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 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDINGS LTD.	
DOCUMENT	**BRIEF OF THE MONITOR, ERNST & YOUNG INC.**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DARREN R. BIEGANEK Q.C./ RYAN F.T. QUINLAN Barrister & Solicitor Phone: (780) 441-4336 Fax: (780) 428-9683 File No.: 196164	**DUNCAN CRAIG LLP** LAWYERS MEDIATORS 2800 Scotia Place 10060 Jasper Avenue Edmonton, Alberta, Canada, T5J 3V9

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I. INTRODUCTION

1. On July 5, 2017, Canada North Group Inc. ("CNG"), Canada North Camps Inc. ("CNC"), Campcorp Structures Ltd. ("Campcorp"), D.J. Catering Ltd. ("DJ"), 816956 Alberta Ltd. ("816"), and 1371047 Alberta Ltd. ("137") (hereinafter collectively referred to as the "Applicants") made an application before this Honourable Court requesting certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and obtained an initial order (the "Initial Order"), a stay of proceedings (the "Stay") against the Applicants for a period of 30 days up to and including August 3, 2017, and the appointment of Ernst & Young Inc. (the "Monitor") as monitor of the Applicants.

2. Since that time, 1919209 Alberta Ltd. ("1919") and Canada North Group LP Holdings Ltd. ("Holdings") have been added as "Applicants" to these proceedings, while Campcorp and DJ have been removed from the proceedings.

3. The Stay has been extended on multiple occasions, and is currently in place up to December 31, 2018.

4. The next hearing in these *CCAA* proceedings is scheduled for October 23, 2018. At that time, this Honourable Court will consider, amongst other issues:

    a. whether to permit Jeff and Jackie Hadfield to submit a claim to the Monitor for its review and consideration in respect of a mortgage that they hold against the Wandering River camp lands notwithstanding that their claim was not submitted prior to the Claims Bar Date set in these proceedings;

    b. whether the mortgages granted in favour of Weslease respectively by 137 and 18512398 Alberta Ltd. (formerly known as CNC) ("185") are invalid, or otherwise ought to be discharged;

    c. whether to approve the sale of the "HML Dorms" (as defined below) as recommended by the Monitor; and

    d. whether to temporarily seal the Confidential Supplement to the Monitor's Eighteenth Report (the "Confidential Supplement").

5. The Monitor submits this Brief in respect of the above noted issues.

II. ISSUES ADDRESSED

6. This Brief addresses the following specific subjects:

    a. What are the applicable principles in respect of an application to permit a creditor to submit late claim after the Claims Bar Date pursuant to the Claims Process Order?;

    b. Are the Weslease Mortgages (as defined below) invalid, or otherwise ought to be discharged as against their respective certificates of title?;

    c. Should this Honourable Court approve the Offer of Alta-Fab Structures Ltd. ("Structures") in respect of the HML Dorms?; and

    d. Should this Honourable Court temporarily seal the Confidential Supplement?

III. LAW AND ARGUMENT

A. CLAIMS SUBMITTED AFTER THE CLAIMS BAR DATE IN CCAA PROCEEDINGS

7. On October 4, 2018, Jeff and Jackie Hadfield filed an Application seeking an Order declaring that the mortgage they hold in respect of the Wandering River camp lands is valid and subsisting and that the 1370147 Alberta Ltd. and Wandering River Properties Limited are indebted to the Hadfields in the sum of $811,000.00.

Generally see the Affidavit of Jeff Hadfield sworn October 4, 2018

8. The Hadfields did not submit this secured claim to the Monitor prior to the Claims Bar Date set by this Honourable Court in these proceedings, notwithstanding that they received the Claims Process Order and Creditor Package at the same time as the other creditors of the Applicants. As discussed below, it was submitted 8 months late after being prompted to do so by the Monitor.

Monitor's Seventeenth and Eighteenth Reports

9. In these circumstances, the Monitor is seeking advice and direction respecting whether this Honourable Court will permit the Hadfields to submit this secured claim to the Monitor for its consideration (and potential approval) notwithstanding the passage of the Claims Bar Date.

10. This section of the Brief will outline the legal principles applicable to this Honourable Court's determination of whether it ought to permit the Hadfields to submit a late Proof of Claim to the Monitor, for its consideration, notwithstanding the expiry of the Claims Bar Date in these proceedings.

11. 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 provides the debtors and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors and 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 later claim should not be an automatic outcome. 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.

SemCanada Crude Co., Re, 2012 ABQB 489 at paras. 62-63 ("*SemCanada*") **[TAB 1]**

12. The Alberta Court of Appeal in *Blue Range Resource Corp., Re* set out the applicable criteria to consider when deciding whether to allow a claimant to file a late claim notwithstanding having previously set a claims bar date:

> 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. ...

> ...
>
> 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?

Blue Range Resource Corp., Re, 2000 ABCA 285 at paras. 14 and 27 ("*Blue Range*") **[TAB 2]**

13. "Inadvertence" in this context includes carelessness, negligence, accident, and is unintentional.

Blue Range at para. 27 **[TAB 2]**

14. As noted above, the Court must also assess whether the applicant creditor was acting in good faith. Relevant considerations are whether the claimant was seeking to delay or otherwise avoid participating in the *CCAA* process, and whether the claimant submitted its claim as soon as it became aware of the situation. Circumstances that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

Target Canada Co., Re, 2017 ONSC 327 at para. 30 **[TAB 3]**; *Royal Bank v. Cow Harbour Construction Ltd.*, 2011 ABQB 223 ("*Cow Harbour*") at paras 32-33 **[TAB 4]**

15. Knowledge of the existence of the *CCAA* proceedings, and presence or absence of that creditor having legal representation, are considerations in determining "inadvertence."

SemCanada Crude Co., Re, 2012 ABCA 313 at paras. 13-14 **[TAB 5]**

16. On the subject of prejudice, the *Blue Range* decision is also instructive. The Court held:

> 36 <u>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</u>. ...
>
> 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. ... 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. <u>In addition, materiality is relevant to the issue of prejudice</u>. 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.
>
> ...
>
> 39 Further, the late claimants were well known to the Monitor and all of the other creditors. ...

> 40 <u>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</u>. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available process is an integral part of the process. A reduction in that share cannot 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? ... [emphasis added]

Blue Range at para 36, 37, 39 and 40 **[TAB 2]**; also see *BA Energy Inc., Re*, 2010 ABQB 507 at para. 49 ("*BA Energy*") **[TAB 6]**; *Cow Harbour* at para 39 **[TAB 4]**

17. In *BA Energy Inc.*, Justice Romaine similarly stated that an important consideration respecting potential prejudice is "whether creditors by reason of the late claim lost a realistic opportunity to do anything that they otherwise might have done."

BA Energy at para 47 **[TAB 6]**

18. Notwithstanding that other creditors will receive less if a late claim is permitted does not constitute prejudice in the context of this determination, courts will often consider the materiality of the late claim in the context of the overall estate. The larger the materiality, the more likely that prejudice will be found in the circumstances.

SemCanada at para. 64 and 67 **[TAB 1]**; *Blue Range* at para 40 **[TAB 2]**; *BA Energy* at para 46, **[TAB 6]**

19. The applicant seeking permission from this Honourable 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, and this Honourable Court is to take into account the specific circumstances of each case.

BA Energy at para 41 **[TAB 6]**; *SemCanada* at para 62 **[TAB 1]**

20. Prior awareness of the applicant's (late) claim by other creditors, the debtor and the monitor are relevant to the issue of prejudice.

Blue Range at para 39 **[TAB 2]**; *Cow Harbour* at para 42 **[TAB 4]**

21. The Court may be less inclined to permit its late filing if a plan has already been sanctioned and/or a distribution has already been made to creditors prior to the late claim being filed.

Cow Harbour at para 39 **[TAB 4]**; *SemCanada* at para. 71 **[TAB 1]**

22. To the best of the Monitor's information, the basic facts relevant to the above considerations are:

    a. the Hadfields were at all material times aware of these CCAA proceedings, and received the Claims Process Order and accompanying Creditor Package from the Monitor, along with all other creditors;

    b. the Claims Bar Date was January 19, 2018;

    c. the Hadfields did not have legal counsel in these proceedings until very recently;

d. The Monitor sent correspondence to the Hadfields on August 23, 2018 notifying them of their failure submit a Proof of Claim in these proceedings, and requesting that they do so, along with an explanation as to why no claim was submitted before the expiry of the Claims Bar Date;

e. on September 19, 2018, the Monitor received a signed Proof of Claim form from the Hadfields that did not include any supporting documents or an explanation;

f. on October 4, 2018, Jeff Hadfield swore an Affidavit that included all of the supporting documentation and his explanation as to why he did not submit a claim before the expiry of the Claims Bar Date (no explanation for why Jackie Hadfield did not submit a prior claim was provided);

g. the explanation provided Jeff Hadfield in his Affidavit was, in essence, that he did understand the materials he received from the Monitor and likely avoided dealing with the materials received from the Monitor for personal reasons;

h. the Monitor and the Applicants were aware of the Hadfield's mortgage prior to the Claims Bar Date (the Monitor is not going to speak to the knowledge of other creditors);

i. no plan of arrangement is going to be submitted by the Applicants in these *CCAA* proceedings, and there has been no creditor vote, nor will there be in the circumstances;

j. no liquidation of the real property that is subject to the Hadfield mortgage has occurred to date, and the Hadfields' claim does not appear to be statute barred;

k. the amount of the Hadfields' claim is $811,000.00, which is relatively modest in comparison to the total amount of creditor claims in these proceedings. The only other claimants registered against the applicable land are the municipality for outstanding property taxes and the Monitor in respect of the professional fees secured by the Administration Charge. Arguably, CWB is entitled to any surplus equity that may have otherwise existed for the Applicants in this property. However, CWB does not have a specific charge against this land; and

l. Prejudice does not appear to be present if the Hadfields' claim is allowed to be considered by the Monitor.

B. WESLEASE MORTGAGES

23. As part of Weslease's claims made in these proceedings, it has indicated that it is the holder of two valid and subsisting mortgages granted by 185 and 137, respectively. Specifically, the details of these alleged mortgages are as follows:

Applicant	Real Property Description	Amount Claimed on Mortgage
185 (formerly known as Canada North Camps Inc.	Wabasca (1251 Industrial Drive)	$761,000
137	Bonnyville North lands (which are the lands owned by 137 that do not form part of the actual camp operation)	$1,500,00

(collectively referred to as the "Weslease Mortgages").

Affidavit of Keith Talbot sworn October 5, 2018 at paragraphs 59-68 and Exhibits "P"-"S"

24. The Weslease Mortgages are signed by Paul McCracken on behalf of 185 and 137 respectively, and they are registered at the Land Titles Office against the applicable legal titles.

Affidavit of Keith Talbot sworn October 5, 2018 at Exhibits "P" and "R"

25. The Mortgages each state:

a. the "Mortgagor" promises to Weslease to pay "the liabilities which the Mortgagor has incurred or may incur pursuant to Lease Agreement(s) dated March 1, 2016, and such further and other agreements as may be entered into between the Mortgagor and the Mortgagee (the "Lease Agreements")";

b. the Mortgagor agrees that this Mortgage will secure repayment in favour of the Mortgagee of all present and future indebtedness and liabilities of the Mortgagor to the Mortgagee "pursuant to the Lease Agreements" and the Mortgagor has delivered the Mortgage as collateral security for the liabilities "under the Lease Agreements";

c. in consideration of the Mortgagee agreeing to provide financial assistance "to the Mortgagor," the Mortgagor has agreed with the Mortgagee to the terms of the Mortgage; and

d. the Mortgage was executed as continuing collateral security of the indebtedness "of the Mortgagor to the Mortgagee under the Lease Agreements..."

Affidavit of Keith Talbot sworn October 5, 2018 at Exhibits "Q" and "S"

26. The Weslease Mortgages, by their terms, secure any indebtedness that may be due and owing by 185 and 137 under and pursuant to Lease Agreements entered into by them, respectively, with Weslease.

27. However, based on Weslease's Proof of Claim and the Affidavit of Keith Talbot sworn October 5, 2018 filed in these proceedings, there are no "Lease Agreements" between Weslease and either

of 185 or 137. There are only lease agreements entered into by 1919 and Paul McCracken (jointly) with Weslease.

28. Further, to the best of the Monitor's information, there is no direct loan or other direct indebtedness between Weslease and 185 or 137, respectively, nor did 185 or 137 guarantee the indebtedness due and owing from 1919 or Paul McCracken to Weslease.

29. As such, there is no indebtedness due by 185 or 137 to Weslease, pursuant to any Lease Agreements, guarantees or otherwise. There has been no consideration given by Weslease to either 185 or 137 to support the Weslease Mortgages.

30. Pursuant to sections 1(o) and 103 of the *Land Titles Act*, a mortgage acts as security for a debt. A mortgage does not, by itself, create a debt where none otherwise exists.

Land Titles Act, RSA 2000, c L-4 **[TAB 7]**

31. Further, it is clear that a mortgage ought to be discharged where there is no indebtedness due and owing on the mortgage.

32. The Monitor respectfully submits that the Weslease Mortgages are invalid and not enforceable, and ought to be discharged on account of their being no indebtedness due and owing by 185 and 137, respectively, to Weslease.

Land Titles Act, RSA 2000, c L-4, s. 106 **[TAB 7];** *Law of Property Act*, RSA 2000, c L-7, s. 75 **[TAB 8]**

C. APPROVAL OF OFFER FOR THE HML DORMS

33. Since obtaining its expanded powers, and since these proceedings became liquidating CCAA proceedings, the Monitor has retained two outside consultants, who specialize in the sale of assets like those of the Applicants, to assist the Monitor in the marketing and sale of the Applicants' assets.

34. One of these consultants, Used Modulars Canada Ltd. ("Used Modulars"), has recently received an offer to purchase two 38 Person Alta-Fab Dormitories (the "Alta Fabs Units") along with a two unit Recreation Complex currently located at the HML camp (collectively the "HML Dorms").

35. Used Modulars is the broker who assisted the parties with the sale of the Aurora Dorms, discussed in previous reports of the Monitor. Used Modulars has a strong knowledge of the camp industry, the players and available assets in the market.

36. Used Modulars initiated an invitation for sealed bids process by email on August 22, 2018 in relation to only the Alta Fabs Units and notified a number of parties which it believed would be qualified, serious and interested in the Alta Fabs. The closing date for bids from interested parties was set for 2:00 p.m. MST on August 31, 2018. Used Modulars felt this timeframe was reasonable in the circumstances, as most of the interested parties were aware of the pending opportunity in advance of the formal notice and would be able to quickly conduct their due diligence and submit and offer within the timeframe stipulated. Other factors, such as the end of summer, and onset of fall weather also played a part in the timeframes initially chosen by Used Modulars.

37. Used Modulars initially directly contacted 19 individuals from 13 different companies. In addition to the direct marketing efforts of Used Modulars, the Monitor advises that the Alta Fabs units were also advertised for sale on Used Modulars' web site.

38. On August 31, 2018, after the 2:00 p.m. deadline had passed, Used Modulars advised that it had Structures made an offer not just for the Alta Fabs Units, but instead it was for the HML Dorms (i.e.

it included the two unit recreational complex at HML). Both Used Modulars and the Monitor felt that this initial offer was low in the circumstances, and as such, the Monitor instructed Used Modulars to reject the offer.

39. After advising Structures that its offer was rejected, the Monitor requested that Used Modulars contact all of the interested parties, including Structures, and advise that no offer was accepted by the Monitor pursuant to the initial invitation for offers, and if any party still wished to submit an offer on the Alta Fabs Units, they could do so at any time. The Monitor also requested Used Modulars continue to pursue any new leads on the Alta Fabs units, if any.

40. Structures submitted a new and "final" (per Used Modulars) for the HML Dorms. No other party has submitted any bid on the HML Dorms or the Alta Fabs Units to date.

41. The details of this revised Structures' offer (the "Offer") are set out in the Confidential Supplement, and are not repeated here for confidentiality purposes.

42. The Monitor supports the Offer.

43. This Honourable Court has the power to grant a Vesting Order in respect of the HML Dorms. Section 36 of the *CCAA* states:

> 36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
>> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>>
>> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>>
>> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>>
>> (d) the extent to which the creditors were consulted;
>>
>> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>>
>> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> ...

> (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.
>
> (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

CCAA **[TAB 9]**

44. The entirety of section 36 of the CCAA is not a pure application to this scenario, since it is not one of the Remaining Applicants selling assets, but rather, the Monitor, pursuant to its expanded powers, selling the assets on behalf of the Applicants for the benefit of stakeholders. Nonetheless, section 36(6) clearly permits this Honourable Court to issue a Vesting Order in respect of the HML Dorms in favour of Structures.

45. The four factors set out in *Royal Bank of Canada v. Soundair Corp.* ("*Soundair*") have also been routinely considered in *CCAA* asset sales scenarios. The *Soundair* factors are:

    a. whether the Receiver (Monitor) made sufficient effort to obtain the best price and has not acted improvidently;

    b. the interests of the parties;

    c. the efficacy and integrity of the process by which offers were obtained; and

    d. whether there was unfairness in the working out of the process.

Royal Bank of Canada v. Soundair Corp., 1991 CarswellOnt 205 at para.16 **[TAB 10]**; *Re Veris Gold Corp.*, 2015 BCSC 1204 at paras. 24-25 ("*Veris Gold Corp.*") **[TAB 11]**

46. In *Veris Gold Corp.*, the Court also recognized that "[a] more general test has been restated... namely to consider the transaction as a whole and decide 'whether or not the sale is appropriate, fair and reasonable'," which is sometimes referred to as the White Burch test.

Veris Gold Corp. at para. 23 **[TAB 11]**

47. In *Re AbitibiBowater Inc.*, the Court noted that it has jurisdiction to approve a sale of assets in the course of CCAA proceedings, and observed that "[a]bsent some compelling, exceptional factor to the contrary, the Court should accept an applicant's proposed sales process where it was recommended by the Monitor and supported by the stakeholders" (para 59).

Re AbitibiBowater Inc., 2009 QCCS 6460 at paras. 36 and 59 **[TAB 12]**

48. In this case, the Monitor respectfully submits that:

    a. it has given notice of this sale approval and vesting order application to interested creditors and other stakeholders;

    b. Structures is an arm's length party to the Applicants and the Monitor;

c. all potential purchasers had a fair, transparent and level process upon which to purchase the HML Dorms;

d. the process leading to the Offer was diligent and reasonable in the circumstances, and the Monitor took active steps to increase the purchase price of the HML Dorms in order to ensure maximization of value for the HML Dorms;

e. the Monitor has led and approved the process leading to the Offer;

f. these proceedings have already become liquidating CCAA proceedings, and as such, liquidation of the HML Dorms must occur for creditors to recover amounts owed to them and to complete these CCAA proceedings;

g. the Monitor filed a Report with this Honourable Court stating that in its opinion the Offer and sale of the HML Dorms pursuant to the Offer will be beneficial to the stakeholders of the estate;

h. creditors knew that offers for the Applicants' assets were being sought by Monitor, and while creditors were not involved in the day to day tasks related to the marketing and sale process, any creditors that inquired as to status or certain aspects of such process were responded to and kept up to date, as applicable, and the Monitor did specifically share with CWB, on a confidential basis, the details of the Monitor's arrangements with Used Modulars and the marketing strategy to be utilized by Used Modulars and the Monitor;

i. the sale of the HML Dorms through the Offer is in the best interests of, and will only have a positive effect on, the stakeholders of the estate;

j. the consideration to be received for the HML Dorms is reasonable and fair taking into account their likely actual value;

k. the Monitor made sufficient efforts to obtain the best net realizations for the HML Dorms and has not acted improvidently in recommending that it proceed with the Offer;

l. the marketing process undertaken by the Monitor is one characterized by efficacy and integrity; and

m. there was no unfairness in the working out of the marketing and offer process.

49. For the reasons set out above and in the Confidential Supplement (which are not repeated here for confidentiality reasons), the Monitor submits that approving the Offer for the HML Dorms is appropriate, fair and reasonable in the circumstances of these proceedings.

50. As such, the Monitor recommends that this Honourable Court approve the Structures' Offer and grant the required Approval and Vesting Order in respect of the HML Dorms.

D. SEALING OF THE CONFIDENTIAL SUPPLEMENT

51. On an application to temporarily seal a court file, this Honourable Court has broad discretion and may make a direction on any matter that the circumstances require, and it may grant the Order notwithstanding the provisions of Division 4 of Part 6 of the *Rules of Court*.

Alberta Rules of Court, Alta. Reg. 124/2010, Rule 6.28. See Orders granted by the Alberta Court of Queen's Bench in the following proceedings:

Order, granted by Justice K.M. Eidsvik in Royal Bank of Canada v. Hannaco (2008) Ltd. O/A Canada Grey Motor Inn, Naheed Zia and Nasreen Zia, January 14, 2011, at para. 11

Order, granted by Justice K.D. Yamauchi in The Matter of Cow Harbour Construction Ltd., May 28, 2010, at para. 5

Order, granted by Justice J. Topolniski in Bank of Montreal v. Kallbom Sand & Gravel Ltd. et al, May 15, 2012, at para. 1

52. Temporary sealing Orders should only be granted when:

a. an Order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and

b. the salutary effects of the Order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (S.C.C.) at para. 45 **[TAB 13]**

53. The most appropriate sealing Order in a Court approval sale situation is that the supporting valuation material remain sealed until such time as the sale transaction has closed.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J.) at para. 17 ("*Look Communications*") **[TAB 14]**

54. Commercial Courts have accepted that temporary sealing Orders are appropriate in circumstances where the information subject to sealing Orders contain sensitive commercial information, the release of which could be prejudicial to the stakeholders of the confidential information.

Alberta Treasury Branches v. Elaborate Homes Ltd., 2014 ABQB 350 at para. 54 ("*Elaborate Homes*") **[TAB 15]**; *Nortel Networks Corp. (Re)* (2009), 56 C.B.R. (5th) 224 (Ont. S.C.J.) at para. 39 **[TAB 16]**; *Maxtech Manufacturing Inc.* (Re) (2010), 64 C.B.R. (5th) 239 (Ont. S.C.J.) at para. 30 **[TAB 17]**

55. In the context of an insolvency proceeding and the sale of assets, it is common for the Court to seal the Receiver or Monitor's confidential documents in case a further bidding process may be required if the transaction being approved falls through.

Look Communications at para. 17 **[TAB 14]**; *Elaborate Homes* at para. 54 **[TAB 15]**

56. A temporary sealing Order is required until the sale is fully executed due to the confidential nature of the accepted offer and the deleterious effect it would have on the integrity of any future sale process should the original sale not close.

Look Communications at para. 17 **[TAB 14]**; *Elaborate Homes* at para. 54 **[TAB 15]**

57. It is extremely rare that an interested party will come back asking that the sealing Order be set aside as ordinarily all of the assets that are bid on during the court sale process are sold and approved by Court Order. No one will have a further interest in the confidential information when the transaction is closed.

Look Communications at para. 17 **[TAB 14]**; *Elaborate Homes* at para. 54 **[TAB 15]**

58. In this case, the Confidential Supplement contains significant commercial information regarding the value of the HML Dorms and the access fir mats being sold in conjunction with 726, the value of bids made by interested parties and value of the offers supported by the Monitor.

59. If for some reason the transactions respecting the HML Dorms and the access fir mats did not close, having this commercial information widely accessible to the public may cause significant prejudice to the future sales or bidding process, as well as may prejudice the Monitor's ability to obtain the best offers possible on such assets.

60. Further, it could create a situation where an unfair advantage is created for some bidders or interested parties by obtaining such information from the Court record while others have to rely on their own resources.

61. It is respectfully submitted that the deleterious effects, arising from the release of this sensitive commercial information, would have on the integrity of any future sale process should these transactions not close justifies the temporary sealing of the Confidential Supplement.

IV. CONCLUSION AND RELIEF SOUGHT

62. The Monitor respectfully requests:

a. advice and direction as to whether to Jeff and Jackie Hadfield are permitted to submit their claim to the Monitor for its review and consideration notwithstanding that their claim was not submitted prior to the Claims Bar Date set in these proceedings;

b. a declaration that the Weslease Mortgages ought to be discharged;

c. an Order Approving Sale and Vesting Title in respect of Structures' Offer; and

d. an Order temporarily sealing the Confidential Supplement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of October, 2018.

DUNCAN CRAIG LLP

Per: ______________________________

DARREN R. BIEGANEK, Q.C./RYAN F.T. QUINLAN
Counsel for Ernst & Young Inc., in its capacity as Monitor of 667402 Alberta Ltd., 18512398 Alberta Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd.,1919209 Alberta Ltd., and Canada North Group LP Holdings Ltd., and not in its personal or corporate capacity

LIST OF AUTHORITIES

Tab

1. *SemCanada Crude Co., Re*, 2012 ABQB 489
2. *Blue Range Resource Corp., Re*, 2000 ABCA 285
3. *Target Canada Co., Re*, 2017 ONSC 327
4. *Royal Bank v. Cow Harbour Construction Ltd*., 2011 ABQB 223
5. *SemCanada Crude Co., Re*, 2012 ABCA 313
6. *BA Energy Inc., Re*, 2010 ABQB 507
7. *Land Titles Act*, RSA 2000, c L-4
8. *Law of Property Act*, RSA 2000, c L-7
9. *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36
10. *Royal Bank of Canada v. Soundair Corp*., 1991 CarswellOnt 205
11. *Re Veris Gold Corp*., 2015 BCSC 1204
12. *Re AbitibiBowater Inc*., 2009 QCCS 6460
13. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
14. *Look Communications Inc. v. Look Mobile Corp*., 2009 CarswellOnt 7952 (Ont. S.C.J.)
15. *Alberta Treasury Branches v. Elaborate Homes Ltd*., 2014 ABQB 350.
16. *Nortel Networks Corp. (Re)* (2009), 56 C.B.R. (5th) 224 (Ont. S.C.J.)
17. *Maxtech Manufacturing Inc. (Re)* (2010), 64 C.B.R. (5th) 239 (Ont. S.C.J.)

TAB 1

2012 ABQB 489
Alberta Court of Queen's Bench

SemCanada Crude Co., Re

2012 CarswellAlta 1399, 2012 ABQB 489, [2012] A.W.L.D. 4492, 219 A.C.W.S. (3d) 755, 546 A.R. 203, 93 C.B.R. (5th) 188

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

In the Matter of a Plan of Compromise or Arrangement of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options Inc. and 1380331 Alberta ULC

B.E. Romaine J.

Judgment: July 31, 2012*
Docket: Calgary 0801-08510

Counsel: A. Robert Anderson, Q.C., Doug Schweitzer for SemCAMS ULC
Anthony Jordan, Q.C. for Celtic Exploration Ltd.
Ashley John Taylor for Bank of America, N.A.

Subject: Insolvency; Natural Resources; Property; Public

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.ii Contractual rights

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights
Contract between company and creditor was suspended upon initial order being made under Act — Creditor applied to file late claim for damages arising from suspension for period from initial order to implementation of plan of arrangement (POA) — Creditor further applied for declaration that its claims for damages subsequent to POA were not affected claims, or alternatively, to file late claims therefore — Company cross-applied to strike out creditor's statement of claim — Application dismissed, cross-application granted — Post-POA claims were subject to arrangement pursuant to s. 19(1) of Act as relating to contingent liabilities even though damages could not be ascertained at time proceedings commenced — Affected claims may result not only from repudiated contract but by virtue of proceedings themselves — All of creditor's claims were subject to POA that was given effect by sanction order — Application was made 2 1/2 years after claims bar date and 1 1/2 years after POA implementation — Failure to make timely claims was neither inadvertent nor in good faith and allowing application would prejudice other creditors and bring proceedings into disrepute.

Table of Authorities

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

s. 19(2) — considered

s. 20(1)(a) — considered

APPLICATION by creditor to file late amended claims in proceedings under *Companies' Creditors Arrangment Act*; CROSS-APPLICATION by company to strike out creditor's statement of claim.

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

Introduction

1 Celtic Exploration Ltd. applies for relief arising from the suspension of an inlet gas purchase agreement (the "IGPA") that it had entered into with SemCAMS ULC. The IGPA was suspended in July, 2008 in connection with SemCAMS' filing for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and was the subject of reasons for decision dated August 27, 2010, cited as [*SemCanada Crude Co., Re*] 2010 ABQB 531 (Alta. Q.B.) (the "IGPA decision"). Leave to appeal the IGPA decision was denied on December 17, 2010 [*SemCanada Crude Co., Re*, 2010 CarswellAlta 2459 (Alta. C.A.)].

2 Celtic seeks an order (i) permitting it to file a late amended claim for damages arising from the suspension of the IGPA for the period from July 22, 2008 (the date of the Initial Order in the CCAA proceedings) to and including November 30, 2009 when the Plan of Arrangement (the "Plan") came into effect and SemCAMS emerged from the protection of the CCAA (the "CCAA Period"), and (ii) declaring that its claims for suspension damages for the periods from December 1, 2009 to and including September 30, 2009 (the "Post Plan Implementation Period") and from October 1, 2010 onwards (the "Post October 2010 Period") are not Affected Claims compromised, barred and released by the Plan or otherwise.

3 Alternatively, in the event that the Court finds that the suspension damages claims for the Post Plan Implementation Period and the Post October 2010 Period are subject to the claims process established under the CCAA proceedings (the "Claims Process") and are therefore Affected Claims as defined in the Plan, Celtic seeks an order permitting it to file a late amended claim for those damages.

4 SemCAMS objects to Celtic's application and, in response, has brought an application pursuant to which it seeks an order declaring that (i) Celtic's proposed damages claim, including its claim for suspension damages arising from the CCAA Period, the Post Plan Implementation Period and the Post October 2010 Period, is subject to the Claims Process, (ii) the proposed damages claim is an Affected Claim within the meaning of the Plan that was comprised, released and barred by the Plan and the order approving and sanctioning the Plan dated October 27, 2009 (the "Sanction Order"), and (iii) Celtic is precluded from filing a late or amended claim. SemCAMS also seeks an order declaring the Statement of Claim filed by Celtic with respect to the proposed damages claim to be a breach of the Plan and the Sanction Order, and directing that it be struck out.

5 The Bank of America (the "BA") as Agent on behalf of the Secured Lenders of SemCAMS (as defined in the Plan) supports SemCAMS' application in so far that it submits that, if the proposed damages claim by Celtic is an Affected Claim, it should be declared to be barred, extinguished and released by the Plan and Sanction Order and Celtic should not be allowed to file any late or amended claim.

Issues

6 The main issues arising from these applications are as follows:

a) Are Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period "Affected Claims" under the CCAA proceedings, and therefore subject to the Claims Process?

constitute an Affected Claim. Those potential events of default were cured by the stay imposed under the Initial Order and by the Sanction Order, which provided for a waiver of all defaults. The Affected Claims are caught by the release and discharge contained in section 8.1 of the Plan, which was given effect by the Sanction Order.

42 Celtic submits that it would be inconsistent with the general purposes of the CCAA if SemCAMS and its counterparties remained bound by existing contracts, but SemCAMS could not be compelled to fully perform its obligations as they arise as a result of the Sanction Order. That would certainly be true if it was in fact the case. However, while Celtic and SemCAMS have not been able to resolve their difference over what is required or necessary to reinstate the IGPA, that does not mean that SemCAMS has been relieved of its obligations under the agreement, or relieved from a claim for damages arising from the suspension.

43 The fact that the IGPA was suspended by mutual agreement and not terminated implies an obligation to reinstate the agreement when the impediment to performance, here the CCAA proceedings, has ceased to exist. However, changes in the status and positions of the parties in the interim must also be taken into consideration, and it is on that issue that the parties are unable to agree. If SemCAMS failed to agree to the reinstatement of the IGPA on terms that adequately reflected the changed circumstances, the continued suspension would give rise to a damages claim.

44 However, such a claim would be an Affected Claim within the meaning of the CCAA proceeding that could be, and was, compromised by the Plan and the Sanction Order.

b) Should Celtic be allowed to file a late amended claim for suspension damages during the CCAA Period? If Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period are "Affected Claims", should Celtic be allowed to file a late claim for these damages?

45 Celtic submits that, in the event its claims for suspension damages are found to be Affected Claims under the CCAA proceedings, it should be permitted to amend its previouslyfiled Proof of Claim to claim such damages. While Celtic divides its claims into three periods: the period it characterizes as the "CCAA Period", the Post Plan Implementation Period and the Post October 2010 Period, I have found that the claims for damages for suspension of the IGPA for all of these periods fall within the definition of "claims" for the purpose of Section 19 and were thus subject to compromise by the Plan and the Sanction Order.

46 The only distinction that may be made among these three periods of time with respect to a late filing application relates to whether the claim for suspension damages for the CCAA Period would be an amendment to the Proof of Claim filed by Celtic on November 28, 2008 or a new claim.

47 I find that the claims for suspension damages for all three periods of time are new claims. The previously filed Proof of Claim related to amounts owing for the delivery of raw gas to the KA Plant in the months prior to the Initial Order. The proposed claims for suspension damages relate to losses incurred as a result of the suspension of the IGPA after the Initial Order was granted, arising from Celtic's inability to sell its gas to third parties at the same price it would have received under the IGPA. Thus, there is no reason to distinguish among the three periods of time with respect to the question of whether Celtic should be allowed to file a late claim.

48 I must agree with the BA and SemCAMS that Celtic's application to file a claim or claims for suspension damages at this late date is extraordinary. Celtic did not file its application until April, 2011, approximately two and a half years after the Claims Bar Date of December 1, 2008 and approximately one and a half years after the Plan Implementation Date of November 30, 2009. .

49 In para. 26 of *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.), the Court of Appeal set out the appropriate criteria to apply to late claims in CCAA proceedings:

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 that cannot be alleviated, are there any other considerations that may nonetheless warrant an order permitting late filing?

50 As I noted in *BA Energy Inc., Re,* 2010 ABQB 507 (Alta. Q.B.) at para. 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.

1. Inadvertence and Good Faith

51 Celtic submits that "inadvertence" should not be taken too literally. However, Wittmann, J.A. noted at para. 27 of ***Blue Range Resource Corp., Re*** that "inadvertence" in the context of the first criterion includes carelessness, negligence or accident and is unintentional.

52 Celtic's failure to make a timely claim was not unintentional. It submits that it "simply" did not perceive it had a right to damages because it did not believe that the IGPA had been suspended. Celtic was aware of the CCAA proceedings from the time of the Initial Order and retained counsel with respect to the proceedings throughout. It filed a Proof of Claim for a different kind of claim. It cannot argue that its failure to file a claim was careless, negligent or accidental: it was Celtic's deliberate choice, acting with the advice of counsel, to maintain its position that the IGPA had not been suspended, but amended, without providing for the possibility that this position would be found to be incorrect and that it may have a claim for damages arising from a suspension. The financial implications to Celtic if the IGPA was found to be suspended were made clear to it when it received draft third party gas processing agreements from SemCAMS on August 26, 2008. In fact, Celtic itself calculated its suspension losses for the period from July 22, 2008 to September 30, 2009 in an affidavit filed in response to the application that resulted in the IGPA decision.

53 Celtic submits that the possibility of suspension damages must also have been apparent to SemCAMS and the BA before the Plan was negotiated and presented to creditors. That is beside the point: the Claims Process in CCAA proceedings requires creditors to identify and to file their claims or be barred from pursuing them. It is not up to the debtor company to guess at potential claims, or whether creditors will decide to pursue them.

54 Celtic also submits that its claims for suspension damages are not claims for a "debt". While this is true, the Claims Process provides for contingent claims for liabilities and that is what SemCAMS submits Celtic should have filed.

55 The Claims Process Order of October 22, 2008, which was served on Celtic and its counsel, makes it clear that "claim" includes contingent claims, defining "claim" as including:

> ... any ... claim ... made, <u>in connection with any indebtedness, liability or obligation of any kind whatsoever</u>, and any interest accrued thereon or costs payable in respect thereof, <u>including without limitation</u> ... <u>by reasons of any breach of contract or other agreement (oral or written)</u> ... <u>and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown</u> ... and <u>whether or not any right or claim is executory or</u> anticipatory in nature including ... with respect to any matter, action, cause or chose in action <u>whether existing at present or commenced in the future</u> ... [emphasis added]

The Monitor's Seventh Report dated October 21, 2008 provided a thorough summary of the claims process.

56 Had Celtic filed its claim for suspension damages, current and future, such claim would have been determined during the Claims Process or there would have been a reservation for the full amount of its claimed damages.

57 The first criterian of the *Blue Range Resource Corp., Re* analysis requires that I consider whether Celtic acted in good faith.

58 SemCAMS and the BA submit that Celtic knew it had a potential claim for damages arising from the suspension of the IGPA as early as August 28, 2008, more than three months prior to the Claims Bar Date, or at any rate, by September 22, 2008, when it sent a letter to SemCAMS asserting that it had not in fact suspended the sale of gas under the IGPA. Celtic had by August 21, 2009 received the Plan and the Monitor's 20th Report, which identifies and alerts stakeholders to the fact that Affected Claims, which by definition include contingent claims, will be compromised, discharged and released under the Plan. Certainly, the question of suspension damages was a live issue during the application that led to the IGPA decision of August 27, 2010, and Celtic was well aware from submissions that were made that SemCAMS took the position that any such claim was barred by the Claims Process Order and compromised under the Plan. Despite all this, Celtic did not bring its application to file a late claim until April, 2011. I cannot find that Celtic acted in good faith by delaying its claim.

2. Prejudice Caused by the Delay

59 Celtic submits that, since during the application that gave rise to the IGPA decision, SemCAMS has indicated that it may, under certain conditions, consider agreeing to a late - filed claim for suspension damages. It argues that this is an indication that there is in fact no prejudice to SemCAMS or the ordinary creditors from its late claims. SemCAMS' offer to accept a late filed claim was made at a far earlier date than this application for leave to file a late claim, and at a time when the claim was for far less than the amount now claimed.

60 SemCAMS points out that several of the conditions to this offer to accept a late claim have not been met. The mere fact that SemCAMS considered agreeing to a late claim at an earlier time and under different circumstances does not indicate lack of prejudice now.

61 Celtic concedes that a late claim will prejudice the BA and its group of secured creditors, but submits that this should not be a factor since the BA has already agreed to an Ordinary Creditors' Pool, and the size of that pool will not increase as a result of granting leave to Celtic to amend its Proof of Claim.

62 As I indicated in *BA Energy Inc., Re*, 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 provides the debtor company 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 later 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.

63 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.

64 Celtic's proposed suspension damages claim would represent an approximately 22% increase in the total value of Ordinary Claims filed against SemCAMS. The new claim increases Celtic's total claims by about 66%. The Plan and the Monitor's Report made it clear that the Secured Lenders represented by the BA agreed to refrain from making a claim against SemCAMS in respect of their first-ranking, fully secured claim in part because they would receive the surplus remaining in the Ordinary Creditors Pool after the claims of ordinary creditors had been satisfied. It is a reasonable inference that this decision was made on the basis of claims that had been filed as of the Claims Bar Date, which did not include the Celtic $22.5 million suspension damages claim.

65 One of the tests for prejudice is whether a late claim causes another creditor to lose a realistic opportunity to do

something it might otherwise have done: ***Blue Range Resource Corp., Re*** at para. 40. While it is true that the secured lenders as represented by the BA were likely aware that Celtic may have a potential claim for suspension damages, they were also entitled to rely on the Claims Bar Process, the release provisions of the Plan and the Sanction Order to expect some finality.

66 In ***Blue Range Resource Corp., Re***, the applications to accept late claims were made within a few months of the plan sanction order. Here, the delay is much longer, and the decision in ***Blue Range Resource Corp., Re*** is clear that the timing of the late claim with respect to the stage of proceedings is a key consideration: para. 36.

67 If Celtic is able to file a late claim for suspension damages, the Secured Lenders could receive up to $900,000 less than they otherwise would. This is a material and significant claim, in contrast to the relatively minor value of late claims in ***Blue Range Resource Corp., Re*** that were filed after that plan was implemented.

68 It is noteworthy that the Secured Lenders did not have to consent to the amount that was made available to Ordinary Creditors in the Ordinary Creditors' Pool, as they had clear priority for their claim of approximately US $2.939 billion.

69 This application also gives rise to a potential issue of unequal treatment among creditors. There were other unsecured creditors with claims arising from inlet gas purchase agreements. If Celtic's application is successful, it is not impossible that such creditors would seek to file similar late claims for suspension damages.

70 I find that there is relevant prejudice to other creditors arising from the delay, and I am not satisfied that such prejudice can be alleviated by attaching any conditions to an order permitting late filing.

3. Other Considerations

71 It is relevant that Celtic brings its application to file a late claim after the Plan has been sanctioned and implemented. In *Re T. Eaton Company Limited et al*, May 5, 1999 98-CL-2586, Blair J. noted, in a case where notification of the claims bar process had "fallen through the cracks" with respect to one creditor such that she had no opportunity to file a claim, that permitting a creditor to file a late claim after plan sanction and implementation "is tantamount to altering or modifying the Plan", and that the jurisdiction to allow such a late claim should thus be "exercised sparingly and in exceptional circumstances only", citing *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.). While these comments pre-dated ***Blue Range***, which is now the law in Alberta on this issue, the timing of such an application with reference to plan implementation is relevant to the issue of prejudice.

72 As previously described, this claim would be paid out of the Ordinary Creditors' Pool. It is clear that this large claim was not anticipated when the Pool was structured as part of the Plan and the BA consented to the Plan. The Plan specifically provides that it cannot be modified without the prior consent of BA as Agent of the secured creditors, acting reasonably, and, in the circumstances, it cannot be said that BA is acting unreasonably in opposing the application.

73 SemCAMS and the BA submit that to allow a creditor with full knowledge of the CCAA Proceedings and the Claims Process to ignore the Claims Bar Date and file a significant new claim more than two years after such date would throw the entire CCAA restructuring process into disrepute. I must agree. Celtic has no good or satisfactory reason to offer as to why it failed to file a contingent claim for suspension damages within a reasonable time. It decided on this strategy for its own reasons, and at its own peril. None of the factors set out in ***Blue Range*** or in *BA Energy Inc., Re* favour its application. The policy reasons that emphasize the need for certainty and finality in an approved and sanctioned plan and fairness of treatment to all creditors outweigh the prejudice to Celtic of disallowing a late claim. The application to file a late claim for suspension damages is thus dismissed.

c) Should Celtic's Statement of Claim be struck out?

74 Celtic alleges in its Statement of Claim that the granting of the Initial Order in the CCAA Proceedings was an event of default under the IGPA and that Celtic, as non-defaulting party, suspended performance of all transactions under the IGPA with the agreement of SemCAMS. I have found that the suspension damages claimed under the Statement of Claim are Affected Claims that may be, and were, compromised by the Plan and the Plan Sanction Order. Paragraph 44 of the Plan

TAB 2

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

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.

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.

TAB 3

2017 ONSC 327
Ontario Superior Court of Justice

Target Canada Co., Re

2017 CarswellOnt 3130, 2017 ONSC 327, 277 A.C.W.S. (3d) 18, 45 C.B.R. (6th) 225

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., 1985, c. C-36, AS AMENDED

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

G.B. Morawetz R.S.J.

Judgment: March 1, 2017
Docket: CV-15-10832-00CL

Counsel: Marco Cedrone, Alex Ilchenko, for Kulwinder Rai
Robin B. Schwill, Dina Milivojevic, for Target Corporation
Lisa S. Corne, for Lou Pharma Corp. and Naser Ghasemlou and Fruits & Passion Boutiques Inc.
Jay Carfagnini, Jesse Mighton, for Alvarez & Marsal Canada Inc., Monitor
David Ullman, Alexandra Teotorescu, for Capital Brands LLC
Jeremy Dacks, for Target Canada Entities

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Late claimants — Applicant was granted protection under Companies' Creditors Arrangement Act (CCAA) — Court issued claims procedure order setting out procedures to be followed for filing and determination of claims against applicant and their former directors and officers — Affected creditors at creditors' meeting voted to approve applicant's joint amended and restated plan of compromise and arrangement which included broad releases in favour of applicant in respect of claims not filed in claims process — Since creditors' meeting monitor had been contacted by number of putative claimants seeking to file proofs of claim for adjudication under claims process — Monitor brought motion for advice and directions — Order was granted permitting specific late claimants to file their claims — To extent that claims were proven against applicant they were entitled to participate in distribution — Claims of specific late claimants were supported by uncontroverted evidence that established that their failure to file timely claims was caused by inadvertence and there was no suggestion they were not acting in good faith — There was no evidence to suggest specific late claimants were seeking to delay or otherwise avoid participating in CCAA process — Monitor reported that even if specific late claimants were permitted to file their claims and such claims were ultimately accepted as proven in amounts known to monitor, there would be no change in estimated range

of distribution to affected creditors — Parent company of applicant had established that they would be prejudiced if late claims were permitted to be filed to extent that such claims were being made as against them — To extent that claims were made against parent company, monitor was directed not to accept such claims.

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, (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.) — followed

Target Canada Co., Re (2015), 2015 CarswellOnt 9199 (Ont. S.C.J. [Commercial List]) — referred to

Target Canada Co., Re (2016), 2016 CarswellOnt 8815 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

MOTION by monitor in proceedings under *Companies' Creditors Arrangement Act* for advice and directions regarding late claimants.

***G.B. Morawetz R.S.J.*:**

1 Alvarez & Marsal Canada Inc., in its capacity as Court appointed Monitor (the "Monitor") of the Applicant, brought this motion for advice and directions regarding the treatment of a number of claimants who have not filed timely claims in accordance with the claims procedure order issued in these proceedings, but who now seek to have their claims admitted for determination in the claims process.

2 The Monitor specifically requests guidance on the following issues:

(a) Should any of the known late claimants be permitted to file proof of claims in the claims process?

(b) If so, and if such claims are determined to be allowed (in whole or in part), which distributions are such claimants entitled to participate in?

(c) How is the Monitor to address any as-of-yet unknown late claims that may come forward in the future, bearing in mind the need for certainty and finality for the Estate and for all Stakeholders?

Background

3 The Target Canada Entities (the "TCE") were granted protection under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to the initial order dated January 15, 2015 (the "Initial Order"). The Initial Order appointed the Monitor.

(ii) CBI is to file its responding materials by November 4, 2016; and

(iii) Any other claimant seeking to late-file a claim is to serve and file responding materials, including an evidentiary record sufficient for the CCAA court to make a determination that the allowance of such claim at this late stage is appropriate in the circumstances, prior to the November 29 Motion, in accordance with the *Rules of Civil Procedure*.

First and Second Interim Distribution

18 On June 29 and 30, 2016, the TCE, in consultation with the Monitor, issued the initial distribution totalling approximately $672.5 million (the "Initial Distribution"). The Initial Distribution represented approximately 55.34% of affected creditors' proven claims.

19 On October 19 and 20, 2016, the TCE, in consultation with the Monitor, issued a Second Interim Distribution in the amount of approximately $87 million (the "Second Distribution"). The Second Distribution represented approximately 12.65% of affected creditors' proven claims. The Second Distribution was, subject to further order of the court, without prejudice to the rights of the putative late claimants in respect of this motion.

20 As of October 31, 2016, the date of the Thirty-Second Report of the Monitor, approximately 68% of affected creditors' proven claims had been distributed.

21 Following the Second Distribution, approximately $3.5 million is being held in the TCE cash pool for scheduled vendor payments. An additional amount of approximately $97.4 million is being held in reserve in the TCE disputed claims reserve account pending the resolution of disputed claims, including, in particular, the claims of the 27 remaining unresolved pharmacist franchisees and CRA.

22 The Monitor has reported that current reserves are sufficient to satisfy distributions to the known late claimants, should they be permitted to file their claims, and such claims are ultimately accepted as proven by the Monitor (or the Claims Officer) in the amounts known to the Monitor at this time, without materially disturbing the estimated range of the coverage to affected creditors (being approximately 78% to 82%).

23 In determining the motion, one must also take into account the terms of the October 18 Endorsement which are set out at [17] above. Specifically, (iii) sets out the process to be followed by any claimant seeking to file a late claim. The October 18 Endorsement specifically provides that any other claimant seeking to late file a claim is to serve and file responding materials, *including an evidentiary record sufficient for the CCAA court to make a determination that the allowance of such claim at this late stage is appropriate in the circumstances (emphasis added).*

24 The test to evaluate whether a court will accept creditor claims after the passing of the claims bar date is articulated in *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.) ("Blue Range").

25 The question put before the court in *Blue Range* (para. 5) was as follows:

> 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?

26 The judgment of the court in ***Blue Ridge*** was delivered by Wittmann J.A. (as he then was). The relevant portions read as follows:

> [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 *US 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 the *US Bankruptcy Rules* approaches, bolstered by the application of some of the concepts included into other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

. . .

[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. ...

27 On the subject of prejudice, the Blue Range decision is also instructive. At [40] the court stated:

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 process is an integral part of the process. A reduction in that share cannot 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.

28 There are certain similarities between Blue Range and Target Canada. Both entities filed under the CCAA, and both Blue Range and Target Canada were essentially liquidations. In addition, in both cases, the plans of arrangement had already been voted upon by the creditors and sanctioned by the court.

29 In accordance with the terms of the October 18 Endorsement, certain claimants have filed materials in connection with the motions. Their reasons for not having filed timely claims are summarized as follows:

(a) Fruits & Passion Boutiques Inc. ("Fruits & Passion"): Fruits & Passions claim that it did not file a timely claim because it did not receive the Claims Package that was mailed to it in late June 2015, perhaps because Fruits & Passion moved its head office in the summer of 2015. Fruits & Passion asserted its claim within a reasonable time after receiving notice of its claim bar date.

(b) Lou Pharma Corp. ("Lou Pharma"): Lou Pharma claims that it did not file a timely claim because Mr. Ghasemlou (Lou Pharma's sole shareholder, officer and director) was in Iran for all of June and July 2015 and most of August 2015 and consequently was not aware of the Claims Procedure Order or Claims Bar date, did not receive the Claims Package, was not familiar with legal processes in Canada generally and has not previously had exposure to a claims process in any insolvency or restructuring proceeding.

(c) Kulwinder Kaur Rai: Ms. Rai's claim is for damages arising from a slip and fall at a Target Shopping Centre in Surrey, B.C. A paralegal at the law firm representing Ms. Rai claims that a timely claim was not filed because of Mr. Rai's counsel's view that the CCAA proceeding did not apply to Mr. Rai's claims "because an insurer has already responded to the claim in British Columbia".

(d) CBI: CBI claims that it assumed it had filed a timely claim because:

i. It received regular offers from claims traders to purchase CBI claim against Target Canada;

ii. It was listed on the list of creditors posted on the Monitor's website and it assumed, based on its understanding of U.S. bankruptcy procedure, that being listed on the list of creditors meant that its claim was deemed to be filed; and

iii. It was not aware of the disclaimer on the Monitor's website about the nature of the list of creditors.

CBI also states that it is "still unsure" that the proof of claim was not filed and relies on the turnover in its accounting department to justify its ignorance with respect to the status of the proof of claim.

(e) Mohammad Alam: Mr. Alam commenced an action for damages as a result of injuries allegedly sustained by him on August 16, 2014 while a patron/invitee at a Target Shopping Centre located in Ajax, Ontario.

Mr. Alam retained counsel on August 21, 2014. Counsel to Mr. Alam sent a notice of claim to the defendant, Target, on August 27, 2014. The following day, August 28, 2014, Mr. Alam received a letter from Sedgwick Claims Management Services Canada Inc. advising that they had been assigned to handle the incident on behalf of Target Corporation and its insurer, ACE American Insurance Company.

On August 2, 2016, Counsel to Mr. Alam contacted the adjuster for the defendant Target Canada to inquire about the status of Target Canada.

Since the loss occurred on August 16, 2014, counsel to Mr. Alam maintains the limitation date for maintaining the claim is August 16, 2016.

On August 12, 2016, the Statement of Claim was issued against the defendants, Target Corporation, Target Canada Co. o/a Target Canada and 151516 Ontario Inc.

Mr. Alam takes the position the he relied on the wording of paragraph 54 of the Claims Procedure Order which reads as follows:

> THIS COURT ORDERS that nothing in this Order shall prejudice the rights ... or prevent or bar any person from seeking recourse against or payment from the Target Canada Entities insurance .... that exists to protect or indemnify ... or other Persons, whether such recourse or payment is sought directly by the Person asserting a Claim from the insurer .... or any Target Canada Entity; provided, however, that nothing in this Order shall create any rights in favour of such Person under any policies of insurance nor shall anything in this Order limit, remove, modify or alter a defence to such Claim available to the insurer pursuant to the provisions of any insurance policy or at law; and further provided that any Claim or portion thereof for which the Person receives a payment directly from, or confirmation that she is covered by, the Target Canada Entities insurance ... or other liability insurance policy or policies that exist to protect or indemnify the Directors or Officers or other persons shall not be recoverable as against a Target Canada Entity or Director or Officer as applicable.

30 The claims of Fruits & Passion, Lou Pharma, Kulwinder Kai Rai, CBI and Mohammed Alam were supported by uncontroverted evidence that establishes, in my view, that their failure to file timely claims was caused by inadvertence and there was no suggestion that these claimants were not acting in good faith. Further, there is no evidence to suggest that these claimants were seeking to delay or otherwise avoid participating in the CCAA process. Indeed, it would have been contrary

to their interest not to participate in the CCAA process.

31 Turning now to the effect of permitting the claims in terms of the existence and the impact of any relevant prejudice caused by the delay. The second, third and fourth factors of the Blue Range test deal with any prejudice to other creditors if late claims are admitted. In this case, the Monitor reports that even if the late claimants are permitted to file their claims and such claims are ultimately accepted as proven in the amounts known to the Monitor at this time, there will be no change in the estimated range of the distribution to affected creditors (being approximately 78% - 82%).

32 A relevant question is whether other creditors lost a realistic opportunity to do anything that they otherwise might have done.

33 From the outset, it was clear that this was a liquidation plan. Target Canada followed a court approved process to liquidate its assets. The proceeds from the liquidation were being made available to creditors in accordance with their legal priorities.

34 Simply put, unsecured creditors are sharing *pro rata* in any assets of Target Canada available for distribution after satisfying secured creditors, preferred creditors and valid trust claims. There was no other choice available to unsecured creditors.

35 There is, however, one significant variable that would affect the distribution to unsecured creditors. It concerns the status of the claim of the parent company, Target Corporation.

36 Target Corporation, as Plan Sponsor (as defined in the Plan), made significant economic contributions to the CCAA proceedings and the Plan. These contributions included the following:

a. Funding a trust established for the benefit of the employees of Target Canada in the amount of $95 million;

b. Making available debtor-in-possession financing to Target Canada to allow Target Canada to meet payroll and other obligations;

c. Providing ongoing shared services to facilitate the orderly wind-down of the Applicant's operations; and

d. Subordinating well in excess of $3.1 billion in inter-company debt against Target Canada.

37 Target Corporation submits that they made these contributions to the Plan and relied upon obtaining the releases provided for in the Plan. Specifically, pursuant to the Plan, Target Corporation and its subsidiaries (including Target Brands Inc.) ("Target Brands") were released from all claims (subject to certain exceptions which are not relevant for the purpose of this motion) existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions were taken to implement the Plan, that were arising out of or in connection with the Claims, the Business whether or however conducted, the Plan, the CCAA proceedings, or any Claims that were barred or extinguished by the Claims Procedure Order.

38 Target Corporation also submits that it relied upon the anticipated recovery on its remaining unsecured claims which it did not subordinate, based on the Monitor's illustrative recovery.

39 Finally, Target Corporation takes the position that it would not have sponsored the Plan on the terms to which it agreed without being able to rely on the finality and enforceability of the release and discharge of claims provided for in the Sanction Order. This evidence is set out in the affidavit of Cory Haaland, sworn November 22, 2016.

40 Target Corporation has been named as defendant in three of the late claims and Target Brands has been named as defendant in one of the late claims. Each of these late claims was initiated after the Sanction Order was granted and the Plan implementation occurred. From the standpoint of Target Corporation, each late claim against Target Corporation or Target Brands has already been released pursuant to the terms of the Plan, as approved by the Sanction Order.

41 Given the evidence of Target Corporation that they would not have sponsored the Plan on terms to which it agreed

without being able to rely on the finality and enforceability of the release and discharge of claims provided for in the Plan, as approved by the Sanction Order, I am satisfied that Target Corporation and Target Brands have established that they would be prejudiced if such late claims were permitted to be filed to the extent that such claims are being made as against Target Corporation and Target Brands. Further, I am satisfied that given the contributions of Target Corporation and the fact that the Plan has been sanctioned and distributions have already been made to creditors, the relevant prejudice to Target Corporation and Target Brands cannot be alleviated by attaching any appropriate conditions to an order permitting late filings.

42 I conclude that Fruits & Passion, Lou Pharma, Kulwinder Kaur Rai, CBI and Mohammed Alam have satisfied the test as set out in *Blue Range*.

43 Accordingly, an order is granted permitting Fruits & Passion, Lou Pharma, Kulwinder Kaur Rai, CBI and Mohammad Alam, to file their claims. The Monitor is directed to review and value them and, to the extent that the claims are proven, against Target Canada, these claimants are entitled to participate in a distribution.

44 To the extent that the claims are made against Target Corporation or Target Brands, the Monitor is directed not to accept such claims. The claims as against Target Corporation and Target Brands have been barred and the release is effective.

45 Two other claimants made submissions at the November 29 Motion, but did not file an evidentiary record.

(a) Erin Wolf Bloom: Ms. Wolf-Bloom commenced a lawsuit against Target Canada Co. and Target Brands, Inc. as a result of injuries which Ms. Bloom alleges persist following her purchase of a Target brand shampoo known as "Up and Up".

The Statement of Claim has not been served as Ms. Bloom has been advised by the Monitor that no claims are permitted against Target-related companies.

Ms. Bloom's position is that she is not a creditor of the TCE as she has a claim against the insurer and ought to be allowed to effect service of her Statement of Claim and to prove her claim for payment under the third-party liability insurance in place.

(b) Wazir Chand & Co. PVT Ltd.: In response to receiving the Motion Record, Wazir Chand sent an email to the Monitor on November 3, 2016 in which they state that they are resubmitting the details of outstanding claims against Target Canada totalling U.S. $10,747.90.

The email also references attachments of scanned copies of three invoices, respective purchase orders and the relative 3FCRs in support of their claim.

In response, on November 21, 2016 counsel to the Monitor requested further information from Wazir Chand, specifically an explanation as to why Wazir Chand did not file a proof of claim with the Monitor, noting that a claims package was sent to Wazir Chand in June 2015.

In reply, by email dated November 23, 2016, Wazir Chand indicates that they never received any communication whereby a proof of claim was required. This was the reason provided as to why Wazir Chand could not send the proof of claims earlier.

46 The claims of Ms. Wolf Bloom and Wazir Chand have not been supported by any evidence as required by the November 18 Endorsement. The Monitor is directed to advise Ms. Wolf Bloom and Wazir Chand that if they intend to pursue their claims, they are required to file some evidence as to why they did not file a timely proof of claim with the Monitor. If and when such evidence is filed, the Monitor can request direction from the court, taking into account the reasons set out in this endorsement.

47 The second issue is to provide the Monitor with directions with respect to distributions in which late claimants are entitled to participate. The Monitor has made two distributions, pursuant to court order. These distributions are not to be disturbed.

TAB 4

2011 ABQB 223
Alberta Court of Queen's Bench

Royal Bank v. Cow Harbour Construction Ltd.

2011 CarswellAlta 533, 2011 ABQB 223, [2011] A.W.L.D. 2213, 201 A.C.W.S. (3d) 335, 516 A.R. 125, 76 C.B.R. (5th) 143

Royal Bank of Canada (Plaintiff) and Cow Harbour Construction Ltd. and 1134252 Alberta Ltd. (Defendant's)

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

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

And In the Matter of a Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.

K.D. Yamauchi J.

Heard: March 25, 2011
Judgment: April 5, 2011
Docket: Edmonton 1003-11241, 1003-05560, BKCY 24-115359

Counsel: Bryan Maruyama for Applicant, Matthews Equipment Limited, operating as Hertz Equipment Rental
Randall S. Van de Mosselaar for Respondent, PricewaterhouseCoopers Inc., receiver of Cow Harbour Construction Ltd.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
IX Proving claim
  IX.4 Practice and procedure
    IX.4.b Filing proof of claim

Headnote

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Filing proof of claim
Debtor company C Ltd. sought and was granted relief under Companies' Creditors Arrangement Act — Initial order imposed stay of proceedings and prohibited creditors defined by order to be "critical suppliers" from filing builders' liens against lands on which C Ltd. did work or furnished materials in respect of improvements — Court established process pursuant to which creditors claiming to be critical suppliers could assert their claims — Monitor e-mailed proof of claim package to parties, allegedly including creditor H Ltd.'s law firm, which set out claims bar date — H Ltd. did not file proof of claim in time — Receivership order was granted — Law firm denied having received e-mails allegedly sent by Monitor — H Ltd. applied for leave to file proof of claim after claims bar date — Application granted — Leave granted to H Ltd. to file proof of claim after claims bar date — H Ltd.'s failure to file proof of claim was result of inadvertence — H Ltd. was not attempting to seek unjustified advantage by not filing claim and was not improperly manipulating process — H Ltd., by providing Receiver with its proof of claim immediately on being advised, or reminded, of its need to provide it, showed that it acted in good faith — Because of immateriality of H Ltd.'s claim relative to proofs of claim as whole, C Ltd.'s other creditors' awareness of H Ltd.'s potential claim, and fact that nothing had been done concerning those claims to date, neither critical suppliers nor Receiver would suffer any prejudice if leave was granted to H Ltd. to file its claim.

McLaws, via email (the "June 1 Email"), a copy of the Proof of Claim "package" that claimants would use if they wanted to make a claim as a Critical Supplier, and setting out the Claims Bar Date.

12 Ms. White does not recall whether she received the May 28 Email or the June 1 Email. She has reviewed her email archives and has found no record of the May 28 Email or the June 1 Email. As well, Hertz's systems department informed Ms. White that once an email received by anyone at Hertz has been deleted, it cannot be retrieved.

13 There was nothing that prevented Ms. White from asking Parlee McLaws to check their "sent items" to see whether (contrary to their "routine" practice) they failed to forward either the May 28 Email or the June 1 Email to Hertz or to Ms. White. She did not make that inquiry.

14 Hertz did not file a Proof of Claim with the Monitor by the Claims Bar Date.

15 On August 25, 2010, this Court granted an order in which it appointed PricewaterhouseCoopers Inc. as receiver (the "Receiver") of all of Cow Harbour's and 1134252 Alberta Ltd.'s current and future assets, undertakings and properties (the "Receivership Order"). This Court granted the Receivership Order pursuant to the *Judicature Act*, RSA 2002, c. J-2, s. 13(2) and the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 243(1) ("*BIA*").

16 Parlee McLaws provided Hertz's Proof of Claim to the Receiver on January 12, 2011, together with the supporting invoices.

17 On January 12, 2011, this Court granted a further order (the "January 12 Order"), in which it ordered, among other things, that in accordance with the May 21 Order, any creditor who did not file a Proof of Claim by June 16, 2010, shall, unless otherwise ordered, be conclusively deemed not to be a Critical Supplier.

18 Hertz now requests this Court to grant it leave to file its Proof of Claim, even though it failed to file it on or before the Claims Bar Date.

III. Issue

19 Whether this Court should grant Hertz leave to file its Proof of Claim subsequent to the Claims Bar Date.

IV. Discussion

20 *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.) at para. 26, held that courts, in a *CCAA* proceeding, respond to the following questions when they are determining whether they will permit a claimant to file its claim after the expiry of a deadline for filing claims:

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

1. Inadvertence and Good Faith

21 *Blue Range* held that "inadvertent" includes carelessness, negligence, accident, and is unintentional (para. 27).

22 Hertz argues that the inadvertence in this case is attributable to Parlee McLaws failing to advise Hertz to file its Proof of Claim in advance of the Claims Bar Date. In fact, Hertz argues that it did not receive the Proof of Claim at all and did not recognize the need to file its Proof of Claim until Parlee McLaws advised it to do so on January 12, 2011. Hertz completed its Proof of Claim and had Parlee McLaws submit it to the Receiver on the day that Parlee McLaws brought this requirement to its attention. Finally, Hertz argues that its failure to file its Proof of Claim was not the result of any deliberate act attributable to Hertz.

23 The Receiver argues that while "inadvertence" sets a seemingly low standard, it is not sufficient for a party to claim inadvertence if there is no explanation for its failure to file its claim on time. In the absence of conduct evidencing "inadvertence," a period of inadvertence will have "ceased to run" when a claimant's solicitor is given specific notice of a claims bar date.

24 The Receiver further argues that Hertz has not provided sufficient or any evidence of conduct amounting to inadvertence, whether on Hertz's behalf, or on behalf of Parlee McLaws. In fact, it argues, there is no evidence to indicate why Hertz did not file its Proof of Claim in a timely manner. While Hertz argues that this was a result of Parlee McLaw's inadvertent failure to provide the documents to Hertz, there is no evidence to support this assertion. This is so, despite the fact that Ms. White was specifically asked this question during questioning and subsequently filed a supplemental affidavit.

25 The Receiver argues that this Court may provide the relief Hertz seeks only if Hertz proves "exceptional circumstances." This term comes from *Ivorylane Corp. v. Country Style Realty Ltd.*, 2004 CarswellOnt 2567 (Ont. S.C.J. [Commercial List]) at para. 47. The court, in that case, cites *Blue Range* for this proposition. This Court does not agree that *Blue Range* made this a part of the test. Instead, it requires this Court to examine the facts before it in the light of the 4 questions it posed. Whether the result of that analysis is exceptional or unexceptional matters not.

26 The description of "inadvertent" in *Blue Range*, says that the action is "unintentional." It is difficult to imagine a situation where carelessness, negligence or accident could be "intentional" and still be inadvertent, unless the court in that case was envisaging a situation where a claimant is wilfully blind or procrastinating. Nonetheless, to determine inadvertence, one must look at the circumstances in which the claimant found itself. For example, was there an advantage to Hertz "lying in the weeds" until the Claims Bar Date passed? Although we must examine this question, as well, when deciding whether any prejudice flows, it is important to answer that question at this stage.

27 Hertz's statement that it was not lying in the weeds is not sufficient. Further, the Receiver argues that there is no evidence before this Court to indicate why Hertz did not file its Proof of Claim in a timely manner. While this Court agrees with the Receiver that it is Hertz's onus to show why it requires an extension, Romaine J. in *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.), tells us that "the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case" (para. 34).

28 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), the court would not grant the claimant leave to pursue his claim after the creditors had approved a plan of arrangement and the court sanctioned it. He became aware of the *CCAA* proceedings at some point during the proceedings and at various stages throughout the proceedings, his solicitors contacted the debtor's solicitors to inquire about the process. He, however, did not pursue his claim until a point where he could recover potentially more than the debtor's other creditors. The court in *Blue Range* said of the *Lindsay* case:

> 18 ... [T]he 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.

29 The Receiver forcefully argued that, on the evidence, we still do not know whether Parlee McLaws ever forwarded the May 28 Email or the June 1 Email to Hertz. Ms. White's supplemental affidavit says nothing more than that Hertz is unable to retrieve emails once they are deleted. That may be so, but this lack of evidence does not completely answer the question.

We must look at "the specific circumstances of the case" to answer it. In this case, there would be no advantage for any creditor to simply lie in the weeds. They could lose their claim completely or they could be subject to a costs claim. The only advantage could be that they would not have to incur the cost of having to file a Proof of Claim. As well, there could be a practical advantage, such as the one outlined in *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.). That situation does not apply in this case. This Court finds that there would be no advantage to Hertz by its lying in the weeds and the only explanation for it not filing its Proof of Claim was inadvertence on its part or on the part of Parlee McLaws.

30 The Receiver rightly points out that service on a solicitor of record is service on the claimant. In fact the *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 11.16, 11.17 and 11.20 permit this. Does the *Blue Range* test of unintentional negligence, carelessness and accident apply equally to the claimant's solicitors, as well as the claimant itself? Or is the *Blue Range* test limited only to claimants? If it is the latter, then the claimant's remedy would be as against the Alberta Lawyers Insurance Association. With respect to the former, the court in *Air Canada, Re* (2004), 49 C.B.R. (4th) 175 (Ont. S.C.J. [Commercial List]), allowed the claimant to file its late notice when counsel had acknowledged that it was through its inadvertence that the notice had not been filed on time, and that corrective action was taken promptly and that the extension of time would not cause a hardship to any interested party or prejudice the debtor company's reorganization.

31 This Court does not countenance solicitors' negligence, but in the unique circumstances of this case where there are 3 solicitors from the same firm dealing with numerous clients involved in a *CCAA* matter, one can see how the solicitors might be inadvertent. In fact, throughout this Court's involvement in this matter, Parlee McLaws has made submissions which, at the same time, support and contest a particular approach to a matter. One would have thought that solicitors with the experience of those involved in this matter would never allow something like this to happen.

32 This Court must also assess whether Hertz was acting in good faith in these circumstances. A simple assertion that it was acting in good faith is not enough. This analysis can be done by answering what appears to be two sides of the same coin. Was Hertz acting in bad faith and was it acting in good faith? With respect to the former, the "lying in the weeds" analysis will answer that question. With respect to the latter, a court will find that a claimant is acting in good faith if it submits its claim as soon as it becomes aware of the situation. See *e.g. Blue Range* at paras. 28 and 30. In the case at bar, Hertz, through Parlee McLaws, provided its Proof of Claim to the Receiver immediately on being advised of the need so to do.

33 This Court finds that Hertz's failure to file its Proof of Claim was the result of Parlee McLaws' "inadvertence." To this end, this Court chooses to follow the approach that the court took in *Air Canada*. In the alternative, if Hertz did receive the Proof of Claim, it failed to file the Proof of Claim through its own inadvertence. As well, Hertz, by providing the Receiver with its Proof of Claim immediately on being advised, or reminded, as the case may be, of its need to provide it, shows that it acted in good faith.

2. Prejudice

34 Hertz argues that having this Court granting it leave to file its Proof of Claim after the Claims Bar Date, and the claim itself, would have a negligible impact on the Critical Supplier claims process. The Receiver has not yet (1) completed its review of the previously submitted Proofs of Claim; (2) completed the appeals process in respect of the Receiver's review of the previously submitted Proofs of Claim; or (3) made any distribution in respect of the CS Charge. Hertz has not been "lying in the weeds."

35 It further argues that its claim was known to the Monitor and the other creditors. The Monitor categorized Hertz as a true lessor. The Monitor communicated that categorization to all creditors in the Monitor's Fifth Report. Hertz was also known to the Receiver and is listed as having an unsecured claim in the amount of $196,966.29, in the Notice and Statement of Receiver dated August 31, 2010, that the Receiver circulated to all of Cow Harbour's creditors, pursuant to the *BIA*.

36 Furthermore, Cow Harbour's creditors were aware that there were other creditors who had filed late Proofs of Claim. This Court has not yet adjudicated on the validity of the other late-filed proofs of claim.

37 Finally, Hertz argues that none of Cow Harbour's creditors will have lost a realistic opportunity to do anything that they otherwise might have done. Conversely, had Hertz submitted its Proof of Claim on time, each of the other creditors

would have proceeded in exactly the same fashion as they did.

38 The Receiver argues that in any consideration of prejudice, this Court should weigh the prejudice to the Receiver or a monitor in a *CCAA* proceeding on its ability carry out its duties and effect a level of predictability and finality in *CCAA* or receivership proceedings.

39 *Blue Range* (para. 36) tells us that timing is a key element when determining whether Hertz or the other Critical Suppliers will suffer any prejudice if this Court were to grant Hertz leave to file its claim. What does this mean? Had the Receiver completed its analysis of the Critical Suppliers' issue and distributed funds then this Court might be less inclined to allow Hertz to file its Proof of Claim. As well, Cow Harbour's other creditors were aware of Hertz's potential claim through many of the Monitor's reports: *Blue Range* at para. 39. This Court has not adjudicated on the admissibility of any of the other late Proofs of Claim, as yet.

40 *Blue Range* at para 37, also tells us that materiality is relevant to the issue of prejudice. Assuming that Hertz's claim is the agreed-upon amount of $178,598.47, its claim, as against the total amount of the Proofs of Claim of $49,962,687.68 is .357%. In *Blue Range*, the court found a .435% claim to be immaterial. Surely, .357% is even less material.

41 Even if materiality is not *sine qua non* of this Court's analysis, the fact that the Critical Suppliers will receive less money, should this Court grant Hertz leave to file its Proof of Claim, is not something this Court need consider:

> 37 In a *CCAA* 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.

42 Because of the immateriality of Hertz's claim relative to the Proofs of Claim as a whole, Cow Harbour's other creditors' awareness of Hertz's potential claim, and the fact that nothing has been done concerning these claims to this point, this Court finds that neither the Critical Suppliers nor the Receiver will suffer any prejudice if this Court were to grant leave to Hertz to file its claim.

43 Because this Court finds that there would be no "relevant prejudice" that flows as a result of its approving Hertz's late filing, this Court does not intend to deal with the third and fourth *Blue Range* questions.

Conclusion

44 Proceedings under the *CCAA* are meant to deal with compromises and arrangements among a debtor company and its creditors. If a creditor fails to file its claim in those proceedings because of its solicitors' negligence or its own inadvertence, as defined in *Blue Range*, it should be permitted to argue that, nonetheless, a court should permit it to file its claim. That is the reason why *Blue Range* outlined the four questions and why this Court inserted the "unless otherwise ordered by the court" provision in the May 21 Order and the January 12 Order.

45 The objective of a claims procedure order was set out by Romaine J. in *BA Energy* as follows:

> 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.

46 It is important to note that each case depends on its unique facts. This Court finds that Hertz was not attempting to seek an unjustified advantage by not filing its claim or that it was improperly manipulating the process. Its failure to file its claim was inadvertent. Accordingly, this Court grants Hertz leave to file its Proof of Claim subsequent to the June 16, 2010 deadline.

Application granted.

TAB 5

2012 ABCA 313
Alberta Court of Appeal

SemCanada Crude Co., Re

2012 CarswellAlta 1829, 2012 ABCA 313, [2013] A.W.L.D. 331, 225 A.C.W.S. (3d) 594, 536 A.R. 396, 559 W.A.C. 396

Celtic Exploration Ltd., Applicant (Applicant) and SemCAMS ULC, Respondent (Respondent) and SemCanada Crude Company, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc. 3191278 Nova Scotia Company and 1380331 Alberta ULC, Not Parties to the Application (Not Parties to the Application) and Bank of America N.A., Respondent (Respondent)

Constance Hunt J.A.

Heard: October 4, 2012
Judgment: November 5, 2012
Docket: Calgary Appeal 1201-0219-AC

Proceedings: refusing leave to appeal *SemCanada Crude Co., Re* (2012), 2012 ABQB 489, 2012 CarswellAlta 1399, 93 C.B.R. (5th) 188 (Alta. Q.B.)

Counsel: A.J. Jordan, Q.C., for Applicant
A.R. Anderson, Q.C., D. Schweitzer, for Respondent, SemCAMS ULC
M. Konyukhova (viia Telephone Conference), for Respondent, Bank of America N.A.

Subject: Insolvency; Natural Resources; Property; Public

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.ii Contractual rights

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights

Contract between company and creditor was suspended upon initial order being made under Companies' Creditors Arrangement Act — Creditor applied to file late claim for damages arising from suspension for period from initial order to implementation of plan of arrangement (POA) — Creditor unsuccessfully further applied for declaration that its claims for damages subsequent to POA were not affected claims, or alternatively, to file late claims therefore — Company successfully cross-applied to strike out creditor's statement of claim — Application judge found that post-POA claims were subject to arrangement pursuant to s. 19(1) of Act as relating to contingent liabilities even though damages could not be ascertained at time proceedings commenced — Application judge noted that all of creditor's claims were subject to POA that was given effect by sanction order — Application was made 2 1/2 years after claims bar date and 1 1/2 years after POA implementation — Application judge concluded that failure to make timely claims was neither inadvertent nor in good faith and allowing application would have prejudiced other creditors and bring proceedings into disrepute — Creditor brought application for leave to appeal — Application dismissed — Creditor did not provide sufficient evidence to show that issues had any reasonable chance of success on appeal — Judge's decision would not be vulnerable on relevant standard of review — Further, judge's conclusions regarding inadvertence, good faith and prejudice had rational basis in light of evidence.

Table of Authorities

Cases considered by *Constance Hunt J.A.*:

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

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta. C.A.) — referred to

SemCanada Crude Co., Re (2010), 76 C.B.R. (5th) 1, 100 C.P.C. (6th) 221, 48 Alta. L.R. (5th) 58, (sub nom. *Celtic Exploration Ltd. v. SemCAMS ULC*) 510 A.R. 101, (sub nom. *Celtic Exploration Ltd. v. SemCAMS ULC*) 527 W.A.C. 101, 2010 CarswellAlta 2459, 2010 ABCA 403 (Alta. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 121(2) — considered

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

s. 19(1) — considered

APPLICATION by creditor for leave to appeal judgment reported at *SemCanada Crude Co., Re* (2012), 2012 ABQB 489, 2012 CarswellAlta 1399, 93 C.B.R. (5th) 188 (Alta. Q.B.).

***Constance Hunt J.A.*:**

1 Celtic Exploration Ltd. (Celtic) seeks leave to appeal *SemCanada Crude Co., Re*, 2012 ABQB 489 (Alta. Q.B.) (available on CanLII). The Bank of America, agent to the secured creditors, joins SemCAMS in opposing the application.

2 Leave to appeal is denied because Celtic has not convinced me that the issues it puts forward have a reasonable chance of success on appeal.

Facts

3 The very complex facts are set out in the decision, which incorporated some of the findings of the same judge in a related case, *SemCanada Crude Co., Re*, 2010 ABQB 531, 495 A.R. 367 (Alta. Q.B.), leave to appeal refused, 2010 ABCA 403, 510 A.R. 101 (Alta. C.A.) [*Celtic #1*]. The fact recital that follows is limited to the key points that arise from the leave application, and paragraph references are to *Celtic #2*.

4 SemCAMS was granted an Initial Order under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 on July

22, 2008: para 9. The Claims Process had a cut-off date of December 1, 2008: para 13. A Plan of Arrangement came into effect on November 30, 2009: para 14.

5 The parties had an Inlet Gas Processing Agreement (IGPA) which, in *Celtic #1*, was found to have been suspended by agreement of the parties in July 2008, at the inception of the *CCAA* process. Although Celtic filed a claim in the Claims Process relating to gas supplied to SemCAMS in June and July 2008, it made no claim for contingent damages arising from the suspension of the IGPA. Celtic participated in the creditor vote on SemCAMS' proposed Plan of Arrangement: para 14.

6 The present application for leave resulted from Celtic's April 2011 application to file a late claim in the *CCAA* proceedings for damages incurred as a result of the IGPA suspension between July 22, 2008 and November 30, 2009 (the *CCAA* period, which I refer to as "Period 1"). It also sought a declaration that its damages from December 1, 2009 to September 30, 2010 (the Post Plan Implementation Period, which I refer to as "Period 2") and post October 1, 2010 (which I refer to as "Period 3") are not affected claims compromised by the Plan of Arrangement. Any difference between the latter two periods arises because in September 2010, Celtic advised SemCAMS that it intended to reinstate deliveries under the IGPA: para 15.

Test for Leave

7 To obtain leave to appeal a supervising *CCAA* judge's decision, the applicant must establish serious and arguable grounds of appeal of real and significant interest to the parties. This test subsumes four factors: the point on appeal is significant to the practice; the point is of significance to the action itself; the appeal is *prima facie* meritorious; and the appeal will not unduly hinder progress of the action: *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.) at paras 15-16, (2003), 44 C.B.R. (4th) 96 (Alta. C.A.).

8 The appropriate standard of review is considered as part of the third factor: *Liberty* at paras 19-20. Absent an error of law or principle, this Court will only interfere with a supervising *CCAA* judge's decision if there has been a palpable and overriding error in an exercise of discretion or fact finding: *Canadian Airlines Corp., Re*, 2000 ABCA 149(Alta. C.A. [In Chambers]) at para 29, (2000), 261 A.R. 120 (Alta. C.A. [In Chambers]).

The Supervising CCAA Judge's Decision

9 The judge dealt with Periods 2 and 3 together, concluding that such claims were caught by section 19(1) because SemCAMS "was subject to the possibility of liability under the IGPA before the *CCAA* proceedings commenced": para 24. These claims were "future" liabilities. Section 121(2) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 defines contingent and unliquidated claims. These types of claims are incorporated in *CCAA* proceedings and may be evaluated under the Claims Process: paras 25-26. She acknowledged that such claims may have been difficult to value, "but that is often the nature of a contingent or future claim": para 27. She emphasized that the *CCAA* permits debtor companies to deal with future and contingent claims: paras 31-32. She held that "[t]he obligation to pay damages arising from the suspension is not a new breach of the IGPA that occurred after the Plan Implementation Date, but a claim of continuing damages that arise from the suspension of the IGPA": para 35.

10 In a similar vein, she was not persuaded that there were grounds to distinguish between Periods 2 and 3. The question of whether the IGPA, having been suspended by agreement, could be reinstated unilaterally by Celtic was not a "new issue" but rather one that arose from the suspension of the IGPA: para 38. Thus the damages claimed in Period 3 were the "same type of damages claimed for the preceding periods": *ibid.* Since it was not a fresh breach, it could be dealt with under section 19(1).

11 Because the claims for these two periods were subject to compromise under the *CCAA*, they were also caught by the Plan of Arrangement: para 40.

12 The judge then considered whether Celtic should be permitted to file a late amended claim for the suspension damages. She determined that all three periods could be treated together because they were all "new" claims, in the sense that they differed from the claim filed by Celtic concerning gas delivered before the *CCAA* proceedings commenced: para 47. She

described Celtic's application as "extraordinary", coming two and a half years after the Claims Bar Date and 18 months after the Plan Implementation Date: para 48.

13 She applied the criteria set out in *Blue Range Resource Corp., Re*, **2000 ABCA 285, 271 A.R. 138** (Alta. C.A.), to decide whether the late claims should be permitted. She held that Celtic's failure to make a claim for suspension damages in the *CCAA* proceedings was "not unintentional": para 52. Celtic was aware of the *CCAA* proceedings, having filed a claim therein, with legal advice. She was unable to find that Celtic had acted in good faith by delaying its claim, since at many earlier points it was aware of the potential damages should it be found that the IGPA had been suspended: para 58. She also considered that there would be prejudice to other creditors caused by these claims: paras 59-70.

14 Finally, under the heading "Other Considerations", she noted that late claims should be accepted sparingly; the Plan of Arrangement could not be modified without the consent of the Bank of America, which was not acting unreasonably in opposing the application to amend; and permitting these claims would throw the *CCAA* restructuring process into disrepute.

Discussion

15 Celtic raises three main points:

(i) Did the judge err in finding claims for damages arising from the suspension or breach of the IGPA for periods *after* the Plan was implemented were compromised by the Plan and the sanction order?

(ii) Did the judge err in failing to find that SemCAMS was obligated to perform the IGPA after the Plan was approved and implemented?

(iii) Did the judge wrongly refuse to allow Celtic to amend its proof of claim to claim damages from suspension of the IGPA?

16 I am not persuaded that any of these issues has a reasonable chance of success on appeal.

17 Celtic asserts that the first issue contains an extricable question of law, to which the correctness standard applies. During oral argument it framed that question along these lines: is an executory contract to which a debtor company is party, which contract is not terminated during *CCAA* proceedings, subject to compromise for breaches that occur after the *CCAA* proceedings?

18 I agree that this is an interesting legal question. Given the facts here, however, I am not persuaded that it necessarily arises.

19 The judge saw the matter differently, considering whether, on the facts she found, the post-*CCAA* suspension damages were future liabilities for the purposes of the *CCAA*. In deciding that they were, she held that they were not new or fresh breaches but ones that arose from the suspension of the IGPA, which had occurred within the period of the *CCAA* proceedings.

20 Thus characterized, this is an issue of mixed fact and law reviewable on the palpable and overriding error standard. I cannot say (indeed, Celtic did not specifically argue) that she mis-characterized the issue. Given the matters that she took into account, nor can I say that her decision would be vulnerable on the relevant standard of review.

21 On the second point, Celtic argues that by refusing to decide whether it had a unilateral right to reinstate the IGPA, the judge essentially dismissed this claim without considering it. Put another way, Celtic says that her treatment made suspension of the IGPA identical to its termination, which is not what the parties intended when, in July 2008, they agreed to suspend its operation.

22 This too is a matter of mixed fact and law arising from the manner in which the judge viewed the problem. Her focus was on the fact that all the damages had the same source: the IGPA to which SemCAMS was subject at the commencement

TAB 6

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.

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.

TAB 7

Province of Alberta

LAND TITLES ACT

Revised Statutes of Alberta 2000
Chapter L-4

Current as of December 15, 2017

Office Consolidation

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(iv) any other document in writing relating to or affecting the transfer of or dealing with land or evidencing title to land;

(l) "judge" means an official authorized in Alberta to adjudicate in civil matters in which the title to real estate is in question;

(m) "land" means land, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether the estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any of them are specially excepted;

(n) "memorandum" means the endorsement on the certificate of title of the particulars of an instrument or caveat presented for registration;

(o) "mortgage" means a charge on land created merely for securing a debt or loan;

(p) "mortgagee" means the owner of a mortgage;

(q) "mortgagor" means the owner or transferor of land, or of any estate or interest in land charged as security for a debt or a loan;

(r) "owner" means a person entitled to any freehold or other estate or interest in land, at law or in equity, in possession, in futurity or expectancy;

(s) "possession" when applied to persons claiming title to land means also alternatively the reception of the rents and profits of the land;

(t) "register" means the register of titles to land kept in accordance with this Act;

(u) "Registrar" means the Registrar of Titles and includes a Deputy Registrar and an Assistant Deputy Registrar;

(v) "registration" means

(i) the bringing of land under the provisions of this Act,

(a) to be charged or made security in favour of a mortgagee, the mortgagor shall execute a mortgage in the prescribed form, or to the like effect, or

(b) to be charged with or made security for the payment of an annuity, rent charge or sum of money in favour of any encumbrancee, the encumbrancer shall execute an encumbrance in the prescribed form, or to the like effect.

(2) A mortgage or encumbrance shall

(a) contain an accurate statement of the estate or interest intended to be mortgaged or encumbered, and

(b) give a description of the land intended to be dealt with that is sufficient to identify the land,

and a memorandum of the mortgage or encumbrance shall be made on the certificate of title.

(3) A mortgage or encumbrance providing for the delivery to the mortgagee or encumbrancee of grain is registerable in the same manner as any other mortgage or encumbrance if there is set out in it the amount of grain of any specified description and grade as being the amount of grain deliverable pursuant to it, and all the provisions of this Act relating to other mortgages or encumbrances apply, with all necessary modifications, to any mortgage or encumbrance to which this subsection relates.

RSA 1980 cL-5 s105;1988 c27 s39

Mortgage as security

103 A mortgage or encumbrance under this Act has effect as security but does not operate as a transfer of the land charged by it.

RSA 1980 cL-5 s106

Priority of mortgage

104(1) On registration of a mortgage for a specific principal sum, the mortgage obtains priority in accordance with section 14 of this Act for all advances and obligations secured pursuant to the terms of the mortgage, notwithstanding that they are made or incurred subsequent to the registration, on or after January 1, 1983, of any other instrument or caveat.

(2) On registration of a mortgage that provides for a revolving line of credit up to a specific principal sum, the mortgage obtains priority in accordance with section 14 of this Act for all advances and obligations secured pursuant to the terms of the mortgage notwithstanding

(a) that the advances and obligations are made or incurred subsequent to the registration, after December 31, 1982, of any other instrument or caveat, and

(b) that at any time during the term of the mortgage there may not be any outstanding advances to be secured.

(3) If a mortgagee refuses to make, or a mortgagor has and exercises a right to refuse to accept or be bound by, any further advances that would be secured under subsection (1) or (2), the mortgagee shall, on the request of the mortgagor, provide a discharge of the mortgage as to the further advances.

(4) The rights given under the *Builders' Lien Act* and the *Personal Property Security Act* are not affected by this section.

1982 c23 s14;1985 c48 s2(21);1988 cP-4.05 s86

Mortgages affected by conditional sales agreement

105(1) A mortgage, charge or encumbrance on land or on any estate or interest in land contained in, endorsed on or annexed to a written order, contract or agreement for the purchase or delivery of any chattel or chattels, is void to all intents and purposes whatsoever, notwithstanding anything in any Act.

(2) No such mortgage, charge or encumbrance, and no caveat founded on it, or on any such writing or instrument, shall be registered or filed under this Act.

(3) If any such writing or instrument, by inadvertence, accident or otherwise howsoever, is registered or filed in any Land Titles Office contrary to this section, the registration or filing is ineffective and nugatory to all intents and purposes whatsoever, and may be cancelled by a judge of the Court of Queen's Bench on the application of any person interested.

RSA 2000 cL-4 s105;2009 c53 s95

Discharge of mortgage or encumbrance

106(1) The Registrar shall discharge a mortgage or an encumbrance wholly or in part, or the land comprised in it wholly or in part, according to the tenor of the discharge, and shall make an entry of the discharge on the certificate of title affected by the discharge, in any of the following cases:

(a) on the production to the Registrar of a discharge in the prescribed form signed by the mortgagee or encumbrancee and accompanied with the proper affidavit of execution, but

(i) when it is expressly stated in a mortgage or encumbrance to 2 or more mortgagees or encumbrancees that the money has been advanced on a joint account, it is sufficient if the discharge of the mortgage or encumbrance is signed by any one of the mortgagees or encumbrancees, or

(ii) when it is expressly stated in a mortgage or encumbrance that the mortgage or encumbrance is held in joint tenancy by 2 or more mortgagees or encumbrancees, it is sufficient, on the death of a joint tenant, if the discharge of the mortgage or encumbrance is signed by the surviving mortgagees or encumbrancees;

(b) on the production of a certificate signed by a judge certifying that the judge is satisfied of the payment of all or part of the money secured by the mortgage or encumbrance, and that the mortgagee or encumbrancee is living, or if dead, that no succession duty or other tax is payable to the Crown in right of Alberta with respect to the mortgage or encumbrance;

(c) on the production of a certificate signed by a judge certifying that the right of any person to recover any money secured by the mortgage or encumbrance has been extinguished by reason of the operation of the *Limitation of Actions Act*, RSA 1980 cL-15, or is unenforceable pursuant to an immunity from liability established under the *Limitations Act*.

(2) On the entry being made on the certificate of title, the land or the estate, or interest in the land, or the portion of the land mentioned or referred to in the endorsement as provided in this Act, ceases to be subject to or liable for the principal sum or annuity, or, as the case may be, for the part of it mentioned in the entry as discharged.

RSA 2000 cL-4 s106;2007 c22 s2

Postponements

107(1) A person entitled to the benefit of a mortgage, encumbrance, lease or other instrument or a caveat registered against land may postpone the person's rights under it by filing a postponement in the prescribed form.