In the Court of Appeal of Alberta

Citation: Canadian Overseas Petroleum Limited (Re), 2024 ABCA 190

Date: 20240604
Docket: 2401-0132AC
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Canadian Overseas Petroleum Limited, COPL Technical Services Limited, Canadian Overseas Petroleum (UK) Limited, Canadian Overseas Petroleum (Bermuda) Limited, Canadian Overseas, Petroleum (Bermuda Holdings) Limited, Canadian Overseas Petroleum (Ontario) Limited, COPL America Holding Inc., COPL America Inc., Atomic Oil & Gas LLC, Southwestern Production Corp. and Pipeco LLC

Between:

BP Energy Company

Applicant

- and -

Canadian Overseas Petroleum Limited, COPL Technical Services Limited, Canadian Overseas Petroleum (UK) Limited, Canadian Overseas Petroleum (Bermuda) Limited, Canadian Overseas, Petroleum (Bermuda Holdings) Limited, Canadian Overseas Petroleum (Ontario) Limited, COPL America Holding Inc., COPL America Inc., Atomic Oil & Gas LLC, Southwestern Production Corp. and Pipeco LLC

Respondents

Reasons for Decision of
The Honourable Justice William T. de Wit

Application for Permission to Appeal

Reasons for Decision of
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Introduction

[1] BP Energy Company (BP) seeks leave to appeal under section 13 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (CCAA) and a staying of orders granted by Justice Yamauchi on April 24, 2024.

Background

[2] Canadian Overseas Petroleum Limited (COPL) is a publicly traded oil and gas exploration, development and production company with headquarters in Calgary Alberta. COPL is in financial difficulties and as counsel for COPL advised in the hearing before Justice Yamauchi, as of February 2024, they were "days away from being fully depleted of -- any and all cash reserves".

[3] COPL has two senior creditors, collectively, Summit Partners Credit Fund III, L.P., Summit Investors Credit III, LLC, Summit Investors Credit III (UK), L.P., and Summit Investors Credit Offshore Intermediate Fund III, L.P. (Summit) and the applicant in this matter, BP. Summit and BP are secured and rank equivalently on a first priority, *pari passu* basis. Summit has a secured loan facility in the amount of $45 million and BP has hedge obligations or terminated swap agreements which result in obligations due and owing in the amount of $11.8 million.

[4] In February 2024, prior to the CCAA proceedings, COPL's interim chief executive officer and chief restructuring officer met with representatives from BP and Summit to request interim financing. He advised BP that the seniority of BP's debt would likely be impaired if it did not participate in the proposed interim financing and formally requested participation by BP. BP declined to participate. Summit was the only party that agreed to advance interim financing to COPL.

[5] On March 8, 2024, COPL obtained an initial protection order under the CCAA from Justice Sidnell. Prior to obtaining this order, BP was served with the application including documents which set out the details of the restructuring support agreement, the restructuring term sheet, the sale and investment solicitation process (SISP) and the stalking horse purchaser agreement (SHPA). As part of the initial protection order, Summit provided interim financing to COPL in the amount of $1.5 million.

[6] On March 19, 2024, the CCAA process was extended, and the interim financing was increased to $11 million and the SISP was approved by the order of Justice Johnston. BP was given notice of that application and did not oppose it. That order has not been appealed.

[7] Part of the SISP included the SHPA. On April 8, 2024, the SHPA was entered into by Summit and certain vendors of COPL. BP was aware of the proposed terms of the SHPA but did not oppose it.

[8] The SHPA allows Summit to acquire the COPL's assets for a base consideration of $55 million which is comprised by the $11 million interim financing and the assumption, by Summit, of its own portion of the *pari passu* secured indebtedness of approximately $45 million. BP's hedge obligations in the amount of $11.8 million is not being assumed. The Monitor, KSV Restructuring Inc (Monitor), an advisory, restructuring and valuations company, had contact with approximately 137 prospective purchasers, but received no qualified bids exceeding the SHPA offer and therefore, approved the SHPA.

[9] On April 24, 2024, Justice Yamauchi heard an application for an approval and vesting order (AVO) to confirm the SHPA. At this hearing BP opposed the AVO. Justice Yamauchi inquired whether BP had knowledge of the SISP and SHPA and canvassed with all counsel whether BP knew of the issues in place during the March 19, 2024 hearing on the SISP. He found that BP had knowledge but did not oppose the SISP or appeal Justice Johnston's order in that regard.

[10] During the hearing in front of Justice Yamauchi, counsel for BP raised a number of arguments but the main argument was that it was not proper to value the assets of COPL at $55 million, whether they be a cash consideration or assumption of debt, and then give all of the assets to Summit while BP would receive nothing on its debt of $11.8 million. According to BP, the assets should be apportioned according to Summit and BP's respective percentage of debt.

[11] Counsel for BP also argued that section 36(6) of the CCAA does not allow for a vesting of assets to only one of the creditors and not the other. Justice Yamauchi noted that Summit was assuming liability as opposed to receiving "a cheque" for its secured claims and that it was a "going concern transaction that will ultimately see Summit paid perhaps, depending on the success or failure of the corporation". In his reasons, Justice Yamauchi referred to section 36(6) and indicated that because there was no money in, section 36(6) did not apply and even if section 36(6) could apply to a credit deal, it did not apply in the circumstances of this case.

[12] In his reasons, Justice Yamauchi also indicated that this was not a roll-up because the stalking horse bidder is not paying cash and not rolling up the amounts that were previously owed to the Summit group but is simply assuming that obligation. He commented it is questionable whether they will get paid in the future, but they are not being paid now.

[13] Justice Yamauchi also indicated that an important consideration is that the SHPA was only part of a bigger transaction involving the entirety of the proceeding. He referred to the case of *White Birch Paper Holding Company* (*Arrangement relatif à*), 2010 QCCS 4915, for the proposition that BP could not be silent throughout the proceedings, including the SISP, and now at the last hour attempt to "scuttle" what had previously occurred.

Proposed Issues

[14] BP seeks leave to appeal the chambers judge's decision on the grounds that he erred:

A. in finding that section 36(6) of the CCAA did not apply to the circumstances of this case;
B. in finding that this was not a roll-up and failing to apply the *Royal Bank v Soundair Corp*, 1991 CanLII 2727 (ON CA), (1991) 83 DLR (4th) 76 and *Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508, principles and applying the *White Birch* principles; and
C. in fact by drawing a conclusion, in the absence of evidence, that it was BP's intention to delay its objection and spoil the SISP.

Leave to Appeal

[15] The test for leave to appeal under section 13 of the CCAA involves a four-part test:

1. Is the appeal *prima facie* meritorious and not frivolous?
2. Is the point on appeal of significance to the action?
3. Is the point raised of significance to the practice?
4. Will the appeal unduly hinder the progress of the action?

[16] Deference is granted to a chambers judge's decision regarding determinations under the CCAA. An applicant must point to an error of law or palpable and overriding error in fact or exercise of discretion: *BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264 at para 8.

Parties' Positions

Is the Appeal *Prima Facie* Meritorious and Not Frivolous?

[17] The objective of the CCAA is to attempt to avoid the social and economic losses which result from the liquidation of an insolvent company. The typical CCAA case involves an attempt to facilitate the reorganization and survival of a prefiling debtor company so that it can remain in an operational state. Where such a goal cannot be accomplished liquidation, receivership or the *Bankruptcy and Insolvency Act* regime will apply. The CCAA also has the objectives of maximizing creditor recovery, the preservation of going concern value, the preservation of jobs and communities, and the enhancement of the credit system generally. See *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10 at paras 40-42.

[18] Section 36(6) of the CCAA states:

> The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favor of the creditor whose security, charge or other restriction is to be affected by the order.

[19] BP argues that section 36(6) must apply because the section authorizes the court to approve the bulk sale of assets in a CCAA proceeding and provides inherent protection for affected creditors. BP asserts that the stalking horse purchaser's assumption of the assumed liabilities are the assumption of "proceeds" and therefore section 36(6) applies. According to BP, the legislation rejects the premise that a vesting order can be made which strips the interest of a creditor, who is otherwise entitled to recovery, without their consent.

[20] The Monitor, COPL and Summit (respondents) argue that there is no precedent for such an interpretation. Section 36(6) explicitly applies to "proceeds". BP's interpretation requires characterizing an assumed liability as consideration and therefore something to which a lien should attach. Its interpretation assumes payment of all unsecured liabilities. They argue that it would be nonsensical to interpret the assumption of liabilities as proceeds such that the assumption of liabilities would not affect other creditors being fully paid out for their debts, if these creditors were higher ranking or as in this case, *pari passu* creditors.

[21] The respondents submit that many CCAA proceedings involve credit bidding which generates no cash proceeds and involves a purchaser assuming certain of the debtor's unsecured debts. BP disagrees with this submission but the respondents point to recent cases such as *Invico Diversified Income Limited Partnership v NewGrange Energy Inc*, 2024 ABKB 214, and *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 332. Similar credit bids in CCAA proceedings can be found in other jurisdictions, for example, *PCAS Patient Care Automation Services Inc (Re)*, 2012 ONSC 2778 and *Fire & Flower Holdings Corp et al*, 2023 ONSC 4048. None of these cases raise the interpretation of section 36(6) in the manner that BP seeks to argue.

[22] The respondents further submit that if debts and other obligations cannot be assumed without higher ranking or *pari passu* creditors first being paid out, purchasers would never assume unsecured trade contracts that are necessary for the operation of a business. The respondents take the position that such an interpretation would preclude any going concern sales transactions in CCAA proceedings because it would not be viable for the purchaser. If a purchaser was able to pay all the debtor's creditors in full, there would be no need for the CCAA process. Therefore, BP's interpretation is contrary to the purpose and objectives of the CCAA.

[23] BP also argues that the chambers judge erred by finding that the arrangement in question was not in effect a roll-up as it reordered the priorities among the senior secured *pari passu* creditors. Such an effect is impermissible under section 11.2 of the CCAA.

[24] The respondents argue that the chambers judge did not err in finding that this was not a roll-up. A "roll-up" generally refers to securing a prefiling debt with a court-ordered charge of higher priority granted as part of credit advanced after commencement of an insolvency proceeding. The transaction in this case did not reorder pre-insolvency debt priority among the secured creditors. Summit's credit bid and interim loan allowed COPL to continue operating during the CCAA proceedings. The interim loan, as part of the CCAA proceedings, was not used to pay prefiling debt and no charge securing prefiling obligations was granted. In granting the March 8, 2024 court order for the initial CCAA application, Justice Sidnell was satisfied that the order did not secure prefiling indebtedness of the lender. BP did not appeal that order. The interim loan was not in effect a roll-up as it was not used to pay prefiling debt, no agreement was disclaimed and no priorities reordered or recategorized. Therefore, the chambers judge made no error in finding that this was not a roll-up and was something completely different.

[25] BP further argues that the chambers judge did not consider the *Soundair* factors in coming to his determination that the AVO be granted. BP specifically took issue with the timing of the process and whether certain bids were "qualified bids" which could affect the fairness of the process.

[26] However, during the hearing in front of the chambers judge, submissions were made by both sides regarding the timing of the information being disclosed to BP and the effect that it would have on the fairness of the proceedings. Submissions included the *Soundair* principles, and the factors set out in section 36(1)-(5) of the CCAA. The chambers judge asked questions with respect to these factors and heard submissions from both sides. He found that the process was fair in the circumstances.

[27] In addition, the *Soundair* factors were also considered during the SISP hearing. The SISP order was a final order that was not appealed by BP.

[28] BP argues the sales process is distinct from the transaction. It says the SHPA as proposed in the SISP was non-binding and it was not until the AVO application that the terms were final.

[29] The respondents do not disagree that the sales process and the transaction are separate but the *Soundair* principles and the factors in section 36 of the CCAA apply to the sale process. The complaints of BP regarding the transaction are just a collateral complaint about the sales process. They submit that BP cannot complain about that process. The evidence shows that BP was aware that its security could be affected as early as February 20, 2024 when BP was asked to consider the possibility of BP participating by extending interim financing to COPL. The CCAA process usually occurs quickly because corporations that have financial difficulties may not be able to survive for any length of time without the restructuring that occurs in the CCAA process. In this case, BP had two months from the time it knew its security was at risk until the hearing at the end of April 2024. This was not such a short period of time that BP could not have been involved in the CCAA process. It knew about the matters dealt with in the March hearings but did not raise objections or appeal the orders.

[30] BP also argues that the chambers judge erred in fact and law by finding that BP's objection to the AVO was an intentional 11th hour maneuver to scuttle what has been going on for the past several months. BP argues that there is absolutely no evidence for such a finding. The comment of the chambers judge was in reference to the *White Birch* case. That case set out the principle that it is a factor to consider when a party, who has knowledge of the circumstances, but does not participate in the CCAA process or appeal prior determinations and only claims their disagreement at the very end. This does not make the process unfair.

Is the Point on Appeal of Significance to the Action and to the Practice?

[31] BP takes the position that the interpretation of section 36(6) is significant with respect to this case and significant with respect to the practice of insolvency law. It argues that a fundamental principle is that a secured creditor vested out of its collateral must receive consideration by vesting into the proceeds. It also argues that there is no more important stakeholder in a CCAA restructuring than a creditor in a senior secured security position. BP argues that the lack of case law interpreting section 36(6) to mean that it only applies to cash proceeds creates uncertainty for secured creditors in Canada.

[32] The respondents take the position that the chambers judge's determination that section 36(6) can only apply to proceeds that are cash is the only logical interpretation in the circumstances of this case. They cite *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85 at para 77, for the proposition that certain proposed grounds of appeal are novel because they lack merit. The chambers judge in this case indicated that he was not surprised that there was little case law on this issue as he found that BP's argument was meritless.

Will the Appeal Unduly Hinder the Progress of the Action?

[33] This element of the test is extremely important and can usurp the other factors and result in a denial of leave to appeal. BP takes the position that this is now a liquidating proceeding and that the disposition of the debtor's assets can occur now or later. The sale to the purchaser in the SHPA has an outside date of August 31, 2024. BP also indicates that the only affected stakeholders are the senior secured creditors that being itself and Summit. It claims that the only progress would be to the benefit of the only two impacted stakeholders and it is not progress where the advantage is to only one of the stakeholders.

[34] The respondents admit that the CCAA proceedings have become a liquidation proceeding but the SHPA is part of a much bigger deal. The AVO and approval of the SHPA did not only include the credit bid but also the interim financing provided by Summit. Without this interim financing, COPL would not continue to be offered as a going concern in the SISP and without the SHPA, Summit would not have offered interim financing. The SHPA and AVO would allow COPL to continue to operate which would facilitate one of the key objectives of CCAA proceedings, namely, to preserve a corporation's value. According to the respondents, based on the current cash flow forecast, COPL will not be able to continue operations beyond the end of

June. However, if the SHPA closes, Summit would be required to fund the go forward costs of the operations. The respondents state that without the SHPA, there will be no purchaser and there will be significant loss of jobs.

[35] If leave to appeal is granted, the delay would mean the end of the CCAA proceedings and COPL will be in bankruptcy. The expectation from the sale in bankruptcy of non-going concern assets is likely to result in insufficient proceeds to cover the interim financing debt and nothing to pay the prefiling obligations owed to Summit and BP.

[36] The respondents reject the suggestion by BP that a receiver could continue the operations as a going concern. The respondents point out the interim financing would still be required to continue operations and it will not be forthcoming from Summit without the SHPA. The fact that no bids were received during the sales process signifies that no other prospects for interim financing will be found.

[37] Additionally, delay also affects the chapter 15 *Bankruptcy Code* proceedings in the United States of America. A hearing for the recognition of the vesting order in the United States is currently scheduled for June 6, 2024.

Application of the Test

[38] With respect to whether the proposed grounds of appeal are *prima facie* meritorious, the only ground which appears to raise a question of law is the interpretation of section 36(6) of the CCAA. However, as described above, the respondents point out that BP's interpretation undermines the operation and objectives of the CCAA by overturning an historically accepted practice and giving BP a potential veto over the SISP. Additionally, the lack of merit to BP's interpretation of section 36(6) is demonstrated by the lack of support by any case authority. In any event, the chambers judge determined it did not apply in the circumstances of this case and his decision is accorded great deference in CCAA matters: *Uti Energy Corp v Fracmaster Ltd*, 1999 ABCA 178 at para 3.

[39] The issue of whether the SHPA is a roll-up does not raise a question of law but at best, disputes a question of mixed fact and law, in particular, how the chambers judge categorized the effect of the orders in the CCAA proceedings and the SHPA.

[40] As the respondent argues, the SHPA does not meet the general concept of a roll-up where a prefiling debt is granted a higher priority after insolvency proceedings commenced. In this case, no prefiling debt was secured with a charge that reordered priority. The chambers judge's conclusion was supported by the conclusion of the court at the initial CCAA application.

[41] To succeed on appeal on a question of fact or mixed fact and law, the applicant would have to show the chambers judge's conclusion, that this was not a roll-up, was a palpable and overriding error.

[42] The issue of the application of the *Soundair* and *Third Eye* principles questions the chambers judge's exercise of discretion. The principles require assessment of any unfairness in the process. The chambers judge's questions during the hearing showed he was extremely concerned about fairness to BP as he questioned counsel about notice to BP and its awareness and knowledge of the details of the SISP. Not only did he not find any unfairness, but he also had the recommendation of the Monitor whose duty to the court is to supervise a robust and transparent sales process pursuant to the terms of the SISP order. The SISP order was never appealed and there is no evidence that the SISP was not complied with.

[43] To succeed on appeal, the applicant would have to show the chamber judge exercised his discretion unreasonably: *Callidus Capital Corp* at para 53.

[44] With respect to BP's claim that the chambers judge concluded BP had the intention to delay its objection and spoil the SISP, in my view, this overstates the chambers judge's comments. He pointed out, correctly, that BP was aware that its security would be affected by the SISP, and the proposed SHPA, but it declined to participate in any interim financing, it did not object to nor appeal the SISP order and did not submit a qualifying bid in the SISP. Only at the hearing to approve the AVO, did BP object. The reference to *White Birch* was to make the point that the objecting party knew about the process but remained silent during the approval of the process and raised a late objection once the sales process had run. The court in *White Birch* as well as other courts have declined to reopen the sale process in such circumstances. This does not raise a ground of appeal.

[45] The proposed grounds of appeal show no or little merit. Even assuming the issue of the interpretation of section 36(6) raises a discrete question of law, appellate courts are to exercise the power to grant leave "sparingly": *BMO Nestbitt Burns Inc v Bellatrix Exploration* at para 8, quoting *Duke Energy Marketing Limited Partnership v Blue Range Resource Corporation*, 1999 ABCA 255 at para 3. The fact that an appeal is only with leave indicates that Parliament intended that most decisions made by the CCAA judge "should be interfered with only in clear cases": *Luscar Ltd v Smoky River Coal Limited*, 1999 ABCA 179 at para 61.

[46] In the absence of raising grounds of appeal of sufficient merit, the proposed appeal would not be of significance to the practice.

[47] The proposed appeal would not be of significance to the action itself in terms of the restructuring of COPL except that it could reopen the AVO and thwart the principles and objectives of the CCAA.

[48] Reopening a final order and an appeal itself would cause delay which would result in undue delay to the progress of the action, the fourth factor of the test for leave.

[49] Along with the merits of the proposed appeal, the factor of delay is ascribed the most weight: *Resurgence Asset Management LLC v Canadian Airlines Corporation*, 2000 ABCA 149

at para 46. The factor of delay goes to the root of the purpose of the CCAA: the need for a timely and orderly resolution of the matter and the effect on the interests of all parties. As has been noted in numerous decisions, orders under the CCAA "depend upon a careful and delicate balancing of a variety of interests and of problems" and an appeal "may well upset the balance, and delay or frustrate the process": *Resurgence Asset Management* at para 42, quoting *Re Pacific National Lease Holding Corp* (1992), 15 CBR (3d) 265 (BCCA).

[50] In this case, the practical reality is that delay is antagonistic to the purposes of the CCAA. As the Supreme Court commented in *Callidus*, even in a liquidating CCAA, the remedial objectives may be met by eliminating further loss for creditors or focussing on the solvent aspects of the business and even if the reorganization of pre-filing debtor corporation is not a possibility, preserving going-concern value, the ongoing business operations or maximizing creditor recovery of assets can be the focus (paras 45-46). None of that is possible if these proceedings are delayed.

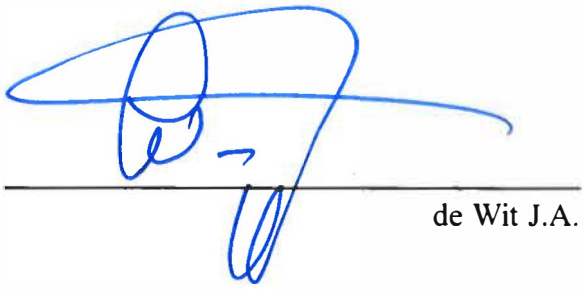
[51] As the respondents have explained, the delay caused by an appeal would result in catastrophic effects to the restructuring. There are not sufficient funds for an additional SISP or to continue operations beyond the end of June. Without the SHPA closing, there will be a significant loss of jobs, COPL's assets may cease operating and one of the key objectives of the CCAA, preserving value, will be undermined.

Conclusion

[52] Having considered all the factors, I am satisfied that leave should not be granted. The application is dismissed.

Application heard on May 29, 2024

Reasons filed at Calgary, Alberta
this 4th day of June, 2024



de Wit J.A.

Appearances:

D.M. Pontin
for the Applicant

M. Wasserman
D. Rosenblat
L.K. Good
V. Nikolov
S.Irving (no appearance)
for the Respondents

J.L. Oliver
for the Monitor, KSV Restructuring

R. Zahara
J. Eeles
A.J. Roth-Moore
J.R. Alberto (no appearance)
for the Interim Lender, Summit Partners Credit Fund III, L.P., Summit Investors Credit III, LLC, Summit Investors Credit III (UK), L.P., and Summit Investors Credit Offshore Intermediate Fund III, L.P.