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CLERK OF THE COURT

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

AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.

DOCUMENT **BRIEF OF LAW of ROYNAT INC.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Darren R. Bieganek, KC/ Zachary Soprovich Barrister & Solicitor Phone: 780.441.4386 Fax: 780.428.9683 Email: dbieganek@dcllp.com File # 204-213536	**DUNCAN CRAIG LLP** LAWYERS MEDIATORS 2800 Rice Howard Place 10060 Jasper Avenue Edmonton, Alberta Canada T5J 3V9

I. INTRODUCTION

1) The Applicants, J.W. Carr Holdings Ltd., Spruce Grove Industrial Park Inc., 272649 Alberta Ltd. ("272"), Grande Prairie Place Enterprises (1996) Inc., 1170292 Alberta Ltd. and 627612 Alberta Ltd. (collectively the "Applicants") seek an Initial Order under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ("CCAA") including, *inter alia*, the following relief:

   a) authorizing and directing the Applicants to pay the reasonable professional fees and disbursements of the Monitor and its legal counsel, and the reasonable professional fees and disbursements of legal counsel to the Applicants, with the payment of such reasonable professional fees and disbursements to be secured by a court-ordered charge on the assets of the Applicants (the "Administration Charge");

   b) approving the Interim Financing of up to $500,000 initially which is proposed to be provided by MGB Investments Ltd. to the Applicants in order to finance the Applicants' operations during these proceedings, with the payment of such interim financing to be secured by a court-ordered charge on the assets of the Applicants (the "Interim Lender's Charge");

   c) approving and granting a limited form of priority to the Administration Charge and the Interim Lender's Charge;

   d) approving priority amongst the charges ("Charge Priority") as follows:

      i) First – The First Charge Encumbrances (comprising existing fixed mortgages of specific real property of the Applicants which are registered against title to the Properties as first priority fixed charge mortgages and associated security);

      ii) Second – The Administration Charge (to the maximum amount of $500,000) to secure the payment of the reasonable professional fees and disbursements of the Monitor, legal counsel to the Monitor and legal counsel to the Applicants;

      iii) Third – The Interim Lender's Charge (to the maximum amount of $500,000 initially, to be increased to $2,700,000) in order to secure the repayment of funds advanced to the Applicants pursuant to the Interim Financing; and

      iv) Fourth – The Non-First Charge Encumbrances (comprising all encumbrances other than First Charge Encumbrances).[1]

2) Roynat Inc. ("Roynat") opposes the Application with respect to the charge priority and seeks an order that the Administration Charge and Interim Lender's Charge be subordinate to the entirety of Roynat's security against 272, in accordance with a Forbearance Agreement between Roynat and 272 dated March 24, 2023 (the "Forbearance Agreement").

II. FACTS

3) The facts pertinent to Roynat are generally set out in the Affidavit of Cian McDonnell and follow on a summary basis.

A. Primary Indebtedness of 272 to Roynat

4) Roynat has made loans and obtained security from 272 over a number of years. The foremost security is a first mortgage ("First Mortgage") in favour of Roynat over lands in Grande Prairie legally described

[1] Applicants' Originating Application, paragraphs 1(f)-(h) and 11.

as Plan 1523374, Block 7, Lot 3 (the "Clariant Building" or "Lands") and general security over all present and after acquired personal property including a floating land charge over real property.[2]

5) As of March 7, 2023, 272 is indebted to Roynat in the amount of $2,638,069.53 plus further interest and solicitor and own client full indemnity legal costs.[3]

B. <u>272's Guarantee of Janmar Investments (Alberta) Ltd.'s Debts</u>

6) Additionally, 272 has provided a limited guarantee and collateral mortgage on the Lands in the amount of $250,000.00 ("Janmar Charge") in support of outstanding loans and obligations made by Roynat to Janmar Investments (Alberta) Ltd. ("Janmar").[4]

7) Janmar's indebtedness to Roynat exceeds $8,100,000.00.[5]

8) Janmar is in default of its obligations with Roynat. Demand was made on Janmar by Roynat on or about September 29, 2022 and a forbearance agreement was subsequently entered into with Janmar, and its guarantors, including 272, on or about November 24, 2022. The forbearance expiry date is April 15, 2023 and said expiry date has not, at time of this Brief, been extended.[6]

C. <u>Default by 272</u>

9) The outstanding loans due and owing by 272 to Roynat matured on November 15, 2022. The loans were not repaid.

10) On December 6, 2022, Roynat issued a continuance letter to 272 ("Continuance Letter") which provided, *inter alia*, that 272 had until January 31, 2023 to provide Roynat with evidence of financing available to satisfy the 272 indebtedness, inclusive of the Janmar Charge, or a signed sale agreement related to the Lands to retire the 272 indebtedness, inclusive of the Janmar Charge.

11) 272 failed to provide confirmation of financing or a signed sale agreement for the Lands and on February 14, 2023, Roynat demanded repayment by 272.[7]

12) Through discussions between 272 and Roynat, Roynat was aware that 272 intended to make an application under the CCAA. Roynat was prepared to see 272 and its affiliated companies take steps needed to address their financial picture, only if Roynat was not to be impacted by the CCAA proceedings.

13) In furtherance of those discussions and through good faith negotiation, Roynat and 272 entered into a forbearance agreement dated March 24, 2023 (the "Forbearance Agreement"). The Forbearance Agreement crystallized Roynat's unambiguous understanding that it would not be affected or subordinated by any CCAA proceedings which may be commenced.[8]

14) Pursuant to section 2.2(g) of Forbearance Agreement, 272 agreed that an event of default under the Forbearance Agreement includes:

> [272, Holdings, Marjorie Carr or Estate of James Carr] or any one of them making an assignment in bankruptcy or any other assignment for the benefit of creditors, making any proposal or seeking any relief under the *Bankruptcy and Insolvency Act*, the

[2] Affidavit of Cian McDonnell, paras 2 - 4.
[3] Affidavit of Cian McDonnell, para 8.
[4] Affidavit of Cian McDonnell, para 18.
[5] Affidavit of Cian McDonnell, para 20.
[6] Affidavit of Cian McDonnell, para 22.
[7] Affidavit of Cian McDonnell, paras 9 - 12.
[8] Affidavit of Cian McDonnell, paras 13 - 14.

> *Companies' Creditors Arrangement Act* or any other bankruptcy, insolvency or analogous law in Canada without the prior written approval of the Lender, which approval may be withheld by the Lender in its absolute, sole and unfettered discretion.[9]

15) Pursuant to section 3.14(l) of the Forbearance Agreement, 272 agreed that the terms of the Forbearance Agreement continue to apply notwithstanding any subsequent CCAA proceedings:

> (l) if [272, Holdings, Marjorie Carr or Estate of James Carr] or any one of them make any proposal or seek any relief under the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act* or any other bankruptcy, insolvency or analogous law in Canada ("**Restructuring Proceedings**"), and without regard to whether the Restructuring Proceedings were instituted with or without the prior written approval of [Roynat] (said approval being in [Roynat's] absolute, sole and unfettered discretion pursuant to Article 2.2(g) of this Agreement), then:
>
> i. the terms of this Agreement will continue to bind the parties to this Agreement;
>
> ii. [Roynat] will not be affected by any stay <u>or other order</u> in such proceedings;
>
> iii. [272, Holdings, Marjorie Carr or Estate of James Carr] agree that [Roynat] is and shall be an unaffected creditor in the Restructuring Proceedings, and none of the Debtors shall take the position that [Roynat] is so affected by any Restructuring Proceedings or any plan or proposal in any Restructuring Proceedings;
>
> iv. [272, Holdings, Marjorie Carr or Estate of James Carr] shall not, without the written consent of [Roynat] (which may be withheld in [Roynat's] absolute, sole and unfettered discretion), <u>make or support any application which would have the effect of creating any change ranking in priority to the Security or in priority to any other rights of [Roynat] or altering or varying the rights of [Roynat] under the terms of the Security or this Agreement</u>; and
>
> *v.* [272, Holdings, Marjorie Carr or Estate of James Carr] shall not, without the written consent of [Roynat] (which may be withheld in [Roynat's] absolute, sole and unfettered discretion), apply or seek approval of <u>any payment or charge in priority to the Indebtedness or the Security</u>.[10]
>
> *[emphasis added]*

16) "Security" is defined within the Forbearance Agreement to include, *inter alia*, the First Mortgage and the Janmar Charge.[11]

17) Pursuant to section 3.6 of the Forbearance Agreement, Roynat has authority to approve sales agents in respect of the sale of the Lands and 272 shall not agree to a sale of the Lands without Roynat's prior written approval.[12]

18) Roynat has not provided its written consent to these CCAA proceedings, nor any aspect of the relief sought, and Roynat has not been consulted in respect of the choice of any sales agent respecting the Lands.

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[9] Affidavit of Cian McDonnell, Exhibit "E", pg 65.
[10] Affidavit of Cian McDonnell, Exhibit "E", pg 68 - 69.
[11] Affidavit of Cian McDonnell, Exhibit "E", pgs 62 and 82.
[12] Affidavit of Cian McDonnell, Exhibit "E", pg 66.

19) While the DIP Term Sheet, this Application and the proposed forms of Initial Orders provide that Roynat's First Mortgage position remains unaffected, the Interim Lender's Charge and Administration Charge are proposed by the Applicants to rank in priority to the Janmar Charge, contrary to the terms of the Forbearance Agreement.

20) After receipt of the materials in support of this Application, Roynat issued a notice of default ("Notice") to 272 on April 13, 2023. By the Notice, Roynat did not terminate the Forbearance Agreement. It did, however, advise it would be opposing certain aspects of this Application.[13]

III. ISSUES

21) While the global issues for this Application are as set out in paragraph 6 of the Applicants' Bench Brief, the issue concerning Roynat in relation to the Janmar Charge are whether the Court ought to alter the relief sought, and specifically rank the Janmar Charge in priority to the Administration Charge and Interim Lender's Charge on either of the following bases:

a) Have the Applicants, and specifically 272, failed to act in good faith (pursuant to section 18.6 of the CCAA) by not disclosing the terms of the Forbearance Agreement related to the Janmar Charge, and by entering into the DIP Term Sheet within one week after signing the Forbearance Agreement?

b) In consideration of the factors within CCAA section 11.2(4), is the relief sought by the Applicants materially prejudicial to Roynat?

IV. ARGUMENT

A. Good Faith

22) Section 18.6 of the CCAA stipulates the following with respect to good faith:

> Good faith
>
> 18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> Good faith — powers of court
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

23) In *9354-9186 Quebec Inc. and 9354-9178 Quebec Inc. v Callidus Capital Corporation* the SCC noted that while the discretionary authority conferred by the CCAA is broad in nature, it is not boundless. The authority must be exercised in furtherance of the remedial objectives of the CCAA and additionally, the Court must keep in mind three "baseline considerations" which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence.[14]

24) In *Bhasin v Hrynew*, the SCC recognized a general duty of honest contractual performance.[15] Parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.[16]

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[13] Affidavit of Cian McDonnell, para 30 and Exhibit "I".
[14] *9354-9186 Quebec Inc. and 9354-9178 Quebec Inc. v Callidus Capital Corporation*, 2020 SCC 10 ("*Bluberi*") at para 49 **[TAB 1]**.
[15] *Bhasin v Hrynew*, 2014 SCC 71 at para 92 [*Bhasin*] **[TAB 2]**.
[16] *Bhasin* at para 63.

25) While it is not disputed that the Court has broad discretion when considering an application for an Initial Order, that discretion can be tempered by the CCAA itself. In *Can-Pacific Farms Inc., Re*, the Court found that discretion should rarely be exercised in favour of a petitioning party who has not fully disclosed all material facts:

> …it is incumbent upon a petitioning company to present fully the factual basis upon which the relief under the Act is sought. The making of any order under the Act is discretionary. That discretion should rarely be exercised in favour of an applicant who has not fully disclosed all of the material facts. It is still incumbent upon a petitioning company to bring forward everything that might be material or might affect the decision of the Court.[17]

26) With respect to Roynat 272, the applicable timeline is as follows:

a) November 15, 2022 – 272's loans mature and are not repaid;
b) December 6, 2022 – Roynat issues the Continuance Letter to 272;
c) February 2023 – Roynat issues demands to 272;
d) March 2023 – Forbearance Agreement between 272 and Roynat is negotiated, and ultimately executed by 272 on March 24, 2023;
e) March 27, 2023 – DIP Term Sheet executed by the Applicants[18].

27) The Applicants have not disclosed the terms of the Forbearance Agreement with Roynat, which provides, *inter alia*, that:

a) 272 shall not seek any relief under the CCAA without the prior written approval of the Lender, which approval may be withheld by the Lender in its absolute, sole and unfettered discretion; and

b) If CCAA proceedings are initiated, 272 shall not make or support any application which would have the effect of creating any change ranking in priority to the Security or in priority to any other rights of Roynat.

28) Roynat has understood that 272, and the Applicants generally, would be taking steps to file for CCAA protection. While Roynat was prepared to see 272 and its affiliated companies take steps to address their financial circumstances, Roynat, at all times, made clear that it was only prepared to do so in circumstances where Roynat was not to be impacted at all by the proceedings. With that knowledge, Roynat entered into good faith negotiation with 272 and ultimately agreed to forbear from certain enforcement proceedings under the specific terms of the Forbearance Agreement.

29) 272 entered into the Forbearance Agreement on March 24, 2023 and thereafter, with full knowledge of the Forbearance Agreement's terms, signed the DIP Term Sheet and commenced this Application, without Roynat's written approval and seeks to subordinate the Janmar Charge, contrary to the Forbearance Agreement.

30) While there have not been an abundance of cases considering a lack of good faith in CCAA proceedings, the concept was considered by this Court in *Bellatrix Exploration Ltd. (Re)*.[19]

31) In *Bellatrix*, the Court considered the conduct of a debtor, Bellatrix, that ceased performance, during CCAA proceedings, under an Eligible Financial Contract related to the purchase and supply of natural gas. The debtor ceased performing the "uneconomic contract that it could not afford to perform while attempting to restructure". The Court found that while the debtor breached the contract by non-

[17] *Can-Pacific Farms Inc. (Re)*, 2012 BCSC 760 at paras 3(a) and 6 **[TAB 3]**.
[18] Affidavit of Marjorie Carr, Exhibit "III".
[19] *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 809 [*Bellatrix*] **[TAB 4]**.

performance, it was "transparent and candid" throughout the process and that it is not unusual for a CCAA debtor to fail to perform uneconomic ongoing monthly contracts.

32) The circumstances of this case are vastly different. The breaches of the Forbearance Agreement by 272 relate to non-financial provisions. There is no evidence to suggest that there are economic reasons 272 has breached the Forbearance Agreement, nor has 272 disclosed the breaches of the Forbearance Agreement.[20]

33) The timing of a debtor's breach, or non-performance, of a contract is instructive when considering good faith. In *Bellatrix* the contract in question was entered into in 2010. The CCAA Initial Order was October 2, 2019. Bellatrix sent notice of disclaimer on November 25, 2019.[21] In the subject case, the circumstances are entirely different. 272 entered into a Forbearance Agreement and almost immediately brought this Application in breach of that Agreement. This is not a case, as in *Bellatrix*, where economic conditions changed over an elongated period of time, such that a contract could no longer be performed by a debtor. Rather, 272 executed the Forbearance Agreement and within one week entered into the DIP Term Sheet, which includes priority provisions in breach of the Forbearance Agreement. Those actions, in Roynat's submissions, lack the requisite good faith required of an applicant in CCAA proceedings and necessitate the Court to revise the proposed Initial Order accordingly.

34) Roynat respectfully submits that this Honourable Court should use the discretion afforded to it under section 18.6(2) of the CCAA and revise the proposed Initial Order to make the Administration Charge and Interim Lender's Charge rank as subordinate to the Janmar Charge against the Lands.

B. <u>Material Prejudice</u>

35) Further, section 11.2(4) of the CCAA provides a non-exhaustive list of factors for the Court to consider, including whether any creditor would be materially prejudiced as a result of the security or charge:

> Factors to be considered
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> <u>(f) whether any creditor would be materially prejudiced as a result of the security or charge</u>; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.
>
> *[emphasis added]*

36) The Applicants have the onus, at all times, to satisfy the Court that the factors are met and that the relief sought is appropriate.

[20] *Bellatrix* at paras 100 - 102.
[21] *Bellatrix* at paras 3, 6 - 7.

37) There is no independent evidence of value of any assets of the Applicants in support of this Application. There is specifically no independent evidence before the Court with respect to the value of the Lands.

38) What is known is that Roynat is owed in excess of $2,638,069.53 on its First Mortgage, with further interest and costs accumulating. As of December 2022, in excess of $66,000.00 in taxes were outstanding against the Lands, which would have priority over the First Mortgage. Realtor realization costs will be an additional cost that the Lands will be subject to on sale.

39) Roynat is of the view that it faces material prejudice, namely the complete eradication of any potential equity in the Lands being available to the Janmar Charge, if the Administration Charge and Interim Lender's Charge take priority over the Janmar Charge.

40) Roynat spent weeks negotiating and ultimately entered into the Forbearance Agreement in good faith with 272, with the intention to support anticipated CCAA proceedings so long as the provisions of the Forbearance Agreement were adhered to. This Application contravenes the Forbearance Agreement with respect to the Janmar Charge and places Roynat in a position where material prejudice will be incurred, if and when the Janmar Charge is eliminated by the Administration Charge and Interim Lender's Charge.

41) Based on the evidence before the Court, there is a material risk to Roynat that the Janmar Charge would be completely eliminated if the Administration Charge and Interim Lender's Charge, contrary to the Forbearance Agreement, were granted priority over the Janmar Charge. The Interim Lender's Charge and Administration Charge ranking in priority to the Janmar Charge is materially prejudicially to Roynat.

42) The Applicants have not satisfied the onus that Roynat, in particular, will not be materially prejudiced by the proposed Initial Order. On this basis, the requested relief, as related to the Janmar Charge, must be denied.

V. <u>CONCLUSIONS AND RELIEF SOUGHT</u>

43) The relief sought by the Applicants, including 272, is both materially prejudicial to Roynat's position as the effect may significantly diminish, if not entirely eliminate, the Janmar Charge on the Lands and has been brought without good faith, considering the relief sought is contrary to a Forbearance Agreement executed by 272 only weeks prior to this Application.

44) It is respectfully requested that, in accordance with the Forbearance Agreement, the Administration Charge and Interim Lender's Charge be ordered as subordinate in priority to the Janmar Charge within the Initial Order.

DATED this 14th day of April, 2023.

DUNCAN CRAIG LLP

Per:

____
Darren R. Bieganek, KC/ Zachary Soprovich
Counsel for Roynat Inc.

TABLE OF AUTHORITIES

1. *9354-9186 Quebec Inc. and 9354-9178 Quebec Inc. v Callidus Capital Corporation*, 2020 SCC 10
2. *Bhasin v Hrynew*, 2014 SCC 71
3. *Can-Pacific Farms Inc. (Re)*, 2012 BCSC 760
4. *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 809

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10,
1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.
Neil A. Peden, for Appellants / Interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Geneviève Cloutier, Clifton P. Prophet, for Respondent, Callidus Capital Corporation
Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing

15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in CCAA Proceedings

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

2014 SCC 71, 2014 CSC 71
Supreme Court of Canada

Bhasin v. Hrynew

2014 CarswellAlta 2046, 2014 CarswellAlta 2047, 2014 SCC 71, 2014 CSC 71, [2014] 11 W.W.R. 641, [2014] 3 S.C.R. 494, [2014] A.W.L.D. 4738, [2014] A.W.L.D. 4740, [2014] A.W.L.D. 4828, [2014] A.W.L.D. 4829, [2014] S.C.J. No. 71, 20 C.C.E.L. (4th) 1, 245 A.C.W.S. (3d) 832, 27 B.L.R. (5th) 1, 379 D.L.R. (4th) 385, 464 N.R. 254, 4 Alta. L.R. (6th) 219, 584 A.R. 6, 623 W.A.C. 6, J.E. 2014-1992

Harish Bhasin, carrying on business as Bhasin & Associates, Appellant and Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited), Respondents

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: February 12, 2014
Judgment: November 13, 2014
Docket: 35380

Proceedings: reversing in part *Bhasin v. Hrynew* (2013), [2013] 11 W.W.R. 459, 84 Alta. L.R. (5th) 68, 12 B.L.R. (5th) 175, 567 W.A.C. 28, 544 A.R. 28, 2013 CarswellAlta 822, 2013 ABCA 98, 362 D.L.R. (4th) 18, Jean Côté J.A., Marina Paperny J.A., R. Paul Belzil J. (Alta. C.A.); reversing *Bhasin v. Hrynew* (2011), [2012] 9 W.W.R. 728, 96 B.L.R. (4th) 73, 2011 ABQB 637, 2011 CarswellAlta 1905, A.B. Moen J. (Alta. Q.B.)

Counsel: Neil Finkelstein, Brandon Kain, John McCamus, Stephen Moreau, for Appellant
Eli S. Lederman, Jon Laxer, Constanza Pauchulo, for Respondents

Subject: Civil Practice and Procedure; Contracts; Torts

Headnote

Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith
C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.
Contracts --- Remedies for breach — Damages — Miscellaneous
C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and

Group UK and Ireland Ltd., [2013] EWCA Civ 200 (Eng. C.A.) (BAILII), where it confirmed that good faith was not a general principle of English law, but that it could be an implied term in certain categories of cases: paras. 105 and 150.

58 Australian courts have also moved towards a greater role for good faith in contract performance: *Cheshire and Fifoot's Law of Contract*, (9th Australian ed. 2008), at 10.43 to 10.47. The duty of good faith in its modern form was recognized by Priestley J.A. in *Renard Constructions (ME) Pty. Ltd. v. Canada (Minister of Public Works)* (1992), 26 N.S.W.L.R. 234 (New South Wales C.A.). There is no generally applicable duty of good faith, but one will be implied into contracts in certain circumstances. The duty of good faith can be implied as a matter of law or as a matter of fact, although the cases are not always clear on the basis on which the term is being implied. Australian courts have taken a broad view of what constitutes good faith: see, e.g., *Burger King Corp. v. Hungry Jacks 's Pty Ltd.*, [2001] NSWCA 187 (New South Wales C.A.) (AustLII). The law of good faith performance in Australia is still developing and remains unsettled: E. Peden, "Good faith in the performance of contract law" (2004), 42: 9 *L.S.J.* 64, at p. 64. However, it is clear that the duty of good faith requires adherence to standards of honest conduct: A. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000), 116 *Law Q. Rev.* 66, at p. 76; *Burger King*, at paras. 171 and 189.

(iii) The Way Forward

59 This selective survey supports the view that Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear: Belobaba; O'Byrne, "Good Faith in Contractual Performance", at p. 95; B. J. Reiter, "Good Faith in Contracts" (1983), 17 *Val. U.L. Rev.* 705, at pp. 711-12. It also shows that in Canada, as well as in the United Kingdom and Australia, there is increasing attention to the notion of good faith, particularly in the area of contractual performance. Opponents of any general obligation of good faith prefer the traditional, organic development of solutions to address particular problems as they arise: see, e.g., M. G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984), 9 *Can. Bus. L.J.* 385; D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993), 14 *Advocates' Q.* 435, at pp. 436 and 440. However, foreclosing some incremental development of the law at the level of principle would go beyond what prudent caution requires and evidence an almost "perverted pride" — to use Swan's term — in the law's failings.

60 Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties: see Swan and Adamski, at §1.24.

61 The fact that commercial parties expect honesty on the part of their contracting partners can also be seen from the fact that it was the American Bar Association's Section of Corporation, Banking and Business Law that urged the adoption of "honesty in fact" in the original drafting of the Uniform Commercial Code ("U.C.C."): E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963), 30 *U. Chicago L. Rev.* 666, at p. 673. Moreover, empirical research suggests that commercial parties do in fact expect that their contracting parties will conduct themselves in good faith: see, e.g., S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963), 28 *Am. Soc. Rev.* 55, at p. 58; H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 *Brit. J. Law. & Soc.* 45, at pp. 47-48; S. Macaulay, "An Empirical View of Contract", [1985] *Wis. L. Rev.* 465; V. Goldwasser and T. Ciro, "Standards of Behaviour in Commercial Contracting" (2002), 30 *A.B.L.R.* 369, at pp. 372-77. It is, to say the least, counterintuitive to think that reasonable commercial parties would accept a contract which contained a provision to the effect that they were not obliged to act honestly in performing their contractual obligations.

62 I conclude from this review that enunciating a general organizing principle of good faith and recognizing a duty to perform contracts honestly will help bring certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations.

(iv) Towards an Organizing Principle of Good Faith

88 The duty of honest performance has similarities with the existing law in relation to civil fraud and estoppel, but it is not subsumed by them. Unlike promissory estoppel and estoppel by representation, the contractual duty of honest performance does not require that the defendant intend that his or her representation be relied on and it is not subject to the uncertainty around whether estoppel can be used to found an independent cause of action: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.), at para. 5; *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.); Waddams, *The Law of Contracts*, at paras. 195-203; B. MacDougall, *Estoppel* (2012), at pp. 142-44. As for the tort of civil fraud, breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on and breach of it supports a claim for damages according to the contractual rather than the tortious measure: see, e.g., *Parna v. G. & S. Properties Ltd.* (1970), [1971] S.C.R. 306 (S.C.C.), cited with approval in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.), at para. 19.

89 Mr. Bhasin, supported b many judicial and academic authorities, has argued for wholesale adoption of a more expansive duty of good faith in contrast to the modest, incremental change that I propose: A.F., at para. 51; Summers, at p. 206; Belobaba; *Gateway Realty*. In many of its manifestations, good faith requires more than honesty on the part of a contracting party. For example, in *Dynamic Transport*, this Court held that good faith in the context of that contract required a party to take reasonable steps to obtain the planning permission that was a condition precedent to a sale of property. In other cases, the courts have required that discretionary powers not be exercised in a manner that is "capricious" or "arbitrary": *Mason, at p. 487*; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (Ont. C.A.), at p. 7. In other contexts, this Court has been reluctant to extend the requirements of good faith beyond honesty for fear of causing undue judicial interference in contracts: *Wallace*, at para. 76.

90 It is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith. This is because it is unclear to me how any broader duty would assist Mr. Bhasin here. After all, the contract was subject to non-renewal. It is a considerable stretch, as I see it, to turn even a broadly conceived duty of good faith exercise of the non-renewal provision into what is, in effect, a contract of indefinite duration. This in my view is the principal difficulty in the trial judge's reasoning because, in the result, her decision turned a three year contract that was subject to an express provision relating to non-renewal into a contract of roughly nine years' duration. As the Court of Appeal pointed out, in my view correctly, "[t]he parties did not intend or presume a perpetual contract, as they contracted that either party could unilaterally cause it to expire on any third anniversary": para. 32. Even if there were a breach of a broader duty of good faith by forcing the merger, Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract. Since no damages flow from this breach, it is unnecessary to decide whether reliance on a discretionary power to achieve a purpose extraneous to the contract and which undermined one of its key objectives might call for further development under the organizing principle of good faith contractual performance.

91 I note as well that, even in jurisdictions that embrace a broader role for the duty of good faith, plaintiffs have met with only mixed success in alleging bad faith failure to renew a contract. Some cases have treated non-renewal as equivalent to termination and thus subject to a duty of good faith: *Shell Oil Co. v. Marinello*, 294 A.2d 253 (U.S. N.J. Sup. Ct. 1972), aff'd, 07 A.2d 598 (U.S. N.J. Sup. Ct. 1973); *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (U.S. Pa. S.C. 1978), at pp. 741-42. Other courts have seen non-renewal as fundamentally different, especially where the express terms of the contract contemplate the expiry of contractual obligations and leave no room for any sort of duty to renew: *J.H. Westerbeke Corp. v. Onan Corp.*, 580 F. Supp. 1173 (U.S. Dist. Ct. D. Mass. 1984), at p. 1184; *Pitney-Bowes Inc. v. Mestre* (1981), 517 F. Supp. 52 (U.S. Dist. Ct. S.D. Fla. 1981), cert. denied, 464 U.S. 893 (U.S. Sup. Ct. 1983).

92 I conclude that at this point in the development of Canadian common law, adding a general duty of honest contractual performance is an appropriate incremental step, recognizing that the implications of the broader, organizing principle of good faith must be allowed to evolve according to the same incremental judicial approach.

93 A summary of the principles is in order:

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.

> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

(3) Application

94 The trial judge made a clear finding of fact that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause": para. 261; see also para. 271. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly.

95 The immediate dispute in this case centred on the non-renewal clause contained in cl. 3.3 of the 1998 Agreement which Mr. Bhasin entered into in November 1998. It provided that the Agreement was for a three-year term and would be automatically renewed unless one of the parties gave notice to the contrary at least six months before the end of the initial or any renewed term:

> 3.3 The term of this Agreement shall be for a period of three years from the date hereof (the "Initial Term") and thereafter shall be automatically renewed for successive three year periods (a "Renewal Term"), subject to earlier termination as provided for in section 8 hereof, unless either [Can-Am] or the Enrollment Director notifies the other in writing at least six months prior to expiry of the Initial Term or any Renewal Term that the notifying party desires expiry of the Agreement, in which event the Agreement shall expire at the end of such Initial Term or Renewal Term, as applicable.

96 The factual matrix in which the judge made her finding of dishonest performance is complicated and I will only outline it in very broad terms in order to put that finding in context. There were two main interrelated story lines.

97 The first concerns Mr. Hrynew's persistent attempts to take over Mr. Bhasin's market through a merger — in effect a takeover by him of Mr. Bhasin's agency. The second concerns the difficulties, beginning in early April 1999, that Can-Am was having with the Alberta Securities Commission, which regulated its business and its enrollment directors in Alberta. The Commission insisted that Can-Am appoint a full-time employee to be a PTO responsible for compliance with Alberta securities law. Can-Am ultimately appointed Mr. Hrynew, with the result that he would audit his competitor agencies, including Mr. Bhasin's, and therefore have access to their confidential business information. Mr. Bhasin's refusal to allow Mr. Hrynew access to this information led to the final confrontation with Can-Am and its giving notice of non-renewal in May 2001. Can-Am, for its part, wanted to force a merger of the Bhasin agency under the Hrynew agency, effectively giving Mr. Bhasin's business to Mr. Hrynew. It was in the context of this situation that the trial judge made her findings of dishonesty on the part of Can-Am.

98 The trial judge concluded that Can-Am acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to Mr. Hrynew's role as PTO. Her detailed findings amply support this overall conclusion.

99 By early 2000, Can-Am was considering a significant reorganization of its activities in Alberta; by June of that year, it sent an organizational chart to the Commission showing that Mr. Bhasin's agency was to be merged under Mr. Hrynew's. But it had said nothing of this to Mr. Bhasin: trial reasons, at paras. 167-68. The trial judge found that these representations made by Can-Am to the Commission were clearly false if, as she concluded, they intended to refer to Mr. Bhasin: para. 246. She also found that Can-Am, by June 2000, was fearful that the Commission was going to pull its licence in Alberta and that it was prepared to do whatever it could to forestall that possibility. "However, it was not dealing honestly with [Mr.] Bhasin about the realities of the situation as [it] saw them": para. 246.

100 In August 2000, Mr. Bhasin first heard of Can-Am's merger plans for him during a meeting with Can-Am's regional vice-president. But when questioned about Can-Am's intentions with respect to the merger, the official "equivocated" and did

2012 BCSC 760

British Columbia Supreme Court [In Chambers]

Can-Pacific Farms Inc., Re

2012 CarswellBC 1528, 2012 BCSC 760, [2012] B.C.W.L.D. 5551, 215 A.C.W.S. (3d) 636, 94 C.B.R. (5th) 152

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

In the matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 and the Business Corporation Act, S. B.C. 2002, c. 57

And In the matter of Can-Pacific Farms Inc., Petitioner

Burnyeat J.

Heard: March 29-30, 2012
Oral reasons: March 30, 2012
Docket: Vancouver S121930

Counsel: K.E. Siddall for Petitioner
G. Thompson, M.C. Verbrugge for Canadian Imperial Bank of Commerce

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — General principles

Debtor was farming company that was having financial difficulties — Debtor entered into forbearance agreements with mortgagee to avoid foreclosure — Agreements included covenant not to file for protection under Companies' Creditors Arrangement Act — Debtor allegedly breached forbearance agreements — Debtor failed to pay proceeds of particular crop and sale of equipment to mortgagee — Attempts to sell property had proven unsatisfactory — Debtor brought application for initial order under Act — Application granted in part — Debtor's need to hire numerous part-time workers to harvest current crop was interest that should be protected — Debtor's failure to disclose material facts was not condoned but did not result in denial of relief — Mortgagee's firm reluctance to approve any plan that debtor might offer was not proper basis for denying initial relief — Debtor was not permitted to have $100,000 administrative charge rank ahead of interest of creditors — If debtor's projections were accurate, it would not need administrative charge — Principal of debtor was required to pay amounts expended by mortgagee for security observers — Proposed monitor was approved despite its prior involvement with debtor — Avoiding delay and further costs outweighed monitor's potentially compromised independence.

APPLICATION by debtor for initial order under *Companies' Creditors Arrangement Act*.

***Burnyeat J.*:**

1 This application is for an initial order in proceedings brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*Act*"). I am asked to make a declaration that the Petitioner is a corporation to which the *Act* applies. I am satisfied that is the case. The second order requested is that the Petitioner be permitted to file a formal plan with the Court for the approval of its creditors and that I order as a "comeback date" April 30, 2012.

2 The application is opposed by the first mortgagee, Canadian Imperial Bank of Commerce, who, along with the second mortgagee, is owed roughly $8 million. The application is supported by some of the unsecured creditors of the Petitioner and by a lien holder.

3 The opposition on behalf of the Canadian Imperial Bank of Commerce relates in part to the failure of the Petitioner to make disclosure. In particular, the following is not disclosed in the materials:

> (a) The Petitioner, through its principal, Mr. Kooner, has failed to disclose numerous breaches under the various forbearance agreements that were entered into with the Canadian Imperial Bank of Commerce, including a covenant not to file for protection under the *Act* in consideration of the forbearance shown;
>
> (b) The fact that the 2011 berry crop proceeds of between a two and four million dollars which should have been received by the Canadian Imperial Bank of Commerce were used otherwise, including depositing the proceeds with a different financial institution;
>
> (c) The fact that the proceeds from the sale of equipment of the Petitioner have been received but not applied in accordance with the security held by the Canadian Imperial Bank of Commerce and the fact that other equipment of the Petitioner is being advertised for sale;
>
> (d) The fact that there was a recent payment to prior or to subsequent creditors of as much as $250,000; and
>
> (e) The fact that there was a filing by the Petitioner under the *Farm Debt Mediation Act*.

4 It is submitted that the failure to disclose all material facts should lead to a refusal of the Court to make the order that is sought: *Hester Creek Estate Winery Ltd., Re* (2004), 50 C.B.R. (4th) 73 (B.C. S.C. [In Chambers]), and *Encore Developments Ltd., Re* (2009), 52 C.B.R. (5th) 30 (B.C. S.C.).

5 Both of those decisions involved setting aside initial orders that had been obtained on an *ex parte* basis. These decisions are based on the assumption that, when you appear on an *ex parte* basis, it is incumbent upon an applicant to reveal to the Court anything that might have the possibility of influencing the decision that the Court is asked to make and that, if complete material disclosure is not made, the *ex parte* order may be set aside.

6 With the change made to the *Act*, the initial order is not made on an *ex parte* basis. Having said that, it is incumbent upon a petitioning company to present fully the factual basis upon which the relief under the *Act* is sought. The making of any order under the *Act* is discretionary. That discretion should rarely be exercised in favour of an applicant who has not fully disclosed all of the material facts. It is still incumbent upon a petitioning company to bring forward everything that might be material or might affect the decision of the Court. I am satisfied that the Petitioner has not done so here.

7 The Canadian Imperial Bank of Commerce also raises the issue that there is no broad interest to be protected here. At this point in the berry growing season, there are only two full-time employees of the Petitioner so that it is only their ongoing interest which needs to be protected. Having said that, the berry operation is such that hundreds will be called upon this summer on a part-time basis to harvest the crop and make it available for sale. I take into account that this is an interest which should be protected.

8 The Canadian Imperial Bank of Commerce submits that any plan brought forward is doomed to fail as it will oppose any plan. I cannot accede to that argument. I think that argument has been generally discredited by various court decisions. The example I gave is that, if the plan foolishly said, "we will pay to the bank twice as much as it is owed", I am quite confident that even the Bank would vote for such a plan.

9 I agree with the observations in *Pacific Shores Resort & Spa Ltd., Re*, [2011] B.C.J. No. 2482 (B.C. S.C. [In Chambers]). The argument raised is an argument that should meet with no favour before the Court in these circumstances on the first order sought, although it may be given some credence on the comeback order:

> This argument is also part of the "doomed to failure" argument of [the creditor]. I have been referred by [the creditor] to *Hunters Trailer & Marine Ltd. (Re)*, 2000 ABQB 952, as authority for the proposition that unless there is equity in the assets beyond that owed to secured creditors, a *CCAA* order is only appropriate if the secured creditors are supportive of it.

To the contrary, at para. 19 of that case, the Court states quite clearly that a recalcitrant creditor should not necessarily prevent the granting of an order under the *CCAA*. This approach is consistent with the comments of Madam Justice Newbury in *Forest & Marine* who stated, in the face of a major secured creditor's insistence that it would vote against any plan:

> [27] I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the Court's exercise of its statutory jurisdiction could be neutralized in this manner.

(at paras. 40-41)

10 I realize that what is being attempted by the Petitioner comes after some 19 months of default under the security of the Canadian Imperial Bank of Commerce. It is an attempt to find financing to pull the whole situation "out of the fire". Since default, there has been an order *nisi* of foreclosure with a redemption period that expired almost a year ago and an order for sale which has produced two offers neither of which would pay the secured creditors in full and neither of which had the subject clauses removed so that they could proceed.

11 The Petitioner submits that it will make major advances between now and when they report back to the Court on April 30, 2012. The Petitioner submits it will have the proceeds of up to $333,000 from the sale of a property, that there will be sales of other assets which may occur, and that Mr. Kooner is committed to putting these funds into the company so that the company has sufficient cash flow to meet the cash flow requirements that are set out in the materials before the Court. Mr. Kooner is also prepared to advance sufficient funds to allow $11,000 a month to be available to the Canadian Imperial Bank of Commerce and $6,000 per month to be available for the second mortgagee.

12 The position of all of the creditors will be enhanced by April 30, 2012 if there can be the investment contemplated. The payments contemplated will maintain the status quo in the interim. In all of the circumstances, I will make the order that is sought. The comeback motion will be heard by me at 9:00 a.m. on April 30, 2012.

13 The Petitioner also seeks an administrative charge in the amount of $100,000 which would rank ahead of the interest of the creditors. In the circumstances, I am satisfied that no administrative charge should be granted at this time. The funds that Mr. Kooner says will be available will allow those costs to be covered. Not granting an administrative charge is one way of assuring that the status quo will be maintained so that, along with the payment of $17,000 per month to the secured creditors, the position of the secured creditors will be no worse than it is presently. The sums of $11,000 and $6,000 will be payable in certified funds payable to each of the two mortgagees no later than close of business on April 2, 2012, and then no later than close of business on April 27, 2012.

14 The stay of proceedings already ordered in the foreclosure proceedings including the application for the appointment of a receiver in those proceedings will be extended to 4:00 p.m. on April 30, 2012. I make no order staying the ability of the Canadian Imperial Bank of Commerce to continue with the order for conduct of sale which was granted by this court some considerable time ago.

15 In addition to the requirement of the payment of $17,000, the costs previously incurred by the Canadian Imperial Bank of Commerce to hire security observers will be borne by Mr. Kooner by the payment of the sum of $36,000 to counsel for the Canadian Imperial Bank of Commerce no later than close of business on April 4, 2012. Further costs of security observers will also be paid by Mr. Kooner.

16 The secured creditors will be at liberty to apply on three days' clear notice if the sums set out above have not been paid in accordance with the order made.

17 The Petitioner makes the further application that Murphy & Associates, Trustee in Bankruptcy, be appointed as Monitor to report to the Court and the creditors of the Petitioner regarding the arrangements that will be made by the Petitioner and the progress in that regard.

18 While I have no doubt about the ability of Murphy & Associates to fulfill the role of being a monitor, I have grave reservations of about whether it is appropriate for Murphy & Associates to be appointed as Monitor. Murphy & Associates has been a consultant to the Petitioner. The financial records which are before the Court have been prepared with the assistance of Murphy & Associates. It is also apparent that the Plan which will be forthcoming has been prepared in its initial stages with the assistance of Murphy & Associates.

19 A monitor under proceedings under the *Act* has an obligation to act independently: *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); *Royal Oak Mines Inc., Re* (1999), 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]); *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]). The role of a monitor is also set out by the Learned Author of *Commercial Insolvency in Canada* (Markham, ON: LexisNexis Butterworths, 2005):

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any part in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors. (at p. 236)

20 The Monitor must not only be impartial but also must appear to be impartial so that the confidence of creditors and members of the general public can be assured. Pursuant to s. 23(1) of the *Act*, a monitor must carry out a number of functions in relation to a company as prescribed under the *Act* or as the court may direct.

21 Section 11.7(2) of the *Act* places restrictions on who may serve as a monitor by excluding an auditor, accountant, legal counsel of the debtor if they acted as such within the previous two years. Those excluded from acting as monitors may be appointed "... with the permission of the court and on any conditions that the court may impose ..." (s. 11.7(2) of the *Act*). Murphy & Associates was not the auditor for the Company and, accordingly, does not have the intimate knowledge of the financial affairs of the Company which would be available to an auditor or an accountant for the Company. Decisions reached both prior to and after the enactment of s. 11.7 of the *Act* have come to opposite conclusions as to whether it appropriate for an auditor to be appointed as a monitor. While Murphy & Associates is not the auditor for the company, the decisions do reflect the debate of about whether or not it is appropriate to appoint as a monitor a company or an individual that has had prior dealings with the petitioning company.

22 In *Stokes Building Supplies Ltd., Re* (1992), 13 C.B.R. (3d) 10 (Nfld. T.D.), the Court dismissed the application of a company to appoint its auditor as a monitor because the auditor lacked the requisite degree of "independence" that was necessary and that "... as agent of the Court, is independent of the parties." (at p. 15).

23 In *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.), the Court came to the opposite conclusion about whether an auditor could also be appointed as a monitor:

> Permitting the auditor of a company to act as its monitor under a reorganization plan under the *CCAA* is merely a recognition of the commercial realities at play when a company is forced to seek protection under the *CCAA*. Under the *CCAA*, relief from one's creditors is not automatic. There is no automatic stay of proceedings against the applicant company by creditors merely because it has applied for such relief. The relief must be granted by the order of the Court after the application is filed and after the applicant company has declared and publically filed documents declaring that it is insolvent. Therefore, in order to prepare for a *CCAA* application, the applicant company will usually require the continuing assistance of its own accountants and auditors. These professionals would most likely be the accounting professionals most knowledgeable about the affairs and business of the applicant company and most competent to promptly assembly the requisite information and plans to support the initial application for relief under the *CCAA*. A mandatory requirement that the auditor of an applicant company not be permitted to serve as monitor would, in most cases, result in considerable additional delay because the proposed monitor (not being familiar with the affairs of the company) would need to be brought up to speed. This extra work would obviously result in a duplication of expense for a company which is already cash strapped. Most importantly,

it would delay a *CCAA* application being made on a timely basis, resulting in obvious risk of adverse moves being made against the applicant company by its creditors before it can obtain court protection.

Cognizant of these commercial realities and the fact that creditors were cancelling dealership agreements and commencing legal action against Hickman, this Court was satisfied to confirm the appointment of Deloitte & Touche Inc. as Monitor.

(at paras. 8-9)

24 It is difficult to come to the conclusion that Murphy & Associates is "independent of the parties" when it has served as the advisor to the Company. While the advice that Murphy & Associates provided to the Company may be viewed by the Company as invaluable, it cannot be said that Murphy & Associates is the most knowledgeable about the affairs and business of the Company. Murphy & Associates has not served as the auditor or the accountant for the Company.

25 However, Murphy & Associates has had the opportunity of reviewing the financial affairs of the Company and has come to a satisfactory arrangement regarding the payment for services rendered to date. Because I am not prepared to order the administrative charge of $100,000 requested, any monitor will have to look to the principals of the Company for a retainer to cover its costs. Accordingly, it is not possible today to both appoint a different monitor and make the initial order sought by the Petitioner. Any different monitor will not have had the opportunity of negotiating an appropriate retainer to cover the cost of the obligations imposed upon the Monitor.

26 In order to avoid a delay and in order to avoid the cost of expenses already incurred which would have to be repeated by a different monitor, the appointment of Murphy & Associates as Monitor is made.

27 Without laying down a general rule that it is inappropriate for a petitioner to seek the appointment as a monitor of a financial adviser that has been working with a petitioner to prepare proceedings under the *Act*, such an appointment should not be made as a general rule.

Application granted in part.

End of Document

2020 ABQB 809
Alberta Court of Queen's Bench

Bellatrix Exploration Ltd (Re)

2020 CarswellAlta 2545, 2020 ABQB 809, [2020] A.J. No. 1453, [2021] A.W.L.D. 478, [2021] A.W.L.D. 481, [2021] A.W.L.D. 483, [2021] A.W.L.D. 568, 327 A.C.W.S. (3d) 166, 86 C.B.R. (6th) 191

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

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

B.E. Romaine J.

Judgment: December 22, 2020
Docket: Calgary 1901-13767

Counsel: Kelly Bourassa (agent), James Reid (agent), for National Bank of Canada
Robert J Chadwick, Caroline Descours, for Bellatrix Exploration Ltd.
Howard A Gorman, Q.C., Gunnar Benidiktsson, for BP Canada Energy Group LLC
Joseph G.A. Kruger, Q.C., Robyn Gorofsky, for Monitor, Pricewaterhousecoopers Inc.

Subject: Civil Practice and Procedure; Insolvency; Restitution

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Disclaimer provisions did not require performance of contract — Rather, these provisions provided opportunity for orderly termination of contract when necessary.

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Corporation had no right to set-off either legal or equitable — Corporation's damages arose from pre-filing contract — Company had not violated Act process — Court was reluctant to interfere with contract between parties — Continuation of stay would not prejudice corporation.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Company was transparent as to its situation after bankruptcy took place — No bad faith claim was tenable — If court was in error on issue of equitable rights, company could be entitled to relief on basis of delay — Corporation had not provided evidence of its claimed damages — Claim of corporation remained unliquidated and unsecured.

Restitution and unjust enrichment --- General principles — When remedy available

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — There was juristic reason for enrichment — Corporation could not claim constructive trust.

APPLICATION by lenders for declaration that they were entitled to property of bankrupt company; APPLICATION by corporation for performance of contract by company and related equitable relief.

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

I Introduction

1 The ultimate issue in this application is whether BP Canada Energy Group ULC or the First Lien Lenders to Bellatrix Exploration Ltd. have priority to certain funds held by the Monitor and by Bellatrix pending resolution of disputed claims. These claims include BP's breach of contract claim arising from Bellatrix's purported disclaimer of, and ongoing failure to perform under, a GasEDI agreement between Bellatrix and BP.

2 Bellatrix has obtained protection from its creditors under the *Companies Creditors' Arrangement Act*, RSC 1985, c. C-36, as amended. It holds approximately US$14.2 million of the funds in issue and approximately US$1.6 million is held by PricewaterhouseCoopers Inc. in its capacity as Court-appointed Monitor of Bellatrix.

II Relevant Facts

3 Bellatrix and BP were parties to a GasEDI Base contract for the short-term sale and purchase of natural gas and a Special Provisions for GasEDI Base Contract, both dated as of March 1, 2010 (collectively, with transaction confirmations, the "GasEDI Agreement").

4 Bellatrix and BP entered into two transaction confirmations pursuant to the terms of the GasEDI Agreement, dated as of December 12, 2017.

5 Pursuant to the GasEDI Agreement, Bellatrix was required to deliver natural gas to an agreed delivery point in Alberta. BP would then purchase and take title to that natural gas. Pursuant to the transaction confirmations, BP agreed to pay for the natural gas in accordance with a pricing formula based on posted index prices at specific or designated downstream pricing hubs in the US and Ontario, on a month to month basis. The GasEDI Agreement does not provide BP with a security interest in respect of Bellatrix's obligations under the contract.

6 Bellatrix was granted protection under the CCAA by an initial order dated October 2, 2019.

7 On November 25, 2019, with the Monitor's approval, Bellatrix sent BP a Disclaimer Notice with respect to the GasEDI Agreement, pursuant to section 32(1) of the CCAA. The Disclaimer Notice provided that the disclaimer of the GasEDI Agreement, unless successfully objected to by BP, would not take effect until December 25, 2019, 30 days later.

8 On November 25, 2019, BP responded to the Disclaimer Notice, advising Bellatrix of its view that the GasEDI Agreement constituted an eligible financial contract ("EFC") under the CCAA, and that therefore it could not be disclaimed.

9 On November 26, 2019, Bellatrix stopped delivering gas to BP.

10 On November 27, 2019, Bellatrix offered to resume delivery of natural gas under the GasEDI Agreement during the disclaimer period if BP would agree not to withhold revenues owed to Bellatrix. Bellatrix proposed that BP pay Bellatrix revenue without any set-off, reduction or deduction. On the same day BP responded, refusing to accept the terms of this proposal.

11 On November 28 and November 29, 2019, BP sent letters reiterating its position that the GasEDI Agreement was an EFC and could not be disclaimed, and demanding that Bellatrix immediately resume performance under the contract. In its letters, BP stated that, even if the GasEDI Agreement was not an EFC, Bellatrix continued to be bound by the terms of the agreement until the expiry of the disclaimer notice period, and that Bellatrix's unilateral breach thereof constituted a post-filing breach.

12 Bellatrix had delivered natural gas to BP in accordance with the GasEDI Agreement from November 1 to November 25, 2019. The amount payable to Bellatrix by BP for that natural gas was US$1,583,859.38, subject to any valid rights of set-off. That amount would ordinarily have been paid on December 24, 2019.

13 On December 6, 2019, Bellatrix, BP and the Monitor entered into an agreement pursuant to which BP paid the December payment to the Monitor in trust pending further resolution of matters relating to Bellatrix's disclaimer of the GasEDI Agreement. The agreement reserved all rights of BP in respect of the December payment, including the right, if applicable, to set-off or net the December payment against any obligations of Bellatrix to BP under the GasEDI Agreement.

14 BP filed an application seeking a declaration that the GasEDI Agreement is an EFC within the meaning of the CCAA. BP sought additional relief in its application, including an order enjoining Bellatrix from unilaterally suspending deliveries of gas under the agreement, but due to time constraints, the parties agreed to limit submissions to the single issue of whether the GasEDI Agreement is an EFC. If BP had proceeded with the other relief it sought and been successful, Bellatrix would have been required to deliver gas to BP, but not entitled to receive the proceeds of sale.

15 On February 4, 2020, Jones, J. held that the agreement was an EFC: *Bellatrix Exploration Ltd., Re*, [2020] A.J. No. 329 (Alta. Q.B.) (the "EFC Decision"). This decision is under appeal, leave granted 2020 ABCA 178 (Alta. C.A.). The decision makes no reference to any obligation of Bellatrix with respect to continued performance of the agreement.

16 On February 6, 2020, BP counsel wrote to Bellatrix counsel advising, among other things, that, as a result of the EFC Decision, BP expected Bellatrix to resume performance of the GasEDI Agreement.

17 On February 11, 2020, counsel to Bellatrix responded noting that the EFC Decision did not address any of the other relief sought in BP's application, including a requirement that Bellatrix perform its obligations under the GasEDI Agreement. The response reiterated Bellatrix's position that BP has an unsecured claim in Bellatrix's CCAA proceedings. The response also advised that Bellatrix did not expect any potential purchaser or credit bid party to assume the terms of the GasEDI Agreement.

18 Counsel to BP filed an order with respect to the EFC Decision on March 5, 2020. The order, among other things, grants BP leave to apply to the Court for such further advice and direction as may be required with respect to the remainder of relief sought in the GasEDI Agreement application.

19 BP brought no application to address the remainder of the relief sought in the EFC determination application until BP filed its cross-application on August 7, 2020 to the application filed by the Agent to the First Lien Lender, five months later.

20 On March 20, 2020, Bellatrix applied for, among other things, an order extending the stay of proceedings under the CCAA to May 7, 2020. As a result of Court closures due to the COVID-19 pandemic, the application was made via desk application, subject to any interested party objecting to the application.

21 There were no objections to the application, and on March 31, 2020, the Court granted an order extending the stay of proceedings to May 7, 2020. The order provided for a further automatic stay extension to June 8, 2020, subject to, among other things, any objections from interested parties.

22 In a May 1, 2020 decision allowing leave to appeal the EFC Decision, Strekaf, J.A. directed that the determination of how the interests of BP and other parties to the CCAA proceedings could best be protected pending the hearing of the appeal of the EFC Decision should be determined by this Court. No party has sought a stay of the EFC Decision.

23 There were no objections to the automatic stay extension on June 8, 2020 from any interested parties, and the stay has continued. Applications for the stay extension orders submit that Bellatrix has been acting in good faith and with due diligence in carrying out the terms of all orders of the Court and in respect of all matters relating to the CCAA proceedings.

24 On May 8, 2020, Hollins, J. granted an Approval and Vesting Order approving the sale of substantially all of Bellatrix's assets to Spartan Delta Corp. Bellatrix closed the sale on June 1, 2020. The GasEDI Agreement was not assumed by the purchaser.

25 Pursuant to the Spartan transaction, the purchaser acquired substantially all of Bellatrix's assets and assumed all of Bellatrix's liabilities in respect of its wells, environmental obligations, pre-filing cure costs in respect of assumed contracts and certain other assumed labilities. The Spartan transaction also permitted the purchaser to make offers of employment to Bellatrix's employees.

26 The First Lien Lenders are secured creditors of Bellatrix pursuant to a credit agreement dated June 4, 2019 and certain security granted in relation to that agreement. In contrast to the GasEDI Agreement, the credit agreement and the security granted in relation thereto secure any indebtedness that may become owing by Bellatrix under any swap contracts or other derivative agreements with the First Lien Lenders. The Agent of the First Lien Lenders, on behalf of the lenders, has a registered, valid and enforceable first priority security interest in all of Bellatrix's present and after-acquired personal property and a first priority floating charge on all of Bellatrix's present and after-acquired real property.

27 On May 22, 2020, the Court granted a Stay Extension and Distribution Order authorizing Bellatrix to distribute $47.5 million, a portion of the net proceeds from the Spartan sale, to the Agent of the First Lien Lenders in partial satisfaction of their secured claim. Bellatrix held back certain funds from distribution, including funds for disputed claims such as the BP claim.

28 Bellatrix remains indebted to the First Lien Lenders in excess of $44.5 million. Bellatrix may not be able to pay the secured claim of the First Lien lenders in full given the results of the sale process. In the circumstances, a claims process has not been initiated in these CCAA proceedings.

29 The First Lien Lenders seek a declaration that they have a first priority interest in all the property of Bellatrix, including funds held back in relation to the BP claim, a declaration that amounts owing to BP, if any, are an unsecured claim, and an order directing the Monitor to make a further distribution to the Agent in the amount of approximately $28.9 million. Bellatrix supports this position and submits that the Agent for the First Lien Holders is entitled to distribution of the sale proceeds and the December payment of approximately $1.6 million held in trust by the Monitor in priority to BP.

30 In a cross application, BP seeks judgement for damages in an amount equivalent to US$14.2 million, an order lifting the stay in the CCAA proceedings to permit BP to enforce the judgement, and an order directing the Monitor to pay BP the approximately US$1.6 million December payment from the held-back funds, an order directing Bellatrix to pay the remainder of the claimed damages out of the sale of proceeds of its assets, or, in the alternate, granting BP a charge over the property of Bellatrix in the amount of the claimed damages with priority over the secured creditors and *pari passu* with the Interim Lenders

Charge, or in the further alternative, an order declaring that any funds held by the Monitor and Bellatrix up to the amount of the claimed damages are held in trust for BP.

III Issues

31 The main issue is whether the CCAA grants BP, as the non-insolvent counterpart to an EFC that has not chosen to terminate the agreement, any security or priority for its damages as a result of Bellatrix's ongoing failure to perform under the agreement. In other words, does the exception to the debtor's right to disclaim an EFC set out in section 34(7)(a) of the CCAA create an obligation for the debtor to continue to perform the EFC throughout insolvency proceedings?

32 Other issues include the following:

(a) Is BP entitled to the funds held by the Monitor in respect of the December payment pursuant to a right of set-off?

(b) Is BP entitled to lift the stay to permit it to obtain and enforce a judgment against the sale proceeds?

(c) Is BP entitled to equitable relief?

(d) Has BP proved the amount of its claim for damages?

IV Analysis

A. Does the exception to the debtor's right to disclaim an EFC set out in section 34(7)(a) of the CCAA create an obligation for the debtor to continue to perform the EFC throughout insolvency proceedings?

33 The stay provision of the CCAA, which prevents termination of an agreement because of a contractual counterparty's insolvency, does not apply to an EFC: section 34(7).

34 Section 34(8)(a) of the CCAA allows solvent counterparties to EFCs certain "permitted actions" during the stay period if they are allowed to take such actions under the specific EFC agreement, including netting or setting off or compensation of obligations between the company and the other parties to the EFC. However, section 34(10) does not permit enforcement actions to recover net termination values once they are determined. Rather, if net termination values are owed by the company to another party to the EFC, section 34(10) deems the non-insolvent counterparty "to be a creditor of the company with a claim against the company in respect of those net termination values".

35 As noted by the First Lien Lenders, the purpose of protection for EFCs under the CCAA is to provide stability to financial markets by allowing a non-defaulting counterparty the right to terminate and crystallize claims arising under an EFC.

36 Like other creditors of the company, the net claims of a non-insolvent counterparty after termination are subject to the stay of proceedings. The Canadian Bankers Association in its submissions in favour of EFC amendments to the *Bankruptcy and Insolvency Act* in 1991 commented that:

> ... it cannot be overemphasized that our proposal is not to benefit either party to an eligible financial contract. ... <u>Any net amount, if owed to the other party, would be fully subject to the proposed stay provisions. What would be achieved is that the rights of both parties would have been reduced to a fixed and certain amount, just like an amount owed under a regular contract at the time of the stay.</u> (emphasis added): as cited in *Re Androscoggin Energy LLC*, [2005] OJ No. 395 at para 3.

37 The Insolvency Institute of Canada Report of the Task Force on Derivatives dated September 26, 2013 notes at pages 2 and 3 that:

> EFC protection is a significant exception to the stay of proceedings under the CCAA and BIA. There are two main purposes of the EFC safe harbours: (i) to protect non-defaulting counterparties from the risk of increasing exposure to the insolvent counterparty under the EFC and (ii) to reduce systemic risk in Canadian and global financial markets. Non-defaulting counterparties may be at risk because, in certain instances, the amounts under the EFCs are very substantial and the value of

> the underlying products subject to EFCs are volatile in nature and can change dramatically during an insolvency proceeding. If the solvent counterparty to an EFC is subject to a stay of proceedings and therefore unable to terminate its EFCs with the insolvent counterparty, there is a risk that the value of such EFCs could deteriorate sufficiently (from the insolvent counterparty's perspective) to put the solvent counterparty at risk. Systemic risk may arise where the solvent counterparty is a systemically important institution or where the solvent counterparty has entered into EFCs with one or more other counterparties. In extreme cases, the failure of one counterparty could have a domino effect, where the failure of one counterparty, particularly a derivatives dealer, triggers the failure of a second counterparty who is also a derivatives dealer and the failure of the second counterparty could trigger the failure of others. Multiple insolvencies may cause a lack of liquidity in the financial sector and unavailability of credit to solvent enterprises and, ultimately, systemic risk. The systemic risk could spread to global markets and lead to world-wide financial instability and, in extreme cases, recession.

38 The protection offered to non-insolvent counterparties to an EFC is the ability to terminate the EFC and crystallize its loss despite the stay provision of the CCAA, a protection not afforded to other creditors. The other protection is allowing set-off if the EFC agreement itself permits it. The exceptions were included in the *Act* for the protection of the derivative market generally from volatile and systemic risk. They do not compel a CCAA debtor to continue to perform an EFC that has not been terminated, nor does the CCAA provide the non-insolvent counterparty with any priority for its claim, apart from the protection of the exemption.

39 Unless the non-insolvent counterparty to the EFC has a security interest, it is an unsecured creditor, and participates in the CCAA proceedings on the same footing as other creditors: *Blue Range Resource Corp., Re*, 2000 ABCA 239 (Alta. C.A.) at para 9.

40 Therefore, assuming that the GasEDI Agreement is an EFC, BP is allowed to terminate it and crystallize its loss. However, as BP has not done so, its remedy for Bellatrix's breach of the GasEDI Agreement is a claim in the CCAA proceedings as an unsecured creditor unless there are other remedies available to it in the specific circumstances.

41 BP submits that, unless it is granted the relief it seeks, the practical effect of Bellatrix's conduct would be to render the disclaimer rules of the CCAA meaningless. It notes that a valid disclaimer under section 32(7) of the CCAA results in a "provable claim", unsecured unless otherwise provided for in the disclaimed contract. However, if CCAA debtors are allowed to breach executory contracts at will, the result is identical: the solvent party has a provable claim, unsecured unless otherwise provided for under the contract. BP submits that, if that is true, section 32(7) of the CCAA is without a purpose, as there is no practical difference between contracts that can and cannot be lawfully disclaimed. Either way, if the debtor chooses to breach the contract, the solvent counterparty is left with the same remedy — which in many cases, is no remedy at all.

42 Therefore, BP submits that the "clear implication" of the statutory disclaimer provisions of the CCAA is that a company is required to perform its obligations under executory contracts as of the filing date, unless and until those contracts can be validly disclaimed under section 32.

43 As noted previously, the exception from EFCs included in the disclaimer provisions of the *Act* do not expressly provide that an EFC must be performed. Such a mandatory requirement would thwart the objectives of the CCAA, since compelling a CCAA debtor to performs an EFC that it cannot afford to perform would in many cases affect its ability to attempt to restructure.

44 The disclaimer provisions, while initiated by the debtor, provide the solvent party to a disclaimable contract an opportunity to object to the disclaimer and a process for doing so. Section 32(4) of the *Act* sets out factors that the court must consider in deciding the issue.

45 While the solvent party to a contract that the debtor merely stops performing may not have available to it the same statutory process, it may apply to the court for an order compelling performance as BP initially purported to do. The court supervising the CCAA proceedings in its consideration of such an application would likely take into account factors similar to those set out in section 32(4), including whether compelling performance would interfere with the prospect of a viable arrangement, and whether refusing such an order would cause significant financial hardship to a party to the contract.

46 While the considerations may be similar, a disclaimer proceeding is initiated by the debtor, provides for a statutory process and mandates a termination date for the disclaimer. As noted by Morawetz, J. in *Target Canada Co., Re*, 2015 CarswellOnt 3274 (Ont. S.C.J.), the disclaimer is beneficial to creditors generally because it enables the debtor to move forward with a liquidation plan without further delay. In contrast, the unilateral non-performance of a contract gives rise to uncertainty for both the debtor and the counterparty as to the status of the contract, including whether or not the solvent counterparty at its election will accept the termination of the contract as repudiated, and the date of its termination.

47 The disclaimer provisions are thus not rendered meaningless by the existence of a less formal option, but provide an opportunity for orderly termination and certainty to the parties to the disclaimed contract. Implying an obligation to perform an uneconomic contract that may affect the ability of the CCAA debtor to attempt to restructure would require more direct statutory language.

48 It must be noted that Bellatrix attempted to resolve the issue through the disclaimer option before the GasEDI Agreement was found to be an EFC.

B. Is BP entitled to the funds held by the Monitor in respect of the December payment pursuant to the right of set-off?

49 Assuming that the GasEDI Agreement is an EFC, section 34(8)(a) of the CCAA permits the netting or setting off of obligations between the debtor company and the other party to the EFC if the EFC is terminated on or after the commencement of the CCAA proceedings and if such action is "in accordance with the provisions of the contract".

50 However, BP has not terminated the GasEDI Agreement and is not seeking to terminate and set-off its position to reduce exposure to risk. Therefore, the set-off provisions of section 34(8)(a) are not available to it.

51 BP seeks to maintain Bellatrix's obligation to perform the agreement but set-off amounts it owes to Bellatrix for previously delivered product. Whether or not the GasEDI Agreement is an EFC, the agreement does not on its terms allow the set-off of the December payment.

52 Section 10.2 of the base contract in the GasEDI Agreement permits the non-defaulting party to withhold any amounts owed to the defaulting party when there is an event of default or a potential event of default and to set-off such amounts against "any amounts owed to the Defaulting Party under the [GasEDI Agreement] whether or not yet due" and set-off against such withheld amounts "any amounts *owed the non-Defaulting Party hereunder* (whether or not yet due)". BP submits that it is entitled to set-off its damages claim against the December payment, relying on the language "whether or not due" in section 10.2.

53 However, BP is the payor, not the payee under the agreement and Bellatrix was not obligated to pay BP anything "hereunder", either when the agreement to hold the funds in trust was entered into or when the funds would normally be paid later in December. Although an event of default includes a party's failure to deliver gas "for the greater of 4 cumulative days or 5% of the number of days in a Delivery Period .... in any one transaction", and BP may have a claim for damages in an amount has not yet been determined, there were no amounts "owed to" BP at the time of the December payment in respect of which it could exercise any contractual right of set-off.

54 Section 10.5 of the agreement states that a "Performing Party" has the right to withhold any or all payments due the non-performing party for the period of the applicable non-performance and net or set-off amounts due the Performing Party against such withheld amounts. Bellatrix stopped delivering gas on November 26, 2019. The December payment was for the delivery of gas between November 1 and November 25, 2019. Therefore, for the same reasons, section 10.5 of the agreement does not give BP a right of set-off.

55 BP thus has no contractual right of set-off with respect to the December payment but submits that it has a right of equitable set-off, citing *Blue Range Resource Corp., Re*, 2000 ABCA 200 (Alta. C.A.). In *Blue Range*, the appellants were allowed to set-off anticipated damages they would incur under certain natural gas marketing contracts against payments owed under those contracts for the delivery of natural gas.

56 In that case, as in this, the cost to the appellants to replace the gas was higher than the cost they were paying under the contracts. The Court of Appeal in *Blue Range* set out the principles from the Supreme Court of Canada decision in *Telford v. Holt* (1987), 41 D.L.R. (4th) 385 (S.C.C.), at 398 that apply when dealing with equitable set-off:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands;
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed;
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim;
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract; and
>
> 5. Unliquidated claims are on the same footing as liquidated claims.

57 The Court noted at para 19:

> The important point for invoking equitable set-off is the close connection of the transactions. Would it be manifestly unjust to require the appellants to pay the costs of the February and March deliveries in view of the fact that they will suffer significant losses due to the early termination of the same contract that called for the delivery of gas in February and March? In our view, such a requirement is unjust.

58 In *Blue Range*, the CCAA debtor terminated the contracts. Here, BP's position is that the GasEDI Agreement has not been terminated, remains in full force and effect and that Bellatrix is required to perform the agreement.

59 The First Lien Lenders and Bellatrix submit that BP does not meet the test for equitable set-off because it would not be "manifestly unjust" to allow Bellatrix to claim the December payment without taking into consideration the cross-claim.

60 They point out that, in a letter dated February 11, 2020, Bellatrix's counsel advised BP on its position on the ability of a CCAA debtor to elect non-performance of an agreement. Bellatrix responded that the EFC Decision did not deal with the issue of performance or set-off. Bellatrix has been consistent in its position throughout the CCAA proceedings. Despite this, BP did not apply to lift the stay or to claim a right of set-off until this application was filed.

61 While I have found later in this decision that BP's delay in taking action would not disentitle it from a equitable remedy, BP has not established an equitable ground for being protected, and therefore fails the *Telford* test for that reason. BP is not entitled to set-off the December payment, whether or not the GasEDI Agreement is an EFC.

62 Bellatrix submits that, since BP does not fit within the permitted set-off provisions of section 34(8), but for the agreement among Bellatrix, BP and the Monitor to have the Monitor hold the December payment in trust, BP would have been in violation of the stay under the initial CCAA order had it purported to withhold the December payment. If it had unilaterally withheld the payment, BP would have deprived Bellatrix of substantial liquidity at a time when Bellatrix was seeking to pursue its strategic process to identify a going concern transaction for the benefit of its many stakeholders, relying on funds drawn under its Interim Financing Facility, and Bellatrix would have been unable to make various payments to secured and other unsecured creditors.

63 However, as I have found that BP has neither a legal nor an equitable right of set-off, it is not necessary that I decide this issue.

C. Is BP entitled to lift the stay to permit it to obtain and enforce a judgement against the sale proceeds?

64 As a corollary to the relief of lifting the stay, BP asks the Court to direct immediate payment of the alleged damages to BP out of the sale proceeds, less the December payment.

65 The test for lifting a stay focuses on the totality of circumstances and the relative prejudice to the parties involved: *Alberta Energy Regulator v. Lexin Resources Ltd*, 2019 ABQB 23 (Alta. Q.B.) in the context of a receivership, citing *Alignvest Private Debt Ltd. v. Surefire Industries Ltd.*, 2015 ABQB 148 (Alta. Q.B.) at para 40 and 43 (appeal on other grounds dismissed, [2015] A.J. No. 1234 (Alta. C.A.)).

66 Guidance can be drawn from the provisisons of section 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as amended, in determining whether a stay in CCAA proceedings should be lifted. The Court should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant: *Ma, Re*, [2001] O.J. No. 1189 (Ont. C.A.).

67 Lifting the stay is not routine: there must be sound reasons to relieve against the stay: *Ma, Re*, at para 3.

68 In order for a party applying to lift the stay to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted: *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.* (2005), 29 C.B.R. (5th) 62 (Ont. S.C.J.) at para 18-19. Examples may include hardship caused by the stay or necessity of payment or a situation where it is in the interests of justice to allow the stay to be lifted: *Canwest Global Communications Corp., Re* (2009), 61 C.B.R. (5th) 200 (Ont. S.C.J. [Commercial List]). The prejudice to the applicant should be different qualitatively from that suffered by other creditors, who also lose, in whole or part, the benefit of their contracts by reason of the debtor's insolvency.

69 BP submits that it suffers unique harm from the breach of the GasEDI Agreement, and argues that such prejudice favours the lifting of the stay to allow it to enforce its damages claim against Bellatrix. However, BP does not provide any valid reason why its damages claim is unique.

70 First, BP submits that it is a post-filing creditor. This is incorrect: its damages claim arises from a pre-filing contract, whether it is an EFC or not.

71 Second, BP notes, relying on *Bank of Montreal v. Probe Exploration Inc.*, [2000] A.J. No. 1752 (Alta. Q.B.), that courts are reluctant to interfere with the rights of contractual parties in a liquidation scenario where the result would be to prefer the interests of the debtor and its primary secured creditor. However, I agree with the First Lien Lenders that the *Probe* case is distinguishable from the situation of Bellatrix's failure to perform under the GasEDI Agreement.

72 In *Probe*, the unique facts included the existence of an intercreditor agreement that contemplated the mutual intent between the secured creditor and the party opposing the termination of the agreement at issue that any purchaser of Probe would be bound by Probe's obligations under the contract.

73 BP submits in proposing the lifting of the stay that Bellatrix has abused and violated the CCAA process. As noted later in this decision, there is no basis for this allegation.

74 BP also submits that the stay should be lifted because the GasEDI Agreement as an EFC is entitled to certain benefits. These benefits do not imply a right to lift the stay in the context of a damages claim. Section 34(10) of the *Act* makes it clear that such a claim merely makes the holder a creditor, in this case an unsecured creditor. The unique risks inherent in the status of an EFC contract are recognized in the limited relief offered in section 34. The CCAA does not provide any special security or priority for a damages claim arising from an EFC.

75 Finally, as noted by the Agent, this is the end of the CCAA process, and in the nature of a priorities dispute. There exists no valid reason to lift the stay or to order the immediate payment to BP of damages out of the sale proceeds or to grant BP a priority charge on the sale proceeds ranking *pari passu* with the Interim Lenders Charge unless consideration of good faith or equity compel that result.

D. Is BP entitled to equitable relief?

76 BP seeks a declaration of constructive trust as a remedy for Bellatrix's breach of the GasEDI Agreement, arguing that Bellatrix's stakeholders have been unjustly enriched. BP also submits that Bellatrix has engaged in a pattern of abusive conduct and has unjustly appropriated approximately $14.5 million by breaching a contract that it is prohibited from disclaiming.

77 The onus of proving a constructive trust rests with the claimant. It is a discretionary remedy that will not be imposed without taking into account the interest of others who may be affected by granting the remedy: *Hoard, Re*, 2014 ABQB 426 (Alta. Q.B.) at para 26.

78 As noted at para 23 of *Hoard*, given that the BIA provides a code by which legislators have balanced the interest of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust. The same reasoning applies to the CCAA.

1. Unjust enrichment

79 A constructive trust can be used to remedy unjust enrichment where monetary damages are inadequate and there is a link or causal connection between the claimant's contribution and the property in which the constructive trust is claimed: *Moore v. Sweet*, 2018 SCC 52 (S.C.C.) at para 91. Therefore, even if the elements of unjust enrichment are satisfied in this case, there is no link between the funds that are the proceeds of sale of Bellatrix's assets and BP. The most that could be recovered through this remedy would be the December payment.

80 The doctrine of unjust enrichment requires an enrichment, a corresponding deprivation, and the absence of a juristic reason for the enrichment: *Hoard*, at para 26.

81 With respect to the requirement of enrichment, the Alberta Court of Appeal noted in *Luscar Ltd. v. Pembina Resources Ltd.*, 1994 ABCA 356 (Alta. C.A.) at para 129 that:

> where there exists a contract under which parties are governed, and one party gains by the breach of the same, that party is not truly enriched, because the breaching party takes that gain subject to its liability for breach of contract.

82 With respect to deprivation, BP was not required to provide any goods or services to Bellatrix or take on any financial risk or exposure. As noted in this decision, BP has failed to establish the amount of any financial hardship it may have suffered as a result of Bellatrix's disclaimer or breach of the GasEDI Agreement.

83 BP concedes that the provisions of the CCAA can provide a juristic reason for an enrichment, but submits that BP is in a unique position as compared to other CCAA creditors in that Bellatrix has breached a contract that it was prohibited from breaching, both by the CCAA and by the Court.

84 As noted previously, the CCAA does not prohibit a debtor from failing to perform a contract, be it an EFC or otherwise. Nor is it correct that in failing to perform the GasEDI Agreement, Bellatrix is in breach of a court order. There is nothing in either the EFC Decision or the order that emanates from it that compels performance of the agreement.

85 The statutory priority of the First Lien Lenders under the CCAA constitutes a juristic reason to deny recovery to BP through the doctrine of unjust enrichment.

86 BP submits that Bellatrix conceded in its submissions before the Court in the application to determine whether the agreement is an EFC that, if it was, Bellatrix would be obligated to perform it. However, Bellatrix actually stated that if the agreement was an EFC, it would be required either to perform it "or otherwise to pay damages to BP".

87 Therefore, BP is not entitled to a constructive trust as a remedy for unjust enrichment.

2. Wrongful Conduct

88 In *Soulos v. Korkontzilas* (1997), 46 C.B.R. (3d) 1 (S.C.C.), the Supreme Court held that a constructive trust can also be used to right wrongful conduct. The following conditions must be met: the insolvent company must be under an equitable obligation in relation to the activities giving rise to the assets in its hands; the property in the hands of the insolvent company must be shown to have resulted from deemed or actual agency activities in breach of its equitable obligation to the claimant; the claimant must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the insolvent company remain faithful to their duties; and there must be no factors that would render the imposition of a constructive trust unjust in all the circumstances.

89 Subsequent decisions emphasize that the property sought to be impressed with the trust must be the property obtained through the wrongful act, *Hoard* at para 35.

90 BP submits that the timing of Bellatrix's purported disclaimer and breach of contract was not a coincidence, in that Bellatrix knew payments for gas delivery under the GasEDI Agreement would be subject to BP's contractual right to set them off against BP's damages for Bellatrix's breach of contract. It argues that Bellatrix timed its delivery of the disclaimer notice and its breach of contract for the day immediately after BP made its payment for October gas deliveries on November 25, 2019, thus depriving BP of the ability to set that payment off against damages.

91 However, although it issued a disclaimer notice on November 25, 2019, Bellatrix continued to deliver gas under the agreement until November 24, 2019 and thus was not in breach of the contract until after that date. It did not mislead BP about the timing of its decision. While the decision on the timing of the disclaimer notice may have been strategic, it was not wrongful conduct.

92 BP also alleges that the timing of the disclaimer notice put it in the position of being an involuntary interim lender, as Bellatrix was able to use funds that BP may have been able to set-off if it had known about the disclaimer earlier.

93 BP's position is different from the position of an interim lender that advances funds to an insolvent debtor to finance an uncertain restructuring process. BP did not advance the roughly $14.5 million that Bellatrix estimated it would be able to achieve in additional revenue by selling its gas elsewhere, and BP it is not out of pocket for that amount.

94 BP also submits that failure to perform the agreement allowed Bellatrix to sell the gas it would have been required to sell BP to other parties and use the proceeds to fund operations and pay other creditors, including the actual interim lender, and that this was wrongful conduct.

95 As noted previously, Bellatrix's decision to cease performing an uneconomic contract during the CCAA process is not wrongful conduct: it allowed the company to generate increased revenue it would not be able to generate under the BP agreement to fund the company's operations while it attempted to restructure. BP was not required to pay for gas that was not delivered or provide any services to Bellatrix. While the outcome of the process was a liquidation, it was a going concern liquidation that was the best opportunity for the preservation of jobs and likely the maximization of value.

96 As noted previously, there is no merit to the allegation that Bellatrix misled the Court. As was the case with unjust enrichment, there is no link or causal connection between the alleged wrongful acts and the proceeds of sale of Bellatrix's assets.

97 In short, BP has no basis to claim a constructive trust based on wrongful conduct.

98 In *Hollinger Inc., Re*, 2013 ONSC 5431 (Ont. S.C.J. [Commercial List]) at para 39, leave to appeal denied in 2014 ONCA 282 (Ont. C.A.), the Ontario Court of Justice found that there is no legitimate reason for the proprietary remedy where the claimant relies on the remedy to try and gain a super-priority over other creditors in the CCAA. BP has an unsecured monetary damages claim and it should not be entitled to a constructive trust that would subvert the priorities of other creditors unless it has established that it would be unconscionable not to recognize such a trust. BP has not done so.

3. Bad Faith

99 BP also relies on section 18.6 of the CCAA, a new provisison that provides that any interested person in any proceedings under the *Act* shall act in good faith with respect to the proceedings, and that if it is satisfied that an interested person fails to act in good faith, the Court may make the appropriate order. The duty of acting in good faith is not a new duty for a CCAA debtor: sections 11.02(3), 33(3), 50(12), 50.4(11) and 65.12(2)

100 As I have noted previously, BP has not established any wrongful conduct by Bellatrix, which has merely used the tools available to it under the CCAA. Bellatrix was faced with an uneconomic agreement that it could not afford to perform while attempting to restructure. Bellatrix advised BP at an early stage of the proceedings that, in the circumstances, the agreement would never be accepted by a purchaser of Bellatrix's assets, which BP as a sophisticated party would likely have recognized. BP had the option of terminating the agreement as an EFC and exercising its right to set-off after termination, but chose the option of maintaining that Bellatrix was required to continue to perform the agreement.

101 While Bellatrix breached the GasEDI Agreement by non-performance, it has been transparent and candid throughout with respect to its position and conduct. Although it did not abide by the statutory 30 days notice under its notice of disclaimer, that was after BP refused to accept the disclaimer and advised Bellatrix of its view that the agreement was an EFC.

102 It is not unusual for a CCAA debtor to fail to perform uneconomic ongoing monthly contracts, both before and after filing, whether formally disclaimed or not, and such failure to perform is not per se bad faith.

103 The December payment has been held in trust pending a resolution of the issues of set-off and priority, so Bellatrix has not failed to act in good faith with respect to the payment. The timing of the disclaimer notice, while strategic, was not bad faith conduct, and Bellatrix has not, as alleged by BP, misled the Court or failed to comply with a Court order.

104 The Monitor has stated that it is satisfied that Bellatrix has acted in good faith throughout the proceedings.

105 As noted by Dr. Janis Sarra in "La bonne foi est une considération de base — Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", Annual Review of Insolvency Law, eds Janis Sarra & Barbara Romaine, Toronto: Thomson Reuters Canada, 2014:

> The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.

106 Bellatrix has not exhibited conduct that would fall within these categories and has not acted in bad faith.

107 The First Lien Lenders and Bellatrix point out that BP failed to allege that Bellatrix was not acting in good faith through four stay applications, and only raised the allegation at the end of August, 2020. However, BP responds that, as Bellatrix as a concession to BP agreed to hold back an amount from the sale proceeds to cover BP's damages claim, it had no need to object to the stay extension. While I have not found bad faith by Bellatrix, I accept that BP's failure to object to the stay does not preclude its claim of bad faith in the circumstance.

4. Delay

108 The First Lien Lenders and Bellatrix submit that it would be inequitable to grant BP the super-priority it seeks for damages in priority to the stakeholders of Bellatrix.

109 They note that BP initially applied for various forms of relief, including orders directing Bellatrix to resume performance of the GasEDI Agreement and to remedy any existing default, but ultimately only pursued the issue of characterization of the GasEDI Agreement as an EFC. While BP may have been constrained by time limits in its initial application heard on January 23, 2020, it knew by February 25, 2020, that Jones, J's decision dealt only with the characterization of the GasEDI Agreement

as an EFC, and that it was free to proceed with the remainder of the relief it sought before any other commercial duty judge. The order emanating from the decision grants BP leave to apply for further advice and direction with respect to the remaining relief.

110 While the pandemic interfered with regular commercial duty chambers in March and April, during Bellatrix's May 22, 2020 application before Hollins, J. to make interim distributions to certain priority and secured lenders. BP advised the Court that it may have a priority claim against Bellatrix and asked the Court to set aside US$14.5 million to be held in trust pending resolution of the disclaimer dispute with Bellatrix. The Court refused and suggested that BP bring its own application if it was concerned that it was facing disadvantage. It was not until August 7, 2020, in response to First Lien Lenders priority application, that BP brought a cross-application seeking relief similar to that it had originally sought in December, 2019.

111 The First Lien Lenders submit that it would be inequitable and prejudicial to the First Lien Lenders if BP were now allowed a priority claim in relation to Bellatrix's breach of the GasEDI Agreement. Bellatrix remains indebted to the First Lien Lenders in excess of $44 million and it is clear that Bellatrix would not be able to pay the First Lien Lenders' secured claims in full if BP's unsecured damages claim is paid in priority to its claim.

112 Bellatrix points out that BP did not proceed to seek the remainder of its relief at a time when Bellatrix may have been able to perform the contract if ordered to do so. Now, nine months later, it has no assets that would allow performance.

113 BP responds that it has protested its treatment from the start, and that the First Lien Lenders have suffered no prejudice from the delay, as they and Bellatrix were aware of BP's claim from December, 2019, even though BP did not act on it until after the sale of assets had been concluded. As noted in *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.), albeit in a different context, the fact that creditors will receive less money if late claims are allowed is not prejudice. "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": *Blue Range* at para 40.

114 Bellatrix and the First Lien Lenders were fully aware of BP's claim, and there is no evidence that earlier determination of the claim would have caused Bellatrix to do anything differently with respect to the sale of assets. This is not a case of a creditor "lying in the weeds", or even a case where BP implied that it had changed its position even though it did not take earlier action. In the specific circumstances of this case, including the disruption of court proceedings caused by the COVID pandemic, I would find that BP is not disentitled to relief on the basis of delay if I am incorrect on its entitlement to equitable relief.

E. Has BP proved the amount of its claim for damages?

115 The amount of damages claimed by BP, in this application, $14.5 million, is equal to the amount that Bellatrix estimated, as part of the EFC determination application, that it could generate as additional revenue from the date of the disclaimer until the end of October, 2020, based on certain assumptions.

116 BP concedes that its damages claim is based on this estimate. However, that estimate must be reduced by the fact that Bellatrix did not realize any revenues for its natural gas after the sale of its assets closed on June 1, 2020.

117 I agree with Bellatrix and the First Lien Lenders that benefits to Bellatrix of the disclaimer do not necessarily equate to BP's entitlement to damages. BP has not provided any evidence of its actual damages relating to the disclaimer of or non-performance under the GasEDI Agreement, taking into account any mitigation BP would have been able to obtain by entering into other arrangements for the purchase of natural gas or otherwise.

118 Therefore, the claim remains an unliquidated unsecured claim.

V Conclusion

119 The First Lien Lenders are entitled to a declaration that they have a first priority interest in all the property of Bellatrix, including the December payment held in trust and funds held back from the sale of assets. Any amounts owing to BP are an

unsecured claim. The Monitor is authorized to make a further distribution to the Agent in the amount of approximately $28.9 million, the exact amount subject to its final calculations.

120 BP's cross-application is dismissed.

Lenders' application granted; corporation's application dismissed.