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COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	2401-0132AC
TRIAL COURT FILE NUMBER:	2401-03404
REGISTRY OFFICE:	CALGARY
APPLICANT:	BP ENERGY COMPANY
STATUS ON APPEAL:	PROPOSED APPELLANT
STATUS ON APPLICATION:	APPLICANT
RESPONDENTS:	CANADIAN OVERSEAS PETROLEUM LIMITED AND THOSE ENTITIES LISTED IN SCHEDULE "A"
STATUS ON APPEAL:	PROPOSED RESPONDENTS
STATUS ON APPLICATION:	RESPONDENTS
DOCUMENT:	**MEMORANDUM OF ARGUMENT OF THE RESPONDENTS (Opposing Application for Permission to Appeal)**

Registrar's Stamp
REGISTRAR
FILED
24 May 2024
AM
Court of Appeal of Alberta

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PART I - INTRODUCTION

1. Canadian Overseas Petroleum Limited, ("**COPL**"), together with the other parties listed in Schedule "A" (collectively, the "**Respondents**" and together with certain affiliates, the "**COPL Group**") oppose BP Energy Company ("**BP**")'s application for permission to appeal (the "**Application**") the Approval and Vesting Order dated April 24, 2022 (the "**AVO**") granted by Justice Yamauchi (the "**Chambers Judge**") under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**").

2. The AVO, which approved the sale of the COPL Group's business pursuant to a Stalking Horse Purchase Agreement (as defined below), represents the successful culmination of these CCAA proceedings and a going-concern outcome for the COPL Group. The sale was conducted in accordance with a court-approved sales and investment solicitation process (the "**SISP**"). The details of the SISP were known in advance of its approval, including by BP, who did not object. Nor did BP raise any objection to any of the terms of the SISP at the SISP approval hearing or seek to appeal the approval of the SISP, but instead stayed silent while the SISP was conducted in accordance with the terms approved by the CCAA court.

3. BP first expressed its opposition to the SISP and the Stalking Horse Purchase Agreement at the conclusion of the SISP, shortly before the motion for approving the AVO (the "**AVO Motion**"). At the AVO Motion, BP argued that the proposed sale violated s. 36(6) of the CCAA and was akin to a "roll-up". BP further attacked certain elements of the SISP that had been approved by the Court over a month prior to the AVO Motion, including its timelines and bidding processes. The Chambers Judge rejected BP's arguments, finding that they were devoid of legal merit and had been brought much too late in the game.

4. BP now brings the Application based on the same arguments. By adopting an extraordinary interpretation of s. 36(6) which is entirely unsupported by either existing case law or the plain text of the CCAA, as well as seeking to redefine the concept of a "roll-up" and extend s. 11.2(1) of the CCAA to the approval of a sale transaction, BP seeks to derail the entire restructuring of the COPL Group by way of a hopeless and meritless appeal. The Respondents submit that this Application is devoid of merit, that the well-established test for leave to appeal a decision under the CCAA is not satisfied, and that this Application should therefore be denied.

PART II - FACTS

A. Background to the CCAA Proceedings

5. The COPL Group has two significant secured debts which rank *pari passu*: (i) a senior secured loan agreement (the "**Senior Credit Agreement**") between COPL America and certain lender parties (collectively, the "**Lender**"); and (ii) a master risk management agreement (the "**BP Swap Counterparty Master Agreement**") between COPL America and BP.[1]

6. In early 2024, the COPL Group began exploring a restructuring of its business. Accordingly, both the Lender and BP were invited to participate in a proposed DIP Loan at approximately their percentage of the senior secured *pari passu* debt. BP was informed that its debt would likely be impaired if it did not participate in the proposed DIP. While the Lender agreed act as DIP Lender, BP ultimately declined to participate.[2]

7. On March 7, 2024, the COPL Group and the Lender executed a restructuring support agreement (the "**Restructuring Support Agreement**"), which appended the "**Restructuring Term Sheet**." The Restructuring Term Sheet set out the key terms of the SISP and the stalking horse purchase agreement between the Lender and the COPL Group (the "**Stalking Horse Purchase Agreement**"), which would take the form of a credit bid of the DIP Loan. In addition, certain liabilities of the COPL Group would be assumed, including: (i) liabilities under the Senior Credit Agreement; and (ii) various unsecured liabilities, such as liabilities under contracts which were to be assigned to the Stalking Horse Purchaser (the "**Assumed Liabilities**"). [3]

B. The Initial Order and the SISP Order

8. On March 8, 2024, the Respondents obtained the "**Initial Order.**" At that time, the Respondents indicated their intention to seek an order approving the SISP,[4] and attached a full copy of the Restructuring Support Agreement and the Restructuring Term Sheet.[5] The materials

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1 Affidavit of Peter Kravitz, affirmed March 7, 2024, at paras. 76, 84-86 [First Kravitz Affidavit] – **BPEC Appeal Book TAB 7**. Capitalized terms in this factum not otherwise defined have the same meaning as in the Kravitz Affidavit.

2 First Kravitz Affidavit, at paras. 144-145 – **BPEC Appeal Book TAB 7**.

3 First Kravitz Affidavit, at paras. 146-147 – **BPEC Appeal Book TAB 7**; Affidavit of Peter Kravitz, affirmed April 18, 2024, at p. 21 [Third Kravitz Affidavit] – **COPL Appeal Book TAB 1**.

4 First Kravitz Affidavit, at para. 17 – **BPEC Appeal Book TAB 7**.

5 First Kravitz Affidavit, Exhibit "P" – **BPEC Appeal Book TAB 7**.

contained all details of the SISP and the Stalking Horse Purchase Agreement, including the proposed timeline and the nature of the consideration to be provided by the Stalking Horse Purchaser. BP was served with the application record in support of the Initial Order.

9. At the comeback hearing held on March 19, 2024, the Court granted (among other things) an order approving the proposed SISP (the "**SISP Order**"), including the SISP timeline and the structure of the Stalking Horse Purchase Agreement. BP was again served with the application record in support of the SISP Order. No parties opposed the SISP Order or sought to appeal it.

10. On April 8, 2024, the COPL Group and the Stalking Horse Purchaser entered into the Stalking Horse Purchase Agreement. The Stalking Horse Purchase Agreement was served on the CCAA service list, which included BP, on April 9, 2024.[6] No competing bids were submitted, and the Stalking Horse Bid was deemed to be the successful bid pursuant to the SISP.

C. The Decision Below

11. On April 24, 2024, the Debtors brought a motion (the "**AVO Motion**") seeking the AVO, approval of the Stalking Horse Purchase Agreement, and authorization for the Applicants to execute the transaction contemplated within (the "**Transaction**"). The Debtors gave notice of the AVO Motion to all parties on the service list (including BP) on April 17, 2024.

12. BP first indicated an intention to oppose the AVO Motion on April 18, 2024, and BP's materials opposing the AVO Motion were received at 5:11 p.m. on April 23, 2024, the evening before the AVO Motion. BP objected on a number of grounds that it raises again in this Application, all of which were rejected by the Chambers Judge, who held that:

(a) Section 36(6) of the CCAA was not engaged in respect of the Transaction, as a credit bid does not generate "proceeds" to which security could attach.[7]

(b) The Transaction was not a roll-up, as it did not alter the priority among the COPL Group's creditors and did not secure pre-filing amounts owing to the Lender.[8]

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6 Third Kravitz Affidavit at paras. 24-25 – **COPL Appeal Book TAB 1**.

7 Proceedings Transcript, Court Action No. 2401-03404, Calgary, Alberta, April 24, 2024, at p. 30, lines 30-41 [Proceedings Transcript] – **BPEC Appeal Book TAB 1**.

8 Proceedings Transcript, at p. 30, lines 12-17 – **BPEC Appeal Book TAB 1**.

(c) Having failed to raise any objections to the SISP at the appropriate times, BP should not be permitted to lie in the weeds and then swoop in at the "11th hour" and object to elements of the SISP and Transaction which had already been approved as part of the SISP Order. [9]

13. As a result, the Chambers Judge approved the AVO substantially in the form requested.

PART III - LAW AND ARGUMENT

14. The sole issue is whether the Application for leave to appeal should be granted.

A. Test for Leave to Appeal from a CCAA Order

15. An order made under the CCAA may only be appealed with leave.[10] Leave to appeal should be granted only sparingly,[11] owing to the "real time dynamic" of CCAA proceedings and the "generally discretionary character" of the orders made within them.[12] Decisions of a chambers judge are accorded considerable deference, and are interfered with only where the chambers judge acted unreasonably, erred in principle, or made a manifest error.[13]

16. Contrary to BP's submissions, this deference applies regardless of whether the Chambers Judge had handled previous steps in the CCAA process. This Court rejected a similar argument in *Bellatrix*, noting that "gradations of deference" should generally be resisted, especially where the chambers judge has extensive experience in CCAA matters.[14]

17. In determining whether leave should be granted, the court applies the following test:

(a) Whether the proposed appeal is prima facie meritorious or frivolous;

(b) Whether the points on the proposed appeal are of significance to the practice;

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9 Proceedings Transcript, at p. 29, lines 30-41; p. 30 lines 1-10, 19-29; p. 31, lines 16-28 – **BPEC Appeal Book TAB 1**.
10 CCAA, at s. 13.
11 See, i.e., *BMO Nesbitt Burns Inc. v. Bellatrix Exploration Ltd*., 2020 ABCA 264 at para. 8 [*BMO Nesbitt Burns*].
12 *Essar Steel Algoma Inc. (Re),* 2017 ONCA 478 at para. 19.
13 *BMO Nesbitt Burns*, at para. 8; *Repsol Canada Energy Partnership v. Delphi Energy Corp*., 2020 ABCA 364 at para. 9 [*Delphi Energy*].
14 *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85 at para. 10 [*Bellatrix*].

(c) Whether the points of the appeal are of significance to the action; and

(d) Whether the proposed appeal will unduly hinder progress of the action. [15]

B. The Appeal is not Prima Facie Meritorious

18. An applicant must demonstrate that the appeal is sufficiently meritorious to justify delaying the ultimate disposition of the issue under review.[16] This initial screening mechanism is designed to reduce the likelihood that an appeal with "very low prospects of success" will enter the appeal stream.[17] In order for an appeal to be prima facie meritorious, there must be:

> […] an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "prima facie" meritorious.[18]

19. BP's submissions reveal no error of law or palpable or overriding error of fact.

(a) The Chambers Judge did not Err in Finding that s. 36(6) was not Engaged

20. BP argues that s. 36(6) "must apply" to the Transaction, as it is the provision which authorizes the court to approve the bulk sale of assets in a CCAA proceeding.[19] This submission misrepresents both the scope of s. 36(6) and the nature of the Chambers Judge's findings.

21. Section 36(6) of the CCAA permits the court to authorize sales or dispositions free and clear of any prior charge. If a sale generates "proceeds", those proceeds will be subject to an equivalent charge. This requirement is designed to ensure that any such proceeds are distributed to creditors in accordance with pre-existing priorities. BP argues that the Stalking Horse Purchaser's assumption of the Assumed Liabilities constitutes "proceeds" within the meaning of s. 36(6). Accordingly, BP argues that the requirement to attach "proceeds" under s. 36(6) means that debts and other obligations cannot be assumed as part of a going-concern sale without all

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15 *Bellatrix*, at para. 9.
16 *BMO Nesbitt Burns*, at para. 14.
17 *Mudrick Capital Management LP v. Lightstream Resources Ltd.*, 2016 ABCA 401 at para. 50 [*Lightstream Resources*].
18 *Canadian Airlines Corp. (Re)*, 2000 ABCA 149 at para. 35 [*Canadian Airlines*].
19 Memorandum of Law of BP Energy Company, at para. 23.

higher-ranking creditors first being fully paid out (or in the case of *pari passu* creditors, paid out in proportion to the respective debts).[20]

22. The Chambers Judge rejected this argument on the basis that s. 36(6) does not apply to non-cash consideration, including the assumption of the Assumed Liabilities:

> If there is money in, certainly the interests of secured creditors have to be recognized. This is not a money in process. This is not a transaction that reflects it and therefore the subsection 36(6) really does not apply to this particular transaction […] so it's not apropos to this transaction because we're not dealing with cash in. This is a credit and it's something completely different from that and there's probably good reason why there is very little case law with respect to this.[21]

23. The Chambers Judge did not find that the Transaction was exempt from s. 36(6) generally; rather, the Chambers Judge simply found that s. 36(6) was not engaged on the facts –there were no "proceeds" to attach. This finding reveals no errors of law.

24. BP refers to no case law in support of this expansive reading of s. 36(6) because there is none. This is hardly surprising. BP's novel conception of s. 36(6) would fundamentally upend going-concern CCAA sales, which frequently involve credit-bidding (by definition, a credit bid generates no cash proceeds) and/or the purchaser assuming certain of the debtor's unsecured debts. If, as BP asserts, debts and other obligations cannot be assumed without all higher-ranking creditors first being fully paid out, a purchaser could never assume unsecured trade contracts that are necessary for the operation of a business without assuming or paying out all secured debt. Furthermore, BP's assertion that *pari passu* debt must all be assumed or assumed *pro rata* is equally problematic, as it would mean a buyer must assume or repay <u>all</u> unsecured debt in order for it to be able to assume any individual unsecured obligation in its entirety. For example, a buyer could not fully assume an employee's contract (and the underlying liabilities) as part of a going concern acquisition without paying or assuming all of a debtor's unsecured debt, which may include significant funded unsecured debt. Essentially, BP's interpretation would preclude any going concern sale transaction (i.e., one that requires the retention of employees and/or unsecured

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[20] Memorandum of Law of BP Energy Company, at paras. 23-24.
[21] Proceedings Transcript, p. 30, lines 32-41 – **BPEC Appeal Book TAB 1**.

trade contracts) that does not see all of a debtor's creditors repaid in full, which is absurd and would largely preclude going concern sale transactions in the insolvency context.

25. The complete failure of BP to substantiate its extraordinary interpretation of s. 36(6) demonstrates its fundamental lack of merit and, on this basis alone, the test for leave to appeal is not satisfied. In *Bellatrix*, this Court rejected a similarly unsupported motion for leave to appeal because the applicant (BP) had cited no authority for its extraordinary propositions which were "fundamentally based on legal fictions."[22] Similarly, in *North American Tungsten Corp. (Re)*, the BC Court of Appeal rejected a motion for leave to appeal where there was no arguable basis for the applicants' submissions, "either in the language of the statute, or the jurisprudence."[23]

(b) The Transaction is not a Roll-Up

26. The Chambers Judge correctly held that the Transaction did not re-order priority among the secured creditors. The Transaction involved a credit bid of the DIP Loan, which is secured by a court-ordered super-priority charge ranking ahead of all other secured obligations, including those owed to BP. Having refused the invitation to participate in DIP financing, BP has no cause to complain when the DIP Lender – which provided the financing that allowed the COPL Group to continue operating during these CCAA proceedings, including to conduct the SISP – is permitted to credit bid in respect of amounts advanced under the DIP. No superior (or any) bid was received in the SISP that would have provided proceeds to satisfy lower ranking secured claims, such as the claims of BP in relation to its pre-filing secured indebtedness.

27. Further, the Transaction does not in any way resemble a roll-up. A so-called roll-up is precluded under s. 11.2(1) of the CCAA, which prohibits an interim financing or DIP charge from securing pre-filing obligations. The Transaction does not involve the granting of any charge, let alone a charge securing pre-filing obligations. The DIP Loan was approved by the CCAA Court at the time of the Initial Order, at which time the Court was satisfied that it does not secure any pre-filing indebtedness of the Lender. BP did not object to or appeal this approval.

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22 *Bellatrix*, at para. 62.

23 *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 426 at para. 40 [*North American Tungsten*].

28. Section 11.2(1) of the CCAA does not apply here. The scope of the credit bid is strictly limited to the DIP, which did not include a roll-up. This is a matter of the granting of the DIP charge, which occurred at the application for the Initial Order and does not secure any pre-filing debt. The Chambers Judge correctly found that "on a de facto basis, [the Transaction] is not a roll-up, it is something completely different."[24]

(c) The Chambers Judge did not Err in Applying the *Soundair* Factors

29. BP argues that the CCAA judge failed to consider "whether there has been any unfairness in the working out of the sales process," as required under *Soundair*.[25] BP takes issue with the SISP timeline and the method for determining whether bids received were "qualified bids."

30. This argument should be rejected as an improper collateral attack on the SISP Order. These features of the SISP were supported by Monitor and approved, without opposition, by the CCAA Court as part of the SISP Order. As noted above, BP was well-aware of these details of the SISP well before the date of the SISP Order, and entirely failed to object.

31. The *Soundair* criteria are based on the "integrity of the process," and courts must therefore be wary of reopening a settled bidding process.[26] It is well established that once a sale process is approved by a court, that process should be honoured absent extraordinary circumstances,[27] and that where a sale process has been approved by the court without opposition, and has not been subsequently appealed, the details of that process, "including all its steps and phases, its appropriateness and efficiency, cannot be challenged."[28]

32. As the court noted in *White Birch*, a party cannot simply lie in the weeds, waiting for a sales process to play out before objecting to details which were settled in the SISP:

> […] this process was put in place without any opposition whatsoever. It is not enough to appear before a Court and say: "Well, we've got nothing to say now. We may have something to say later" and then, use this argument to reopen the entire process once the result is known and the result turns out to be not as satisfactory as it may have been expected. In other words, silence sometimes may

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24 Proceedings Transcript, p. 30, lines 13-17 – **BPEC Appeal Book TAB 1**.
25 Memorandum of Law of BP Energy Company, at paras. 26-28.
26 *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742 at para. 26
27 *Grant Forest Products Inc. (Re)*, 2010 ONSC 1846 at para. 29
28 *Aveos Fleet Performance Inc./Aveos performance aéronautique inc. (arrangement relatif à)*, 2012 QCCS 4074 at para. 20.

> be equivalent to acquiescence. All stakeholders knew what to expect before walking into the auction room.[29]

33. The Chambers Judge therefore committed no error in concluding, that "this is a situation where the BP Group was aware of what was going on and at the 11th hour they are seeking to skuttle what has been going on for the last several months."[30] The Chambers Judge understandably refused to entertain BP's late-breaking objection on the grounds of fairness. This exercise of discretion is deserving of a high level of deference.

C. The Appeal is of No Significance to the Practice or the Proceeding

34. The proposed appeal is of no significance to the practice or the proceeding. As this Court noted in respect of a similarly unsupported appeal in *Bellatrix*, a meritless appeal can be of no significance to the profession, regardless of its novelty: "the grounds proposed are novel because they lack merit. That factor favors dismissal of the motion."[31] Similarly, this Court in *Mudrick* held that where an argument is devoid of merit, the lack of merit "overwhelms" any arguments regarding the significance of the appeal to the practice or the proceeding.[32] As the Chambers Judge correctly noted in dismissing BP's argument as meritless, there is a "very good reason why there is very little case law" addressing BP's theories.[33]

D. The Appeal would Unduly Hinder the COPL Group's Restructuring

35. Even where the other criteria for leave to appeal are satisfied (which they are not in this case), the court may still deny leave where the appeal would unduly hinder the progress of the CCAA proceedings. This element of the test is rooted is in the purpose of the CCAA, the role of the supervising judge, the need for a timely and orderly resolution of the matter, and the effect on the interests of all parties.[34] Determining whether an appeal will unduly hinder an action involves a consideration of whether granting leave will "undermine restructuring efforts" or otherwise "adversely effect the debtors' ability to restructure their affairs."[35]

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29 *White Birch Paper Holding Company (Arrangement relatif à),* 2010 QCCS 4915 at para. 40.
30 Proceedings Transcript, p. 30, lines 13-17 – **BPEC Appeal Book TAB 1**.
31 *Bellatrix*, at para. 77.
32 *Mudrick*, at para. 62.
33 Proceedings Transcript, p. 30, lines 32-41 – **BPEC Appeal Book TAB 1**.
34 *Canadian Airlines*, at para. 42
35 *North American Tungsten*, at paras. 42, 44.

36. The onus is on BP to produce evidence demonstrating that granting the appeal would not unduly hinder the action.[36] BP has failed to discharge this onus. To the contrary, the COPL Group is currently expected to nearly run out of cash on or around June 8, 2024,[37] at which point the business will no longer be able to continue operating or close the Transaction. Granting leave to appeal – thereby delaying the closing past the date on which the COPL Group will run out of cash – will put the entire Transaction at risk, leave the COPL Group with no cash to operate, and effectively destroy its business.

PART IV - RELIEF SOUGHT

37. For the foregoing reasons, the Respondents respectfully submit that leave to appeal should be denied and this Application dismissed with costs awarded to the Respondents. Given the imminent liquidity issues outlined above, the Respondents respectfully request that a decision on this application be rendered as quickly as is reasonably possible in the circumstances.

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[36] *Canadian Airlines*, at para. 45.

[37] See Second Report of the Monitor dated April 19, 2024, at para. 6.0.2 – **BPEC Appeal Book TAB 6**.

TABLE OF AUTHORITIES

SCHEDULE "A"

Respondents

Canadian Overseas Petroleum Limited

COPL America Holding Inc.

COPL America Inc.

Canadian Overseas Petroleum (UK) Limited

Canadian Overseas Petroleum (Ontario) Limited

COPL Technical Services Limited

Canadian Overseas Petroleum (Bermuda Holdings) Limited

Canadian Overseas Petroleum (Bermuda) Limited

Southwestern Production Corporation

Atomic Oil and Gas LLC

Pipeco LLC