COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	2401-0132AC
TRIAL COURT FILE NUMBER:	2401-03404
REGISTRY OFFICE:	CALGARY
PLAINTIFF/APPLICANT:	BP ENERGY COMPANY
STATUS ON APPEAL:	APPELLANT
STATUS ON APPLICATION:	APPLICANT
DEFENDANT/RESPONDENT:	IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF CANADIAN OVERSEAS PETROLEUM LIMITED AND THOSE ENTITIES LISTED IN SCHEDULE "A"
STATUS ON APPEAL:	RESPONDENT
STATUS ON APPLICATION:	RESPONDENT
DOCUMENT:	**MEMORANDUM OF ARGUMENT OF BP ENERGY COMPANY (Application for Permission to Appeal)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Dentons Canada LLP 15th Floor, Bankers Court 850 – 2nd Street SW Calgary, AB T2P 0R8 Attention: Derek Pontin Email: derek.pontin@dentons.com Ph: (403) 268-7015 Fax: (403) 268-3100

and

CONTACT INFORMATION FOR ALL OTHER PARTIES:	**Cassels Brock & Blackwell LLP** Bankers Hall West 3810, 888 3 Street SW

Calgary, Alberta T2P 5C5
Attention: Jeffery Oliver
Email: JOliver@cassels.com
Counsel for the monitor KSV Restructuring Inc.

Osler, Hoskin & Harcourt LLP
1 First Canadian Place, 100 King Street West, Suite 6200 Toronto, Ontario
M5X 1B8
Attention: Marc Wasserman
Email: MWasserman@osler.com
Counsel for Canadian Overseas Petroleum Limited et al.

Potter Anderson & Corroon LLP
1313 N. Market Street, 6th Floor
Wilmington, Delaware, USA
19801-6108
Attention: L. Katherine Good
Email: kgood@potteranderson.com
US Counsel for Canadian Overseas Petroleum Limited et al.

Kirkland & Ellis LLP
601 Lexington Avenue
New York, New York, USA 10022
Attention: Brian Schartz
Email: bschartz@kirkland.com
US Counsel for the interim lender Summit Partners Credit Fund III, L.P.; Summit Investors Credit III, LLC; and Summit Investors Credit III (UK), L.P.

MLT Aikins LLP
2100 Livingston Place,
222 3 Avenue SW
Calgary, Alberta T2P 0B4
Attention: Ryan Zahara
Email: RZahara@mltaikins.com
Counsel for the interim lender Summit Partners Credit Fund III, L.P.; Summit Investors Credit III, LLC; and Summit Investors Credit III (UK), L.P.

TABLE OF CONTENTS

PART I – STATEMENT OF FACTS 4

A. Overview 4

B. Background 5

PART II – STATEMENT OF POINTS IN ISSUE 6

PART III – STATEMENT OF ARGUMENT 7

A. The Appeal is *Prima Facie* Meritorious 8

B. Significance to the Action and Significance to the Practice 11

C. The Appeal Will Not Unduly Hinder the Progress of this Action 12

D. Interim Stay of the AVO 13

PART V – RELIEF REQUESTED 13

PART I – STATEMENT OF FACTS

A. Overview

1. The Appellant, BP Energy Company ("**BPEC**"), seeks leave to appeal the granting of an approval and vesting order ("**AVO**") by the Honourable Justice K. Yamauchi on April 24, 2024 (the "**Decision**") in the *Companies' Creditors Arrangement Act* ("***CCAA***") proceedings of Canadian Overseas Petroleum Limited ("**COPL**") and certain related entities (together with COPL, referred to herein as "**COPL Entities**").[1]

2. The AVO approves transactions contemplated by a Stalking Horse Purchase Agreement dated as of April 8, 2024 ("**SHPA**"), by and among certain of the COPL Entities, as Vendors (collectively, the "**Vendor**"), and 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., as purchasers (collectively, the "**Purchaser**" or the "**Summit Parties**").

3. This application concerns the applicability of section 36(6) of the *CCAA* to the AVO. The Honourable Justice approved the AVO on the basis that "subsection 36(6) really does not apply to this particular transaction", or is not apropos to the proposed transaction, because it is a credit deal under which the Purchaser is not paying cash for its proposed acquisition of the assets.

4. The Summit Parties and BPEC are *pari passu* senior secured creditors to the COPL Entities. The value of the estate assets is such that, together, BPEC and the Summit Parties comprise the fulcrum creditors of the COPL Entities' estate. The effect of the AVO is to split the fulcrum, extinguishing BPEC's rights and priority in the assets, while preserving the Summit Parties' position, in full. This is contrary to the *CCAA* and other applicable law.

---

[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 as amended [*CCAA*] – **BPEC Table of Authorities TAB 1**.

B. Background

5. COPL is a publicly traded international oil and gas exploration, development and production company headquartered in Calgary, Alberta. One of the COPL Entities, "COPL America", has two senior secured creditors, being the Summit Parties and BPEC. The Summit Parties' obligations arise under a secured loan facility in the base amount of USD $45 million. The BPEC hedge obligations, of approximately USD $11.8 million, arise in connection with terminated swap agreements, memorialized under a secured swap termination agreement. The Summit Parties and BPEC are parties to an Intercreditor Agreement, under which the Summit Parties and BPEC are secured and rank equivalently on a first priority, *pari passu* basis.[2]

6. The COPL Entities obtained initial *CCAA* protection by way of Initial Order on March 8, 2024, granted by Honourable Justice E. Sidnell. The Initial Order approved interim financing, to be extended by the Summit Parties on a super-priority basis, in an initial amount of $1.5 million.

7. On March 19, 2024, the *CCAA* proceeding was extended, the interim financing increased to $11 million, and a sale process ("**SISP**") approved by orders of Honourable Justice B. Johnston. The SISP approval was premised on a Restructuring Support Agreement ("**RSA**"). The RSA attached a non-binding restructuring term sheet, which outlined the basis for the proposed SHPA.[3] The parties to the RSA were to negotiate and enter into the SHPA on or prior to March 22, 2024 (subject to any Monitor-approved extension).[4]

8. The SHPA was entered on April 8, 2024. The deadline for letters of intent in the SISP was April 17, 2024. No qualifying bids were received by the LOI deadline and the AVO was granted on April 24, 2024, by Honourable Justice K. Yamauchi.

---

[2] Second Report of the Monitor, dated April 19, 2024, at pages 7-9 [Second Report] – **BPEC Appeal Book TAB 6**.

[3] Affidavit of Peter Kravitz, dated March 7, 2024, at Exhibit "P" [page 1294] [First Kravitz Affidavit] – **BPEC Appeal Book TAB 7**.

[4] First Kravitz Affidavit, at para 183 [page 65], and Exhibit "P" [page 1297], which date could be extended with Monitor approval – **BPEC Appeal Book TAB 7**.

9. Concurrently, the COPL Entities commenced recognition proceedings under Chapter 15 of the United States *Bankruptcy Code*. A U.S. hearing date is set for the AVO of May 14, 2024.

10. The SHPA provides the Purchaser will acquire the COPL Entities' assets for approximate base consideration of USD $55 million. That is comprised of a credit bid for the super-priority debt (est. $11 million interim financing) and assumption by the Purchaser of its own portion of the *pari passu* secured indebtedness. The BPEC secured hedge obligation is not being assumed.

11. The SISP provides that a "Qualified Bid" must exceed the stalking horse offer, plus incremental bid protections, unless the Purchaser allows a lesser bid to qualify. This discretion, for the Purchaser to control participation in the SISP, was afforded only to the Summit Parties.

PART II – STATEMENT OF POINTS IN ISSUE

12. At the AVO approval hearing, the Honourable Justice delivered reasons in chambers concluding, among other things[5]: i) section 36(6) of the *CCAA* does not apply to this application for a vesting order; ii) the factors under section 36(3) of the *CCAA* (and similar common law requirements) are met; iii) the transaction is not a rollup or akin to a rollup, nor an improper disclaimer and preference; and iv) the principles iterated in *Re White Birch Paper Holding Co*[6] regarding a "bitter bidder" are applicable and must be applied.

13. It is respectfully submitted the Honourable Justice erred in law by finding section 36(6) does not apply to the COPL Entities' application for the AVO, nor that the AVO sanctions an unlawful preference and a reordering of priorities.

14. It is respectfully submitted the Honourable Justice erred in fact and law, by approving a transaction that has effect of a rollup; by failing to correctly apply the principles set out in *Royal*

[5] Proceedings Transcript, Court Action No. 2401-03404, Calgary, Alberta, April 24, 2024 – **BPEC Appeal Book TAB 1**.

[6] *Re White Birch Paper Holding Co*., 2010 QCCS 4915, 2010 CarswellQue 10954 [*White Birch*] – **BPEC Table of Authorities TAB 2**.

Bank v Soundair Corp[7] and in *Third Eye Capital Corporation v Dianor Resources Inc*[8]; and by applying the principles of the case of *White Birch*, to the prejudice of BPEC.

15. It is respectfully submitted the Honourable Justice erred in fact, by drawing a conclusion, in absence of evidence, that BPEC's intention was to delay its objection and spoil the SISP.

16. It is respectfully submitted a stay of the AVO should be ordered, until after appeal.

PART III – STATEMENT OF ARGUMENT

17. This Honourable Court has recently iterated the four-part test for permission to appeal under section 13 of the *CCAA*[9]: i) is the appeal *prima facie* meritorious (in essence, not frivolous); ii) is the point on appeal of significance to the action; iii) is the point raised of significance to the practice; and iv) will the appeal unduly hinder the progress of the action.

18. Appellate intervention in *CCAA* proceedings is exercised sparingly. Decisions of supervising chambers judges are accorded deference. The applicant must point to an error of law, or a palpable and overriding error in fact or exercise of discretion.[10]

19. Gradations of deference should be avoided, as being unwieldy[11]; however, a relevant factor is that the Honourable Justice, in granting the AVO, did not have the advantage of history of these *CCAA* proceedings. As the Supreme Court reflected in *Callidus*, *CCAA* proceedings often entail a "unique supervisory role for judges", where "[f]rom beginning to end, each CCAA proceeding is overseen by a single supervising judge … [who] acquires extensive knowledge and

---

[7] *Royal Bank of Canada v Soundair Corp*, [1991] 83 DLR (4th) 76, 4 OR (3d) 1 (CA) [*Soundair*] – **BPEC Table of Authorities TAB 3**.

[8] *Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508 [*Third Eye*] – **BPEC Table of Authorities TAB 4**.

[9] *BMO Nesbitt Burns Inc. v. Bellatrix Exploration Ltd*, 2020 ABCA 264, at paras 7–8, 81 CBR (6th) 161 – **BPEC Table of Authorities TAB 5**.

[10] *Ibid* – **BPEC Table of Authorities TAB 5**.

[11] *Re Bellatrix Exploration Ltd*, 2021 ABCA 85, 2021 CarswellAlta 508 [*Bellatrix 2021*], at para 10 – **BPEC Table of Authorities TAB 6**.

insight into the stakeholder dynamics and the business realities …"[12] Appellate courts will consider this, or the lack of such advantage, in the context of an appeal.[13]

A. The Appeal is *Prima Facie* Meritorious

20. The appellant must demonstrate sufficient merit, before permission to appeal will be granted. "The standard is not onerous; the appeal must be arguable and not frivolous."[14]

21. It is submitted the errors of law and fact in the decision below are evident, clearly not frivolous and warrant reconsideration on appeal.

22. The Honourable Justice in chambers erred in law in finding that "subsection 36(6) [of the *CCAA*] really does not apply to this particular transaction and, if it did, … it's not apropos to this transaction because we are not dealing with cash in."[15]

23. It is respectfully submitted section 36(6) of the *CCAA* must apply. It is the section that authorizes the Court to approve the bulk sale of assets in a *CCAA* proceeding. There is no ambiguity in the statutory language, which provides inherent protection for affected creditors:

> (6) 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 favour of the creditor whose security, charge or other restriction is to be affected by the order.[16]

24. The Honourable Justice in chambers found cash consideration should be treated differently than credit; however, that is not the language or intent of the legislation. In fact, the legislation expressly rejects the premise that a vesting order can be made, wherein a security

---

[12] *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10, at para 47 [*Callidus*] – **BPEC Table of Authorities TAB 7**.

[13] *Re 8640025 Canada Inc*, 2017 BCCA 303, at para 41 – **BPEC Table of Authorities TAB 8**.

[14] *Bellatrix Exploration Ltd v BP Canada Energy Group ULC*, 2020 ABCA 178, at para 28 – **BPEC Table of Authorities TAB 9**.

[15] Proceedings Transcript, at page 30, lines 31-39 – **BPEC Appeal Book TAB 1**.

[16] *CCAA*, section 36(6), with emphasis added – **BPEC Table of Authorities TAB 1**.

interest of a creditor, who is otherwise entitled to recovery, can be stripped from the collateral. In such event that assets are cleansed of security, the consideration is held for creditors in exchange.

25. It is respectfully submitted the Honourable Justice further erred in law, by reordering the priorities among the senior secured, *pari passu* creditors. This has the same effect as a rollup, which is generally impermissible under section 11.2 of the *CCAA* and under Canadian law.[17] The AVO sanctions what is effectively a credit bid from a non-priority position, to effect repayment of creditors out of order of legal priorities.

26. In addition to the foregoing, errors in fact and law are reflected in the application of the *Soundair*[18] factors and the *Third Eye*[19] factors, which are applicable in addition to section 36(6) of the *CCAA*.[20] A sale process must be assessed with a retrospective view to these factors, as "it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process."[21]

27. The timeline for the steps in this proceeding are set out above, and inform the Court as to these factors. There was only 9 days between the SHPA being finalized and the LOI deadline. There was only a non-binding term sheet before that, attached as a schedule to the RSA at the time the SISP was approved. There was only one week's notice provided before AVO approval.

28. The non-binding term sheet was drafted such that a qualified bid could either exceed the Summit Parties' indebtedness (inclusive of both the interim financing and their portion of the *pari passu* senior debt), or a competing bidder could ask the Summit Parties to let them compete at a lesser price point. This would allow the Purchaser to "virtually possess a veto over the

---

[17] *Medipure Pharmaceuticals Inc (Re)*, 2022 BCSC 1771, at para 60 – **BPEC Table of Authorities TAB 10**.

[18] *Soundair*, *supra* note 7 – **BPEC Table of Authorities TAB 3**.

[19] *Third Eye*, *supra* note 8 – **BPEC Table of Authorities TAB 4**.

[20] *Re CannaPiece Group Inc*, 2023 ONSC 841 [*CannaPiece*] – **BPEC Table of Authorities TAB 11**.

[21] *Re Brainhunter Inc*, 2009 CanLII 72333 (ONSC), at paras 16-17 (with emphasis added) – **BPEC Table of Authorities TAB 12**.

liquidation of the company including a position tantamount to an ability to refuse to consent to its sale except on terms satisfactory to that party".[22] This would amount to "an absurdity", as was rejected by this Honourable Court in *Bellatrix 2021*.[23]

29. It is respectfully submitted errors of fact and law are evident in the failure of the Honourable Justice to fully consider the foregoing implications, under *Soundair* and *Third Eye*.

30. It is further submitted the Honourable Justice erred in fact, drawing an inference, absent any evidence, that BPEC's objection to the AVO was an intentional "11th hour" maneuver to "skuttle what has been going on for the past several months".[24]

31. Compressed timing is a common factor to many *CCAA* proceedings. This has been a very compressed proceeding. The Honourable Justice in chambers inquired as to the timing of BPEC's filed materials, and why BPEC failed to object to the approval of the SISP. Reasons were given in chambers.[25] It does not follow, in evidence or at all, that BPEC acted with positive intent to delay its opposition, so as to upset the proposed AVO in a tactical manner. It is submitted the inference drawn by the Honourable Justice, in that regard, reflects a manifest error.

32. In the same view, the Honourable Justice expressed that the *White Birch* principles, set out at paragraphs 37 to 42 of that case, are "completely on point with respect to what is before this Court". The Honourable Justice applied the principles of that case. It is submitted this is further erroneous.

33. In *White Birch*, the *CCAA* was commenced in February of 2010 and a SISP Order was made at the end of April. There was interest in the assets, a stalking horse purchase and sale

---

[22] *Bellatrix 2021*, *supra* note 11, at para 66 – **BPEC Table of Authorities TAB 6**.

[23] *Ibid* – **BPEC Table of Authorities TAB 6**.

[24] Proceedings Transcript, at page 31, lines 19-20 – **BPEC Appeal Book TAB 1**.

[25] Proceedings Transcript, at page 19, lines 2-8 – **BPEC Appeal Book TAB 1**.

agreement was entered in August, and a sale process culminated in September and was followed by an auction.

34. The purchase price, of the winning bidder, was $236 million. The competing offer, of the underbidder, was $235.5 million. The superior bid included a partial credit bid, of $78 million, whereas the underbidder was proposing to pay in cash.

35. Both the superior bidder and the underbidder comprised the senior debt position – the superior bidder was described as the "majority lender", within the first lien position, and the underbidder the "minority lender". The Court observed each group held different rights within the first lien position, and only the majority lender had the right, under its security, to credit bid.

36. The underbidder objected to the sale and sought an order directing sale to itself, or a new auction. The Court rejected the argument of the underbidder, observing the underbidder had been heavily involved in the sale process, had been part of "various preliminary steps", and was seeking to spoil the process as a "bitter bidder".[26]

37. That situation is entirely distinct from the points of law and fact raised by BPEC in the case at bar. BPEC is not a bitter bidder. There is no evidence at all of spoilage. BPEC faces significant prejudice that has arisen within a severely truncated restructuring timeline.

B. Significance to the Action and Significance to the Practice

38. Issues significant to the practice, and by consequence significant to this action, exist in the effective disclaimer of BPEC's security interest and priority rights, through avoiding the legislative requirement under the *CCAA* that a creditor vested out of its collateral must receive consideration by vesting into the proceeds. There is no more important stakeholder, in a *CCAA* restructuring, than a senior secured security position, sitting on the fulcrum.[27]

---

[26] *White Birch*, *supra* note 6, at para 29 – **BPEC Table of Authorities TAB 2**.

[27] *Re Windsor Machine & Stamping Limited*, 2009 CanLII 39771 (ONSC), at para 43 **– BPEC Table of Authorities TAB 13**.

39. In this regard, two issues are particularly important to Canadian insolvency practice. First, the appellant is not aware of any case law that supports a conclusion that section 36(6) of the *CCAA* does not apply to a sale or disposition of property for consideration other than cash, particularly where the consideration is partially comprised of an assumption of debt that is contrary to applicable priorities. This is a novel determination and creates potential for avoidance of the protections that are enumerated for secured creditors in the *CCAA*.

40. Second, the decision at issue has significant implication for parties engaged in secured financing in Canada. The AVO simply dismisses the priority rights of BPEC. Whereas cash is clearly divisible among creditors, the assumption of pre-filing debt is not. The indivisibility of the consideration to be paid for the assets operates to the exclusion of BPEC, in a scenario in which it would otherwise be entitled to substantial recovery. This creates material uncertainty for secured creditors in Canada, and invites potential for mischief in *CCAA* proceedings.

C. The Appeal Will Not Unduly Hinder the Progress of this Action

41. The requested appeal will not unduly hinder the further progress of this action. This is already a liquidating proceeding. If the debtors' assets are now disposed of, or later by this or any other process, it is the same outcome, with no alternative path to emergence as a restructured going concern.

42. The sale to Purchaser has an "Outside Date", in the SHPA, of August 31, 2024. The SHPA was signed on April 8, 2024, so contemplates a nearly 5-month window to complete.

43. The only affected stakeholders are the senior secured creditors, BPEC and the Summit Parties. No other creditors will receive funds from any sale (as there was no participation in the SISP in excess of the stalking horse floor). This action can only "progress" if advancing in some fashion for the benefit of the only two impacted stakeholders. Movement to the advantage of one stakeholder, and prejudice of the other, is not progress.

44. The debtors' cash flows indicate a positive cash position out to at least the first[28] or the second[29] week of June. It is unclear if additional committed funds remain available under the interim financing.

D. Interim Stay of the AVO

45. The tri-partite test is well-known for staying an Order pending appeal: i) is there is a serious question to be tried (or an arguable issue that is not frivolous or vexatious); ii) will there be irreparable harm if the stay is not granted; iii) does the balance of convenience favour granting the stay? [30]

46. If permission to appeal is granted, it is respectfully submitted the test for stay of the AVO would inherently be met. The same factors as warrant leave to appeal, support the interim stay.

47. It is submitted the requested appeal will be heard on an accelerated basis, until which time the parties will remain in *status quo*. Preservation of *status quo* is precisely within the spirit and purpose of the *CCAA*.

48. By contrast, a lack of stay gives rise to uncertainty, mootness and irreparable harm.

PART V – RELIEF REQUESTED

49. BPEC respectfully requests permission to appeal the Decision, and a stay of the AVO until such time as any appeal may be heard and determined.

---

[28] First Report of the Monitor, dated March 15, 2024, at page 38 – **BPEC Appeal Book TAB 5**.

[29] Second Report, *supra* note 2, at page 67 – **BPEC Appeal Book TAB 6**.

[30] *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 304 [*DGDP-BC Holdings*], at para 16 – **BPEC Table of Authorities TAB 14**.

TABLE OF AUTHORITIES

TAB	CONTENTS
1	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36.
2	*Re White Birch Paper Holding Co*, 2010 QCCS 4915.
3	*Royal Bank of Canada v Soundair Corp*, [1991] 83 DLR (4th) 76, 4 OR (3d) 1 (ONCA).
4	*Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508.
5	*BMO Nesbitt Burns Inc. v. Bellatrix Exploration Ltd*, 2020 ABCA 264.
6	*Re Bellatrix Exploration Ltd*, 2021 ABCA 85.
7	*9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10.
8	*Re 8640025 Canada Inc*, 2017 BCCA 303.
9	*Bellatrix Exploration Ltd v BP Canada Energy Group ULC*, 2020 ABCA 178.
10	*Medipure Pharmaceuticals Inc (Re)*, 2022 BCSC 1771.
11	*Re CannaPiece Group Inc*, 2023 ONSC 841
12	*Re Brainhunter Inc*, 2009 CarswellOnt CanLII 72333 (ONSC).
13	*Re Windsor Machine & Stamping Limited*, 2009 CanLII 39771 (ONSC).
14	*DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 304.