COURT OF APPEAL FILE NUMBER	1703-0237AC
TRIAL COURT FILE NUMBER	1703-12327
COURT	COURT OF APPEAL OF ALBERTA
JUDICIAL CENTRE	EDMONTON

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

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., DJ CATERING LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. AND 1919209 ALBERTA LTD.

DOCUMENT	**MEMORANDUM OF LAW ON BEHALF OF THE MONITOR, ERNST & YOUNG INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DUNCAN CRAIG LLP Barristers & Solicitors 2800 Scotia Place 10060 Jasper Avenue Edmonton, Alberta T5J 3V9 Attention: Darren R. Bieganek, QC Telephone: 780.441.4386 Facsimile: 780.969.6381 File No.: 204-196164

A. INTRODUCTION AND FACTS

1) The Attorney General of Canada, acting on behalf of Her Majesty the Queen in right of Canada as represented by the Minister of National Revenue (the "Crown"), seeks Leave to Appeal the decision or Madam Justice Topolniski dated September 11, 2017 (the "Reasons").

2) The Crown sought to vary the Initial Order granted by Justice Nielsen on July 5, 2017 ("Initial Order") in which he granted Priority Charges pursuant to the provisions of the *Companies Creditors Arrangement Act* ("CCAA") totalling $1,650,000.00 in priority to the Crown's deemed trust claims.

3) The Crown argued that Justice Nielsen lacked jurisdiction to grant the Priority Charges to the extent that he directed that the Priority Charges would have priority to the Crown's deemed trust claim for unremitted source deductions.

4) Justice Topolniski heard argument on August 11, 2017 and in the reasons delivered September 11, 2017 dismissed the Crown's application finding that the CCAA gives the Court the ability to rank the Priority Charges ahead of the Crown's security interest arising out of the deemed trust.[1]

5) It is the position of the Monitor, Ernst & Young Inc. ("Monitor"), that Justice Topolniski's decision is sound, and that the Crown does not meet the test set out by this Court in *Resurgence*[2] for granting leave to appeal.

6) The Initial Order of July 5, 2017, granted the Priority Charges totalling $1,650,000: Interim Lending: $1,000,000.00, Administration: $500,000.00, Directors: $150,00.00. The Interim Lender Charge was increased to $2,500,000 on July 27, 2017, bringing the total Priority Charges to $3,150,000.

7) The Crown received notice of both applications, but did not make any arguments at either application.

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[1] *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550, at Para 14 – Tab A of the *CRA Memorandum*
[2] *Resurgence Asset Management LCC v Canadian Airlines Corporation*, 2000 ABCA 149 **[TAB 2, Respondents' Joint Book of Authorities ("Joint Book"), V1]**

8) The actual debt owing for unremitted source deductions is $685,542.93: $652,916.43 in Canada North Camps Inc. ("Camps") and $32,626.50 in Campcorp Structures Ltd. ("Campcorp).[3]

9) The deemed trust is only an issue in two of the Applicant entities. The Priority Charges cover the asset of all Applicants.

10) The assets values in respect of Camps and Campcorp alone, as per sealed Affidavit evidence in the CCAA proceedings, are more than significant to cover not only the Priority Charges but also the Crown's deemed trust.

B. ARGUMENT

11) Appelate review of a discretionary order under the *CCAA* is limited: intervention is justified only for an error in principle or the unreasonable exercise of discretion. In *Fracmaster*[4], Justice Fruman noted that decisions of the chambers judge are owed considerable deference: "[W]e will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error."[5]

12) Substantial deference is accorded to the weight given by trial, chambers, and case management judges, to the factors in legal tests. Any deference afforded is amplified when the judge is a case management judge whose decision is part of a series of decisions relating to an ongoing court process.[6]

13) Leave to appeal is required by the CCAA[7]. Leave to appeal is granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties.[8]

14) In order to determine if this test is met, four factors must be considered:

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

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

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[3] Affidavit of Albert LaRocque sworn September 26, 2017 – Tab L of *CRA's Memorandum of Law*
[4] *Royal Bank v Fracmaster Ltd.*, 1999 ABCA 178, at Para 3. **[TAB 4, Joint Book, V1]**
[5] *Ibid.*
[6] *DeLage Landen Financial Services Canada Inc. v Royal Bank,* 2010 ABCA 394 at para 13. **[TAB 14, Joint Book, V2]**
[7] *Companies' Creditors Arrangement Act,* RSC 1985, c C36, s 13. **[TAB 1, Joint Book, V1]**
[8] Sarra, Janis P. Rescue! *Companies' Creditors Arrangement Act* (2nd Ed.), page 190. **[TAB 15, Joint Book, V2]**

c) Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and

d) Whether the appeal will unduly hinder the progress of the action.[9]

15) The Court in *Resurgence* notes that the final two factors are generally of more importance than the initial two.[10]

The point on appeal is not of significance to the practice

16) The ability of the Courts to grant Priority Charges is essential to allow a distressed company to restructure its affairs under the provisions of the legislation.[11]

17) This issue has already been determined against the Crown in this jurisdiction in *Temple City Housing Inc.* ("*Temple City*").[12]

18) The Crown's leave to appeal application in *Temple City* was denied.[13] A significant reason for denial was that the legislation was about to be changed to specifically allow for the granting of Priority Charges.

19) This case does not represent a change to what has been in practice with respect to CCAA proceedings before or since *Temple City.*

20) *Temple City* was decided at a time when the Priority Charging provisions were not included within the CCAA. Courts relied on section 11 of the legislation and inherent jurisdiction as authority for the Court to grant such Orders.[14]

21) Section 11 reads as follows:

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

[9] *Resurgence,* supra at para 46. **[TAB 2, Joint Book, V1]**
[10] *Ibid* at para 46.
[11] Sarra, Janis P. Rescue! *Companies' Creditors Arrangement Act* (2nd Ed.), page 198. **[TAB 15, Joint Book, V2]**
[12] *Temple City Housing Inc. (Companies' Creditors Arrangement Act),* 2007 ABQB. **[TAB 9, Joint Book, V1]**
[13] *Canada v Temple City Housing Inc.,* 2008 ABCA 1. **[TAB 10, Joint Book, V1]**
[14] CCAA, Section 11. **[TAB 1, Joint Book, V1]**

22) The 2009 amendments to the CCAA:

a) Codified the caselaw respecting the ability of the Court to grant the Priority Charges sections: 11.2, 11.51, and 11.52 (among others); and

b) Preserved the Crown's deemed trust for source deductions but eliminated it for other deemed trusts (see CCAA s. 37(2)).

23) Parliament did not, however, specifically prohibit the Court from granting the Priority Charges in priority to the Crown's deemed trust claim.

24) Rather, the Crown has specific protections built into the CCAA for the deemed trust which are not afforded to any other Creditor. Notably:

a) The Crown can be stayed in respect of collection of pre-filing deemed trust claims, however if the debtor company defaults on any payments due to the Crown in relation to deemed trust items post filing, the stay is automatically lifted[15]; and

b) Deemed trust amounts must be repaid in full within six months after Court sanction (unless the Crown agrees otherwise).[16]

25) Importantly, the CCAA does not provide that the Crown must be paid the deemed trust in priority to all other creditors. It merely provides that they must be paid, in full, within six months of plan approval. In theory, all other claims can be paid ahead of the six month deadline.

26) The validity of the decision in *Temple City* was not altered by those amendments. Justice Topolniski noted at paragraph 33: "The Alberta Court of Appeal denied leave to appeal, finding the issue unimportant to the practice because amendments allowing such charges were on the horizon and future cases would engage statutory interpretation".[17]

27) Justice Topolniski's interpretation of the amendments is consistent with the intention of Parliament in creating them. Parliament chose to create substantial

[15] CCAA, Section 11.09. **[TAB 1, Joint Book, V1]**
[16] CCAA, Section 6(3). **[TAB 1, Joint Book, V1]**
[17] *Canada North Group,* supra at para 33.

protections for the Crown's interest, but did not choose to prevent other charges from being granted in priority to the deemed trust.

28) Justice Lacobucci noted at the conclusion of his decision in *Sparrow Electric Corp.*: "I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. … All that is needed to affect the desired result is clear language of that kind."[18]

29) Parliament chose not to fetter the Court with respect to the granting of Priority Charges in priority to the Crown's deemed trust. This is consistent with the remedial purpose of the CCAA which is, primarily, to avoid the social and economic loss resulting from liquidation of an insolvent company. Without the ability to grant the Priority Charges, the primary purpose of the CCAA is neutered.

30) The Court's decision in this case is completely consistent with *Temple City*, the existing legislation and the remedial purpose of it.

<u>The point on appeal is not of significance to the action itself</u>

31) The outcome of an appeal on this matter will have no impact on the parties except to the extent that the appeal itself would be unduly time-consuming and costly.

32) The Crown notes that the information set out in the Confidential Supplemental Affidavit of Shayne McCracken sworn June 28, 2017, which is sealed, indicates that "the CNC Group has sufficient assets to address both the Crown's $686,000 deemed trust claim as well as the $3,150,000 Priority Charges."[19]

33) The fact that the CNC Group has more than enough assets to satisfy both the Priority Charges and the deemed trust confirms that the Crown will not suffer any prejudice if they are not granted leave to appeal in this case. There will be no adverse affect on the Crown's ability to enforce its security if its claim continues to be subordinate in priority to the Priority Charges. They bring this application merely to make a point for their purposes alone in circumstances where they had notice, chose not to attend on the application for the Initial Order and did not oppose the

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[18] *Royal Bank of Canada v Sparrow Electric Corp.,* [1997] 1 SCR 411, at paragraph 113 **[TAB 7, Joint Book, V1]**

[19] *CRA's Memorandum of Law,* filed September 29, 2017, at paragraph 45.

application to increase the Interim Lender's Charge. The time and effort spent litigating this point, however, comes at a significant cost to the CNC Group who must pay for all of the professionals responding to this application.

34) There is nothing present in this matter to suggest that the Crown's ability to receive payment in full with respect to its interest in unremitted source deductions is in jeopardy.

<u>The appeal is *prima facie* frivolous</u>

35) In order to succeed on appeal if leave is granted, the Crown must demonstrate that:

a) There was an error of law, the standard of which is correctness;

b) There was a palpable and overriding error in the findings of fact; or

c) That there was an error in the chambers judge's exercise of discretion.[20]

36) The Monitor submits that the Crown is unable to satisfy these requirements.

37) The 2009 amendments to the *CCAA* codified the ability of the Court to grant the Priority Charges. However, Parliament chose not to fetter the Court's ability to grant priority for the those charges over the Crown's deemed trust.[21]

38) The Crown is attempting to change Alberta law, as set forth in *Temple City*, in light of the decision in *Rosedale Farms* [22], but not for any purpose that has a practical effect on the parties in this case. *Rosedale Farms* is however, distinguishable based on, among other things, the fact it was decided under different legislation.

39) To being, the Crown argues that their interest is a proprietary interest. However, as noted by the Supreme Court of Canada in *First Vancouver*, the deemed trust, is not a true trust but rather is similar to a floating charge over all of the debtor's assets in favour of the Crown.[23] In this way, it acts much like an interest pursuant

[20] *Resurgence,* supra at para 28. **[TAB 2, Joint Book, V1]**
[21] *CCAA,* Section 11.2, 11.51, 1152. **[TAB 1, Joint Book, V1]**
[22] *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re),* 2017 NSSC 160 Tab J of *CRA's Memorandum of Law*
[23] *First Vancouver Finance v MNR,* 2002 SCC 49 at para. 40. **[TAB 8, Joint Book, V1]**

to a security agreement. The Court in *Temple City* affirmed that the deemed trust creates a security interest in the assets of the debtor, not a proprietary one.[24] At paragraph 38 of her reasons, the Chambers Justice in this case notes that section 2(1) of the CCAA defines the term "secured creditor" as including: "a holder of ... a trust in respect of, all or any property of the debtor company, whether the holder or beneficiaries resident or domiciled within or outside Canada..."[25]. Justice Topolniski also found assistance for this conclusion by referring to the definition of "security interest" in the *Income Tax Act* which definition includes the words "deemed or actual trust".[26]

40) Each of the Priority Charge provisions in the CCAA allow the Court to grant a charge in priority to secured creditors as defined in the CCAA.

41) As noted, *Rosedale Farms* was decided in the context of the *Bankruptcy and Insolvency Act* ("BIA")[27]. In contrast to the *CCAA* definition of secured creditor, which includes a holder or beneficiary of a trust in respect of all or any property of the debtor company, without regard to the manner of its creation, the definition of secured creditor in the BIA refers only to the trustee of a trust constituted by the debtor to secure performance of any obligation".[28]

42) At paragraphs 87 through 89 of her Reasons, Justice Topolniski notes:

> [87] Rosedale Farms is distinguishable in that it concerned a *BIA* scenario. Nevertheless, even if it were otherwise, like Romaine J, I accept that the definitions of secured creditor and security interest in the *CCAA* and Fiscal Statutes support finding that the interests arising from the deemed trusts are security interests, not property interests. In particular, I note that s 224(1.3) defines a security interest as "any interest in property that secures a payment ... and includes a ... deemed or actual trust ... ."
>
> [88] Indeed, it would seem inconsistent to interpret the interest they create in a way contrary to their enabling statutes.
>
> [89] For these reasons, I conclude that CRA's interest is a security interest, not a proprietary interest. The impact and interplay of the "notwithstanding" language in *ITA* s 227(4.1), ... , does not change my conclusion.[29]

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[24] *Temple City*, **[TAB 9 & 10, Joint Book, V1]**
[25] *Canada North Group*, supra at para 38.
[26] Canada North Group, supra at para. 112
[27] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended
[28] BIA, Section 2, definition of "secured creditor" **(Appendix A)**
[29] *Canada North Group,* supra at paras 87-89, CCAA, Section 2(1) **[TAB 1, Joint Book, V1]**

43) The appeal is *prima facie* frivolous.

The appeal will unduly hinder the progress of the action

44) In *Resurgence,* this court suggested that this fourth factor has "at its root the purpose of the *CCAA;* the role of the supervising judge; the need for a timely and orderly resolution of the matter; and the effect on the interests of all parties pending a decision on appeal.[30]

45) Any hindrance whatsoever to the progress of this action would be an undue hindrance with respect to this restructuring, as the outcome has no bearing on the interests of the parties.

46) The CNC Group required the Interim Financing and the Priority Charges in order to maintain its business and restructure under the CCAA. Without them, the business would have failed. Yet, the asset values exceed the claims of the Crown and the Priority Charges significantly.

47) The time and effort spent litigating this matter is costly. The burden of paying those costs for the work of the professionals involved for all parties except the Crown, falls upon the CNC Group, and hinders its ability to proceed through its financial recovery.

48) An appeal in these circumstances will constitute a significant distraction for the companies, which are busy trying to preserve jobs and otherwise avoid the negative impacts of liquidation on themselves, their employees, and their creditors. The CNC Group already has much to concern itself with. This is evident from the Indicative Timeline from the report of the Chief Restructuring Officer.[31]

49) It is well known that proceedings under the *CCAA* are real-time litigation. The pace at which these proceedings must move means that substantial and rapid reliance on court orders can be expected, and delays can cause significant prejudice to the parties.

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[30] *Resurgence,* supra at para 42 **[TAB 2, Joint Book, V1]**
[31] *Indicative Timeline of the Chief Restructuring Officer* – CRO's First Report **[TAB 17, Respondent's Joint Extracts of Evidence)**

50) The Crown has already created substantial delays to this action. At paragraph 69 of her Reasons, Justice Topolniski says:

> Armed with knowledge of the Initial Order the day after it was made and well-knowing that the beneficiaries of the Priority Charges would rely upon them, Crown waited twenty days to informally announce its intentions. Then, Crown chose to attend and take no position at the Extension and Enhance Financing Motions. It also chose to defer advising the Court of this intended motion until after the Court delivered its decision on those motions.[32]

51) An appeal, for no point other than making a point which has no practical effect on the case will, nevertheless greatly affect the proceedings.

C. CONCLUSION

52) The Crown is, on this application, asking the Court to allow leave so as to allow it to make a significant policy point which will have a detrimental effect on restructurings generally but little practical effect on these proceedings. They are wasting the Court's precious time. These policy decisions ought to be left to Parliament, who chose, with the amendments to the CCAA in the face of *Temple City,* to decline to use crystal clear language in amendments to the statute to direct that the Court has a no ability to grant Priority Charges over CRA's deemed trust. As Justice Lacobucci indicated in *Sparrow*, if Parliament wants to give that level of priority to deemed trust, it must say so expressly. It failed to do that with the amendments and this restructuring must not be forced to bear the burden of that failure when the Crown is not prejudiced.

53) In the circumstances, the Crown cannot meet the test for leave and the application ought be dismissed with costs on a full indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October, 2017.

DUNCAN CRAIG LLP
Per:

Darren R. Bieganek, QC
Counsel for Ernst & Young Inc.

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[32] *Canada North Group,* Supra at para 69.

APPENDIX A

"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services; *("entreprise de service public")*

"resolution" or **"ordinary resolution"** means a resolution carried in the manner provided by section 115; *("résolution"* ou *"résolution ordinaire")*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

("créancier garanti")

Editor's Note: S.C. 2001, c. 4, s. 25 replaced the definition of "secured creditor". S.C. 2001, c. 4, s. 177(1) provides as follows:

(1) The definition of "secured creditor" in subsection 2(1) of the Bankruptcy and Insolvency Act, *as enacted by section 25 of this Act [i.e. 2001, c. 4], applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.*

Immediately before the replacement, the definition of ***"secured creditor"*** *read as follows:*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.

"settlement" [Repealed 2005, c. 47, s. 2(1).]

"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"sheriff" [Repealed 2004, c. 25, s. 7(3).]

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; *("résolution spéciale")*

"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1); *("surintendant")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection