

In the Court of Appeal of Alberta

Citation: Henenghaixin Corp v Long Run Exploration Ltd, 2025 ABCA 58

Date: 20250220

Docket: 2401-0341AC

Registry: Calgary

Between:

Henenghaixin Corp.

Applicant

- and -

Long Run Exploration Ltd. and Calgary Sinoenergy Investment Corp.

Respondents

**Reasons for Decision of
The Honourable Justice Jo'Anne Streckfuss**

Application for Leave to Appeal

**Reasons for Decision of
The Honourable Justice Jo'Anne Strekaf**

Overview

[1] Henenghaixin Corp (HCorp) seeks leave to appeal a decision rendered in a proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (CCAA). The decision approved a stalking horse bid in the form of a subscription agreement and a Reverse Vesting Order (RVO) for the shares of Long Run Exploration Ltd that would allow Long Run to operate under new owners with select retained liabilities (the transaction). Any liability not explicitly retained would be transferred and have recourse only against a creditor trust, which is not anticipated to provide any recovery.

[2] One of the liabilities to be transferred is HCorp's claim to a proprietary constructive trust against the assets of Long Run. HCorp's claim arises out of a lawsuit commenced by it in 2020 alleging that certain individuals induced an improper transfer of HCorp's funds to either Long Run or its parent company, Calgary Sinoenergy Investment Corp, by fraud or misrepresentation.

[3] HCorp sought to have the transaction amended to have its claim designated as a retained liability to allow for its preservation and adjudication. The CCAA justice declined to vary the transaction as requested by HCorp and granted approval of the subscription agreement and RVO as presented to the court: *Long Run Exploration Ltd (Re)*, 2024 ABKB 710.

[4] HCorp seeks leave to appeal the decision pursuant to s 13 of the CCAA. The application is opposed by FTI Consulting Canada Inc, the court-appointed Monitor of Long Run and Sinoenergy, and China Construction Bank Toronto Branch, as Agent for certain lenders of Long Run.

[5] The application is dismissed.

Decision of the CCAA justice

[6] In approving the transaction, the CCAA justice applied the principles set out in *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 59 and *Harte Gold Corp (Re)*, 2022 ONSC 653 at para 32 with respect to the approval of an RVO. He noted that judicial discretion must be exercised in furtherance of the CCAA's purposes and be guided by considerations of appropriateness, good faith and due diligence.

[7] The CCAA justice accepted the Monitor's submissions that:

- (a) the RVO was necessary as Long Run operates in a highly regulated environment and an RVO would provide certain attributes that would have been lost with a traditional vesting order;
- (b) the RVO provides more benefits to Long Run's stakeholders than realization under a bankruptcy;
- (c) the RVO would not make any stakeholder worse off as the prospect of zero recovery for some creditors was a function of the debtor's insolvency, not the RVO process; and
- (d) the stalking horse bid was the only qualified bid which represented the best price for the assets and the only proposal that enabled Long Run to continue as a going concern.

[8] As the CCAA justice noted, HCorp's objection was not to the transaction or the RVO in principle, but rather to categorizing its claim against the assets of Long Run as a transferred liability and thereby extinguishing it. HCorp argued that it has a *prima facie* case for unjust enrichment and a claim for constructive trust, and that its claim must be preserved so that it can be adjudicated on the merits. Accordingly, HCorp requested that the transaction be amended to designate its claim as a retained liability.

[9] In assessing HCorp's objection, the CCAA justice held it was necessary to assess the strength of HCorp's claim, as "mere assertion of a constructive trust claim should not be enough to derail or frustrate CCAA proceedings": para 50. Relying on the decision of the Supreme Court of Canada in *Montreal (City) v Deloitte Restructuring Inc*, 2021 SCC 53, as applied in *Laurentian University of Sudbury*, 2022 ONSC 3013, he concluded that HCorp must establish its claim to the standard of proof of a balance of probabilities based on the record presented to the court. Having thoroughly reviewed the evidence presented, the CCAA justice concluded the requisite standard was not met and the circumstances did not give rise to a remedy of constructive trust. He dismissed HCorp's objection.

[10] The CCAA justice concluded that approval of the RVO was beneficial to Long Run's secured creditors, contractual parties, the municipalities to which taxes are owed, and Long Run's employees and suppliers. He accepted that the purchaser indicated it would not proceed with a transaction that was different than that which was presented, which he characterized as "a reasonable position to take". He concluded that "the equities favour approval of the Subscription Agreement/RVO in the present form, without amendment". He further found that the integrity of the CCAA regime would be compromised if a claimant, alleging fraud or misrepresentation but unable to establish that claim on a balance of probabilities, could stop a CCAA proceeding in its tracks.

Test for leave to appeal

[11] Leave to appeal is required pursuant to section 13 of the CCAA. The applicant must demonstrate “serious and arguable grounds that are of real and significant interest to the parties” (*BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264 at para 7), considering the following criteria:

- a) whether the issues raised by the proposed appeal are significant to the practice;
- b) whether the issues are of significance to the action itself;
- c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- d) whether the appeal will unduly hinder the progress of the action.

[12] An appellate court should “exercise its power sparingly, when asked to intervene in issues which arise in CCAA proceedings”: *Duke Energy Marketing Limited Partnership v Blue Range Resource Corporation*, 1999 ABCA 255 at para 3. The decisions of judges supervising CCAA proceedings are accorded a high degree of deference and will be interfered with only if the judge acted unreasonably, erred in principle, or made a manifest error: *Royal Bank of Canada v. Fracmaster Ltd.*, 1999 ABCA 178 at para 3; *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 53.

Should leave to appeal be granted?

[13] HCorp raises the following issues on its application for leave to appeal the decision of the CCAA justice: that the justice (i) determined an issue (whether HCorp’s claim was valid) that was not before him, (ii) applied the incorrect test in assessing the strength of HCorp’s claim, and (iii) ignored and misapprehended key evidence.

[14] HCorp’s first submission, that the CCAA justice effectively determined HCorp’s claim on the merits when adjudication of the claim had not been sought, is difficult to reconcile with the reasons for decision. The CCAA justice expressly stated that all parties were agreeable to having him consider the merits of the claim for the purpose of assessing HCorp’s objection: para 47. Where the parties differed was with respect to the applicable standard of proof.

[15] As noted above, the CCAA justice had concluded that some threshold standard in terms of strength of the claim must be met because mere assertion of a constructive trust cannot be enough to frustrate CCAA proceedings. HCorp does not take issue with that conclusion. The Monitor argued that proof on a balance of probabilities was necessary to control unmeritorious claims, while HCorp submitted that the standard of *prima facie* case should apply.

[16] The CCAA justice applied the standard suggested by the Monitor. In doing so, he was not purporting to make a final decision on HCorp's claim, but to determine whether HCorp had succeeded, on the evidence placed before the court, in establishing its claim on a balance of probabilities such that it should be treated differently in the CCAA process. I see no merit in the first ground proposed by HCorp and would not grant leave to appeal on this issue.

[17] The main issue on which HCorp seeks leave to appeal is the appropriate standard of proof that must be met by a creditor with a contingent priority claim when approval of a transaction is sought in a CCAA proceeding. HCorp submits this is a novel issue for which leave to appeal to a panel of the court should be granted. The Monitor and the Agent submit that the CCAA justice applied existing law and the proposed appeal raises no point of law that has not already been addressed by an appellate court.

[18] The first factor of the test for leave to appeal, significance to the practice, is interpreted broadly and can be influenced by whether there is appellate authority on the question proposed to be considered on appeal: *Resurgence Asset Management LLC v Canadian Airlines Corporation*, 2000 ABCA 149 at para 33; *Repsol Canada Energy Partnership v Delphi Energy Corp*, 2020 ABCA 364 at para 10.

[19] The CCAA justice considered HCorp's claim that certain individuals, while acting as directors and officers of Long Run and Sinoenergy, improperly induced the transfer of \$44 million of HCorp funds to either Long Run or Sinoenergy by fraud or misrepresentation. He recognized that he needed to engage in a form of summary assessment of that claim, as a constructive trust claimant such as HCorp had to meet "some kind of threshold on the merits". He applied the balance of probabilities threshold, which was approved by the Supreme Court of Canada in *Montreal (City)* to the assessment of claims of fraud and misrepresentation in the context of s 19(2) of the CCAA. The same threshold was adopted in *Laurentian University of Sudbury* for consideration of whether a claim should be assessed outside the process established in a CCAA proceeding.

[20] Having adopted the threshold applied in those authorities, the CCAA justice reviewed the evidence before him and concluded that HCorp had not met the threshold. He went on to find, on the evidence, that this was not an appropriate case for a constructive trust.

[21] HCorp submits the cases referenced by the CCAA justice in applying the balance of probabilities standard are distinguishable and that he erred in relying upon them. I am satisfied that the CCAA justice applied existing law and there is no legal error apparent in his reasons. In the circumstances, there is no point of law raised that is of significance to the practice such that it warrants consideration by this Court.

[22] Similarly, I do not find that the issue on appeal proposed by HCorp is *prima facie* meritorious. A proposed appeal is *prima facie* meritorious where, on first impression, there appears to be "an error in principle of law or a palpable and overriding error of fact": *Resurgence* at para

35. I can discern no apparent error in principle of law in the CCAA justice's approach to the applicable threshold for assessment of HCorp's claim.

[23] HCorp also argues that, in assessing HCorp's claim, the CCAA justice misapprehended the evidence of fraud that had been presented to the court. This proposed issue is particular to the evidence and facts before the court in this proceeding, and HCorp has not demonstrated how it raises an issue of general significance to the practice.

[24] Moreover, I do not find an appeal from the CCAA justice's assessment of the evidence presented of HCorp's claim to be *prima facie* meritorious. The CCAA justice undertook a detailed review of the evidence of fraud and misrepresentation that had been presented to the court. He accepted that the evidence lends direct support to a case of fraud or misrepresentation against individual defendants, but that it was not clear on the record that they were acting in their capacity as directors of Long Run. Ultimately, he determined that the evidence presented did not satisfy the threshold of a balance of probabilities.

[25] "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": *Resurgence* at para 35. Challenges to a CCAA justice's assessment of the evidence and his exercise of discretion are reviewable on a deferential standard. HCorp has not demonstrated a *prima facie* appeal with respect to the CCAA justice's assessment of the evidence, his approach to HCorp's claim, or his balancing of the interests and the effects of the plan on all stakeholders.

[26] With respect to the second factor for leave to appeal, whether the issues raised are of significance to the parties and the proceeding as a whole, I am satisfied that factor has been satisfied in this case.

[27] The final factor, whether the appeal would unduly hinder the progress of the action, considers whether the delay involved in prosecuting, hearing and deciding the appeal will be so long as to unduly impede the ultimate resolution of the matter. The purpose of the CCAA is at the root of this factor. The court must consider 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 pending a decision on appeal: *Resurgence* at para 41-42.

[28] HCorp did not apply for a stay of the CCAA justice's order approving the arrangement. The Monitor advises that the arrangement will therefore close when the purchaser is able to transfer the necessary funds. The CCAA justice accepted that the purchaser would not accept a transaction different than the one approved, and there is valid concern that delay would jeopardize completion of the transaction and the continued operation of Long Run's business for the benefit of its creditors, employees and other stakeholders.

Conclusion

[29] Upon weighing all of the factors, I am not satisfied that leave to appeal the decision of the CCAA justice should be granted in this case. The application for leave to appeal is therefore dismissed.

Application heard on January 22, 2025

Reasons filed at Calgary, Alberta
this 20th day of February, 2025

Strekaf J.A.

Appearances:

D.S. Nishimura

T.A. Batty (no appearance)
for the Applicant

B. Wong (no appearance)

J. Regush
for the Respondents, Long Run Exploration Ltd. and Calgary Sinoenergy Investment Corp.

K.J. Meyer (no appearance)

K. Kashuba
for the Monitor, FTI Consulting Canada

K.J. Bourassa

for China Construction Bank Toronto Branch