rules*") the chambers judge chose to incorporate the test in place under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the *BIA* was appropriate. Under the *BIA*, late claims are permitted under almost any circumstance provided

no injustice is done to other creditors. A late filing creditor under the *BIA* may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

8 It has been recently held by this court that decisions of a *CCAA* supervising judge should only be interfered with in clear cases. Deference to a *CCAA* supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) (cited with approval by Hunt, J.A. in *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.)) as follows at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made...
>
> ...
>
> Orders depend on a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA.

The chambers judge was exercising his discretion under the *CCAA* in granting an extension of the claims bar dates. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

Analysis

9 As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the individual creditors. The order dated April 6, 1999 stated in paragraph 2:

> Claims not proven in accordance with the procedures set out in Schedules "A" and "B" shall be deemed forever barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P.01)

The first page of Schedule "A" stated in part:

> A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be <u>forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.</u>
>
> [Emphasis added] (A.B.P.03).

The language used in Schedule "A" goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the *CCAA* has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

10 It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to "smoke out" the creditors. I am dubious that the severe wording of the claims bar orders is effective to "smoke out" the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

The Appropriate Criteria

11 The appellants advocated the adoption of the criteria under the *U.S. Bankruptcy Rules*, Chapter 11, while the respondents favoured either the application of the tests under the *BIA* or some blending of the two standards.

12 Rule 9006 of the *U.S. Bankruptcy Rules* deals with the extension of time in these circumstances. The relevant portion of the Rule states:

> 9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The key phrase in this section is "excusable neglect". In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn. 1993) the U.S. Supreme Court dealt with the interpretation of this phrase. In *Pioneer*, the creditor's attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to "inadvertent delays" (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. *Specialty Equipment Cos. Inc., Re*, 159 B.R. 236 (U.S. Bankr. N.D. Ill. 1993).

13 The Canadian approach under the *BIA* has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the *BIA* when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: *Mount James Mines (Que.) Ltd., Re* (1980), 110 D.L.R. (3d) 80 (Ont. Bktcy.). The Canadian standard under the *BIA* is, therefore, less arduous than that applied under the *U.S. Bankruptcy Rules*.

14 I accept that some guidance can be gained from the *BIA* approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in *CCAA* proceedings. But I also take some guidance from the *U.S. Bankruptcy Rules* standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the *BIA* and *U.S. Bankruptcy Rules* approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

15 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the *CCAA*. Through oversight, the applicant Lindsay was not sent the relevant *CCAA* materials by APCL and was not included in the *CCAA* proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the *CCAA* proceedings became aware of

them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking permission to sue APCL as a guarantor, potentially recovering considerably more than those creditors who participated in the *CCAA* process.

16 After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para 19). She then went on to conclude that Lindsay preferred not to participate in the *CCAA* process and chose to take his chances later on.

17 In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the *CCAA* and the terms of the plan" (para 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the *CCAA* proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

18 While *Lindsay* is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

19 There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts' treatment of delays in the prosecution of actions and the late filing of notices of claim to insurers.

20 In *Lethbridge Motors Co. v. American Motors (Can.) Ltd.* (1987), 53 Alta. L.R. (2d) 326 (Alta. C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543 (Eng. C.A.) where Salmon L.J. said at 561:

> In order for the application to succeed the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was "necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution" (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the *Alberta Rules of Court* in 1994. Rule 244(4) now states that proof of inordinate and inexcusable delay constitutes *prima facie* evidence of serious prejudice: *Kuziw v. Kucheran Estate*, 2000 ABCA 226 (Alta. C.A.).

21 Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the *Insurance Act*, R.S.A. 1980, c. I-5

states:

> 205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to by done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

22 Similar wording is also found in ss. 211 and 385 of the *Insurance Act* and similar legislation exists throughout the common law provinces.

23 When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: *Hogan v. Kolisnyk* (1983), 25 Alta. L.R. (2d) 17 (Alta. Q.B.). In *Hogan* the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The "noncomplying" party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

24 Considering whether the insurer has suffered any prejudice, the court in *Hogan* quoted from a decision of Stevenson, D.C.J. in *W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada* (1979), 9 Alta. L.R. (2d) 232 (Alta. Dist. Ct.) at 237 where Stevenson, D.C.J. said "[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice". In *312630 British Columbia Ltd. v. Alta Surety Co.* (1995), 10 B.C.L.R. (3d) 84 (B.C. C.A.) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

25 These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact of late notice or delays in particular processes.

26 Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

National-Oilwell Canada Ltd. ("National")

28 National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

Campbell's Industrial Supply Ltd. ("Campbell's")

29 Campbell's initial claim in the amount of $14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to $23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

TransAlta Utilities Corporation ("TransAlta")

30 TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B.432-434). TransAlta was permitted to file its total claim of $120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the *CCAA* process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

Petro-Canada Oil and Gas ("PCOG")

31 PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to secured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

32 Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of $223,940.06 was submitted prior to the relevant date. Barrington received a Notice of Dispute of Claim which approved the claim to the extent of $57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B.549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

Rigel Oil & Gas Ltd. ("Rigel")

33 The full amount of Rigel's Notice of Claim was $146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

Halliburton Group Canada Inc. ("Haliburton")

34 Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the *CCAA*

TAB 3

Most Negative Treatment: Check subsequent history and related treatments.

2000 ABCA 285
Alberta Court of Appeal

Blue Range Resource Corp., Re

2000 CarswellAlta 1145, 2000 ABCA 285, [2000] A.J. No. 1232, [2001] 2 W.W.R. 477, 100 A.C.W.S. (3d) 956, 193 D.L.R. (4th) 314, 234 W.A.C. 138, 271 A.R. 138, 87 Alta. L.R. (3d) 352

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended; and in the matter of Blue Range Resources Corporation; Enron Canada Corp., and the Creditor's Committee (Appellants/Appellants) and National Oil-well Canada Ltd. et al. (Respondents/Respondents)

Russell, Sulatycky, Wittmann JJ.A.

Heard: June 15, 2000
Judgment: October 24, 2000
Docket: Calgary Appeal 99-18564, 99-18565, 99-18566, 99-18567, 99-18568, 99-18569, 99-18570, 99-18571, 99-18802

Proceedings: affirmed *Blue Range Resource Corp., Re* (1999), 1999 CarswellAlta 1053, 251 A.R. 1 (Alta. Q.B.)

Counsel: *A. Robert Anderson* and *Scott J. Burrell*, for Enron Canada Corp. and Creditors' Committee.
S. Collins, for TransAlta Utilities Corporation.
D.W. Dear, for Rigel Oil & Gas Ltd.
D. Mann, for Barrington Petroleum Ltd. and PetroCanada Oil & Gas.
K.E. Staroszik, for Founders Energy Ltd.
J.N. Thom, for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — Claims bar date was set during which creditors could prove claims — Notices of claim filed after claims bar date by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission

to file or amend claims after expiry of claims bar date — Applications were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed — Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by Court — Miscellaneous issues
Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — Claims bar date was set during which creditors could prove claims — Notices of claim filed after claims bar date by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission to file or amend claims after expiry of claims bar date — Applications were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed — Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Wittmann J.A.*:

Allen v. Sir Alfred McAlpine & Sons Ltd., [1968] 2 Q.B. 229, [1968] 1 All E.R. 543 (Eng. C.A.) — applied

Cohen, Re (1956), 19 W.W.R. 14, 3 D.L.R. (2d) 528, 36 C.B.R. 21 (Alta. C.A.) — considered

Hogan v. Kolisnyk, [1983] 3 W.W.R. 481, 25 Alta. L.R. (2d) 17, 43 A.R. 17 (Alta. Q.B.) — considered

Kuziw v. Kucheran Estate, 2000 ABCA 226 (Alta. C.A.) — considered

Lethbridge Motors Co. v. American Motors (Can.) Ltd. (1987), 53 Alta. L.R. (2d) 326, 20 C.P.C. (2d) 11, 79 A.R. 321, 40 D.L.R. (4th) 544 (Alta. C.A.) — considered

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73 (B.C. S.C.) — distinguished

Mount James Mines (Que.) Ltd., Re (1980), 28 O.R. (2d) 271, 33 C.B.R. (N.S.) 227, 110 D.L.R. (3d) 80 (Ont. Bktcy.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R.

(3d) 265 (B.C. C.A. [In Chambers]) — considered

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership (1993), 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn.) — considered

Smoky River Coal Ltd., Re, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — considered

Specialty Equipment Cos. Inc., Re (1993), 159 B.R. 236 (U.S. Bankr. N.D. Ill.) — considered

W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada (1979), 9 Alta. L.R. (2d) 232, 19 A.R. 196, [1980] I.L.R. 1-1210 (Alta. Dist. Ct.) — considered

312630 British Columbia Ltd. v. Alta Surety Co., 30 C.C.L.I. (2d) 165, 10 B.C.L.R. (3d) 84, [1995] 10 W.W.R. 100, 23 C.L.R. (2d) 273, 61 B.C.A.C. 208, 100 W.A.C. 208 (B.C. C.A.) — applied

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — considered

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

s. 6 — considered

s. 12(2)(a)(iii) — referred to

Insurance Act, R.S.A. 1980, c. I-5
s. 205 — referred to

s. 211 — referred to

s. 385 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — considered

R. 244(4) [en. Alta. Reg. 234/94] — considered

Federal Rules of Bankruptcy Procedure (U.S.)
Generally — referred to

R. 9006(b)(1) — considered

APPEAL by creditor EC Corp. and creditors committee from judgment reported at (1999), 251 A.R. 1 (Alta. Q.B.), permitting creditors to file notices of claim, or amended claims, after expiry of claims bar date.

The judgment of the court was delivered by *Wittmann J.A.*:

Introduction

1 The *Companies' Creditors Arrangement Act*, R.S.A. 1985, c. C-36, as amended ("*CCAA*"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

2 In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the *CCAA* distribution.

Facts

3 Blue Range sought and received court protection from its creditors under the *CCAA* on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P.01, A.B.P.06). Under this procedure $270,000,000 in claims were filed.

4 The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

5 The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result? (A.B.928).

Judgment Below

6 The chambers judge found that the applicable section of the *CCAA*, s. 12(2)(iii) did not mandate a claims procedure. He stated that preserving certainty in the *CCAA* process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non- compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a *CCAA* proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

7 Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the *United States Bankruptcy Code*, *Federal Rules of Bankruptcy Procedure*, for Chapter 11 Reorganization Cases, ("*U.S. Bankruptcy Rules*") the chambers judge chose to incorporate the test in place under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the *BIA* was appropriate. Under the *BIA*, late claims are permitted under almost any circumstance provided

no injustice is done to other creditors. A late filing creditor under the *BIA* may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

8 It has been recently held by this court that decisions of a *CCAA* supervising judge should only be interfered with in clear cases. Deference to a *CCAA* supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) (cited with approval by Hunt, J.A. in *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.)) as follows at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made...
>
> ...
>
> Orders depend on a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA.

The chambers judge was exercising his discretion under the *CCAA* in granting an extension of the claims bar dates. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

Analysis

9 As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the individual creditors. The order dated April 6, 1999 stated in paragraph 2:

> Claims not proven in accordance with the procedures set out in Schedules “A” and “B” shall be deemed forever barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P.01)

The first page of Schedule “A” stated in part:

> A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be <u>forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.</u>
>
> [Emphasis added] (A.B.P.03).

The language used in Schedule “A” goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the *CCAA* has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

10 It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to “smoke out” the creditors. I am dubious that the severe wording of the claims bar orders is effective to “smoke out” the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to “forever bar” a claim without a saving provision. That saving provision could be simply worded with a proviso such as “without leave of the court”, which appears to be not only what was contemplated, but what in fact occurred here.

The Appropriate Criteria

11 The appellants advocated the adoption of the criteria under the *U.S. Bankruptcy Rules*, Chapter 11, while the respondents favoured either the application of the tests under the *BIA* or some blending of the two standards.

12 Rule 9006 of the *U.S. Bankruptcy Rules* deals with the extension of time in these circumstances. The relevant portion of the Rule states:

> 9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The key phrase in this section is "excusable neglect". In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn. 1993) the U.S. Supreme Court dealt with the interpretation of this phrase. In *Pioneer*, the creditor's attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to "inadvertent delays" (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. *Specialty Equipment Cos. Inc., Re*, 159 B.R. 236 (U.S. Bankr. N.D. Ill. 1993).

13 The Canadian approach under the *BIA* has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the *BIA* when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: *Mount James Mines (Que.) Ltd., Re* (1980), 110 D.L.R. (3d) 80 (Ont. Bktcy.). The Canadian standard under the *BIA* is, therefore, less arduous than that applied under the *U.S. Bankruptcy Rules*.

14 I accept that some guidance can be gained from the *BIA* approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in *CCAA* proceedings. But I also take some guidance from the *U.S. Bankruptcy Rules* standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the *BIA* and *U.S. Bankruptcy Rules* approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

15 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the *CCAA*. Through oversight, the applicant Lindsay was not sent the relevant *CCAA* materials by APCL and was not included in the *CCAA* proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the *CCAA* proceedings became aware of

them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking permission to sue APCL as a guarantor, potentially recovering considerably more than those creditors who participated in the *CCAA* process.

16 After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para 19). She then went on to conclude that Lindsay preferred not to participate in the *CCAA* process and chose to take his chances later on.

17 In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the *CCAA* and the terms of the plan" (para 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the *CCAA* proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

18 While *Lindsay* is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

19 There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts' treatment of delays in the prosecution of actions and the late filing of notices of claim to insurers.

20 In *Lethbridge Motors Co. v. American Motors (Can.) Ltd.* (1987), 53 Alta. L.R. (2d) 326 (Alta. C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543 (Eng. C.A.) where Salmon L.J. said at 561:

> In order for the application to succeed the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was "necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution" (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the *Alberta Rules of Court* in 1994. Rule 244(4) now states that proof of inordinate and inexcusable delay constitutes *prima facie* evidence of serious prejudice: *Kuziw v. Kucheran Estate*, 2000 ABCA 226 (Alta. C.A.).

21 Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the *Insurance Act*, R.S.A. 1980, c. I-5

states:

> 205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to by done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

22 Similar wording is also found in ss. 211 and 385 of the *Insurance Act* and similar legislation exists throughout the common law provinces.

23 When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: *Hogan v. Kolisnyk* (1983), 25 Alta. L.R. (2d) 17 (Alta. Q.B.). In *Hogan* the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The "noncomplying" party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

24 Considering whether the insurer has suffered any prejudice, the court in *Hogan* quoted from a decision of Stevenson, D.C.J. in *W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada* (1979), 9 Alta. L.R. (2d) 232 (Alta. Dist. Ct.) at 237 where Stevenson, D.C.J. said "[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice". In *312630 British Columbia Ltd. v. Alta Surety Co.* (1995), 10 B.C.L.R. (3d) 84 (B.C. C.A.) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

25 These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact of late notice or delays in particular processes.

26 Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

National-Oilwell Canada Ltd. ("National")

28 National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

Campbell's Industrial Supply Ltd. ("Campbell's")

29 Campbell's initial claim in the amount of $14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to $23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

TransAlta Utilities Corporation ("TransAlta")

30 TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B.432-434). TransAlta was permitted to file its total claim of $120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the *CCAA* process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

Petro-Canada Oil and Gas ("PCOG")

31 PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to secured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

32 Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of $223,940.06 was submitted prior to the relevant date. Barrington received a Notice of Dispute of Claim which approved the claim to the extent of $57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B.549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

Rigel Oil & Gas Ltd. ("Rigel")

33 The full amount of Rigel's Notice of Claim was $146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

Halliburton Group Canada Inc. ("Haliburton")

34 Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the *CCAA*

proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26, 1999 requesting that its claim be included in the *CCAA* proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

Founders Energy Ltd. ("Founders")

35 Founders filed its claim prior to the relevant date, but, due to an oversight, claimed as an unsecured rather than a secured creditor. After filing its initial Notice of Claim, Founders received a Notice of Dispute from Blue Range. Within the 15 day appeal period, but outside the claims bar date, Founders then filed an amended Notice of Claim claiming a secured interest in the sum of $365,472.39, on July 26, 1999.

Prejudice

36 The timing of these proceedings is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late and late amended claims are allowed. The total of all late and amended claims of the late claimants, secured and unsecured, is approximately $1,175,000. As set out above, in the initial claims bar order, the relevant date was 5:00 p.m. May 7, 1999. This date was extended for joint venture partners to 5:00 p.m. on June 15, 1999. The Plan of Arrangement, sponsored by Canadian Natural Resources Ltd. ("CNRL"), was voted on and passed on July 23, 1999. Status as a creditor, the classification as secured or unsecured, and the amount of a creditor's claim, are relevant to voting: s.6 *CCAA*.

37 Enron and the Creditor's Committee claim that they would be prejudiced if the late claims were allowed because, had they known late claims might be permitted without rigorous criteria for allowance, they might have voted differently on the Plan of Arrangement. Enron in particular submits that it would have voted against the CNRL Plan of Arrangement, thus effectively vetoing the plan, if it had known that late claims would be allowed. This bald assertion after the fact was not sufficient to compel the chambers judge to find this would in fact have been Enron's response. Nowhere else in the evidence is there any indication that late claimants being allowed would have impacted the voting on the different proposed Plans of Arrangement. In addition, materiality is relevant to the issue of prejudice. The relationship of $1,175,000 (which is the total of late claims) to $270,000,000 (which is the total of claims filed within time) is .435 per cent.

38 Also, the contrary is indicated in the Third Interim Report of the Monitor where it is shown in Schedule D-1 (A.B.269) that $2 million was held as an estimate of unsecured disputed claims. Therefore, when considering which Plan of Arrangement to vote for, Enron, and all of the creditors, would have been aware that $2 million could still be legitimately allowed as unsecured claims, and would have been able to assess that potential effect on the amount available for distribution.

39 Further, the late claimants were well known to the Monitor and all of the other creditors. The evidence discloses that officials at Enron received an e-mail from the Monitor on May 18, 1999 indicating that there were several creditors who had filed late, after the first deadline of May 7, and the Monitor thought that even though they were late the court would likely allow them (A.B.1040). Finally, all of the late claimants were on the distribution list as having potential claims. (A.B. 9-148). It cannot be said that these late claimants were lying in the weeds waiting to pounce. On the contrary, all parties were fully aware of who had potential claims, especially Enron and the Creditors Committee.

40 In a *CCAA* context, as in a *BIA* context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in *312630 British Columbia Ltd.* It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

Summary of Criteria

41 In considering claims filed or amended after a claims bar date in a claims bar order, a *CCAA* supervising judge should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Conclusion

42 Applying the criteria established, I find that the conclusion reached by the chambers judge ought not to be disturbed, and the late claims filed by the respondents should be permitted under the *CCAA* proceedings. The appeal is dismissed.

Appeal dismissed.

End of Document

TAB 4

2001 CarswellAlta 1209
Supreme Court of Canada

Blue Range Resource Corp., Re

2001 CarswellAlta 1209, 2001 CarswellAlta 1210, [2000] S.C.C.A. No. 648, [2001] S.C.R. viii, 266 W.A.C. 179 (note), 283 N.R. 391 (note), 299 A.R. 179 (note)

Enron Canada Corp. v. Campbell's Industrial Supply Ltd., National-Oilwell Canada Ltd., Halliburton Goup Canada Inc., Petro-Canada Oil and Gas and Transalta Utilities Corporation

Binnie J., Gonthier J., Major J.

Judgment: September 27, 2001
Docket: 28332

Proceedings: Leave to appeal refused 2000 ABCA 285, 2000 CarswellAlta 1145, (sub nom. Enron Canada Corp. v. National Oil-Well Canada Ltd.) [2000] A.J. No. 1232, (sub nom. Enron Canada Corp. v. National-Oilwell Canada Ltd.) 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.); Affirmed 1999 CarswellAlta 1053, 251 A.R. 1 (Alta. Q.B.)

Counsel: None given.

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Corporations

***Binnie J., Gonthier J., Major J.*:**

1 The application for leave to appeal is dismissed with costs to the respondents, Campbell's Industrial Supply Ltd., National-Oilwell Canada Ltd., Petro-Canada Oil and Gas and Transalta Utilities Corporation.

End of Document

TAB 5

2010 ABQB 507
Alberta Court of Queen's Bench

BA Energy Inc., Re

2010 CarswellAlta 1598, 2010 ABQB 507, [2010] A.W.L.D. 4793, 192 A.C.W.S. (3d) 27, 70 C.B.R. (5th) 24

In the Matter of Section 193 of the Alberta Business Corporations Act, R.S.A. 2000, c. B-9, as amended; and in the matter of the Judicature Act, R.S.A. 2000, c. J-2, as amended,

And in the Matter of a Proposed Arrangement involving Value Creation Inc., BA Energy Inc. and the holders of common shares of Value Creation Inc.; And in the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended; and in the Matter of BA Energy Inc.

B.E. Romaine J.

Heard: June 1, 2010
Judgment: August 5, 2010*
Docket: Calgary 0801-16292

Counsel: Chris D. Simard, Kelsey J. Drozdowski for Dresser-Rand Canada, Ltd.
David LeGeyt for Ernst & Young Inc.
Howard A. Gorman, Kyle D. Kashuba for BA Energy Inc.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IX Proving claim
IX.4 Practice and procedure
IX.4.c Amendment of claim

Headnote

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Amendment of claim
Debtor entered into agreement of sale with creditor for purchase of equipment — Total purchase price was US$8,577,942.39 — Debtor paid US$7,021,918 pursuant to purchase agreement before successfully applying for protection under Companies' Creditors Arrangement Act — Some equipment was still in creditor's possession at that time — Creditor filed proof of claim with monitor claiming US$1,655,477.95 secured by undelivered equipment — Monitor advised creditor it was free to sell undelivered equipment in satisfaction of its claim — Equipment was custom made and difficult to sell — Creditor filed late amended proof of claim for unsecured claim of US$1,474,161.63 and secured claim of US$177,382 — Monitor disallowed amended claim on basis that it was late — Creditor brought application for order requiring monitor to accept late amended proof of claim — Application dismissed — Amended claim was really new claim so it was properly treated as late — It would not have been fair or equitable to accept late amended proof of claim — Late amended claim was not result of inadvertence — Creditor delayed in valuing undelivered equipment — Creditor changed nature of its claim at time when all creditors would have been aware that distribution to unsecured creditors was expected to be substantial — Allowing late amended claim would have been prejudicial to debtor and other creditors — Debtor structured plan of arrangement on basis that creditor would not be affected — There were no conditions that would have alleviated relevant prejudice — Debtor was

required to pay reasonable conduct money for employee of creditor who was cross-examined on his affidavit.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, [2001] 2 W.W.R. 477, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — followed

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73, 1994 CarswellBC 620 (B.C. S.C.) — distinguished

Look Communications Inc., Re (2005), [2006] G.S.T.C. 122, 2005 CarswellOnt 8591, 21 C.B.R. (5th) 265 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPLICATION by creditor for order requiring monitor to accept late amended proof of claim.

***B.E. Romaine J.*:**

Introduction

1 Dresser-Rand Canada, Inc. ("Dresser-Rand") applies for acceptance of its late amended proof of claim so that it may participate in a distribution to unsecured creditors pursuant to the plan of arrangement and reorganization of BA Energy Inc. ("BA Energy") under the *Companies' Creditors Arrangement Act.*

2 The issue is whether Dresser-Rand, having initially filed a claim which it characterized as fully secured on the basis of holding assets that it described as having a value equal to its claim, is entitled to file a late amended claim that now alleges that a large portion of the claim is unsecured.

Facts

3 In 2006, BA Energy had entered into an agreement of sale with Dresser-Rand for the purchase of a wet-gas compressor and ancillary equipment for use at the proposed Heartland Upgrader, a heavy oil upgrader that BA Energy was in the process of constructing at a site near Fort Saskatchewan, Alberta. The total purchase price for this compressor was USD $8,577,942.39.

4 On December 30, 2008, BA Energy was granted an initial order under the *Companies' Creditors Arrangement Act*,R.S.C. 1985, c. C-36 as amended (the "CCAA").

5 At the time of the filing under the CCAA, BA Energy had paid USD $7,021,918 pursuant to the purchase agreement, leaving a balance owing of USD $1,651.543.63. The compressor was still in the possession of Dresser-Rand at its premises in

Edmonton, with the exception of some of the ancillary equipment which had been delivered to the proposed site of the Heartland Upgrader.

6 On March 9, 2009, counsel to Dresser-Rand enquired of counsel to BA Energy and counsel to the Monitor whether the balance of the purchase price would be paid, "failing which Dresser-Rand will be free to exercise its right of sale pursuant to the *Sale of Goods Act.*" On May 15, 2009, Dresser-Rand sent a Proof of Claim to the Monitor, signed by Dresser-Rand's General Manager in Canada, indicating that it had a secured claim for USD $1,655,477.95 and that "in respect of the said debt, we hold assets of the CCAA Debtor valued at $1,655,477.95 US as security". Under the Claims Procedure Order, claims were to be filed by June 15, 2009.

7 On August 26, 2009, BA Energy repudiated the purchase agreement and advised Dresser-Rand that it had a duty to mitigate its losses with respect to the terminated agreement.

8 In an email dated August 31, 2009, counsel to Dresser-Rand asked counsel to BA Energy to confirm that Dresser-Rand was free to deal with the compressor equipment in its possession and enquired whether BA Energy would return the parts in its possession. On the same day, counsel to BA Energy responded that Dresser-Rand could deal with the equipment subject to any requirement to act reasonably in performing its duty to mitigate and said that he would ask his client about the equipment in its possession.

9 On September 18, 2009, the Monitor advised counsel to Dresser-Rand that, in light of the repudiation, Dresser-Rand's previous claim may have been stayed and that Dresser-Rand may have the right to file "Subsequent Claim" as set out in the Claims Procedure Order. The Monitor also told Dresser-Rand that BA Energy believed that the ancillary equipment in its possession was worth about $1 million. Counsel to Dresser-Rand responded that he did not believe his client would be interested in the equipment at that price.

10 On September 22, 2009, Dresser-Rand submitted a Subsequent Claim for USD $1,651,543.63 (taking into account a further invoice paid by BA Energy). Again, Dresser-Rand in its claim form characterized the claim as secured and, again, the claim form states that Dresser-Rand held assets of the CCAA Debtor valued at USD $1,651.543.63.

11 On December 16, 2009, the Monitor issued a Notice of Revision or Disallowance of the claim. This notice indicates that the Proof of Claim as submitted in the amount of USD $1,651,543.53 was revised and accepted at nil. The Monitor noted as follows:

> **Retained Assets**
>
> [Dresser-Rand] retained possession of certain assets as a result of the termination of the Purchase Order. In the Termination Letter the Applicant directed [Dresser-Rand] to mitigate its losses in respect of the termination of the Purchase Order. The Applicant noted in its review of [Dresser-Rand]'s Claim that the retained assets have a value in excess of the amount of [Dresser-Rand]'s Claim. Accordingly, the Applicant has revised [Dresser-Rand]'s claim to $0.00.

12 On December 18, 2009, counsel to Dresser-Rand asked to meet with counsel to BA Energy and the Monitor to discuss the reasoning behind the Notice of Revision, commenting that "(p)reviously you did not dispute our priority to the extent of what we could realize from the equipment we have in our possession." The email also notes that the compressor is custom-made equipment and that its sale may take some time.

13 On December 20, 2009, counsel to Dresser-Rand delivered a Notice of Dispute to the Monitor, with a covering letter that noted as follows:

> With respect to the enclosed Notice of Dispute, in reviewing the documentation you forwarded to Dresser-Rand Canada, Inc. in this regard, this simply may be a situation where there is misunderstanding of terminology between us. Looking at your statement about the "retained assets", you do not appear to be disputing Dresser-Rand Canada, Inc.'s right to

> retain the assets in question (being compressor equipment) and deal with it as it wishes. To this stage, we have always valued the retained assets as being worth as much or more than the debt that is owed by BA Energy Inc. to Dresser-Rand Canada, Inc. We do not believe that you should have put $0.00 beside the secured aspect of this claim in the Notice of Revision or Disallowance dated December 16, 2009.

14 The Notice of Dispute lists $1,651.543.63 under the designation "Reviewed Claim or Subsequent Claim as Disputed" and characterizes this amount as "Secured". It makes no claim on an unsecured basis. The Notice stipulates that "(t)his claim is fully secured. The Notice of Revision or Disallowance did not reflect this fact."

15 A without-prejudice conference call was held on January 6, 2010 among counsel to BA Energy, the Monitor and counsel to Dresser-Rand.

16 In an email dated January 11, 2010, the Monitor asked Dresser-Rand's counsel whether he had been able to determine the appropriate person for the Monitor to speak to with respect to the equipment in the possession of BA Energy. Counsel to Dresser-Rand responded that he had not and that he was "awaiting the letter [counsel to BA Energy] indicated last week you would be sending on the other point that deals more generally with the claim, etc."

17 On January 14, 2010, the Monitor sent counsel to Dresser Rand an email that attached a letter that he was asked to review, commenting: ... "let me know if it meets your needs before I finalize it."

18 The letter, marked "draft", reads as follows:

> As Court Appointed Monitor of BA Energy Inc. I am sending this letter to you as a follow-up to our teleconference of January 5, 2010 and to provide more clarity with respect to the Notice of Revision and Notice of Dispute between BA Energy Inc. ("BA Energy") and Dresser Rand Canada, Inc. ("DRC").
>
> <u>As agreed on our teleconference</u>, BA Energy does not dispute DRC's rights to retain the assets in question and deal with them as it wishes. <u>This right means DRC shall have no claim against BA Energy given that the value of the assets are at least as much or more than the claim amount</u>. Furthermore, I must note that DRC will accept all potential risks and rewards of its actions in dealing with the assets. For further clarity, should DRC sell the assets for an amount greater than the amount of the claim filed against BA Energy, then this excess amount benefits DRC. Should DRC sell the assets for an amount less than DRC's claim against BA Energy, DRC will not be able to claim the difference against BA Energy.
>
> *I trust this clarifies any misunderstanding between the parties.*
>
> (emphasis added)

19 Counsel to Dresser-Rand responded saying that the letter would be reviewed internally and by his client and that he would get back to the Monitor. Numerous emails ensued between counsel to Dresser-Rand and the Monitor. On January 25, 2010, counsel to Dresser-Rand advised the Monitor that "I am told that I should hear from someone in the US part of the organization tomorrow. Unfortunately, many people have become involved within my client and has made it more complex for me to get instructions."

20 In an email dated January 27, 2010, counsel to Dresser Rand advised the Monitor that:

> ...my people as of yesterday were still assessing their position, including what can be done with the part of the compressor they have and those parts which BA has in its position. Unfortunately, these machines are very custom made for a particular customer and are not readily saleable or useable for anyone else. They [sic] inquiries out to see what they can do and hope to get back to me this week.

21 On February 19, 2010 counsel to Dresser-Rand left a voice mail for the Monitor. The recording was not preserved. Counsel to Dresser-Rand in an email to his client said that in the voice mail, he enquired if BA Energy was interested in making an offer to Dresser-Rand for the compressor "with the concept being that if an acceptable cash offer was made to [Dresser-Rand] for that equipment, [Dresser Rand] would forego any further claim against [BA Energy] for the balance owing." The Monitor in an email to BA Energy said that in the voice mail, counsel to Dresser-Rand was enquiring whether BA Energy would like to acquire the compressor for an unnamed price and that "if [BA Energy] acquired this equipment then Dresser-Rand would withdraw their claim".

22 On February 23, 2010, BA Energy advised the Monitor that it did not wish to purchase the compressor. On the same day, the Monitor filed its Ninth Report with the Court and served it on the parties on the service list. The report states that BA Energy anticipated filing a plan of arrangement which would result in a recovery that would be better than a liquidation, and that it was expected that the plan would be brought to the Court for approval in mid to late March, 2010. During this time period, the Monitor and BA Energy were finalizing the sale of a key asset necessary to fund the plan and were in the course of structuring the plan.

23 On March 15, 2010, BA Energy filed and served its Notice of Motion for approval to circulate a plan of arrangement and hold a meeting of creditors. Dresser-Rand was not listed either as an affected or unaffected creditor nor was it mentioned on the list of disputed claims.

24 Apparently, counsel to Dresser-Rand had not yet been added to the service list at this time and did not receive a copy of the Ninth Report until it was posted on the Monitor's web-site on March 16, 2010. Counsel to Dresser-Rand received a copy of the plan motion materials on March 17, 2010 and requested to be put on the service list on that date. The Monitor also informed counsel to Dresser-Rand on March 17, 2010 that BA Energy was not interested in purchasing the compressor from Dresser-Rand and that it took the position that the Dresser-Rand claim had been satisfied.

25 On March 18, 2010, the Court approved the circulation of the plan of arrangement to creditors.

26 On March 26, 2010, Dresser-Rand submitted a late amended proof of claim in which it stated it had an unsecured claim of USD $1,474,161.63 and a secured claim of USD $177,382.

27 On April 5, 2010, the Monitor issued a Notice of Revision or Disallowance relating to Dresser-Rand's amended proof of claim, with a revised claim amount of zero. The Monitor set out the following as reasons for disallowance:

> Dresser-Rand's Late Amended proof of claim dated March 26, 2010, claiming an unsecured claim in the amount of $1,474,161.63 USD and a secured claim in the amount of $177,382.00 USD (the "Late Amended Claim") is barred and extinguished pursuant to the claims procedure order dated April 29, 2009 (the "Claims Procedure Order"). The Late Amended Claim is in essence the same as the Initial Claim (as defined below) submitted by Dresser-Rand, which claim has been resolved as described below.
>
> Dresser-Rand was aware of and participated in the claims process established under the Claims Procedure Order. Dresser-Rand's initial proof of claim was received by the Monitor on or about May 15, 2009, as amended to a Subsequent Claim (as defined in the Claims Procedure Order) on September 22, 2009 (the "Initial Claim") following BA Energy's repudiation of the purchase order. The Initial Claim by Dresser-Rand was for $0.00 unsecured and Dresser-Rand acknowledged it held equipment or collateral of a value equal to its claim.
>
> On December 16, 2009, the Monitor issued a notice of revision or disallowance thereby disallowing the total claim amount listed by Dresser-Rand in its Initial Claim (the "NOR"). The reason for the disallowance in the NOR was that Dresser-Rand acknowledged that it retained possession of the collateral equipment that it held in full satisfaction of the Initial Claim amounts (the "POC Satisfaction"), therefore, Dresser-Rand had no claim against BA Energy. Dresser-Rand did respond by issuing a notice of dispute on December 21, 2009 (the "NOD"); however, the NOD served to only address a "misunderstanding of terminology" on the part of Dresser-Rand regarding the classification of the claim amounts and not a dispute as to or the rejection of the POC Satisfaction. After further discussions between the parties, the Monitor sent draft correspondence to Dresser-Rand's solicitors dated January 13, 2010 affirming the POC Satisfaction, that Dresser-Rand was retaining the equipment in full satisfaction of its claim and that it had the risk and

benefit of any potential recovery. Throughout the process leading up to the Late Amended Claim, Dresser-Rand valued the collateral equipment as being worth as much or more than the debt owed by the Applicant.

BA Energy and the Monitor relied upon the proofs of claim as filed in the claims process, including the Initial Claim, in calculating the dividend in the BA Energy Plan of Arrangement filed March 10, 2010 (the "Plan"). The inclusion of the Late Amended Claim would have significantly affected BA Energy's/the Monitor's calculations and provisions contained in the Plan, and the subsequent BA Energy creditor review, consideration and implementation of the Plan.

The Dresser-Rand filing of the Late Amended Claim occurred only after distribution of the Plan proposing a 55% dividend. Allowance of the Amended Proof of Claim would: (i) circumvent the *Companies' Creditor Arrangement Act* (Canada) process, the Claims Procedure Order and provide Dresser-Rand an unjustified and improper advantage, and (ii) prejudice BA Energy and/or BA Energy's creditors generally in the pro rata or total distribution under the Plan.

28 Dresser-Rand filed a Notice of Dispute on April 8, 2010, submitting that there was no resolution of its claim as asserted by the Monitor, that it was "prudent and reasonable" for it to amend its claim on March 26, 2010 and that not accepting the claim would be prejudicial to Dresser-Rand and not prejudicial to BA Energy or its creditors. Dresser-Rand filed a Notice of Motion with respect to its claim on April 12, 2010 and served the service list.

29 The meeting of creditors was held on April 15, 2010. Only one creditor appeared in person: the rest voted by proxy. No-one voted against the plan. Counsel to Dresser-Rand read a prepared statement indicating that it had filed an amended proof of claim that may impact the other creditors if ultimately validated.

Analysis

30 Dresser-Rand submits that the amended proof of claim it filed on March 26, 2010 is not a "late claim", but merely an amendment to the September, 2009 proof of claim which was filed in a timely manner in compliance with the Claims Procedure Order. I cannot agree with this submission. The amended proof of claim purports to assert an unsecured claim for the first time, a claim that would qualify as an affected claim under the plan as opposed to the fully-secured claim previously asserted. It changes the nature of the original claim to such a degree that it must be considered a new claim and not a mere amendment.

31 Dresser-Rand initially filed its claim on the basis that it was in possession of assets of such a value as to satisfy its claim and that it was secured by its possession of such assets. It maintained that position for approximately eight months, leading the debtor and the Monitor to believe, not unreasonably, that Dresser-Rand would not be an affected creditor in a plan of arrangement. BA Energy structured its plan on that assumption. Dresser-Rand changed its approach and amended its claim to file in large part as an affected unsecured creditor at a time when it would have been clear to creditors that the distribution to unsecured creditors under a plan would be substantial, albeit prior to a formal vote by unsecured creditors on the plan.

32 While this application involves a determination of whether Dresser-Rand's late amended claim should be accepted, it is neither a clear case of a creditor "lying in the weeds" nor is it clearly the kind of late claim reviewed by Wittmann, J. A. (as he then was) in *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.), the leading authority on the assessment of late claims. However, the principles set out in *Blue Range* are relevant to the application.

33 Wittmann, J. A. set out the following as appropriate criteria for a court to apply to the assessment of late claims:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

34 In identifying these criteria and applying them to specific late claims, Wittmann, J. A. favoured a "blended approach",

taking into consideration both the standards set out under the *Bankruptcy and Insolvency Act.* and the U.S. Bankruptcy Rules, and informed by concepts drawn from the approaches taken in a variety of areas of law when dealing with late notice or delays in process. It is clear from the nature of the criteria that the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case.

A. Inadvertence and Good Faith

35 Wittmann, J.A. noted that "inadvertence" in the context of the first criterion includes carelessness, negligence or accident and is unintentional.

36 BA Energy submits that Dresser-Rand's conduct in this case cannot be described as careless, negligent or accidental, but arose from a deliberate intent to reframe its claim as an unsecured claim when it became apparent that there would be a distribution to unsecured creditors of approximately $0.55 per dollar of claim.

37 It is clear that Dresser-Rand was aware of BA Energy's process under the CCAA from shortly after the initial order and had retained counsel active on its behalf as early as March, 2009. It filed its initial proof of claim in a timely manner in May, 2009. It was aware from August, 2009 that BA Energy had repudiated the agreement but it was also clear that from March, 2009, Dresser-Rand took the position that it was free to exercise a right of sale of the equipment in its possession. I agree that it cannot be said that Dresser-Rand's amended proof of claim arose from inadvertence.

38 BA Energy alleges that Dresser-Rand has acted in bad faith in putting forth its recharacterized and amended claim only when it became apparent that it may do better as an unsecured creditor, given the level of distribution to unsecured creditors anticipated by the successful monetization of assets.

39 While there is insufficient evidence to reach the conclusion that Dresser-Rand acted in bad faith, it is true that it would have been clear to creditors in the relevant time period that a successful plan with an acceptable distribution to unsecured creditors was a strong possibility. At the least, Dresser-Rand delayed approximately eight months before taking any substantial or meaningful steps to value the assets in its possession in order to come to a valuation of its security. While Scott Kaffka, an employee of a U.S. affiliate of Dresser-Rand, suggests in his affidavits that Dresser-Rand was investigating the possibility of remarketing the equipment before January, 2010, it is also clear from the affidavits and cross-examination on them that relatively little was done in that regard until Mr. Kaffka became involved and contacted an equipment dealer to obtain an estimate of value for the compressor on January 28, 2010, some eleven months after counsel for Dresser-Rand first stated that it took the position that it was entitled to sell the equipment. It is noteworthy that on January 27, 2010, counsel to Dresser-Rand advised the Monitor that Dresser-Rand was still assessing its position, and that the opinion as to of value that Dresser-Rand relies upon was not formally prepared until March 19, 2010.

40 The consequences of the delay in adequately investigating the value of the assets it held as security for its claim, which accounts for most of the delay in filing the amended claim, must be borne by Dresser-Rand. The question of the resale value of the compressor was a question within the reasonable control of Dresser-Rand to determine.

41 The objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure order provides the debtor and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors given the financial circumstances of the debtor and that may be sanctioned by the court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a late claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

42 The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

43 Dresser-Rand was offered an opportunity to amend its claim after the purchase agreement with BA Energy was formally repudiated, and did so on September 22, 2010, confirming its initial claim with only a slight variation in amount

claimed. As late as December 21, 2009, Dresser-Rand characterized its claim as a fully-secured claim its Notice of Dispute and concedes that it believed at least to this point in time that the compressor was worth at least as much as its claim. Dresser-Rand submits that there was delay by the Monitor in responding to the amended claim, but a three-month delay in the circumstances of a large restructuring with many claims is not unusual. Dresser-Rand also submits that the Monitor should have reacted more quickly to its February 19, 2010 suggestion that it was open to accepting an unspecified cash offer from BA Energy to settle its claim. While the Monitor did not respond for roughly a month, it is clear that the Monitor was involved in preparing and filing a key report on the restructuring with the Court and also involved in a major monetization of BA Energy's assets that would subsequently fund the plan.

B. Prejudice Caused by the Delay

44 BA Energy, in consultation with the Monitor, prepared its plan in the early months of 2010 without making any provision for an unsecured deficiency claim from Dresser-Rand. Given what had been communicated among the parties with respect to Dresser-Rand's claim at this point of time, this was not unreasonable.

45 It is difficult to determine what the effect Dresser-Rand's late amended claim may have had on the decisions of creditors with respect to whether to approve the plan. All but one creditor voted on the plan by proxy, and some of those proxies were authorized before Dresser-Rand served other creditors with a Notice of Motion with respect to its revised claim on April 12, 2010. Dresser-Rand states in its brief that 16 out of 30 proxies were submitted after April 7, 2010. Therefore, roughly half of the creditors in number had already voted on the plan several days prior to receiving notice of Dresser-Rand's late claim.

46 With respect to the materiality of the claim, it would if accepted comprise approximately 5.4% of the total pool of affected creditors and, if paid from plan proceeds, would reduce the amount available to unsecured creditors from 55 cents per dollar of a claim to 53 cents per dollar of claim. The Dresser-Rand claim therefore is not as insignificant as the late claims accepted by the Court in *Blue Range*.

47 As noted in *Blue Range* at paragraph 40, the fact that creditors may receive less money if a late claim is accepted is not prejudice relative to the second criterion. The test is whether creditors by reason of the late claim lost a realistic opportunity to do anything that they otherwise might have done. In this case, it is not possible to determine if any of the proxy votes cast in favour of the plan would have been affected by knowledge of the late claim. It is only apparent that a significant number of creditors were not aware of the claim when they decided how to vote.

48 During the sanction hearing of April 16, 2010, BA Energy indicated that, instead of reducing the distribution to other creditors if Dresser-Rand's late claim was accepted by the Court, BA Energy would find another way to pay the required distribution to Dresser-Rand.

49 Consideration of prejudice is not restricted to prejudice to other creditors. The second criterion also requires consideration of prejudice to the debtor company or other interested parties: *Blue Range* at paras. 14 and 18. The timing of the late claim with respect to the stage of proceedings is a key consideration in determining whether there has been prejudice: *Blue Range* at para. 36.

50 The parties prejudiced by this late amended claim are BA Energy and its parent Value Creation, BA Energy's largest secured creditor. Value Creation refrained from requiring BA Energy to pay all of the proceeds of the assets it had monetized on Value Creation's secured claim and allowed BA Energy to use a portion of those proceeds to distribute to other creditors under the plan. While there is no doubt that Value Creation benefits from BA Energy's restructuring under the CCAA as a continuing entity with surviving assets, the postponement of a portion of Value Creation's secured claim was arrived at in consideration of the status of creditor claims as they had been filed, without Dresser-Rand's late amended claim.

51 It is not surprising that BA Energy did not attempt to alter its plan after having received notice of Dresser-Rand's amended proof of claim. Given the negotiations that necessarily proceed a vote on the plan, the status of proxy voting and the limited time to the creditors' meeting, BA Energy did not have a realistic opportunity to amend its plan to include Dresser-Rand without the risk of losing support from other creditors and jeopardizing the plan.

52 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.) at para. 74, Huddart, J. held, in a case where there would have been no effect on other creditors if a late claim was accepted as it would be paid from post-arrangement revenue, that it was fair to refuse to grant leave to the late creditor to commence an action against the debtor company for a number of reasons, noting that "(a) CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for himself ... As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything."

53 While the facts of this case are distinguishable from the facts before the Court in *Lindsay*, Dresser-Rand filed a very late revised claim after months of relative lack of diligence with respect to the value of its security, at a time when it had become apparent that the distribution to unsecured creditors under a proposed plan would be substantial. Dresser-Rand's recovery would be improved considerably by its very late recharacterization of claim if Dresser-Rand's new submissions with respect to the resale value of the compressor is accepted.

54 Dresser-Rand submits that, from its perspective, the Monitor's draft letter of January 14, 2010 was a "proposed resolution" of the claim, and that thus BA Energy and the Monitor should have been aware from early 2010 that the Dresser-Rand claim was unresolved and that Dresser-Rand would be claiming a deficiency in value as an unsecured claim. While the letter is marked "draft" and the Monitor requested a response before it was finalized, it refers to an agreement reached in the teleconference and the clarification of a misunderstanding arising from the Notice of Revision. While the Monitor was advised that this letter was being reviewed by Dresser-Rand, and Dresser-Rand invited a proposal for settlement on February 19, 2010, it was not until March 26, 2010, ten months after the expiry of the initial claims bar date that Dresser-Rand made its revised position clear to the debtor and the Monitor.

55 Mr. Kaffka states in his affidavits that Dresser-Rand received a verbal estimate of value from an equipment dealer on January 28, 2010. It may well be that Dresser-Rand did not wish to disclose the low resale value it was now alleging for the compressor at a point in time when it was hoping that BA Energy would make an offer to purchase the compressor, but this was a strategic decision by Dresser-Rand, and, again, the risk of further delay in clearly communicating its revised estimate of value because of this strategic decision must be borne by Dresser-Rand.

56 Dresser-Rand also submits that it would have filed its amended claim sooner had the Monitor advised it sooner that BA Energy was not interested in purchasing the compressor. It is true that Dresser-Rand may have been able to file its amended claim at the end of February, 2010 instead of at the end of March, 2010 had the Monitor responded earlier to Dresser-Rand's suggestion that BA Energy may wish to make an offer on the equipment, but it should be noted that Dresser-Rand's "proposal" was merely an invitation to BA Energy to make a settlement offer, and not a proposal specifying an acceptable price for the compressor that may have alerted the Monitor to its importance. The Monitor in the Thirteenth Report to the Court dated April 30, 2010 explained that it did not place a high priority on its response to the voice-mail enquiry as it thought that it was one of several enquiries that Dresser-Rand was making to potential purchasers to of the compressor.

57 Dresser-Rand submits that BA Energy knew as early as January 14, 2010 (the date of the Monitor's draft letter) that Dresser-Rand may have been in the position of recovering less than it was owed if it sold the equipment. While this was anticipated as a possibility in the January 14, 2010 letter, the responsibility for valuing the equipment Dresser-Rand claimed as its security cannot be transferred to the debtor or the Monitor. Dresser-Rand is in the business of manufacturing and marketing the equipment, and had as late as September 22, 2009 made the formal representation in its revised proof of claim that the equipment was worth the amount of its claim. It appears that in January 2010, an officer of BA Energy enquired of the Monitor whether BA Energy could recover any surplus proceeds from Dresser-Rand's sale of the compressor, further indicating that there is no evidence that either the debtor or the Monitor anticipated Dresser-Rand's late change of position on value.

C. Other Considerations

58 Dresser-Rand submits that equity favours its application, as it is a wronged party with a legitimate claim that has been compromised by the CCAA proceedings. While if Dresser-Rand's current position with respect to value is accepted, it may suffer a deficiency in its claim of roughly $1.6 million still owing on the purchase price of roughly $8 million for the compressor, Dresser-Rand has possession of the compressor and current estimates of a deficiency are still speculative. There

is no overwhelming equitable consideration that would counter-balance relevant prejudice to BA Energy of the late claim.

59 Dresser-Rand submits that the situation is similar to that described in *Look Communications Inc., Re* (2005), 21 C.B.R. (5th) 265 (Ont. S.C.J. [Commercial List]). However, this is not a situation where BA Energy was aware at all times of the applicant's claim and did not object, nor is it a case where, had court approval of the claim been sought prior to plan approval, it would be clear that such approval would be granted as a matter of course. No assumptions can be made about the outcome if this amended claim had been brought in a timely way and disputed.

D. Conclusion on a Late Claim

60 It would not be fair or equitable to accept this late amended claim. Given the facts of this case, there are no conditions that would alleviate relevant prejudice.

61 If I am wrong in my assessment of whether the late revised claim should be accepted, I would agree with BA Energy that the claim should not in any event be accepted as set out in the Amended Proof of Claim, but should be remitted to the Monitor to allow a proper consideration of value. BA Energy and the Monitor have not been given an opportunity to test the allegations made as to the resale value of the compressor as would occur in the normal course of a claim, given the timing of the late claim in relation to the plan and its sanctioning. While the parties may not have discussed this in advance of the application, it is clear that this was not a normal claims dispute, but was restricted to the issue of whether the claim should be accepted.

E. Conduct Money

62 In support of this application, Dresser-Rand filed and relied upon affidavits sworn by Mr. Kaffka, who resides in New York. Mr. Kaffka was cross-examined on these affidavits. Dresser-Rand submits that BA Energy should be required to pay conduct money for Mr. Kaffka's attendance at cross-examination.

63 BA Energy objects to paying conduct money for Mr. Kaffka's cross-examination because he is not an employee of Dresser-Rand Canada Inc., because he had no involvement with the issues prior to January, 2010 and because Dresser-Rand has employees in Alberta who could have provided an affidavit, including Bill Colpitts, its recently-retired General Manager who was involved with the matter and signed the first Proof of Claim.

64 Dresser-Rand submits that Mr. Kaffka was an appropriate affiant because he was primarily responsible for Dresser-Rand's mitigation efforts after January, 2010 and because he was the individual who determined the market value of the compressor.

65 While Mr. Kafka's evidence of pre-2010 efforts by Dresser-Rand to mitigate and to assess value was of necessity hearsay, he was involved in 2010 mitigation efforts. He was not so clearly an inappropriate witness that Dresser-Rand is disentitled to reasonable conduct money. I direct that BA Energy be required to pay reasonable conduct money for Mr. Kaffka's attendance.

F. Costs

66 This is not an appropriate case to depart from the usual practice with respect to costs in commercial insolvency applications, and therefore both Dresser-Rand and BA Energy will bear their own costs.

Application dismissed.

Footnotes

• A corrigendum issued by the court on August 13, 2010 has been incorporated herein.

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