

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-029177-201, 500-09-029190-204
(500-11-057716-199)

DATE: November 11, 2020

BEFORE THE HONOURABLE GENEVIÈVE MARCOTTE, J.A.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT OF:

N° : 500-09-029177-201

VICTOR CANTORE
APPLICANT – Objecting Party
v.

NEMASKA LITHIUM INC.
and
NEMASKA LITHIUM WHABOUCHI MINE INC.
and
**NEMASKA LITHIUM SHAWINIGAN
TRANSFORMATION INC.**
and
NEMASKA LITHIUM P1P INC.
and
NEMASKA LITHIUM INNOVATION INC.
RESPONDENTS – Debtors
and
PRICEWATERHOUSECOOPERS INC.
IMPLEADED PARTY – Monitor
and
INVESTISSEMENT QUÉBEC
and
THE PALLINGHURST GROUP
and
OMF FUND II (K) LTD.

OMF FUND II (N) LTD.

and

FMC LITHIUM USA CORP.

and

BRIAN SHENKER

IMPLEADED PARTIES – Impleaded parties

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

N° : 500-09-029190-204

BRIAN SHENKER

APPLICANT – Impleaded party

v.

NEMASKA LITHIUM INC.

and

NEMASKA LITHIUM WHABOUCHI MINE INC.

and

**NEMASKA LITHIUM SHAWINIGAN
TRANSFORMATION INC.**

and

NEMASKA LITHIUM P1P INC.

and

NEMASKA LITHIUM INNOVATION INC.

RESPONDENTS – Debtors

and

PRICEWATERHOUSECOOPERS INC.

IMPLEADED PARTY – Monitor

and

INVESTISSEMENT QUÉBEC

and

THE PALLINGHURST GROUP

and

OMF FUND II (K) LTD.

OMF FUND II (N) LTD.

and

FMC LITHIUM USA CORP.

IMPLEADED PARTIES – Impleaded parties

and

VICTOR CANTORE

IMPLEADED PARTY – Opposing creditor

JUDGMENT

[1] I am tasked with the determination of two applications for leave to appeal of a judgment rendered on October 15, 2020 by the Superior Court of Québec, district of Montreal (the honourable Louis J. Gouin) which approved a transaction and issued a reverse vesting order pursuant to sections 11 and 36 of the *Companies' Creditors Arrangement Act (CCAA)*.¹

[2] The CCAA proceedings were commenced in December 2019 with respect to the debtor companies (the "Nemaska entities") which are involved in the development of a lithium mining project in Quebec

[3] In January 2020, the CCAA judge approved an uncontested sale or investment solicitation process (« SISP ») which led to the acceptance of an offer submitted by impleaded parties Investissement Québec, the Pallinghurst Group and OMG Fund II (K) Ltd. and OMG Fund II (N) Ltd (« Orion »), in the form of a bid that was made subject to the condition that a reverse vesting order (RVO) be issued.

[4] The proposed RVO provides for the acquisition by the impleaded parties of the shares of Nemaska entities free and clear of the claims of creditors which are transferred along with unwanted assets² to a newly incorporated non-operating company, as part of a pre-closing reorganization.

[5] The RVO allows the purchaser to continue to carry on the operations of the Nemaska entities in a highly regulated environment by maintaining their existing permits, licences, authorizations, essential contracts and fiscal attributes. It is essentially a credit bid whereby the shares of the Nemaska entities are acquired in return for the assumption of the secured debt³.

¹ R.S.C., 1985, c. C-36.

² They essentially consist of residual cash defined as follows in the Accepted bid:

38. The Residual Cash is comprised of: (i) the cash still on hand as at the closing date (to be determined and subject to adjustments), the amount of US\$7M from the US\$20M escrowed funds held in respect of the Livent litigation (plus accrued interest on US\$20M), an amount under the Directors and Officers (the «D&O») trust of approximately \$2M, less (ii) the sum of \$12M to be retained by New Nemaska Lithium to cover its assumption of the secured claim of JMBM.

³ The Accepted bid provides for the following consideration:

36. The Accepted Bid is submitted as a credit bid and the full amount of the Orion Secured Claim is used as such by the Bid Group as consideration.

[6] Applicant Victor Cantore (Cantore) is a shareholder of Nemaska and a creditor of royalties (a 3% net smelter return royalty on all metals), following the sale of his original mining titles to the Nemaska entities in 2009.

[7] Cantore filed an application to have the Court recognize his “*bene esse* real rights” on the mining titles which the parties agreed to debate at a later date and have temporarily carved out of the proposed RVO.

[8] Cantore nonetheless formally objected to the approval of the RVO, raising multiple grounds of contestation, including the CCAA judge’s lack of authority to grant a vesting order for anything other than a sale or disposition of assets, the impossibility under the CCAA for debtor companies to emerge from CCAA protection outside a compromise or arrangement, the violation of securities laws and the improper release stipulated in favour of directors and officers without prior approval from creditors.

[9] Applicant Brian Shenker (“Shenker”) is a shareholder of Nemaska Lithium Inc. Along with other shareholders, he filed an *Application to declare certain claims as exempt and to permit the filing of certain claims in late September 2020*, namely against Nemaska entities’ directors and officers for negligent misrepresentations.

[10] While the application had not been heard by the CCAA judge at the time of the approval hearing, Shenker was allowed to make oral submissions regarding the granting of releases in favour of the directors and officers in the context of the proposed RVO.

[11] Notwithstanding the Cantore objections and the Shenker representations, the CCAA judge approved the RVO following a 9 day hearing.

[12] In his reasons, the CCAA judge reviewed the context of the transaction in detail and insisted on the purpose and efficiency of the RVO to maintain the going concern operations of the debtor companies, while also emphasizing that it is not up to the courts to dictate the terms and conditions to be included in the offer which stems from the uncontested SISP order.

37. The consideration offered under the Accepted Bid includes (i) the assumption by New Nemaska Lithium of the Orion Secured Claim (\$134,500,000); (ii) the assumption by New Nemaska Lithium of the Johnson Matthey Battery Materials Ltd. («**JMBM**») secured claim (\$12,000,000); (iii) the assumption of various liabilities and obligation (including the Livent obligations and all of the Debtors’ obligations under the Chinuchi Agreement from the closing onwards) and (iv) the transfer to Residual Nemaska Lithium of Nemaska Lithium’s cash on hand on closing, subject to certain adjustments (the «**Residual Cash**») and any Excluded Assets.

[13] He also reiterated that the approval of the RVO pursuant to s. 36 CCAA is subject to determining:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently;
- The efficacy and integrity of the process followed;
- The interests of the parties; and
- Whether any unfairness resulted from the process.⁴

[14] He considered that these criteria had been met and found the issuance of the RVO to be a valid use of his discretion, insisting that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[15] In coming to this conclusion, the CCAA judge relied extensively on the principles recently set out by the Supreme Court in the matter of *9354-9186 Quebec inc. c. Callidus Capital Corp.*⁵ namely:

1. The evolution of CCAA proceedings and the important role of the CCAA supervising judge;
2. The remedial objectives of Canadian insolvency laws to provide timely, efficient and impartial resolution of a debtor's insolvency, preserve and maximize the value of a debtor's assets, ensure fair and equitable treatment of the claims against a debtor, protect the public interest, and balance the costs and benefits of restructuring or liquidating the debtor company;
3. The priority afforded by the CCAA to « “avoid [ing] the social and economic losses resulting from the liquidation of an insolvent company” by facilitating the reorganization and survival of the pre-filing debtor company, as a going concern;
4. The CCAA judge's wide discretion pursuant to s. 11 of the CCAA with a view to furthering the remedial objectives of the CCAA while keeping in mind three “baseline considerations,” which the applicant has the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence.

⁴ *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742, para.34-35.

⁵ *9354-9186 Quebec inc. c. Callidus Capital Corp.*[*Callidus*], 2020 CSC 10, para. 38-52, 67-68.

[16] After reviewing the Monitor's report and uncontradicted testimony, the CCAA judge dismissed the Cantore objections and concluded that the Nemaska entities had acted in good faith and with the required diligence, and that the approval of the RVO was the best possible outcome in light of the alternatives, being : (i) the realization of the rights held by secured creditors, (ii) the suspension of the restructuring process to attempt a new SISF at a high cost with an uncertain outcome in an uncertain market that had previously been thoroughly canvassed and had led to a single acceptable bid, or (iii) the bankruptcy of the debtor companies.

[17] He underlined the catastrophic impact of these alternatives on all stakeholders being the employees, creditors, suppliers, the Cree community and local economies.

[18] As far as the various arguments raised by Cantore are concerned, the CCAA judge pointed out that his attorney had conceded that his client would not have continued to oppose the RVO if his *sui generis* rights had been settled and incorporated into an offer to be approved by the Court.

[19] The CCAA judge dismissed Cantore's argument regarding the Court's limited authority to grant a vesting order, stating that the terms « *Sell or otherwise dispose of assets outside the ordinary course of business* » under subsection 36 (1) CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*.⁶

[20] He insisted that this would be particularly appropriate, where the proposed RVO brings an outcome to creditors more favourable than the alternatives and where available tax attributes contribute to significantly improve the offer, to eventually bring a greater distribution to the creditors.

[21] The CCAA judge also insisted on the fact that the expungement of real rights was contemplated by subsection 36(6) and was a necessary condition to the implementation of a solution, and served to prevent a veto on the part of the holders of those real rights.

[22] The CCAA judge further held that the offer did not constitute a plan of arrangement subject to prior creditor approval and that the residual companies would be submitting a plan of arrangement to the remaining creditors for a vote once the first step, being the acquisition of the Nemaska shares by the impleaded parties, is accomplished.

[23] He dismissed the argument of a potential violation of the applicable securities laws, insisting on the fact that the issue had become moot, given the written confirmation obtained from a representative of the Autorité des marchés financiers that

⁶ See Supra note 5.

they would not object to the interpretation of *Regulation 61-101 respecting Protection of Minority Security Holders in Special Transactions*⁷ proposed in the context of the RVO.

[24] He dismissed the argument related to an « impermissible disguised substantive consolidation » of the Nemaska entities and the alleged lack of approval of a consolidation plan, insisting on the fact that the offer had been made by the impleaded parties in response to a SISP process which had not been contested and clearly contemplated the purchase of all or part of the assets of the debtor companies.

[25] Additionally, the CCAA judge held that the release in favour of the directors and officers of the debtor companies contained in the RVO was qualified in such a manner so as to protect the rights of shareholders and creditors whose claim is based on Section 5.1 (2) of the CCAA.

[26] Moreover, he concluded that Cantore's sui generis real rights were being fully protected by the reserve set out under the RVO and he dismissed his proposition that the proposed transaction was not fair and reasonable or that the Monitor had acted in a partial or improper manner, given the serious efforts put forward to salvage the operations of the companies, the rigorous SISP process carried out and the fact that the offer at issue was the only acceptable and serious bid received and that it allowed the mining project operations to resume.

[27] Lastly, he insisted on the urgency to approve the RVO and the fact that that any additional delay would work to the detriment of the impleaded parties as well as the debtor companies, their employees and suppliers, the Cree community and their local economies.

[28] In the applications for leave to appeal, Applicants Cantore and Shenker both argue that the CCAA judgment is flawed, in that the CCAA judge did not have the power to approve a transaction which is structured in such manner as to allow the debtor companies to emerge from CCAA protection free and clear of their pre-filing obligations outside the confines of a plan of compromise or arrangement and without the benefit of an approval by the required majority of creditors.

[29] Both Applicants add that the CCAA judge also erred in approving the broad releases in favour of third parties, including the directors and officers, outside the context of a plan of arrangement and without first determining whether they were fair, reasonable and necessary to the restructuring and whether they could prejudice creditor rights.

⁷ V-1.1, r. 33.

[30] In addition Cantore raises essentially the same arguments which were previously dismissed by the CCAA judge, being that:

1. The pre-filing obligations were essentially “novated” by the Court and consolidated (without prior determination of the need for such consolidation), and were illegally transferred to third parties without prior creditor consent;
2. The CCAA judge erred in law by approving the transaction and issuing the RVO on the basis of evidence given by the Monitor who was not neutral nor impartial;
3. The CCAA judge focused exclusively on the outcome of the proposed transaction which he qualified to be the “best and only alternative available in the circumstances”, while failing to give any meaningful consideration to creditor rights.
4. The CCAA judge approved a transaction that violates applicable securities law, more precisely the minority shareholder approval requirements.
5. The CCAA erred in granting provisional execution and failed to support this order with sufficient reasons relating to the nature and the extent of the harm which could be suffered.

[31] In order to obtain leave to appeal a judgment pursuant to section 13 CCAA, the Applicants must demonstrate that they satisfy the following four-pronged test in that:

1. The point on appeal is of significance to the practice;
2. The point is of significance to the action or proceedings;
3. The appeal is prima facie meritorious;
4. The appeal will not unduly hinder the progress of the proceedings⁸.

[32] Such leave is only granted sparingly given the nature of the powers afforded the CCAA judge.

⁸ See *Bridging Finance inc c. Béton Brunet 2001 inc.*, 2017 QCCA 138 para. 14 and 15 (per Kasirer, J.A., in chambers); *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665, para. 4 (per Hilton, J.A., in chambers).

[33] All parties agree that RVOs are a novelty and that, until now, they have only been granted by consent. They also agree that a delimitation of powers of the CCAA judge under section 11 of the CCAA where the RVO transaction is contested by certain creditors is a point of principle which could be of interest to the practice and could, in certain circumstances, justify granting leave to appeal⁹.

[34] They claim, however, that in the particular context of the transaction, such leave should not be granted as it will serve to hinder the progress of the CCAA proceedings in a context where the great majority of creditors will be prejudiced.

[35] As underlined by the CCAA judge, the only determination that the courts are asked to make is whether or not to approve the RVO, without having the power to dictate its terms:

[16] L'offre Orion/IQ/Pallinghurst est soumise au Tribunal telle que déposée, et il ne revient pas au Tribunal d'indiquer aux Offrants quels termes et conditions doivent en faire partie.

[17] Le choix du Tribunal est le suivant : il approuve ou il refuse l'Offre Orion/IQ/Pallinghurst.

[36] Certain issues raised in appeal do appear to qualify as being significant to the practice of insolvency. This is particularly the case regarding the issue of the scope of authority of the CCAA supervising judge in the context of an order that is not strictly limited to the "sale or disposition of assets" provided for under section 36 (6) CCAA, which, according to the Applicants, results in an outcome that would normally form part of an arrangement subject to prior approval by the creditors. There is also an issue of principle raised regarding the granting of broad third party releases (that are not limited to the transaction itself), outside the confines of an arrangement and without determining their appropriateness and submitting same to the required vote of creditors.

[37] There is however reason to question the merit of the appeal in the particular context of the file. The CCAA judge's comments on Cantore's approach in the file (notwithstanding the parties' agreement to postpone the debate regarding the expungement of his "*bene esse* real rights" in the mining claims), provide the context in which his arguments are being advanced and somewhat affect their legitimacy:

[30] Le report de ce débat, lequel avait essentiellement pour but que la Demande Cantore ne soit plus un obstacle à l'obtention urgente de l'approbation par le Tribunal de l'Offre Orion/IQ/Pallinghurst, dans la mesure où le Tribunal était disposé à aller dans ce sens, n'a pas mis fin à l'opposition du Créancier Cantore à la Demande pour ODI, loin de là.

⁹ *Aviva Cie d'assurance du Canada c. Béton Brunet 2001 inc.*, 2016 QCCA 1837, para. 16.

[31] Ainsi, le Créancier Cantore a continué à prétendre que le Tribunal n'avait tout simplement pas l'autorité et la compétence pour accueillir la Demande pour ODI sauf, par contre, si elle incluait aussi un règlement de la Demande Cantore qui serait alors approuvé par le Tribunal.

[32] Tel que discuté ci-après, il est apparu clairement au Tribunal, tout au long de l'audition, que le Créancier Cantore, par les arguments qu'il présentait, ne prenait nullement en considération ce qui avait été décidé par l'Ordonnance SISP, la Toile de fond de la Demande pour ODI.

[33] Tout était décortiqué à la pièce par le Créancier Cantore, isolé du portait global, loin de ce que le Tribunal avait déjà autorisé.

[34] **À plusieurs occasions, le Tribunal a eu l'étrange impression que l'opposition du Créancier Cantore était un exercice de négociation avec les Débitrices et les Offrants, portant ainsi ombrage à la légitimité des arguments qu'il avançait.**

[35] À un tel point tel que, le 8 octobre 2020 05 :19, le Tribunal a fait parvenir un courriel aux procureurs présents à l'audition, mentionnant, entre autres, ce qui suit :

[...]

I ask you all to be practical and don't take a legal position in front of the Court on this issue, or any other issue, **as a bargaining tool.**

[...]

[Emphasis added]

[38] As it turns out¹⁰, the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at \$8,160 million out of a total value of provable claims of \$200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

¹⁰ In May 2020, Cantore delivered to the Monitor 5 proofs of claims which were disallowed in part by the Monitor by way of a Notice of Revision or Disallowance dated October 22, 2020, leaving an outstanding provable claim of \$8,160,000. Cantore has since filed an application to appeal from the Monitor's revision or disallowance of a claim dated October 29, 2020.

[39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a “bargaining tool”, while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in first instance.

[40] That being said, the applicants have also failed to convince me that their appeal will not hinder the progress of the proceedings and that it is not purely strategic (insofar as Applicant Cantore is concerned) or theoretical (insofar as Applicant Shenker is concerned).

[41] Serious concerns were raised at the hearing regarding the fact that the RVO may be compromised if the closing (which has already been postponed on more than one occasion since the acceptance of the offer in June 2020) cannot take place as determined in the RVO by December 31, 2020. These concerns are compounded by the risk of a potential cash depletion as contemplated by the Monitor (in his Ninth Monitor’s Report) at a monthly rate of \$2.5 to \$3 million. As well, the Monitor deems it unlikely that an alternative or any other new plan of arrangement could generate a distribution to unsecured creditors in the range currently estimated in the RVO (between \$6 million and \$14 million).

[42] This makes the leave to appeal a risky proposition that could turn into the potential “catastrophy” that the CCAA judge referred to in his reasons, one in which all stakeholders, including creditors, employees, suppliers, the Cree community and the local economies stand to lose. In such event, the rights being debated even if important may become theoretical.

[43] As far as Shenker is concerned, while the issues that he proposes to raise with respect to overreaching third party releases are not devoid of merit, granting leave is likely to seriously prejudice creditors, with limited gains to be had on the part of shareholders whose rights remain entirely subordinated to those of the creditors.¹¹ If the manner of constituting the releases makes them invalid or unopposable, then Shenker, and any other party with a claim against directors, may still have a recourse.

THEREFORE, THE UNDERSIGNED:

¹¹ As highlighted by the CCAA judge during a management hearing held on September 18 2020 as reproduced at paragraph 37 of the judgment:

De plus, le Tribunal tient à répéter que dans un contexte d’insolvabilité, tel que dans la présente affaire, les intérêts économiques des Actionnaires, si tant est que de tels intérêts existent encore, sont entièrement subordonnés à ceux de tous les créanciers des Débitrices, et ce, jusqu’à ce que ces créanciers aient été entièrement payés, ce qui n’est nullement envisagé dans le présent dossier et n’a, semble-t-il, jamais été envisagé par qui que ce soit. Il s’agit d’un principe fondamental en la matière et qui ne doit jamais être perdu de vue.

[44] **DISMISSES** the applications for leave to appeal;

[45] **THE WHOLE**, with legal costs.

GENEVIÈVE MARCOTTE, J.A.

Mtre Dimitrios Maniatis
ACCENT LÉGAL
Mtre Tom Provost
MLT AIKINS
For Applicant and impleaded party Victor Cantore

Mtre Neil Peden
Mtre Bogdan Catanu
WOODS
For Applicant Brian Shenker

Mtre Alain Tardif
Mtre Gabriel Faure
Mtre François Alexandre Toupin
Mtre Patrick Boucher
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Mtre C. Jean Fontaine
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For impleaded party Pricewaterhousecoopers inc.

Mtre Luc Morin
NORTON ROSE FULLBRIGHT CANADA
For impleaded party Investissement Québec

Mtre Denis Ferland
DAVIES WARD PHILLIPS & VINEBERG
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Mtre Kevin Mailloux
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Date of hearing: November 2, 2020