Court of Appeal File No. CA47585

COURT OF APPEAL

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

BETWEEN:

PORT CAPITAL DEVELOPMENT (EV) INC. and
EVERGREEN HOUSE DEVELOPMENT LIMITED
PARTNERSHIP

Respondents

(Petitioners/Applicants)

AND:

1296371 B.C. LTD.

Appellant

(Respondent/Applicant)

AND:

CENTURA BUILDING SYSTEMS (2013) LTD. and
SOLTERRA ACQUISITIONS CORP.

Respondents

(Respondents)

REPLY BOOK FOR LEAVE TO APPEAL
AND REPLY BOOK FOR STAY OF PROCEEDINGS

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Service List attached as **Schedule “A”**

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IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

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UPDATED: June 7, 2021

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MEMORANDUM OF ARGUMENT

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PART I – STATEMENT OF FACTS

1. Aviva Insurance Company of Canada (**Aviva**) supports the application of 1296371 B.C. Ltd. for leave to appeal the Order of Madam Justice Fitzpatrick, pronounced June 15, 2021 (the **Order**) pursuant to section 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (***CCAA***).

2. Aviva holds the second-ranking secured claim against the assets that are the subject of this proceeding. Aviva's security secures deposit protection insurance that, if called on, will require Aviva to pay out an estimated $8.6 million to presale purchasers.[1]

3. A detailed summary of the background facts of this proceeding is found at paragraphs 6 to 28 of the appellant's Memorandum of Argument. For the purposes of this reply, Aviva adopts the defined terms therein.

PART II – POINTS IN ISSUE

4. In response to the points in issue set out at paragraph 29 of the appellant's memorandum of argument, Aviva submits that:

(a) the issues raised in the proposed appeal are meritorious and significant to the parties and the practice such that leave to appeal ought to be granted;

(b) it is not necessary to reconsider *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (***Cliffs***),[2] as the chambers judge erred in law and fact by failing to recognize that *Cliffs* is distinguishable, and further erred in law in her interpretation of *Cliffs* by failing to consider the expanded formulation of the *CCAA*'s remedial purpose in more recent and binding authorities;

(c) however, if this Court finds that *Cliffs* is binding authority in British Columbia for the principle that a debtor must provide evidence of their

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[1] Reasons for Judgment of Fitzpatrick J., issued June 30, 2021 (**Chambers Reasons**) at para. 7, Motion Book (**MB**), Tab 2, pp. 12-13; Sixth Report of the Monitor, dated May 20, 2021 at para. 6, MB, Tab 10, pp. 185-86

[2] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 [***Cliffs***]

intention to propose a plan of arrangement to creditors in order to obtain relief under the *CCAA*, then Aviva agrees with the appellant that *Cliffs* ought to be reconsidered by a five-justice division.

5. Should leave be granted, Aviva will consent to a stay of the Order with respect to the Solterra Backup Order, pending the outcome of the appeal.

PART III – ARGUMENT

6. The factors relevant to determining whether leave should be granted are summarized at paragraphs 31 and 32 of the appellant's memorandum of argument. This Memorandum focuses on the first three factors of the test: whether the appeal is *prima facie* meritorious or whether it is frivolous; and whether the point on appeal is of significance to the practice and the parties.

7. For the reasons set out herein, the issues raised in the proposed appeal are meritorious and significant to the parties and the practice, such that leave ought to be granted.

A. The Proposed Appeal is *Prima Facie* Meritorious

i. The chambers judge erred in law and fact by failing to distinguish Cliffs

8. In the decision below, the chambers judge rejected the 129 Revised Offer in favour of the Solterra Backup Offer. The 129 Revised Offer would result in a "materially better" outcome for the stakeholders,[3] is supported by the secured creditors and would preserve the prospect of recovery for the remaining creditors. Further, the 129 Revised Offer would avoid a call on Aviva's deposit protection insurance, freeing up more equity for other stakeholders.[4]

9. In contrast, under the Solterra Backup Offer:

(a) the presale purchasers will be entitled to the return of their deposits, requiring Aviva to pay out approximately $8.6 million; and

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[3] Chambers Reasons at para. 40, MB, Tab 2, p. 19.
[4] Chambers Reasons at para. 42(c), MB, Tab 2, p. 20.

(b) the net sale proceeds will be insufficient to pay the first-ranking creditor, CMLS, in full, and will leave no proceeds available to Aviva or any other remaining creditors.[5]

10. In reaching this result, the chambers judge relied on this Court's decision in *Cliffs* to find that it was not appropriate to grant the relief sought.[6] The chambers judge erred in fact and law in finding that *Cliffs* was applicable to the facts before her, as follows.

11. First, in this case, the Petitioners' secured creditors did not oppose the relief sought. In contrast, in *Cliffs*, the two largest secured creditors had appointed a receiver even before the debtor sought protection under the *CCAA*. They were not given notice of the first day hearing, but at the comeback hearing, they opposed the debtor's application for a stay extension and concurrently applied to appoint an interim receiver. Here, CMLS and Aviva, the Petitioners' first and second-ranking secured creditors, supported the 129 Revised Offer.

12. Further, the timing of Centura's opposition distinguishes this case from *Cliffs*. Until 129 applied for approval of the Revised 129 offer, no creditor challenged the use of the *CCAA* as a vehicle to sell the Petitioners' assets. The stay of proceedings has been extended seven times, most recently to September 30, 2021,[7] and no creditor has argued that using the *CCAA* to market and sell the Project is contrary to the fundamental purposes of the *CCAA*. The fact that the SISP was approved and carried out without opposition by any creditor makes these proceedings fundamentally different than the circumstances before this Court in *Cliffs*.

13. Centura's motivation for opposing the 129 Revised Offer also distinguishes this case from *Cliffs*. Not only is Centura related to Solterra, which has a vested interest in opposing the Revised 129 Offer, but Centura's opposition to the Revised 129 Offer is contrary to its own financial interest: the Solterra Backup Offer will result in a nil return to Centura, whereas the Revised 129 Offer would allow it to maintain some hope of

[5] Chambers Reasons at paras. 42(b), 111, MB, Tab 2 pp. 20, 40.
[6] Chambers Reasons at paras 78-92, MB, Tab 2, pp. 32-35.
[7] Stay Extension and Interim Financing Increase Order dated June 11, 2021, para. 1, MB, Tab 23.

recovery. This further distinguishes this case from *Cliffs*, where the opposing creditors had compelling financial motivation to oppose the relief sought.

14. Second, the history and context of these proceedings differentiates this case from *Cliffs*. Here, the Initial Order authorized the SISP,[8] which was then carried out over the course of many months, with stay extensions being granted from time to time to allow for completion of the SISP. This culminated in the Order appealed from, wherein the court below authorized a sale to Solterra. The chambers judge was clearly satisfied from the outset of these proceedings that a sales process was appropriately ordered under the *CCAA*.

15. In contrast, the debtor in *Cliffs* had ceased to carry on business, yet sought an extension of the stay to allow it to secure sufficient funds to complete its distressed project: no sales process was proposed or agreed upon by the debtor and the secured creditors. In *Cliffs*, it is evident that the secured creditors' preferred means of proceeding was by way of a receivership sale, which was contrary to the relief sought by the debtor company. Here, the Petitioners and their primary secured creditors agreed on a sales process in the context of proceedings under the *CCAA*, which was approved by the chambers judge.

ii. The chambers judge erred in law in interpreting and applying Cliffs

16. The chambers judge found she had jurisdiction to grant the relief sought by 129 under s. 11 of the *CCAA*, and held that the issue before her was whether she should exercise her discretion to grant the relief sought.[9]

17. The chambers judge correctly held that the court must exercise its discretion with a view to the statutory objectives and remedial purposes of the *CCAA*, relying on the decisions of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*[10] and *9354-9186 Québec Inc. v. Callidus Capital Corp*.[11]

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[8] Initial Order dated May 29, 2020, para 29(l), MB, Tab 3.
[9] *Chambers Reasons* at para. 54, MB, Tab 2, p. 26.
[10] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 [***Century Services***].

18. However, the chambers judge erred in law by failing to identify and apply the broad formulation of the *CCAA*'s remedial objectives expressed in *Century Services* and *Callidus*, namely, to "[avoid] the social and economic losses resulting from the liquidation of the debtor company."[12] Instead the chambers judge applied the much narrower formulation of the fundamental purpose of the *CCAA* expressed in *Cliffs*, being "to facilitate compromises and arrangements between companies and their creditors."[13]

19. The chambers judge also erred in law by interpreting *Callidus* as emphasizing the same remedial objectives as the Court of Appeal in *Cliffs*,[14] thus failing to recognize the significant expansion of those remedial objectives in *Callidus*.[15] As accepted by other Canadian courts, the fundamental objectives of the *CCAA* are "both more fundamental and broader than the title of the statute, and go beyond the circumstances of a formal plan of arrangement."[16]

20. Had the chambers judge properly identified and applied the broad formulation of the remedial objectives of the *CCAA* in determining whether the relief sought was appropriate, it would have been apparent that the relief sought by 129 was in line with those objectives. Specifically, the Revised 129 Offer would have paid out CMLS; maintained the pre-sale deposits, thus avoiding the immediate crystallization of the Petitioners' liability to Aviva; and preserved the prospect of recovery for the remaining creditors.

iii. The chambers judge erred in law by focusing on the structure of the Revised 129 Offer instead of its impact on the Petitioners' stakeholders

21. The chambers judge rejected the 129 Revised Offer in part because it was not a redemption of the CMLS Mortgage. Even if this finding were correct at law, the

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[11] *9354-9186 Quebec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 [***Callidus***].
[12] *Century Services, supra* note 10 at para 70; *Callidus, supra* note 11 at para 41.
[13] *Cliffs, supra* note 2, at para 27.
[14] *Chambers Reasons* at para 83, MB, Tab 2, p. 33.
[15] *Century Services* at para 70; *Callidus* at paras. 40-41, 73.
[16] *Re Winnipeg Motor Express Inc*, 2008 MBQB 297.

chambers judge erred by placing greater weight on the structure of the proposed transaction than on the outcome. Similarly, the chambers judge's findings that the 129 Revised Offer was not brought as interim financing or as a sale (and that it might have been acceptable if structured as a sale) demonstrate her erroneous focus on the structure of the transaction.[17]

22. In a complex reorganization, courts are often asked to "sanction measures for which there is no explicit authority in the *CCAA*."[18] However, subject to the requirements of appropriateness, good faith and due diligence, the "general language of the *CCAA* should not be read as being restricted by the availability of more specific orders."[19] Courts must also be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit."[20]

23. In the case before the chambers judge, the requirements of appropriateness, good faith, and due diligence were met, and the participants had achieved common ground that ensured all stakeholders were treated as advantageously and fairly as possible in the circumstances. The chambers judge erred in law in declining to grant the relief sought because the structure of the transaction fell outside the provisions of the CCAA governing interim financing and asset sales.

B. The Proposed Appeal is of Significance to the Parties and the Practice

24. In addition to the significance of the appeal to Solterra and 129, the appeal is significant to Aviva as, if the Solterra Backup Offer completes, Aviva will immediately lose $8.6 million with no prospect of recovery—a result that would be avoided if the 129 Refinancing is approved.

25. The appeal is also significant to the practice. The correct identification of the remedial objectives of the *CCAA* is a question broadly applicable to the practice. The

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[17] *Chambers Reasons* at paras 56-77, MB, Tab 2, pp. 26-32.
[18] *Century Services, supra* note 10 at para 61.
[19] *Ibid* at para 70.
[20] *Ibid* at para 70.

issue is not merely about whether the relief sought by 129 meets the remedial objectives of the *CCAA*. Rather, it involves identification of those remedial objectives and consideration of how they guide the court's discretion in determining whether to grant relief under the *CCAA* more generally.

26. Finally, if this Court finds that *Cliffs* is binding authority in British Columbia for the principle that a debtor must provide evidence of their intention to propose a plan of arrangement to creditors to obtain relief under the *CCAA*, Aviva agrees that *Cliffs* ought to be reconsidered by a five-justice division of this Court convened for that purpose.

PART IV: NATURE OF THE ORDER REQUESTED

27. Aviva requests an order:

(a) that leave to appeal be granted; and

(b) staying the Order with respect to the Solterra Backup Offer, pending the outcome of the proposed appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 9, 2021

Counsel for the Respondent, Aviva Insurance Company of Canada

PART V: LIST OF AUTHORITIES

1. *9354-9186 Quebec Inc. v. Callidus Capital Corp.*, 2020 SCC 10

2. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60

3. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327

4. *Re Winnipeg Motor Express Inc*, 2008 MBQB 297