

Appeal Number: 0901-0048 AC
Q.B. Number: 0901-02012

IN THE COURT OF APPEAL OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

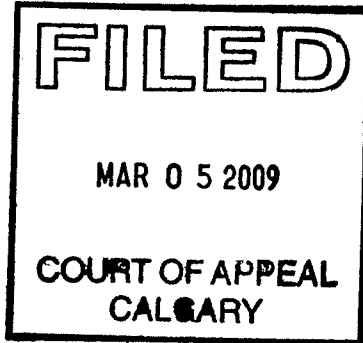
BG INTERNATIONAL LIMITED

(Plaintiff)
Respondent

- and -

CANADIAN SUPERIOR ENERGY INC.

(Defendant)
Appellant



**FACTUM AND BOOK OF AUTHORITIES OF CANADIAN WESTERN BANK
(an interested/effected party)**

(Expedited Appeal scheduled for Tuesday, March 10, 2009 at 10:00a.m.)

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PART I - STATEMENT OF FACTS

1. Canadian Superior Energy Inc. ("CSEI") has appealed the Interim Receivership Order (the "IRO") granted by the Honourable Madam Justice B.E.C. Romaine on February 11, 2009 on the application of BG International Limited ("BG").

IRO, Appeal Digest, Vol 1, F89-99

2. The IRO deviates from the standard template form of Receivership Order in that, among other things, it:

- (a) permits the Interim Receiver, Deloitte & Touche Inc. (the "Receiver"), to borrow up to \$47 million (the "Borrowing Charge") from BG secured by way of a fixed and specific charge over certain specified CSEI assets principally located in Trinidad and Tobago (defined in the Appellant's Factum as the "Property"); and

IRO, paragraph 20, Appeal Digest, Vol 1, F95

- (b) confers a \$14 million fixed and specific charge over the Property in favour of the Canadian Western Bank ("CWB") that ranks in priority to the Receiver's Borrowing Charge and all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "CWB Charge").

IRO, paragraph 21, Appeal Digest, Vol 1, F95-96

3. CSEI is currently indebted to CWB in the approximate sum of \$35,000,000.00. As security for the outstanding debt, CWB holds a Demand Debenture, Guarantee and GIC Collateral in support of outstanding letters of credit.
4. On February 12, 2009, CWB issued to CSEI a demand and Notice of Intention to enforce its security pursuant to section 244.1 of the *Bankruptcy & Insolvency Act*.

PART II - GROUNDS OF APPEAL

5. In the event that this Honourable Court considers that the Chambers Justice did err in granting the IRO, CWB respectfully submits that the entirety of the IRO cannot be set aside *ab initio* and that the Receiver's Borrowing Charge and the CWB Charge must remain in full force and effect.

PART III - POINTS OF LAW

A. Standing of CWB

6. CWB acknowledges that it is not a named party in this appeal, nor has it formally applied to be added as a Respondent or for intervenor status. CWB respectfully submits however, that it is most certainly interested in the outcome of the appeal as the ultimate decision, to the extent that the CWB Charge is set aside, will significantly impact its financial position. On that basis, CWB takes the position that it should be afforded the opportunity to make, albeit brief, submissions at the hearing of this appeal.
7. The fact that CWB has a real and substantial interest in the IRO and its terms was clearly recognized by the Honourable Chambers Justice. At the time that the IRO was granted, CWB was permitted to make submissions and was included in the preamble as one of the "interested parties":

UPON the application of BG International Limited ("BGI") in respect of Canadian Superior Energy Inc. ("CSEI"); AND UPON having read the within Statement of Claim, the Notice of Motion, Affidavit of Ewen Denning, and the Affidavits of Service of Ryan Tilleman and Jessica Eng, respectively, filed; AND UPON reading the consent of Deloitte and Touche Inc. ("Deloitte") to act as receiver and manager of certain of CSEI's Property (as hereinafter defined) ("Receiver") filed; AND UPON hearing counsel for BGI, counsel for Deloitte, *counsel for Canadian Western Bank ("CWB")*, counsel for the Defendant, CSEI *and other interested parties*; IT IS HEREBY ORDERED AND DECLARED THAT: **[emphasis added]**

IRO, preamble, Appeal Digest, Vol 1, F95

8. The fact that CWB is an interested party to these receivership proceedings is further recognized in the terms of the IRO. In addition to granting the CWB Charge in paragraph 21, the IRO, at paragraph 25, permits interested parties, including CWB, to apply on notice to allocate the Borrowing Charge and the CWB Charge amongst CSEI assets. Further, in paragraph 31, interested parties are granted the right to apply to vary or amend the terms of the IRO. Any such application however, must be on notice to the Receiver, BGI and CWB.

IRO, paragraphs 21, 25 and 31, Appeal Digest, Vol 1, F95

9. CWB was also afforded an opportunity to be heard in the course of CSEI's unsuccessful stay application before the Court of Appeal. In her Oral Reasons for Decision, Conrad J.A. specifically recognized CWB as an "interested/effected party".

***BG International Limited v. Canadian Superior Energy Inc.* 2009 ABCA 73
[CWB Authorities - Tab 1]**

10. The simple fact that CWB has a charge, ranking in priority to the Receiver and all other persons, over the Trinidad and Tobago assets subject to the IRO makes it interested in the outcome of this appeal. Though not in a strict insolvency and restructuring context, the Alberta Court of Appeal has defined "interested person" to include someone who's rights or property might be compromised or who has a pecuniary or legal interest in the outcome. To the extent that the Borrowing Charge and CWB Charge provisions of the IRO are set aside, CWB's secured position will be adversely affected.

***Agbi v. Geosimm Integrated Technologies Corp.* (1999), 228 A.R. 134 (C.A.) at para. 44
[CWB Authorities - Tab 2]**

B. Standard of Review

11. CWB respectfully submits that this Honourable Court should not interfere with the Chambers Justice's discretionary decision as it relates to the Borrowing

Charge and the CWB Charge provisions of the IRO as those provisions, by reason of Receiver's exercise of its borrowing powers, have become moot.

C. Detrimental Reliance

12. The relief sought by CSEI in this appeal is an order setting aside, *ab initio*, the entirety of the IRO. While CSEI and BG will argue the propriety of discharging the Receiver, CWB respectfully submits that it is impractical to set aside paragraphs 20 (the Borrowing Charge) and 21 (the CWB Charge) of the IRO.
13. It is CWB's understanding that, by the time this appeal is heard, the Receiver will have borrowed from BG, in accordance with the provisions of the IRO which Order was not stayed by Conrad, J.A., to fund ongoing business operations in Trinidad and Tobago. To set aside or reverse the entirety of the IRO, including the Borrowing Charge and CWB Charge provisions, would serve to unfairly prejudice CWB's financial position vis-à-vis both CSEI and BG.
14. The Alberta Court of Appeal has recently considered similar issues in the specific context of insolvency proceedings. In *Re: Canadian Airlines Corp.*, Paperny J., as she then was, sanctioned a plan of compromise. Portions of the plan were implemented subsequent to the granting of the Order. A holder of unsecured notes sought leave to appeal the Order. The application for leave to appeal was dismissed by Wittmann, J.A., as he then was, on the basis that "essential elements of the Plan have been implemented and are now irreversible". Wittmann J.A. further held that the appeal court could not "order that the Plan be undone in its entirety". He concluded by finding that the application was moot.

(2001), 266 A.R. 131, 2000 ABCA 238 (C.A.) at paras. 27, 30, 32 and 54
[CWB Authorities - Tab 3]

15. In *Minister of National Revenue v. Temple City Housing Inc.*, Canada Revenue Agency sought leave to appeal a provision in an order made under the

Companies' Creditors Arrangement Act granting the Debtor in Possession lender (the "DIP Lender") a priority claim. Rowbotham J.A. dismissed the leave application on the basis that the lower court rendered a discretionary decision which was owed a "high degree of deference". She went on to find that the DIP Lender had advanced funds in reliance on the lower court order such that it was "now virtually impossible to 'unscramble the egg'." In dismissing the application, Rowbotham J.A. referred to the decision in *Re: Canadian Airlines Corp.* and held, given that the DIP Lender had already advanced funding, that the application was moot.

(2008), 422 A.R. 4, 2008 ABCA 1 (C.A.) at para. 14
[CWB Authorities - Tab 4]

16. On the strength of the Court of Appeal's reasons in each of *Re: Canadian Airlines Corp.* and *Temple City Housing Corp.*, CWB respectfully submits that CSEI's application to set aside the Borrowing Charge and the CWB Charge under the IRO is moot because the Receiver has already exercised its borrowing rights.

PART IV - NATURE OF RELIEF DESIRED

17. CWB seeks an order dismissing CSEI's appeal in so far as it relates to setting aside or reversing the Borrowing Charge (paragraph 20) and CWB Charge (paragraph 21) provisions of the IRO.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5TH DAY OF MARCH, 2009.

ESTIMATED TIME OF ARGUMENT: 15 MINUTES



Howard A. Gorman



Kevin E. Barr
Counsel for Canadian Western Bank



List of Authorities

1. *BG International Limited v. Canadian Superior Energy Inc.* 2009 ABCA 73
2. *Agbi v. Geosimm Integrated Technologies Corp.* (1999), 228 A.R. 134 (C.A.)
3. *Re: Canadian Airlines Corp.* (2001), 266 A.R. 131, 2000 ABCA 238 (C.A.)
4. *Minister of National Revenue v. Temple City Housing Inc.* (2008), 422 A.R. 4, 2008 ABCA 1 (C.A.)

In the Court of Appeal of Alberta

Citation: BG International Limited v. Canadian Superior Energy Inc., 2009 ABCA 73

Date: 20090304
Docket: 0901-0048-AC
Registry: Calgary

Between:

BG International Limited

Respondent (Plaintiff)

- and -

Canadian Superior Energy Inc.

Appellant (Defendant)

**Oral Reasons for Decision of
The Honourable Madam Justice Carole Conrad
(In Chambers)**

Motion for a Stay Pending Appeal
of the Order of
The Honourable Madam Justice B.E.C. Romaine
Dated the 22nd day of February, 2009
(Docket: 0901-02012)

**Oral Reasons for Decision of
The Honourable Madam Justice Carole Conrad**

I. Introduction

[1] Canadian Superior Energy Inc. (Canadian Superior) applies for a stay of a receivership order pending final disposition of its appeal.

II. Background

[2] Canadian Superior and BG International Limited (BGI) are involved in a multi-million dollar drilling operation in the Intrepid Block off shore Trinidad and Tobago. Canadian Superior was the operator and held the lease in its name. BGI alleges that it paid cash calls for particular indebtedness and Canadian Superior did not pay the indebtedness to which the cash calls applied. Canadian Superior says that problems arose because a third party, Challenger Energy Corp. (Challenger), had earned a 25 per cent interest, and it did not pay its cash calls. As a result of all of this, although cash was collected from BGI and paid to creditors, it was not paid according to the calls and there was insufficient funds to pay all creditors. Canadian Superior failed to pay all of the outstanding invoices relating to the operations from November onward and BGI was unaware of the status of affairs until the end of January. BGI disputes that Challenger had earned any interest.

[3] The joint operating agreement (JOA) has provisions for dealing with events of default of a party or the operator. BGI gave notice of default to Canadian Superior under the JOA, and Canadian Superior objected to the default. It also has provisions to remove operators.

[4] Arbitration is the contractual method chosen by the parties for settlement of disputes, with the right, of course, to resort to the courts for interim measures. Notice to arbitrate through the London Court of Arbitration was filed. Under the dispute resolution clause, interim measures include such things as injunctions, attachments, and conservation orders in the appropriate circumstances. Receivers were not specifically listed.

[5] BGI applied to the Court of Queen's Bench for a partial receivership order which related solely to the Trinidad and Tobago project, and the notice of motion for the receiver order identified that the application was being made as an interim measure. BGI argued that the project was threatened because there was a danger of an imminent departure of the specialized semi-submersible Kan Tan IV Rig (the rig) from the site. Canadian Superior was served with that application on Monday, February 9, 2009, at approximately 5:00 p.m., returnable for 10:00 a.m., Wednesday morning. BGI sought an order shortening the normal time for service.

[6] Canadian Superior appeared in court on Wednesday morning and requested an adjournment to cross-examine and to prepare its own affidavit material as it had been given insufficient time to either. The application was refused and the receivership order granted. In addition, the time for service was shortened. The order gave the receiver, amongst other things, the right to borrow up to

47 million dollars, and the whole of Canadian Superior's participating interest in the project was to be charged as a fixed and specific charge as security for the payment of the monies borrowed in priority to all security interests, trusts, liens, charges and encumbrances of any person, subject only to a 14 million dollar first charge to Western Canadian Bank (Western Canadian), Canadian Superior's main banker. It then gave Western Canadian a first charge ahead of all others, including the receiver.

[7] Western Canadian had been given notice of the receivership application and, although it did not make an application for relief, it appeared at the hearing. The receivership order was granted February 11th. The notice of appeal was filed on Friday February 13th. Canadian Superior contacted the Court of Appeal for a date to hear an application for a stay on February 18th, approximately one week after the order was granted.

[8] The notice of appeal raises several grounds of appeal. In general terms, Canadian Superior argues that the learned chambers judge erred in refusing an adjournment to permit cross-examination of a number of the respondent's officers; by shortening the time for service; by not allowing an adjournment to properly prepare evidence to refute the claims of BGI; by not allowing the JOA to work between the parties as it was intended; by granting the order at all in the face of other contractual remedies which would have provided basically the same relief; and by failing to require the respondent post an undertaking as to damages.

[9] As the JOA provides a method for removal of operators and a means to take over payment of accounts in the face of defaulting partners or operators, Canadian Superior argues that there was no need for a receiver at all. It submits BGI could have obtained a remedy under the contract and obtained a mortgage over the properties by virtue of the JOA. It argues that by applying for a receiver BGI avoided the obligations provided by the contract in exercising this remedy. Simply stated, counsel argues that BGI should have exercised its rights under the contract and it should have to live with the remedies for which it contracted. The evidence before this judge did not support any extraordinary remedy. By electing to apply for the receiver BGI obtained more than it could have under the agreement.

[10] Counsel for BGI states that the remedy was sought because, even though the contract gives BGI a charge against assets, it did not give BGI a first charge and the sums of money are significant. At one of the hearings of this application counsel also argues that BGI selected this route to become operator before it disbursed funds. In short, counsel argues that the application was really made to conserve the property, which is something that can be done, and which is in everyone's interest. She argues further that BGI would not have gone ahead under the contract without the protection of a priority charge received under the receiving order, and without being operator. Unfortunately, there was not a scintilla of evidence that BGI would not have exercised its contractual rights under the contract but for the receiving order.

[11] In any event, Deloitte & Touche Inc. (Deloitte), the receiver, prepared and filed its first interim receiver's report dated February 20, 2009. The receiver has contacted debtors and the

government of Trinidad and Tobago in an effort to ensure that the operations continue and there is money available to pay debts.

[12] Canadian Superior now seeks a stay of the receivership. The legal test for a stay is the well-known tripartite test set down in many cases, including *Integral Energy & Environmental Engineering Ltd. v. Schenker of Canada Ltd.*, 2001 ABCA, 286 A.R. 360; *G.R. v. C.M.*, 2003 ABCA 268, 126 A.C.W.S. (3d) 9. That tripartite test is as follows:

1. Is there a serious arguable issue on appeal?
2. Will there be irreparable harm if a stay is not granted?
3. Does the balance of convenience weigh in favour of a stay?

A. Issue 1 - Is there a serious arguable issue on appeal?

[13] Turning to the first issue, I am satisfied that Canadian Superior has raised numerous serious arguable issues for appeal, and the arguments are neither frivolous nor vexatious and therefore meet the test.

[14] First, having regard to the serious nature of this case, the factual allegations, and the enormous volume of material filed in support of the application, there are serious arguable issues relating to shortening the time and the refusal to allow an adjournment to cross-examine and prepare material in response. The nature of the emergency claimed, and the basis upon which the receivership order was granted, related to an allegation that there was an immediate threat that the rig was withdrawing the day of the hearing, or forthwith, if payment was not forthcoming. Canadian Superior challenged this fact saying that as operator it was still in negotiations with the owner of the rig. Even the chambers judge recognized that the issue of whether there was a threat of rig removal was controversial. Notwithstanding the deferential standard of review, it is seriously arguable that the chambers judge erred when she shortened time and refused an adjournment on the facts of this case.

[15] Second, I am satisfied that there are many serious arguable issues raised with respect to issuance of the partial receivership order and the provisions contained in that order.

[16] Having regard to the fact that two sophisticated parties entered into a JOA which governs their relationship, and provides for remedies for replacing an operator and dealing with a defaulting party, there is a serious arguable issue about whether this receivership order should have issued on the evidence before the chambers judge where other remedies might suffice. By the last day of this hearing, there having been two adjournments for the purpose of settlement discussions, the arguments seemed to centre, not so much on the rig removal, but on the fact that BGI was not prepared to exercise its rights but for security and operatorship, and that the relief was in the nature of a conservation order. It is unfortunate that the initial proceeding before the chambers judge had not been presented that way. Had BGI been seeking a conservation order, the order might not have attracted the same attention and damage as the receivership order. There was no evidence that BGI

would not have paid. These are issues I need not decide. By the time that the order was granted, it appeared that the debts would all be paid and Western Canadian was at least content to a 14 million dollar first charge, so perhaps the rights under the contract would have been sufficient.

[17] I am satisfied, however, that Canadian Superior has raised serious arguments for appeal and that is all that is required for the purposes of the tripartite test. I do not propose to address each argument. Briefly stated, Canadian Superior argues that BGI was not entitled to bypass the remedies in the operating agreement and use the receivership process to gain remedies to which it may not have been entitled under the arbitration process – in short, immediate operatorship and a first charge (after the 14 million to Western Canadian) – and to avoid the obligations attached to the remedies. It is unnecessary for me to go further on the first issue.

B. Issue 2 - Will there be irreparable harm if a stay is not granted?

[18] This is a troubling aspect of this application. Irreparable harm is frequently difficult to prove. Sometimes the elusive nature of the harm creates the difficulty. Here the applicant argues that if the stay is not granted, the irreparable harm that has commenced as a result of the receivership will continue.

[19] The applicants filed evidence of the consequences of this partial receivership order. Notwithstanding that the receivership related only to the project, its public nature has resulted in other consequences. For instance, Canadian Superior's landlord has taken steps to cancel its property lease in Calgary because of the receivership order, and the cancellation could result in a one-half million dollar penalty. The day the receivership was announced, Canadian Superior shares fell substantially.

[20] This is not a receivership application under either the *Bankruptcy Act*, R.S. 1985, c. B-3, or the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, or any other statutory regime. Rather, the application was with respect to one project. Yet the public reaction was immediate, and I am satisfied that the receivership order has caused damage that is difficult to ascertain, and one which I would classify as irreparable. But the question here is not the damage from the receivership but whether irreparable harm will flow from the failure to stay the order pending appeal.

[21] Although it is difficult to ascertain the extent of continuing damage, I draw the inference from the damage to date that damage may continue to compound as a result of matters that have happened since the order. Therefore, I am prepared to accept, for the purposes of this application, that a refusal of a stay may cause further irreparable harm. Counsel for BGI says that the irreparable harm is caused, not by the receivership order, but by the non payment. But that, in my view, is somewhat circuitous. The issue of non payment is on its way to arbitration. The agreement provides the means of payment and the relief here may not have been necessary, or perhaps could have been accomplished by virtue of a conservation order which could perhaps have avoided some of the public reaction caused by the receivership order.

[22] In any event, I am satisfied there is sufficient danger of irreparable harm should the stay not issue to move to the next step.

C. Issue 3 - Does the balance of convenience weigh in favour of a stay?

[23] That brings me to this last issue. At the last morning of this hearing, Canadian Superior advised that it would be content to have a stay of the receivership order and a new order issue providing the relief contained in sections 17-24 of the old receivership order. This would allow for payment of the full 47 million dollars and the charging provisions. It argued that this would allow Canadian Superior to maintain operatorship and avoid confusion on the job site. It would provide a line of authority and Canadian Superior's operator's insurance would cover any mishap that might occur. Canadian Superior was concerned that it is currently doing operator functions on site, without having its status clarified. This proposal of Canadian Superior was, of course, contingent on the stay of the receivership order.

[24] At this stage of the hearing, the receiver has been in touch with the outstanding creditors and the government, and has made certain assurances to them. Unfortunately, the receiver was not advised that the order is under appeal. Nonetheless, I accept that stability until this appeal is heard is important. And while I appreciate the concerns of Canadian Superior as to insurance, in my view, that concern does not override the importance of the stability. Maintaining stability and continuation of the project on site tips the scales in favour of BGI, providing that the appeal can be heard on a timely basis and contingent on that appeal going ahead. In addition, I will impose the following conditions:

1. The appeal will be heard Tuesday, March 10, 2009.
2. Canadian Superior is directed to file its appeal book, factum and anything else it intends to rely on by noon, Monday, March 2nd, and serve the respondent forthwith after filing. (I direct Canadian Superior to provide a complete draft factum or draft argument (even on the weekend) if it is able to do so, to facilitate the ability of BGI to respond. I appreciate that this may be difficult to do, but to the extent possible, I would ask that you try to accommodate opposing counsel.)
3. I direct the contents of the appeal book, or any disputed appeal book, be prepared in accordance with the *Alberta Rules of Court* for J Appeals.
4. The respondent will file its factum before noon, Thursday, March 5th, and serve it on the other side forthwith.
5. Neither factum will exceed 30 pages.

6. During the interim period until the appeal is heard, the terms of the partial receiving order will remain in place, subject to the following conditions:
 - i. Deloitte is directed not to pay down more funds during the next ten days than required to ensure that the project continues. In that regard, I recognize that it may be necessary to make substantial payments, and these are authorized as per the receivership order, and where convenient, I direct that the consent of Canadian Superior be obtained. If there is a dispute and the receiver is uncertain, then it can seek the advice of the court.
 - ii. The receiver will act as the operator and will deal directly with both Canadian Superior and BGI in carrying out the day-to-day operations. The receiver will continue to employ both parties for day-to-day operations as it has been and seek input from them. In the case of disagreement, the receiver will make the final decision.
 - iii. During the last hearing the receiver mentioned that there were several sub-clauses of paragraph 4 of the receivership order that would not be required and, to that extent, I would ask him to not take unnecessary steps – during the next ten days.

[25] In the result, the stay is denied on these terms. The appeal will proceed on the date directed and costs are to be addressed at the hearing of the appeal.

Application heard on February 23, 24, 26, 27, 2009

Reasons filed at Calgary, Alberta
this 4th day of March, 2009

Conrad J.A.

Appearances:

V.P. Lalonde and M.A. Thackray, Q.C.
for the Applicant Canadian Superior Energy Ltd.

C.L. Nicholson
for the Respondent BG International Ltd.

R. Richelt, agent for T.S. Ellam
for interested/effectuated party Challenger Energy Corp.

K.E. Barr, agent for H.A. Gorman
for the interested/effectuated party Canadian Western Bank

LB. Robinson, Q.C.
for the receiver Deloitte & Touche Inc.

228 A.R. 134, 188 W.A.C. 134, 43 B.L.R. (2d) 173, [1999] 7 W.W.R. 398, 70 Alta.
L.R. (3d) 363, 7 W.W.R. 398, [1998] A.J. No. 1290

C

1998 CarswellAlta 1072

Agbi v. Geosimm Integrated Technologies Corp.
Babatunde Agbi and Purus Corporation, Respondents and Geosimm Integrated
Technologies Corporation, Appellant
Alberta Court of Appeal
McClung, Hunt J.J.A., Coutu J. (ad hoc)
Heard: October 8, 1998
Judgment: November 30, 1998
Docket: Calgary Appeal 98-17872

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Counsel: M.J. Donaldson, for the Appellant.

G.E. Price, for the Respondents.

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

Statutes --- Interpretation -- Role of court -- Language clear

Respondent corporation sent notice of annual general meeting to applicant shareholder -- Shareholder successfully brought application for order adjourning meeting because shareholder did not receive notice until 10 days before meeting and materials accompanying notice were deficient -- Corporation appealed -- Corporation was entitled to rely on record of shareholders to determine shareholder's mailing address for purposes of sending materials -- Business Corporations Act did not require shareholder to receive material -- Legislature intended receipt by shareholder to be deemed under s. 129(2) of Business Corporations Act so long as corporation mailed material to shareholder's address -- Range of circumstances to overcome s. 129(2) must be extremely narrow to give effect to clear intention of Legislature and to avoid creating unnecessary uncertainty over corporation's obligations in meeting requirements of s. 129(2) -- Evidence showed corporation tried to locate shareholder, shareholder normally contacted corporation for meeting materials, and shareholder became aware of meeting -- Evidence did not create exceptional circumstance required to overcome clear language of s. 129(2) -- Business Corporations Act, S.A. 1981, c. B-15, s. 129(2).

Corporations --- Directors and officers -- Appointment -- Election

Respondent corporation sent notice of annual general meeting to applicant shareholder -- Shareholder successfully brought application for order adjourning meeting because shareholder did not receive notice until 10 days before meeting and materials accompanying notice were deficient -- Corporation appealed -- Information circular included with notice disclosed holdings of proposed director, as required by Item 5(1)(i) of Form 30 of Alberta Securities Commission (General) Rules -- Corporation's failure to disclose holdings of associate of proposed director and holdings of associate's spouse was not serious enough breach of Form 30 to justify judicial

228 A.R. 134, 188 W.A.C. 134, 43 B.L.R. (2d) 173, [1999] 7 W.W.R. 398, 70 Alta. L.R. (3d) 363, 7 W.W.R. 398, [1998] A.J. No. 1290

interference with general meeting.

Corporations --- Shareholders -- Shareholders' remedies -- Relief from oppression -- Standing to apply

Respondent corporation sent notice of annual general meeting to applicant shareholder -- Shareholder successfully brought application for order adjourning meeting because shareholder did not receive notice until 10 days before meeting and materials accompanying notice were deficient -- Corporation appealed -- Appeal dismissed -- Shareholder had standing under s. 148 of Business Corporations Act to bring application for adjournment due to deficiencies in meeting materials -- Under s. 148, both executive director and interested person had standing to make application -- Shareholder qualified as interested person -- Standing of shareholder was essential to bring application within short time available to seek adjournment -- Placement of comma within s. 148 was not enough to reach conclusion legislature intended to limit standing to executive director -- Rights of shareholders would be greatly limited if only executive director had standing -- Business Corporations Act, S.A. 1981, c. B-15, s. 148.

Corporations --- Shareholders -- Meetings -- Notice -- Information circular

Applicant shareholder was in litigation with respondent corporation -- Corporation sent notice of annual general meeting to shareholder with information circular that did not disclose litigation -- Shareholder successfully brought application for order adjourning meeting because shareholder did not receive notice until 10 days before meeting and materials accompanying notice were deficient -- Corporation appealed -- Appeal dismissed -- No evidence was available to indicate corporation disclosed litigation pursuant to securities legislation -- Litigation was material fact that required disclosure in accordance with s. 148 of Business Corporations Act -- Annual meeting involved election of proposed director who was named defendant in litigation that involved allegations of oppression, breach of contract and appropriation of corporate opportunity -- Substantial likelihood existed that reasonable shareholder would consider circumstances of litigation important in deciding election of director -- Litigation involved software that had major importance to corporation's operation -- Software was discussed in financial statements that were included with materials accompanying notice and approval of financial statements was part of meeting's agenda -- Business Corporations Act, S.A. 1981, c. B-15, s. 148.

Corporations --- Shareholders -- Shareholders' remedies -- Miscellaneous issues

Applicant shareholder was in litigation with respondent corporation -- Shareholder successfully brought application for order adjourning meeting because shareholder did not receive notice until 10 days before meeting and materials accompanying notice were deficient -- Corporation appealed -- Appeal dismissed -- Consideration of irreparable harm and balance of convenience was not necessary for order adjourning meeting -- Section 148 of Business Corporations Act empowered court to grant any order it thought fit including order adjourning meeting -- Order granted was not interim injunction and did not require application of tripartite test used in interim injunction cases -- Business Corporations Act, S.A. 1981, c. B-15, s. 148.

Cases considered by Hunt J.A.:

Allied Cellular Systems Ltd. v. Bullock (1990), 49 B.L.R. 306 (B.C. S.C.) -- considered

Canada (Director appointed under s. 253 of Canada Business Corporations Act) v. Royal Trustco Ltd. (1984), (sub nom. Sparling (Director appointed under s. 253 of Canada Business Corporations Act) v. Royal Trustco Ltd.) 24 B.L.R. 145, 45 O.R. (2d) 484, 6 D.L.R. (4th) 682, 1 O.A.C. 279 (Ont. C.A.) --

228 A.R. 134, 188 W.A.C. 134, 43 B.L.R. (2d) 173, [1999] 7 W.W.R. 398, 70 Alta. L.R. (3d) 363, 7 W.W.R. 398, [1998] A.J. No. 1290

proxy circular or dissident's proxy circular relates;

(b) an order requiring correction of any form of proxy or proxy circular and a further solicitation;

(c) an order adjourning the meeting. (Emphasis added)

42 It is argued that, in the case of a public company ("a distributing corporation"), only the Executive Director of the Alberta Securities Commission has standing to complain under s. 148.

43 I do not consider this interpretation of s. 148 to be sustainable. In my view, the logical interpretation of the section is that, in the case of a public corporation, *both* the Executive Director and an "interested person" have standing to make the court application.

44 The jurisprudence about the term "interested person" suggests that the expression usually refers to someone whose rights or property have been somewhat prejudiced. See e.g. *I-D Foods Corp. v. G. Heileman Brewing Co.* (1996), 194 A.R. 108 (Alta. Master) and the review of authorities contained therein. Sometimes the term is described as including someone with a pecuniary or legal interest. *T.I.W. Industries Ltd. v. Clarkson Co.* (1983), 42 O.R. (2d) 333 (Ont. H.C.). Applying those tests, there can be no question about a shareholder (in this case, Agbi) qualifying as an "interested person".

45 The Appellant's argument is based primarily upon the placement of commas in s. 148. While punctuation can assist in the interpretation of statutes, care must be taken:

Weight. Although Canadian courts consider punctuation part of the legislation, they are unwilling to place much reliance on it as an aid to interpretation. The primary reason for this distrust is its inherent unreliability. Many of the conventions governing punctuation, especially comma placement, are fluid and unstable. Practices vary from one region to another and may change rapidly over time. Also, considerable discretion is left to individual writers to vary punctuation as a matter of taste or style. And not least of all, even competent users of language often make mistakes out of carelessness or uncertainty. For these reasons, the courts are rightly cautious of attaching too much significance to a single punctuation mark.

Driedger on the Construction of Statutes, 3d ed. by R. Sullivan (Toronto: Butterworths, 1994) at 277.

46 It is easy to understand why the person charged with the regulation of securities in the province (the Executive Director) would be given the authority by the Legislature to challenge the adequacy of meeting materials. But it does not follow that the availability of the remedy should be limited to the Executive Director. This case illustrates why. It was essential to move quickly. Had it been necessary to convince the Executive Director to take action, it might have been impossible to get before the courts soon enough to seek an adjournment.

47 If only the Executive Director could act, moreover, the rights of shareholders would be greatly limited. The trend of corporate legislation is in the opposite direction. It requires more than a comma to reach the conclusion that the Legislature intended the interpretation asserted by the Appellant.

48 The Respondents assert that the Information Circular breached the requirements of s. 148. They rely upon National Policy No. 40, "Timely Disclosure", *Alberta Securities Act and Regulation 1998*, Macleod Dixon, (Toronto: Carswell, 1997) at 586 and the Alberta Stock Exchange Circular No. 4, "Timely Disclosure", *Alberta Securities Act and Regulation 1998*, Macleod Dixon, (Toronto: Carswell, 1997) at 1117 in support of their posi-

2000 ABCA 238, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52,
9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131, 10 W.W.R. 314

H

2000 CarswellAlta 919

Canadian Airlines Corp., Re
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-
36, as amended;
And In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-
15, as amended, Section 185;
And In the Matter of Canadian Airlines Corporation and Canadian Airlines
International Ltd.; Resurgence Asset Management LLC (Applicant) and Canadian
Airlines Corporation and Canadian Airlines International Ltd. (Respondents)
Alberta Court of Appeal [In Chambers]
Wittmann J.A.
Heard: August 3, 2000
Judgment: August 29, 2000
Docket: Calgary Appeal 00-08901

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Proceedings: refused leave to appeal *Canadian Airlines Corp., Re* (2000), 2000 CarswellAlta 662, 2000 ABQB
442, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta.
Q.B.); affirmed (2000), 2000 CarswellAlta 1556, 2001 ABCA 9, [2001] 3 W.W.R. 1 (Alta. C.A.)

Counsel: *D.R. Haigh, Q.C., D.S. Nishimura*, and *A.Z.A. Campbell*, for Applicant.

H.M. Kay, Q.C., A.L. Friend, Q.C., and *L.A. Goldbach*, for Respondents.

S.F. Dunphy, for Air Canada.

F.R. Foran, Q.C., for Monitor, Pricewaterhouse Coopers.

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

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act -- Arrange-
ments -- Approval by court -- "Fair and reasonable"

Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act --
Investment corporation brought counter-application for declaration that plan constituted merger or transfer of
airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes
pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and un-
fairly prejudicial to them -- Application was granted and counter-application dismissed on basis that all statutory
conditions were fulfilled and plan was fair and reasonable -- Investment corporation brought application for
leave to appeal -- Leave to appeal refused -- Appeal concerning fairness and reasonableness of plan could not
proceed on grounds of mootness -- Even if appeal were not moot, leave would be refused on basis that chambers

2000 ABCA 238, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52,
9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131, 10 W.W.R. 314

judge made no palpable error in findings of fact, and no error in her exercise of discretion in approving plan -- Trial judge correctly determined that plan was not oppressive to minority shareholders, did not violate s. 167 of Business Corporations Act of Alberta and represented best option for all parties concerned, including Canadian public -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) -- Business Corporations Act, S.A. 1981, c. B-15, s. 167.

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act -- Arrangements -- Approval by court -- Miscellaneous issues

Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act -- Investment corporation brought counter-application for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial to them -- Application was granted and counter-application dismissed on basis that all statutory conditions were fulfilled and plan was fair and reasonable -- Investment corporation brought application for leave to appeal -- Leave to appeal refused -- Appeal concerning fairness and reasonableness of plan could not proceed on grounds of mootness -- Plan was already partially implemented and certain steps could not be reversed, including issuance of articles of reorganization, changes in share structure and management, and implementation of restructuring plan -- Appeal court could not rewrite plan, but only uphold it or set it aside -- Since it was no longer possible to set plan aside, court could not grant any effective remedy -- Appeal court could not grant declaration that investment corporation was unaffected unsecured creditor, nor could appeal on basis of oppression proceed for same reason -- No special circumstances existed to warrant expenditure of judicial resources on appeal despite its mootness -- Even if appeal were not moot, leave would be refused on basis that chambers judge made no palpable error in findings of fact, and no error in her exercise of discretion in approving plan -- Trial judge correctly determined that plan was not oppressive to minority shareholders, did not violate s. 167 of Business Corporations Act of Alberta and represented best option for all parties concerned, including Canadian public -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) -- Business Corporations Act, S.A. 1981, c. B-15, s. 167.

Cases considered by *Wittmann J.A.*:

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186 (Alta. C.A.) -- considered

Borowski v. Canada (Attorney General), [1989] 3 W.W.R. 97, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232 (S.C.C.) -- applied

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

Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd. (1993), 81 B.C.L.R. (2d) 142, 31 B.C.A.C. 161, 50 W.A.C. 161 (B.C. C.A.) -- considered

Gibbex Mines Ltd. v. International Video Cassettes Ltd., [1975] 2 W.W.R. 10, 49 D.L.R. (3d) 731 (B.C. S.C.) -- considered

2000 ABCA 238, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131, 10 W.W.R. 314

18 The CCAA provides for appeals to this Court as follows:

13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge or the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

19 As set out in *Re Canadian Airlines Corp.*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) ("*Resurgence No. 1*"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court:

- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- (4) whether the appeal will unduly hinder the progress of the action.

20 The respondents argue that apart from the test for leave, mootness is an additional overriding factor in the present case which is dispositive against the granting of leave to appeal.

MOOTNESS

21 In *Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd.* (1993), 81 B.C.L.R. (2d) 142 (B.C. C.A.), an order authorizing the distribution of substantially all the assets of a limited partnership had been fully performed. The appellants appealed, seeking to have the order vacated. The appellants had unsuccessfully applied for a stay of the order. In deciding whether to allow the appeal to be presented, Gibbs, J.A., for the court, said there was no merit, substance or prospective benefit that could accrue to the appellants, and that the appeal was therefore moot.

22 In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), Sopinka, J. for the court, held that where there is no longer a live controversy or concrete dispute, an appeal is moot.

23 No stay of the June 27 order was obtained or even sought. In reliance on that order, most of the transactions contemplated by the Plan have been completed. According to the Affidavit of Paul Brotto, sworn July 6, 2000, filed July 7, 2000, the following occurred:

5. The transactions contemplated by the Plan have been completed in reliance upon the Sanction Order. The completion of the transactions has involved, among other things, the following steps:

- (a) Effective July 4, 2000, all of the depreciable property of CAIL was transferred to a wholly-owned subsidiary of CAIL and leased back from such subsidiary by CAIL;
- (b) Articles of Reorganization of CAIL, being Schedule "D" to the Plan (which is Exhibit "A" to the Sanction Order), were filed and a Certificate of Amendment and Registration of Restated Art-

2000 ABCA 238, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131, 10 W.W.R. 314

icles was issued by the Registrar of Corporations pursuant to the Sanction Order, and in accordance with sections 185 and 255 of the Business Corporations Act (Alberta) (the "Certificate") on July 5, 2000. Pursuant to the Articles of Reorganization, the common shares of CAIL formerly held by CAC were converted to retractable preferred shares and the same were retracted. All preferred shares of CAIL held by 853350 Alberta Ltd. ("853350") were converted into CAIL common shares;

(c) The "Section 80.04 Agreement" referred to in the Plan between CAIL and CAC, pursuant to which certain forgiveness of debt obligations under s.80 of the Income Tax Act were transferred from CAIL to CAC, has been entered into as of July 5, 2000;

(d) Payment of \$185,973,411 (US funds) has been made to the Trustee on behalf of all holders of Senior Secured Notes as provided for in the Plan and 853350 has acquired the Amended Secured Intercompany Note; and

(e) Payments have been made to Affected Unsecured Creditors holding Unsecured Proven Claims and further payments will be made upon the resolution of disputed claims by the Claims officer; and

(f) It is expected that payment will be made within several days of the date of this Affidavit to the Trustee, on behalf of the Unsecured Notes, in the amount 14 percent of approximately \$160,000,000.

24 In *Norcan Oils Ltd. v. Fogler* (1964), [1965] S.C.R. 36 (S.C.C.), it was held that the Alberta Supreme Court Appellate Division could not set aside or revoke a certificate of amalgamation after the registrar of companies had issued the certificate in accordance with a valid court order and the corporations legislation. A notice appealing the order had been served but no stay had been obtained. Absent express legislative authority to reverse the process once the certificate had been issued, the majority of the Supreme Court of Canada held the amalgamation could not be unwound and therefore, an appellate court ought not to make an order which could have no effect.

25 Courts following *Norcan Oils Ltd.* have recognized that any right to appeal will be lost if a party does not obtain a stay of the filing of an amalgamation approval order: *Harris v. Universal Explorations Ltd.* (1982), 35 A.R. 71 (Alta. T.D.) and *Gibbex Mines Ltd. v. International Video Cassettes Ltd.*, [1975] 2 W.W.R. 10 (B.C. S.C.).

26 *Norcan* applies to bind this Court in the present action where CAIL's articles of reorganization were filed with the Registrar of Corporations on July 5, 2000 and pursuant to the provisions of the *ABCA*, a certificate amending the articles was issued. The certificate cannot now be rescinded. There is no provision in the *ABCA* for reversing a reorganization.

27 The respondents point out that there are other irreversible changes which have occurred since the date of the June 27, 2000 order. They include changes in share structure, changes in management personnel, implementation of a restructuring plan that included a repayment agreement with its principal lender and other creditors and payments to third parties. [Affidavit of Paul Brotto, paras. 6, 7, 8, 9, 10, 11, 12.]

28 The applicant relies on *Re Blue Range Resource Corp.* (1999), 244 A.R. 103 (Alta. C.A.), to argue that leave to appeal can be granted after a *CCAA* plan has been implemented. In that case, as noted by Fruman, J.A.

2000 ABCA 238, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131, 10 W.W.R. 314

at 106, a plan was in place and an appeal of the issues which were before her would not unduly hinder the progress of restructuring.

29 In this case, however, the proposed appeal by Resurgence would interfere with the restructuring since the remedies it seeks requires that the Plan be set aside. One proposed ground of appeal attacks the fairness and reasonableness of the Plan itself when the Plan has been almost fully implemented. It cannot be said that the proposed appeal would not unduly hinder the progress of restructuring.

30 If the proposed appeal were allowed, this Court cannot rewrite the Plan; nor could it remit the matter back to the CCAA supervising judge for such purpose. It must either uphold or set aside the approval of the Plan granted by the court below. In effect, if Resurgence succeeded on appeal, the Plan would be vacated. However, that remedy is no longer possible, at minimum, because the certificate issued by the Registrar cannot be revoked. As stated in *Norcan Oils Ltd.*, an appellate court cannot order a remedy which could have no effect. This Court cannot order that the Plan be undone in its entirety.

31 Similarly, the other ground of Resurgence's proposed appeal, oppression under s. 234 of the ABCA, cannot be allowed since that remedy must be granted within the context of the CCAA proceedings. As recognized by the learned chambers judge, allegations of oppression were considered in the test for fairness when seeking judicial sanction of the Plan. As she discussed at paragraphs 140-145 of her reasons, the starting point in any determination of oppression under the ABCA requires an understanding of the rights, interests and reasonable expectations which must be objectively assessed. In this action, the rights, interests and reasonable expectations of both shareholders and creditors must be considered through the lens of CCAA insolvency legislation. The complaints of Resurgence, that its rights under its trust indenture have been ignored or eliminated, are to be seen as the function of the insolvency, and not of oppressive conduct. As a consequence, even if Resurgence were to successfully appeal on the ground of oppression, the remedy would not be to give effect to the terms of the trust indenture. This Court could only hold that the fairness test for the court's sanction was not met and therefore, the approval of the Plan should be set aside. Again, as explained above, reversing the Plan is no longer possible.

32 The applicant was unable to point to any issue where this Court could grant a remedy and yet leave the Plan unaffected. It proposed on appeal to seek a declaration that it be declared an unaffected unsecured creditor. That is not a ground of appeal but is rather a remedy. As the respondents argued, the designation of Resurgence as an affected unsecured creditor was part of the Plan. To declare it an unaffected unsecured creditor requires vacating the Plan. On every ground proposed by the applicant, it appears that the response of this Court can only be to either uphold or set aside the approval of the court below. Setting aside the approval is no longer possible since essential elements of the Plan have been implemented and are now irreversible. Thus, the applicant cannot be granted the remedy it seeks. No prospective benefit can accrue to the applicant even if it succeeded on appeal. The appeal, therefore, is moot.

DISCRETION TO HEAR MOOT APPEALS

33 Even if an appeal could provide no benefit to the applicants, should leave be granted?

34 In *Borowski, supra*, Sopinka, J. described the doctrine of mootness at 353. He said that, as an aspect of a general policy or practice, a court may decline to decide a case which raises merely a hypothetical or abstract questions and will apply the doctrine when the decision of the court will have no practical effect of resolving some controversy affecting the rights of parties.

2000 ABCA 238, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52,
9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131, 10 W.W.R. 314

49 Resurgence also argued that the pension plan surplus must be given value and included in the liquidation analysis because the surplus may revert to the company depending upon the terms of the plan. There was some evidence that in the two pension plans, with assets over \$2 billion, there may be a surplus of \$40 million. The Monitor attributed no value because of concerns about contingent liabilities which made the true amount of any available surplus indefinite and also because of the uncertainty of the entitlement of Canadian to any such amount.

50 The learned chambers judge found that no basis had been established for any surplus being available to be withdrawn from an ongoing pension plan. She also found that the evidence showed the potential for significant contingencies. Upon termination of the plan, further reductions for contingent benefits payable in accordance with the plans, any wind up costs, contribution holidays and litigation costs would affect a determination of whether there was a true surplus. The evidence before the learned chambers judge included that of the unionized employees who expected to dispute all the calculations of the pension plan surplus and the entitlement to the surplus. The learned chambers judge observed also that the surplus could quickly disappear with relatively minor changes in the market value of the securities held or in the calculation of liabilities. She concluded that given all variables, the existence of any surplus was doubtful at best and held that ascribing a zero value was reasonable in the circumstances.

51 In addition to the evidence upon which the learned chambers judge based her conclusion, she is also supported by the case law which demonstrates that even if a pension surplus existed and was accessible, entitlement is a complex question: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.).

52 Resurgence argued that the international routes of Canadian should have been treated as valuable assets. The Monitor took the position that the international routes were unassignable licences in control of the Government of Canada and not property rights to be treated as assets by the airlines. Resurgence argues that the Monitor's conclusion was wrong because there was evidence that the international routes had value. In December 1999, CAIL sold its Toronto - Tokyo route to Air Canada for \$25 million. Resurgence also pointed to statements made by Canadian's former president and CEO in mid-1999 that the value of its international routes was \$2 billion. It further noted that in the United States, where the government similarly grants licences to airlines for international routes, many are bought and sold.

53 The learned chambers judge found the evidence indicated that the \$25 million paid for the Toronto-Tokyo route was not an amount derived from a valuation but was the amount CAIL needed for its cash flow requirements at the time of the transaction in order to survive. She found that the statements that CAIL's international routes were worth \$2 billion reflected the amount CAIL needed to sustain liquidity without its international routes and was not the market value of what could realistically be obtained from an arm's length purchaser. She found there was no evidence of the existence of an arm's length purchaser. As the respondents pointed out, the Canadian market cannot be compared to the United States. Here in Canada, there is no other airline which would purchase international routes, except Air Canada. Air Canada argued that it is pure speculation to suggest it would have paid for the routes when it could have obtained the routes in any event if Canadian went into liquidation.

54 Even accepting Resurgence's argument that those assets should have been given some value, the applicant has not established a *prima facie* meritorious argument that the learned chambers judge was unreasonable to have accepted the valuations based on a liquidation analysis rather than a market value or going concern analysis nor that she lacked any evidence upon which to base her conclusions. She found that the evidence was over-

2000 ABCA 238, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52,
9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131, 10 W.W.R. 314

whelming that all other options had been exhausted and have resulted in failure. As described above, she had evidence upon which to accept the Monitor's valuations of the disputed assets. It is not the role of this Court to review the evidence and substitute its opinion for that of the learned chambers judge. She properly exercised her discretion and she had evidence upon which to support her conclusions. The applicant, therefore, has not established that its appeal is *prima facie* meritorious.

55 On the first issue, Resurgence argues that it should be an unaffected creditor to pursue its oppression remedy. As discussed above, the oppression remedy cannot be considered outside the context of the *CCAA* proceedings. The learned chambers judge concluded that the complaints of Resurgence were the result of the insolvency of Canadian and not from any oppressive conduct. The applicant has not established any *prima facie* error committed by the learned chambers judge in reaching that conclusion.

56 Thus, were this appeal not moot, leave would not be granted as the applicant has not met the threshold for leave to appeal.

CONCLUSION

57 The application for leave to appeal is dismissed because it is moot, and in any event, no serious and arguable grounds have been established upon which to found the basis for granting leave.

Application dismissed.

END OF DOCUMENT

2008 ABCA 1, [2008] 2 C.T.C. 67, 2008 G.T.C. 1128 (Eng.), [2008] A.W.L.D. 582,
[2008] A.W.L.D. 690, [2008] A.W.L.D. 691, [2008] G.S.T.C. 2, 422 A.R. 4, 415
W.A.C. 4, 43 C.B.R. (5th) 35

C

2008 CarswellAlta 2

Minister of National Revenue v. Temple City Housing Inc.
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-
36, as amended

And In the Matter of Temple City Housing Inc.
The Deputy Attorney General on Behalf of Her Majesty the Queen in Right of
Canada as Represented by the Minister of National Revenue (Appellant /
Respondent) and Temple City Housing Inc. (Respondent / Appellant)

Alberta Court of Appeal

Rowbotham J.A.

Heard: December 20, 2007

Judgment: January 3, 2008

Docket: Calgary Appeal 0701-0335-AC

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Counsel: Jill Medhurst-Tivadar for Appellant

Chris D. Simard for Respondent

Howard A. Gorman for Proposed Debtor in Possession Lender, Echo Merchant Fund

G. Scott Watson for Monitor, Hardie & Kelly Inc.

Subject: Estates and Trusts; Goods and Services Tax (GST); Insolvency; Income Tax (Federal)

Tax --- Goods and Services Tax -- Collection and remittance -- GST held in trust

Leave to appeal from debtor-in-possession order -- Corporate taxpayer owed CRA approximately \$973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of \$300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order -- CRA brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had advanced \$300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA -- Excise Tax Act, R.S.C. 1985, c. E-15, s.

2008 ABCA 1, [2008] 2 C.T.C. 67, 2008 G.T.C. 1128 (Eng.), [2008] A.W.L.D. 582,
[2008] A.W.L.D. 690, [2008] A.W.L.D. 691, [2008] G.S.T.C. 2, 422 A.R. 4, 415
W.A.C. 4, 43 C.B.R. (5th) 35

222.

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues

Leave to appeal from debtor-in-possession order -- Corporate taxpayer owed CRA approximately \$973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of \$300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order -- CRA brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had advanced \$300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA.

Tax --- Income tax -- Administration and enforcement -- Collection of tax -- Priorities and superpriorities of Minister

Corporate taxpayer owed CRA approximately \$973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of \$300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order -- CRA brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had advanced \$300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA.

Tax --- Income tax -- Administration and enforcement -- Withholding of tax -- Trust for monies withheld

Corporate taxpayer owed CRA approximately \$973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of \$300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order -- CRA brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had

2008 ABCA 1, [2008] 2 C.T.C. 67, 2008 G.T.C. 1128 (Eng.), [2008] A.W.L.D. 582,
 [2008] A.W.L.D. 690, [2008] A.W.L.D. 691, [2008] G.S.T.C. 2, 422 A.R. 4, 415
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advanced \$300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "un-scramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA.

Cases considered by Rowbotham J.A.:

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) -- considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. Minister of National Revenue v. First Vancouver Finance) 2002 D.T.C. 6998 (Eng.), (sub nom. Minister of National Revenue v. First Vancouver Finance) 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) -- considered

Smoky River Coal Ltd., Re (1999), 1999 CarswellAlta 128, (sub nom. Luscar Ltd. v. Smoky River Coal Ltd.) 237 A.R. 83, (sub nom. Luscar Ltd. v. Smoky River Coal Ltd.) 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) -- followed

Statutes considered:

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

Generally -- referred to

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

Generally -- referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally -- referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally -- referred to

s. 224(1.2) -- referred to

s. 224(1.3)"security interest" -- considered

s. 227(4) -- referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] -- referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47

2008 ABCA 1, [2008] 2 C.T.C. 67, 2008 G.T.C. 1128 (Eng.), [2008] A.W.L.D. 582, [2008] A.W.L.D. 690, [2008] A.W.L.D. 691, [2008] G.S.T.C. 2, 422 A.R. 4, 415 W.A.C. 4, 43 C.B.R. (5th) 35

Generally -- referred to

APPLICATION by Canada Revenue Agency for leave to appeal from order under Companies' Creditors Arrangement Act, granting debtor-in-possession charge to corporate taxpayer.

Rowbotham J.A.:

Introduction

1 Canada Revenue Agency (CRA) seeks leave to appeal a provision in an order made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), granting the Debtor in Possession Lender, Echo Merchant Fund (DIP Lender), a charge in priority over the claim of the applicant. Should leave be granted, the applicant also seeks a stay pending appeal.

Background Facts

2 The respondent, Temple City Housing Inc. (Temple) is a small private company that manufactures homes and truss beams for homes in Cardston, Alberta. Temple has almost 200 employees but has suffered from a shortage of skilled trade workers which has slowed its production and lowered its revenues. In September 2007, entire sections of production had to be shut down because of the lack of workers.

3 Temple has debts in excess of \$5 million and is unable to meet its current obligations. In November 2007, the respondent sought protection under the CCAA in order to carry on business and restructure as a going concern, rather than liquidating its assets.

4 Temple's largest creditor is the applicant, who has claims for unpaid or unremitted employee source deductions for income tax, Canada Pension Plan and Employment Insurance, as well as GST for 2007, which total approximately \$973,000.

5 In order to pay its employees and continue carrying on business, Temple requires additional financing. The DIP Lender made loans of \$185,000 and \$91,500 on the condition that it obtains a security interest in the property of Temple in first priority or super-priority over all other claims, specifically the claim by CRA.

Decision of the CCAA Judge

6 The CCAA judge considered the sections of the *Income Tax Act*, R.S.C. 1985, c. 1, and the *Excise Tax Act*, R.S.C. 1985, c. E-15, that require employers to deduct and withhold amounts from their employees' wages (source deductions) and remit them to the Receiver General. The source deductions are deemed to be separate and apart from the property of the employer in trust for Her Majesty. A deemed trust attaches to the property of the employer both when source deductions are made and if source deductions are not remitted to the Receiver General by their due date.

7 The applicant submitted to the CCAA judge and again in this application, that the deemed trust overrides all competing security interests.

8 The CCAA judge held that the Supreme Court of Canada's decision in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720, [2002] G.S.T.C. 23 (S.C.C.), was authority that the deemed trust is similar in principle to a floating charge. Thus, although the property of the employer is subject to

2008 ABCA 1, [2008] 2 C.T.C. 67, 2008 G.T.C. 1128 (Eng.), [2008] A.W.L.D. 582, [2008] A.W.L.D. 690, [2008] A.W.L.D. 691, [2008] G.S.T.C. 2, 422 A.R. 4, 415 W.A.C. 4, 43 C.B.R. (5th) 35

the deemed trust, Her Majesty's interest in the property did not continue, for example, once property was sold to a third party. She also found that her interpretation was further supported by the definition in the *Income Tax Act*, which states that a "security interest" means "any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a ... deemed or actual trust...". Therefore, she held that Her Majesty's security interest could be treated the same way as any other security interest under the CCAA.

9 Exercising the inherent jurisdiction of a CCAA court, the CCAA judge held that in the circumstances, particularly, given the number of employees affected and the spirit of the CCAA, which is to promote the continuation of the corporation so that it can emerge from insolvency protection, she granted the DIP Lender first priority to the extent of \$300,000 over any claims by the applicant.

10 The order under which leave is sought is dated November 23, 2007 at para. 41 provides:

In particular, the DIP Charge to the extent of \$300,000.00 shall have priority over any claims by CRA [Canada Revenue Agency] in relation to unpaid or unremitted employee source deductions and GST as defined pursuant to the *Income Tax Act* and the *Excise Tax Act*.

Proposed Grounds for Appeal

11 The applicant seeks leave to appeal para. 41 of the November 23, 2007 order on the basis that the CCAA judge erred in granting the DIP Lender priority over Her Majesty's deemed trust claims arising under sections 224(1.2), 227(4) and 227(4.1) of the *Income Tax Act*.

Test for Leave

12 The test for leave is well known. In *Smoky River Coal Ltd., Re*, 1999 ABCA 62 (Alta. C.A.) at para. 22, this Court stated that to obtain leave to appeal an order under the CCAA, there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:

- (1) Whether the point on appeal is of significance to the practice;
- (2) Whether the point raised is of significance to the action itself;
- (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- (4) Whether the appeal will unduly hinder the progress of the action.

Application

13 The applicant is unable to meet the test for leave. The point which the applicant seeks to appeal will not be of significance to CCAA practice because the legislation has been amended. Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 39th Parliament, 2nd Session, 2007, received Royal Assent on December 14, 2007. The amendments to the CCAA include specific authority to grant super-priority to DIP financing such as the loan in this case. This provision has not yet been proclaimed in force. However, once it has been proclaimed in force, the issue of the CCAA judge's inherent jurisdiction to order such priorities

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will not be an issue in future CCAA proceedings. Counsel for the CRA forcefully submitted that despite the amendments, this case is of significance to the practice because, to her knowledge, it is the first time that a court has given priority to the DIP Lender over the CRA's deemed trust. She made several arguments as to why the decision of the CCAA judge was incorrect, assuming that the standard of review is correctness. It seems to me, however, that these arguments, particularly the application of Iacobucci J.'s decision in the *First Vancouver* case, will still have force in future cases where the matter will be largely one of statutory interpretation. I conclude therefore that this particular appeal would not be of significance to the practice.

14 Moreover, the point may not be of significance to the action itself. As counsel for Temple submitted, this is real time litigation. The CCAA judge makes discretionary decisions in a constantly changing situation. Her decision is owed a high degree of deference. The DIP Lender has advanced \$300,000 to Temple in reliance on the November 23 order and, in particular, on the lack of a stay of that order. The proceeds have been paid to Temple's employees and suppliers. It is now virtually impossible to "unscramble the egg", as counsel for Temple submitted; in other words to reverse the effect of para. 41 of the November 23 order and to grant the remedy that the applicant now seeks. As was the case in *Canadian Airlines Corp., Re*, 2000 ABCA 238, 266 A.R. 131 (Alta. C.A. [In Chambers]) at para. 32, this appeal may well be moot.

15 Further, an appeal would hinder the CCAA proceedings because without an order giving the DIP Lender first priority over the applicant's claim, the DIP Lender would not advance funds and without the current and future loans, Temple would be unable to restructure under the CCAA and would be forced to close its business.

16 Given that three of the four factors cannot be met, even if the point on appeal is *prima facie* meritorious, the applicant cannot show that there are serious and arguable grounds of real and significant interest to the parties.

Conclusion

17 As the applicant is unable to meet the test for leave, the application is dismissed and therefore, the application for a stay need not be considered.

Application dismissed.

END OF DOCUMENT

Appeal Number: 0901-0048 AC
Q.B. Number: 0901-02012

IN THE COURT OF APPEAL OF ALBERTA

Between

BG INTERNATIONAL LIMITED

**(Plaintiff)
Respondent**

-and-

CANADIAN SUPERIOR ENERGY INC.

**(Defendant)
Appellant**

**FACTUM AND BOOK OF AUTHORITIES
OF CANADIAN WESTERN BANK
(AN INTERESTED/EFFECTED PARTY)**

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