In the Court of Appeal of Alberta

Citation: Bellatrix Exploration Ltd (Re), 2021 ABCA 85

Date: 20210305
Docket: 2101-0011-AC
Registry: Calgary

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 Bellatrix Exploration Ltd.

Between:

BP Canada Energy Group ULC

Applicant

- and -

National Bank of Canada

Respondent

- and -

Bellatrix Exploration Ltd.

Respondent

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

Application for Permission to Appeal

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

I. Introduction

[1] The applicant, BP Canada Energy Group ULC, ("BPC") seeks leave to appeal to this Court from a decision of Romaine J whereby she rejected various submissions of BPC concerning the disposition of proceedings as to Bellatrix Exploration Ltd. ("Bellatrix") under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"): 2020 ABQB 809, [2020] AJ No 1453 (QL) ("Reasons").

[2] BPC's application before me is governed by s 13 of the *CCAA* which reads as follows:

Leave to appeal	Permission d'en appeler
13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs	13 Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards

[3] The test for grant of leave to appeal under s 13 of the *CCAA* was encapsulated in ***Re: Blue Range Resource Corporation***, 1999 ABCA 255 at paras 2-5, 244 AR 103 as being a burden to show "serious and arguable grounds that are of real and significant interest to the parties" coupled with this Court's finding that "significance to the practice", "precedential value" and "whether the appeal will unduly hinder the progress of the action" are also factors which fit into the determination under the broad language of s 13 of the *CCAA*: see also ***Liberty Oil & Gas Ltd., Re***, 2003 ABCA 158 paras 15-16, 44 CBR (4th) 96.

[4] The *CCAA* is part of an integrated legislative scheme which includes the expeditious but just reorganization or winding down of companies which have fallen onto hard times. The role of the first instance judge is crucial: compare ***9354-9186 Quebec inc. c. Callidus Capital Corp***., 2020 SCC 10 paras 38-52, 67-68, 444 DLR (4th) 373. There, Wagner CJC wrote:

> 39 The CCAA is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), which covers insolvencies of both individuals and companies, and *the Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("WURA"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (WURA, s. 6(1)). While both the CCAA and the BIA enable reorganizations of insolvent companies, access to the CCAA is restricted to debtor companies facing total claims in excess of $5 million (CCAA, s. 3(1)).
>
> 40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "*The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law*", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law* 2016 (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

[5] By the terms of the common law criteria developed for the statutory test, leave to appeal is assessed in the round. As stated by Wagner CJC in ***Callidus Capital***, that corresponds to the role played by the first instance judges:

> 47 One of the principal means through which the CCAA achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each CCAA proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.
>
> 48 The CCAA capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (Century Services, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P.

> Sarra, ed., Annual Review of Insolvency Law 2005 (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).
>
> 49 The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see Century Services, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears 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 (para. 69)."

[6] Within such a (necessarily) discretionary zone of judicial action, the grant of leave to appeal is not automatic howsoever imaginatively the supporting argument is formulated. Rather, leave seems inappropriate for matters of essentially academic interest even if the answer might be of some interest to the practice; *CCAA* proceedings are no place for the endless mullings of Lord Chancellor Eldon. Nor does it appear likely to be beneficial to anyone to grant leave to appeal from case-specific decisions where the applicable standard of review is likely to sweep aside any future appeal.

[7] Nor is leave to be granted merely because success by the applicant might be profitable *to the applicant* in reconfiguring the distribution of losses (often the hard reality of *CCAA* proceedings) and the applicant has an interesting point: compare and ***Cantore v Nemaska Lithium Inc***, 2020 QCCA 1333, [2020] QJ No 7849 (QL) under motion to SCC at [2020] SCCA No 436 (QL) and S***henker v Nemaska Lithium Inc***, 2020 QCCA 1488, [2020] QJ No 9974 (QL) under motion to SCC at [2021] SCCA No 9 (QL). In ***Shenker***, Marcotte JA addressed what was a novel but developing trend towards 'reverse vesting orders' which she said, at para 36, did "appear to qualify as being significant to the practice of insolvency". But she concluded that the arguments for Cantore were a "bargaining tool" and she was not persuaded that his motion was not "purely strategic". As to both Cantore and Shenker, she observed that:

> 42 This makes the leave to appeal a risky proposition that could turn into the potential "catastrophe" 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. 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.

[8] In other words, the 'real world' context is something to consider and the criteria are not assessed in isolation from each other. On the other hand, a matter might be significant to the practice if there is an important matter of interpretation that genuinely and arguably arises in the context, especially if it is a matter that has been problematic or disputed within the practice for some time and needs clarification and such clarification can be provided promptly without damage to the ongoing *CCAA* proceedings and to the parties. That said, if the significance of the issue raised arises merely because an applicant has developed a creative interpretive theory as a flyer, the other circumstances of the matter would be engaged to justify a finding that the practice significance criterion was met.

[9] The line of cases on leave to appeal also point out that deference is owed to the impugned decision unless the judge "acted unreasonably, erred in principle, or made a manifest error" as set out by Strekaf JA in ***BMO Nesbitt Burns Inc. v. Bellatrix Exploration Ltd***, 2020 ABCA 264 at paras 7-8, 81 CBR (6th) 161:

> 7 The test for leave to appeal in CCAA proceedings requires "serious and arguable grounds that are of real and significant interest to the parties", which can be assessed by considering the following four factors (Liberty Oil & Gas Ltd., Re, 2003 ABCA 158 (Alta. C.A.) at paras 15-16):
>
> (1) Whether the point on appeal is of significance to the practice;
>
> (2) Whether the point raised is of significance to the action itself;
>
> (3) Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
>
> (4) Whether the appeal will unduly hinder the progress of the action.
>
> 8 "An appellate court should exercise its power sparingly, when asked to intervene in issues which arise in CCAA proceedings": *Blue Range Resource Corp., Re*, 1999 ABCA 255 (Alta. C.A.) at para 3. Decisions of a supervising chambers judge are accorded considerable deference and will be interfered with only if the judge acted unreasonably, erred in principle, or made a manifest error: *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178 (Alta. C.A.) at para 3. The applicant must point to an error on a question of law, or a palpable and overriding error in findings of fact or in the exercise of discretion: *Canadian Airlines Corp., Re*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) at paras 28-29.

In an analogical sense, one might therefore characterize this language about the test for leave as amounting to what Courts in the United States of America refer to as the "law of the case" respecting leave to appeal. The parties have accepted the criteria explained by Strekaf JA although they seem to construe their scope differently.

[10] On the subject of deference, there was a brief debate in the oral submissions before me as to whether Romaine J's decision might be entitled to some lower level of deference because the case management judge had been Jones J and thus, so the argument went, he had greater familiarity with the matter. (Jones J had expressly determined that he was not 'seized' with this matter.) Generally, though not inevitably, courts should resist *gradations* of deference because it tends to be an unwieldy element of analysis: compare ***Canada v Vavilov***, 2019 SCC 65 at paras 27-31. 441 DLR (4th) 1. In this case, I note that Romaine J has immense experience in matters of this kind: note paras 40 and 47 of ***Callidus Capital***, above.

[11] True, even experts can be wrong and there is equally no concept of 'hyper-deference' for text book authors: ***Wilson v DePuy International Ltd***, 2019 BCCA 440 at para 38, 31 BCLR (6th) 215, leave denied [2020] SCCA No 36 (QL) (SCC No 39044). Further still, extricable questions of law are reviewed for correctness regardless of expertise: compare (as to class action gatekeeping deference) ***AIC Limited v Fischer***, 2013 SCC 69 at para 65, [2013] 3 SCR 949. Moreover, here there were agreed facts. Nonetheless, where reasonableness is the review standard, Romaine J's expertise is a factor.

[12] Also applicable to this motion is s 14.5(1)(f) of the *Alberta Rules of Court*, AR 124/2010 as amended, which allows for appeals to the Court where permission to appeal is granted on "any decision where permission to appeal is required by an enactment". There is no material difference between "leave" to appeal and "permission" to appeal in this context. The word "permission" is a modern expression lately adopted in the *Alberta Rules* and in provincial legislation as the nomenclature for the gatekeeping functions to be performed by single judges of this Court.

II. Synopsis

[13] The following synopsis does not rehearse all the facts. Instead, I choose to focus on what I think to be the principal points.

[14] At the heart of the matter in this motion are BPC's contentions arising from the terms of a contract involving it and Bellatrix for the supply of natural gas (the "GasEDI Agreement"). The parties appear to have originally entered into this agreement as of March 1, 2010. There were two transaction confirmations as of December 12, 2017. There was a pricing formula based on posted index prices at specific or designated downstream pricing hubs in the US and Ontario, on a month to month basis.

[15] On October 2, 2019, Bellatrix was granted protection under the *CCAA*. As part of the *CCAA* proceedings, Bellatrix sought on November 25, 2019 to disclaim the GasEDI Agreement under s 32(1) of the *CCAA*. On November 26, 2019 Bellatrix stopped delivering gas to BPC. BPC and Bellatrix were unable to agree on a substitute arrangement after that. Section 32(1) which provides for "Disclaimer or resiliation of agreements" in the English language official version and for "Résiliation de contrats" in the French official language version.

[16] These official language versions are to be read such as to identify and apply their shared meaning: ***R v Mac***, 2002 SCC 24, [2002] 1 SCR 856; ***Schreiber v Canada (Attorney General)***, 2002 SCC 62 at paras 55-56, [2002] 3 SCR 269; ***R v Daoust***, 2004 SCC 6 at para 26, [2004] 1 SCR 217; ***Re: Canada 3000 Inc***., 2006 SCC 24 at para 49, [2006] 1 SCR 865; ***Merck Frosst Canada Ltd v Canada (Health)***, 2012 SCC 3 at para 203 per Cromwell J, [2012] 1 SCR 23; ***R v Quesnelle***, 2014 SCC 46 at paras 52-53, [2014] 2 SCR 390; ***R v M(TJ)***, 2021 SCC 6 at para 16, [2021] SCJ No 6 (QL).

[17] The shared meaning principle is applied to accord with s 16 of the *Constitution Act, 1982*, s 133 of the *Constitution Act, 1867*, and the *Official Languages Act*, RSC 1985, c 31. This principle is applicable to the interpretation of s 32 of the *CCAA*. The mainly relevant provisions of s 32 of the *CCAA* read as follows:

Disclaimer or resiliation of agreements	Résiliation de contrats
32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation	32 (1) Sous réserve des paragraphes (2) et (3), la compagnie débitrice peut — sur préavis donné en la forme et de la manière réglementaires aux autres parties au contrat et au contrôleur et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel elle est partie à la date à laquelle une procédure a été intentée sous le régime de la présente loi.
Court may prohibit disclaimer or resiliation	Contestation
(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the	(2) Dans les quinze jours suivant la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), toute partie au contrat peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal

monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

[...]

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

[...]

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor

d'ordonner que le contrat ne soit pas résilié.

[...]

Pertes découlant de la résiliation

(7) En cas de résiliation du contrat, toute partie à celui-ci qui subit des pertes découlant de la résiliation est réputée avoir une réclamation prouvable.

[...]

Exceptions

(9) Le présent article ne s'applique pas aux contrats suivants :

a) les contrats financiers admissibles;

b) les conventions collectives;

c) les accords de financement au titre desquels la compagnie est l'emprunteur;

d) les baux d'immeubles ou de biens réels au titre desquels la compagnie est le locateur.

[18] Reference to the French language official version is appropriate generally for federal legislation. But, in this case, such reference is particularly driven by the suggestion made by BPC in oral argument that the word "resiliate" included the concept of "breach" and that, accordingly, the operative effect of s 32(9) was to exclude the ability of an insolvent party to breach or repudiate an agreement in the nature of an "eligible financial contract" ("EFC") under that subsection of the *CCAA*. This argument was hinted at in BPC's Memorandum at para 10, referring to Bellatrix's position that "a company in CCAA is permitted to simply breach executory contracts with impunity even when they cannot be *disclaimed or resiliated* under the governing legislation". The hint there was that disclaimer and resiliation were significantly different phenomena. Nonetheless, this argument has no bottom. Nothing in the shared meaning of the provisions seems to connote that Parliament was referring in s 32(9) to anything other than the form of disclaimer exemption enacted by design for specific purposes.

[19] The main point for BPC was that on receipt of notice of the disclaimer in late 2019, BPC was entitled to reject it on the basis that the disclaimer was invalid under s 32(9)(a) of the *CCAA*. BPC took the position that the GasEDI Agreement was an EFC and s 32(1) therefore did not apply to it. As noted below, BPC carries forward from that position with a number of domino effects.

[20] BPC went on to contend that Bellatrix was therefore obliged to continue *to execute* on the GasEDI Agreement. BPC rejected the suggestion that Bellatrix could just desist, for lack of capacity, from carrying out the GasEDI Agreement outside s 32 of the *CCAA*, rendering BPC an unsecured creditor for whatever BPC could prove to be its claim. Along this line, BPC effectively suggested that Bellatrix had a continuing obligation to supply gas at the relevant price under the GasEDI Agreement. Further dominoes discussed below concern alleged further rights claimed by BPC in the *CCAA* process.

[21] Put one way, that delivery price was 'uncommercial' from Bellatrix's perspective. It appears that Bellatrix and the Monitor estimated a saving of approximately $14,500,000 for desisting the GasEDI Agreement and re-organizing Bellatrix's failing business activities. It was with that in mind that Bellatrix, with the Monitor's approval, issued the notice of disclaimer of the GasEDI Agreement. Using Bellatrix's estimate, BPC contended that its anticipated calculable *gain* from the continuation of the GasEDI Agreement would be calculable as being arguably the same amount as the Bellatrix Monitor anticipated to be the effective calculable *loss* to Bellatrix (and hence its creditors) arising from continuation of the GasEDI Agreement to its conclusion on its terms.

[22] Based on its interpretation of the GasEDI Agreement and of the meaning of an EFC under s 32(9)(a) of the *CCAA*, BPC applied for an order from Jones J to declare the GasEDI Agreement was an "eligible financial contract" such that it could not be disclaimed.

[23] Indeed, Jones J found that the GasEDI Agreement was an EFC under s 32 of the *CCAA* and, as a result, the type of statutory disclaimer provided for under s 32(1) was not applicable under the circumstances: see ***Re: Bellatrix Exploration Ltd***, 2020, 77 CBR (6th) 230, [2020] AJ No 329 (QL). Leave to appeal that decision to this Court was granted at 2020 ABCA 178. A panel of this Court heard that appeal and that judgment is presently on reserve.

[24] It is important to note that although BPC sought a decision from Jones J that the effect of the EFC finding was that Bellatrix was obliged to continue to execute under the GasEDI Agreement, Jones J specifically did *not* make such a ruling: see Reasons at para 15; Formal Order of Jones J reproduced at p 230 of BPC's Memorandum. Moreover, Jones J said he was "not seized with this matter" and BPC could apply "for such further advice or direction as may be required with respect to any remainder of relief" as sought by BPC. That appears to have been the doorway to the hearing before Romaine J.

[25] BPC further argued that the failure of Bellatrix to execute the terms of the GasEDI Agreement constituted a post-filing (ie after *CCAA* protection commenced) obligation of Bellatrix

and that BPC was therefore entitled to compensation out of funds that the Monitor acquired by the ultimate sale of all of the Bellatrix assets as part of the *CCAA* process to Spartan Delta Corporation as approved on May 8, 2020: see Reasons at paras 24-25.

[26] BPC contended, in effect, that – rather as if BPC was a creditor who agreed to advance to the debtor *after* CCAA protection has commenced in order to keep the debtor in operation and to enhance the value of the debtor's assets or perhaps even save the debtor – BPC was entitled to recovery of its profit from the GasEDI Agreement even in priority to secured creditors of Bellatrix, let alone the unsecured creditors of Bellatrix.

[27] It must be noted as well that as of the date of Romaine J's Reasons, BPC had paid into trust the sum of US$1,583,859.38 for what it owed Bellatrix before *CCAA* protection "subject to any valid rights of set-off": Reasons at para 12.

[28] BPC submitted that if it was not found to be a priority claim by the foregoing logic, the disclaimer provision of s 32(9)(a) of the *CCAA* would become meaningless. BPC contended that if *CCAA* debtors were allowed to breach EFCs at will, the result would be the same as if there were a court-approved disclaimer by the insolvent party. BPC said this would reduce the solvent counterparty BPC to a provable but unsecured claim unless otherwise provided under the contract. Put another way, BPC reasoned that the prohibition on disclaimer of EFCs under s 32(9)(a) of the *CCAA* would be nugatory in such situations, which would be the same as if the EFC were properly disclaimed.

[29] BPC raises the additional issue which concerns the money that BPC owed to Bellatrix for supplies of gas under the GasEDI Agreement prior to commencement of the *CCAA* protection. BPC argues, using similar reasoning to the above, that it, BPC, is entitled to set off this debt against the debt owed to BPC by Bellatrix under the GasEDI Agreement because it could not be disclaimed and it was a post-protection form of debt which continued to build up after *CCAA* protection commenced. Set off rights, says BPC, are preserved to creditors under s 21 of the *CCAA*:

Law of set-off or compensation to apply	Compensation
21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be	21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas

[30] Set-off rights are also pointed to in relation to solvent counterparties to an EFC under s 34(8) of the *CCAA*. It provides:

Permitted actions	Opérations permises
(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:	(8) Si le contrat financier admissible conclu avant qu'une procédure soit intentée sous le régime de la présente loi à l'égard de la compagnie est résilié à la date d'introduction de la procédure ou par la suite, il est permis d'effectuer les opérations ci-après en conformité avec le contrat:
(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and	a) la compensation des obligations entre la compagnie et les autres parties au contrat;
(b) any dealing with financial collateral including	b) toute opération à l'égard de la garantie financière afférente, notamment:
(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and	(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,
(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral	(ii) la compensation, ou l'affectation de son produit ou de sa valeur

[31] In the end, the crucial points for BPC turn largely on BPC's interpretation of s 32 of the *CCAA* and what BPC says are its special contractual rights as against Bellatrix and its special priority status respecting assets of Bellatrix derived from those special rights. Without entirely conceding the point, BPC was in a position of acknowledging that if this Court decided the GasEDI Agreement was not an EFC on the other appeal, the threshold for this motion would disappear. Counsel for Bellatrix suggested that were that to happen, BPC just lapses into an unsecured creditor status for whatever claim BPC could prove, and set-off said to arise from the alleged increasing debt to BPC would not apply. At this stage it is appropriate to further elaborate on the positions of the parties respecting these issues.

III. Grounds of the Motion

[32] At para 22 of its Memorandum under the title "The point on appeal is of significance to the practice", BPC argued that there were two "discrete questions of law" as follows:

> (a) is a CCAA debtor obligated to perform executory contracts that cannot be lawfully disclaimed or resiliated?
>
> (b) does the CCAA's express preservation of rights of set-off permit the solvent party to an undisclaimed executory contract to avail itself of contractual and other set-off rights.

[33] Further under the same title, at paras 23 and 24 of its Memorandum, BPC said that it was agreeing with Bellatrix that there was not yet sufficient judicial guidance as to what constitutes an EFC. That issue is in reserve before the other panel and thus cannot be addressed by me. BPC goes on to say under this title that "in the absence of strict compliance with the statutory requirements for a valid disclaimer, the relevant executory contract will remain 'in full force and effect'," citing ***Re: League Assets Corp***, 2016 BCSC 2262 at para 61, 42 CBR (6th) 217. In the Analysis part of my reasons I do not find ***League Assets Corp*** to be authority for the proposition asserted.

[34] In sum, this part of BPC's argument is whether "a company in *CCAA* may simply breach its undisclaimed *executory contracts*". As so expressed in the italicized part, that proposed ground of appeal is much more general than the specific issue whether a debtor company can disclaim an EFC.

[35] Next, under the title "The point on appeal is significant to the proceeding", BPC accepts that Bellatrix's assets have been liquidated. BPC asserts, at para 26 of its Memorandum, that it "stands to gain approximately $14.5 million from funds currently held by the Monitor" whereas the Agent of the Lienholders argues those moneys should go to the Lienholders.

[36] Next, under the title "The Appeal is *prima facie* meritorious", BPC again argues at para 27 that the issue is "whether in law a party (having obtained this Court's protection under the *CCAA*) is required to perform obligations *under executory contracts* that cannot be lawfully disclaimed under section 32 of the *CCAA*, and whether a party to an industry-standard agreement can rely on contractually protected rights of set-off." To repeat, the first part of this argument is considerably larger than the point whether the exception to disclaimer under s 32(9)(a) of the *CCAA* applies. The second part as to "*contractually protected* rights of set-off" is also noteworthy in how the argument further unfolds in the BPC Memorandum.

[37] Further under this title as to *prima facie* merit, BPC seems to revive some of the content of the six grounds (paras 14(a) to (f)) set out in its Application for Permission to Appeal. At para 29 of its written submission, BPC seems to elaborate from the two grounds set out in para 32 above, and seems to expand to four grounds as follows:

> 29 Moreover, the issues raised by BP on this appeal are *prima facie* meritorious. The Chambers Judge, in her decision, made at least four *manifest* errors of law, in that she:
>
> (a) gave effect to an interpretation of the disclaimer provisions of the CCAA in which the power of companies to disclaim executory contracts is not only unlimited, but entirely unnecessary as any contract not capable of being disclaimed may simply be breached (rendering the restrictions on disclaimer of EFCs meaningless);
>
> (b) incorrectly classified the BP claim as a pre-filing unsecured claim, notwithstanding that the disputed Notice of Disclaimer and concurrent Bellatrix breach occurred after the filing date (suggesting CCAA s. 32(7) can somehow apply to an undisclaimed contract, or an EFC);
>
> (c) misinterpreted the plain terms of the GasEDI Agreement, which gave BP a right of setoff and the ability to withhold the December Payment and apply those funds to the damages resulting from the Bellatrix breaches (a right expressly preserved under the CCAA); and
>
> (d) concluded BP was not entitled to legal set-off, without considering the test for legal setoff at all.

[38] As to the reading of s 32, BPC's Memorandum essentially argues that the effect of the Romaine J's Reasons is that "the entirety of s. 32 of the *CCAA* is unnecessary" (Memorandum at para 35) and, more specifically, that it renders s 32(9) a "practical nullity" (Memorandum at para 32), renders s 32(7) a "true nullity" (Memorandum at para 33), and that s 32(4) "fares no better" (Memorandum at para 34).

[39] I will address these points in the Analysis part of these reasons below. First, I turn to Romaine J's reasons.

IV. Reasons of Romaine J

[40] There was an agreed statement of facts before Romaine J. Once again, I elect to focus only on specific elements of the case as were set out in her Reasons.

[41] Romaine J noted the practical situation as to the sale to Spartan and the assumption by Spartan of "all of Bellatrix's liabilities in respect of its wells, environmental obligations, pre-filing cure costs in respect of assumed contracts and certain other assumed labilities": Reasons at para 25. Romaine J described the situation of the First Lien Lenders and said:

> 27 On May 22, 2020, the Court granted a Stay Extension and Distribution Order authorizing Bellatrix to distribute $47.5 million, a portion of the net proceeds from the Spartan sale, to the Agent of the First Lien Lenders in partial satisfaction of their secured claim. Bellatrix held back certain funds from distribution, including funds for disputed claims such as the BP claim.
>
> 28 Bellatrix remains indebted to the First Lien Lenders in excess of $44.5 million. Bellatrix may not be able to pay the secured claim of the First Lien lenders in full given the results of the sale process. In the circumstances, a claims process has not been initiated in these CCAA proceedings.
>
> 29 The First Lien Lenders seek a declaration that they have a first priority interest in all the property of Bellatrix, including funds held back in relation to the BP claim, a declaration that amounts owing to BP, if any, are an unsecured claim, and an order directing the Monitor to make a further distribution to the Agent in the amount of approximately $28.9 million. Bellatrix supports this position and submits that the Agent for the First Lien Holders is entitled to distribution of the sale proceeds and the December payment of approximately $1.6 million held in trust by the Monitor in priority to BP.
>
> 30 In a cross application, BP seeks judgement for damages in an amount equivalent to US$14.2 million, an order lifting the stay in the CCAA proceedings to permit BP to enforce the judgement, and an order directing the Monitor to pay BP the approximately US$1.6 million December payment from the held-back funds, an order directing Bellatrix to pay the remainder of the claimed damages out of the sale of proceeds of its assets, or, in the alternate, granting BP a charge over the property of Bellatrix in the amount of the claimed damages with priority over the secured creditors and pari passu with the Interim Lenders Charge, or in the further alternative, an order declaring that any funds held by the Monitor and Bellatrix up to the amount of the claimed damages are held in trust for BP."

[42] Romaine J also addressed the circumstances respecting the seeming decision of BPC not to seek any remedy compelling Bellatrix to perform the GasEDI Agreement during the period leading up to the sale of the assets of Bellatrix to Spartan, and that BPC, instead, chose to build up and pursue a claim for damages "with priority over the secured creditors and *pari passu* with the Interim Lenders Charge, or in the further alternative, an order declaring that any funds held by the Monitor and Bellatrix up to the amount of the claimed damages are held in trust for BP": Reasons at paras 15-30. BPC seems to take exception to this aspect of her analysis, but it seems relevant to me and not incorrect.

[43] By way of interpreting the protection offered to a non-defaulting counterparty to an EFC under s 32(9)(a) of the *CCAA*, Romaine J referred, at para 37, to the Insolvency Institute of Canada *Report of the Task Force on Derivatives* dated September 26, 2013, which explained that the two

main purposes of this EFC exception were "(i) to protect non-defaulting counterparties from the risk of increasing exposure to the insolvent counterparty under the EFC and (ii) to reduce systemic risk in Canadian and global financial markets".

[44] Assuming, *arguendo*, that the "law of the case" at this point is that which was determined by Jones J -- namely that the GasEDI Agreement was an EFC -- the analysis of Romaine J remains. Romaine J was fully aware of the position argued for BPC that to allow Bellatrix to repudiate or breach the GasEDI Agreement outside of s 32 of the *CCAA* would defeat the purpose of s 32(9)(a) of the *CCAA*. She noted that under s 32(4) of the *CCAA*, the judge was to consider a number of factors in deciding whether or not to permit the disclaimer. She rejected BPC's position thus:

> 41 BP submits that, unless it is granted the relief it seeks, the practical effect of Bellatrix's conduct would be to render the disclaimer rules of the CCAA meaningless. It notes that a valid disclaimer under section 32(7) of the CCAA results in a "provable claim", unsecured unless otherwise provided for in the disclaimed contract. However, if CCAA debtors are allowed to breach executory contracts at will, the result is identical: the solvent party has a provable claim, unsecured unless otherwise provided for under the contract. BP submits that, if that is true, section 32(7) of the CCAA is without a purpose, as there is no practical difference between contracts that can and cannot be lawfully disclaimed. Either way, if the debtor chooses to breach the contract, the solvent counterparty is left with the same remedy -- which in many cases, is no remedy at all.
>
> 42 Therefore, BP submits that the "clear implication" of the statutory disclaimer provisions of the CCAA is that a company is required to perform its obligations under executory contracts as of the filing date, unless and until those contracts can be validly disclaimed under section 32.
>
> 43 As noted previously, the exception from EFCs included in the disclaimer provisions of the Act do not expressly provide that an EFC must be performed. Such a mandatory requirement would thwart the objectives of the CCAA, since compelling a CCAA debtor to performs an EFC that it cannot afford to perform would in many cases affect its ability to attempt to restructure.
>
> 44 The disclaimer provisions, while initiated by the debtor, provide the solvent party to a disclaimable contract an opportunity to object to the disclaimer and a process for doing so. Section 32(4) of the Act sets out factors that the court must consider in deciding the issue.
>
> 45 While the solvent party to a contract that the debtor merely stops performing may not have available to it the same statutory process, it may apply to the court for an order compelling performance as BP initially purported to do. The court supervising the CCAA proceedings in its consideration of such an application

> would likely take into account factors similar to those set out in section 32(4), including whether compelling performance would interfere with the prospect of a viable arrangement, and whether refusing such an order would cause significant financial hardship to a party to the contract.
>
> 46 While the considerations may be similar, a disclaimer proceeding is initiated by the debtor, provides for a statutory process and mandates a termination date for the disclaimer. As noted by Morawetz, J. in Re Target Canada Co, 2015 CarswellOnt 3274, the disclaimer is beneficial to creditors generally because it enables the debtor to move forward with a liquidation plan without further delay. In contrast, the unilateral non-performance of a contract gives rise to uncertainty for both the debtor and the counterparty as to the status of the contract, including whether or not the solvent counterparty at its election will accept the termination of the contract as repudiated, and the date of its termination.
>
> 47 The disclaimer provisions are thus not rendered meaningless by the existence of a less formal option, but provide an opportunity for orderly termination and certainty to the parties to the disclaimed contract. Implying an obligation to perform an uneconomic contract that may affect the ability of the CCAA debtor to attempt to restructure would require more direct statutory language.

[45] Romaine J went on to determine that, also assuming the GasEDI Agreement was an EFC, BPC had not terminated the GasEDI Agreement and was not seeking a set off in order to "reduce exposure to risk". It appears that she read s 34(8) of the *CCAA* as providing for permissible actions by EFC *creditors* as exceptions to the limitations arising under s 34(1) of the CCAA. BPC's position is that s 34(8)(a) is not pertinent to this situation but s 21 of the *CCAA* is. I am not persuaded that BPC is correct on this if BPC is right that the GasEDI Agreement was an EFC. Parliament chose to enact set-off terms for EFCs. At some stage a first instance judge facing a set-off argument would presumably address the section.

[46] On the other hand, BPC explains its set-off position in these terms:

> 39 BP was thus entitled to assert a right of set-off in respect of the December Payment, a right which was confirmed by the GasEDI Agreement, which provided for the payment of stipulated damages to a non-defaulting party, the right to suspend payments owing to the defaulting party, and the right to apply those withheld funds to the amount owing by the defaulting party in each subsequent period of default. At the time of the December Payment, the default of Bellatrix had been ongoing for at least 30 days; under the GasEDI Agreement, the default of Bellatrix resulted in a liquidated claim for monetary damages, due and owing at the time of the December Payment, which BP had the right to set off against any amount otherwise owing.

[47] In my view, BPC's position on this pre-supposes that the GasEDI Agreement could not be disclaimed because it is the alleged continuation of Bellatrix's obligations to BPC that gives rise to a claim by BPC to set off against the existing claim of Bellatrix for gas supplied prior to *CCAA* protection. In other words, as I note in paras 29-31 of my reasons above, BPC's claim of set-off arising after the beginning of the *CCAA* protection is also contingent on the finding that the GasEDI Agreement was an EFC. It is also contingent on proof of damages to BPC arising from the failure of Bellatrix to continue to deliver gas. Despite that, BPC argues that set-off is still available to it on "legal" grounds to recover the roughly $1,600,000 in trust.

[48] Returning to Romaine J's decision, it cannot be said that she was entirely oblivious to the concepts related in s 21 of the *CCAA* even if she did not directly mention the section by number. BPC argues that she failed to consider "legal" set off in addition to "contractual" set-off. In light of her discussion of equitable set-off at paras 55 to 63 of her Reasons, I am not persuaded that she missed the point. I return to the subject of set-off later in the Analysis.

[49] Romaine J went on to discuss other arguments before her as to lifting the *CCAA* stay and to what was said to be unjust enrichment of Bellatrix, wrongful conduct and bad faith of Bellatrix. None of these points were argued before me so I say nothing about them except as to one aspect. I have difficulty discerning what sort of bad faith would be said to arise merely because an insolvent debtor corporation seeks the protection of the *CCAA* when unable to pay out all its creditors in full. It eludes me what difference it makes from the perspective of bad faith that the contract that the debtor is unable to complete happens to be an executory contract. The parties opposing BPC contend that these assertions by BPC are essentially tendentious, and in service of the ultimate theory of resolving a priority dispute in favor of BPC.

[50] Nor do I find fingerprints of bad faith in the record of these proceedings. In quite a different context, the Supreme Court of Canada in ***Wastech Services Ltd v*** G***reater Vancouver Sewerage and Drainage District,*** 2021 SCC 7, [2021] SCJ No 7 (QL) recently identified some markers of bad faith in execution of a contract. To the extent those markers might be transferable to the present context of disclaiming a contract I do not see any of those markers here.

V. Analysis

[51] As do the parties, I will follow the criteria developed under s 13 of the CCAA, albeit not in the traditional order. To set the stage for this, I would draw again from ***Callidus Capital*** dealing further with the purposes of the *CCAA* at paras 41-46, notably as to what are called "liquidating *CCAA*s":

> 41 Among these objectives, the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (Century Services, at para. 70). As a result, the typical CCAA case has historically involved

an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state -- that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the BIA regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the CCAA is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Ac*t, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd*., 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 103). In pursuit of those objectives, CCAA proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the CCAA landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc*., 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "*Liquidating CCAAs: Discretion Gone Awry?*", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 CCAA courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the CCAA being a "restructuring statute" (see, e.*g.*, *Uti Energy Corp. v. Fracmaster Ltd*., 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11

C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "*The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada*" (2014), 56 Can. Bus. L.J. 73, at pp. 88-92).

45 However, since s. 36 of the CCAA came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.3 Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the CCAA, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the CCAA in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the CCAA take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the BIA context. In *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the BIA serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the CCAA, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the CCAA leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge."

Those comments resonate here, at least for me.

Arguable Merit

[52] It is appropriate to deal firstly with arguable merit under s 13 of the *CCAA*. To begin with, I reject the interstitial submission for BPC that there was an error on the part of Romaine J in concluding that the claim of BPC was a claim that arose after CCAA protection came into effect.

[53] As Paperny JA said in ***Repsol Canada Energy Partnership v Delphi Energy Corp***, 2020 ABCA 364 at paras 18-20, 2020 CarswellAlta 1855:

> 18 As was noted by Romaine J at para 25 of *SemCanada*, a "claim" for the purpose of the CCAA includes any "indebtedness, liability or obligation that would be provable under the Bankruptcy and Insolvency Act, RSC 1985, c B-3". Section 121(1) of the BIA defines "provable claims" as "all debts and liabilities, present and future, to which the bankrupt is subject … or to which the bankrupt may become subject... by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt..."; s 121(2) of the BIA makes clear that this includes contingent or unliquidated claims: *SemCanada* at paras 25-26.
>
> 19 The Supreme Court of Canada has confirmed that a claim may be provable in bankruptcy even if it is a contingent claim: see *AbitibiBowater Inc., Re*, 2012 SCC 67 (S.C.C.) at para 28; *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5 (S.C.C.) at para 36. "A 'contingent claim is 'a claim which may or may not ever ripen into a debt, according as some future event does or does not happen'"": *Orphan Well Association*, citing *Peters v. Remington*, 2004 ABCA 5 (Alta. C.A.) at para 23.
>
> 20 More recently, the Quebec Court of Appeal commented that "post-debts are only those incurred after and also resulting from an obligation originating after Determination", and that "an obligation can be contingent, unliquidated, or not exigible as at the day of Determination, but existing and able to give rise to a claim if a court decision 'deems it provable'": *Arrangement relatif à Métaux Kitco inc*., 2017 QCCA 268 (C.A. Que.) at para 77-78 [unofficial English translation].

[54] Patently, BPC has been arguing that its claims arise from the operation of the GasEDI Agreement. It seems to me that Paperny JA's reasoning in ***Repsol*** is impeccable on this point: compare also ***PricewaterhouseCoopers Inc. v Perpetual Energy Inc***., 2021 ABCA 16 at para 87, [2021] AJ No 84 (QL).

[55] National Bank also makes a further argument that post-*CCAA* protection debts may still have no effect on priority: compare ***Arrangement relatif à Gestion Éric Savard inc***, 2019 QCCA 1434 at paras 19-21, 2019 CarswellQue 7641. There is something to be said for that argument but I can leave the resolution of that point for another day. The element of the BPC submission that

their claim is a post-*CCAA* protection claim, whether analogous to a post-protection lender or otherwise, is not arguable under the applicable leave test.

[56] Even if there were some sort of notional accumulating indebtedness such as might arise from interest on a pre-*CCAA* protection indebtedness, that would not, *ipso jure*, be the same thing as the priming charges as to which a *CCAA* judge might grant advance priority: compare ***Canada v Canada North Group***, reserved (December 1, 2020) [2019] SCCA No 366 (QL) (SCC No 38871) from 2019 ABCA 314, 437 DLR (4th) 122.

[57] Next, I see no merit in the additional imbricated point for BPC that either the GasEDI Agreement or s 32 of the CCAA creates some sort of security instrument. I do not find substance in the challenge to Romaine J's interpretation that the GasEDI Agreement did not contain a security instrument to enforce delivery of gas. She gave her reading of the GasEDI Agreement in this respect mention at paras 5 and 98 of her Reasons: "The GasEDI Agreement does not provide BP with a security interest in respect of Bellatrix's obligations under the contract." I cannot see any vulnerability in that conclusion in light of the record.

[58] BPC suggests that correctness applies to the interpretation of the GasEDI Agreement on the basis it is a standard form agreement: see eg ***Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co***., 2016 SCC 37 at paras 4, 21-24, [2016] 2 SCR 23. There is certainly something to be said for this view, but largely because contractual interpretation of standard terms should have a steadiness upon which an edifice of commerce can safely sit. As Lord Steyn wrote in ***Jindal Iron and Steel Co Ltd & Ors v. Islamic Solidarity Shipping Company Jordan Inc*** [2004] UKHL 49 at para 16, [2005] 1 All ER 175, referring to an observation of Lord Mansfield made in 1774:

> In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.

To be precise, Lord Steyn's homage to the great Mansfield was in part to uphold the idea of *stare decisis*, which itself should not be an artificial obstacle to societal evolution. But the wider point of predictability remains.

[59] Contractual interpretation law does not add strength to BPC's argument. Architectures of law have been established as to security interests in various statutes, both federal and provincial, and with considerable precision as to what constitutes a security interest and what is relevant to assessing priorities as between securities. It strikes me that BPC's position would undermine predictability as it amounts to an argument that a creditor might acquire, *mirabile dictu*, a security interest surpassing all others arising from its reading of s 32 of the *CCAA* and the content of the GasEDI Agreement. This approach would make a judicial interpretation a contributor to

inconsistency, an undesirable thing: see ***Ledcor*** at para 39; see also the concurring reasons of Brown J in ***Wastech*** at paras 117-122.

[60] More specifically to this case, I consider it noteworthy that Bellatrix suggests that there were other EFC creditors of Bellatrix, and that they had elected to provide for specific security remedies in their cases. Bellatrix said it would be at least ironic if BPC ended up with a better level of security than their EFC creditors who acted on their securities and accepted disclaimers from Bellatrix. Needless to say, as noted for the National Bank, other creditors had also chosen to establish security rights from the outset. The submissions of BPC about s 32(9)(a) having established a security interest for BPC is unsupportable on this record.

[61] As noted above, BPC's submissions as to s 32(9) of the *CCAA* go past whether the disclaimer by Bellatrix was ineffective under the section due to the GasEDI Agreement being an EFC. BPC would have me grant leave to argue to a panel of this Court that the ineligibility of Bellatrix and its Monitor to make an effective disclaimer under the *CCAA* means that Bellatrix was obliged to *continue to be bound* by the terms of the GasEDI Agreement. On this premise, even if Bellatrix was in no position to deliver gas under the GasEDI Agreement, the gain or profit that BPC would have acquired by Bellatrix continuing to deliver under the GasEDI Agreement would notionally continue to grow and to grow in a form of a constructive trust over the assets of Bellatrix collected by the Monitor.

[62] BPC cites no authority for this extraordinary (and multifaceted) proposition which is fundamentally based on legal fictions. The case of ***Re: League Assets Corp*** cited by BPC is quite distinguishable and does not go anywhere near that far.

[63] Section 32 of the *CCAA* should be read in light of the objectives, context, intent and policies of Parliament (which objectives, context, intent and policies are described in ***Callidus Capital***): see ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27 at para 21, saying that the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see also ***Canada Trustco Mortgage Co. v Canada***, 2005 SCC 54 para 10, [2005] 2 SCR 601, cited in ***Callidus Capital*** at para 60 and in ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 at para 88, [2019] 1 SCR 150.

[64] Section 32 should also be read consistently with the applicable canons of interpretation, including that the provision is part of a larger scheme across several pieces of legislation, and accordingly it should be read in harmony with the scheme and not so as to render any other parts of the scheme ineffective. This canon of interpretation also dates back to Lord Mansfield in ***R v Loxdale*** (1758) 1 Burr 445 at p 447 where he said:

> Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and explanatory of each other.

This was lately cited by the UKSC in ***T W Logistics Ltd v Essex County Council and another***, [2021] UKSC 4 at para 75; see likewise ***Food and Drug Administration et al. v. Brown & Williamson Tobacco Corp. et al***., 529 U.S. 120 (2000) where O'Connor J pointed to the need to see a statutory system as "as a symmetrical and coherent regulatory scheme".

[65] Similarly, Antonin Scalia and Bryan Garner wrote in *Reading Law: The Interpretation of Legal Texts* (2012) at p. 180:

> The imperative of harmony among provisions is more categorical than most canons of construction because it is invariably true that intelligent drafters do not contradict themselves ... Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously".

See also ***Geophysical Service Inc v EnCana Corporation***, 2017 ABCA 125 at para 38, [2017] 9 WWR 55, leave denied [2017] SCCA No 260 (QL) (SCC No 37634).

[66] Rather than serving the objectives of the *CCAA*, BPC's thesis would undermine the operation of the statute. A court should not look with eagle eyes for technicalities that would frustrate key parts of legislation: see eg ***Rollingson Racing Stable Ltd v Horse Racing Alberta***, 2020 ABCA 419 at para 30, [2020] AJ No 1272 (QL), under motion to SCC [2021] SCCA No 21 (QL) (SCC No 39546). A party in the position of BPC would virtually possess a veto over the 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. In my view, BPC's interpretation would create an absurdity such as was rejected in ***Keatley Surveying Ltd v Teranet Inc***, 2019 SCC 43 at para 96, 437 DLR (4th) 567 where Côté and Brown JJ wrote, citing ***Rizzo*** at para 27, that "the legislature does not intend to produce absurd consequences", and "that an interpretation is "absurd" if it "defeat[s] the purpose of a statute or render[s] some aspect of it pointless or futile."

[67] BPC paints a tenebrous portrait of the future of s 32(9)(a) of the *CCAA* if the reading of Romaine J is affirmed. I agree with her that the BPC concern is over-stated. The proposed ground of appeal that Romaine J erred in her interpretation of s 32 of the *CCAA* is not arguable in this case. The motion for grant of leave in this case stumbles at the first hurdle.

[68] As to the further ground of appeal related to set-off, this argument hinges on the interpretation of s 32 in my view. In my view, the GasEDI Agreement ceased to be operative after the *CCAA* protection came into effect. The debt of BPC to Bellatrix existed before that happened. No gradual accumulation of 'claims' by BPC by its notional theory of continuation of the GasEDI Agreement occurred and no such thing can cancel any of that debt out.

[69] The set-off argument has other problems.

[70] To begin with, I agree with National Bank that the record did not provide Romaine J with evidence of moneys owing to BPC by Bellatrix at the time of the December payment due in respect

of which it could exercise any contractual or equitable right of set-off. As exemplified by the decision of ***Re: Androscoggin Energy LLC*** (2005), 8 CBR (5th) 1 (Ont SCJ), the right to set-off must be grounded in the specific agreement or the rules of equity. The fact that the *CCAA* recognizes the application of the law of set-off does not mean it enacts an entitlement to set-off unmoored to the legal foundation for such.

[71] Apart from the rationalization by BPC of what it said to be its increasing claim against Bellatrix based on a mark to market price differential – at paras 39-40 of the its Memorandum – Romaine J does not appear to have been provided with an *evidential* case for damages to BPC that could be set off against the money BPC paid into trust.

[72] Romaine J did not err, as urged by BPC, in concluding that if the GasEDI Agreement was an EFC then the relevant provision as to set-off was s 34(8) of the *CCAA*. As a result of the language in s 34(8) of the CCAA, it would fall to BPC to show a liquidated claim – compare ***Citibank Canada v Confederation Life Insurance*** (1996), 42 CBR (3d) 288 at para 37.

[73] Similarly, the terms of s 34(8) of the *CCAA* would require termination of the EFC. Parliament is taken to know the common law. That would include the disallowance of simultaneous approbation and reprobation of the same contract. Nor, in my respectful opinion did Romaine J err in her analysis as to equitable set-off.

[74] Moreover, the invocation by BPC of the dollar figure which was estimated by the Monitor as an actuating factor in the disclaimer is not proof of a *gain* in fact by Bellatrix let alone a *loss* in the corresponding amount by BPC. Assuming that BPC might have a calculable loss of profit arising from the premature demise of the GasEDI Agreement, BPC would still have to make out the quantification of such a claim. And it would do so as an unsecured creditor.

[75] Furthermore, the argument that the residue of moneys held by the Monitor after the disposition of Bellatrix's assets and liabilities would contain any moneys arising from the cessation of the GasEDI Agreement is largely speculative. It does not rise to a question of law alone for the purposes of leave to appeal. For another thing, the sale of the Bellatrix assets to Spartan was unquestionably the result of negotiations, and the alleged 'gain' by Bellatrix of what it saved from backing out of the GasEDI Agreement may not even exist. Leave to appeal should not be granted to explore legal issues in an evidential void. This proposed ground of appeal also fails at the first stage.

Significance to the Action / Parties

[76] On balance, the delay caused as to the distribution of what's left of the Bellatrix moneys including, potentially, to employees of Bellatrix (as explained by counsel for Bellatrix) makes the outcome of greater significance to them than the doomed claim and set-off claim of BPC. Even assuming the secured creditors get all the remainder, their claims are established.

Significance to the Practice / Hinder the Action

[77] As noted at the outset, a material legal question of significance to the practice can arise in cases with otherwise relatively modest ramifications for the parties and where the point is one of those thorny issues which tends to be evasive of review. That is not this case. The grounds proposed are novel because they lack merit. That factor favors dismissal of the motion.

[78] As already mentioned, the resolution of Bellatrix's assets has occurred, but the distribution of what is left has not. There are eligible claimants waiting on the distribution. Counsel for Bellatrix spoke movingly about the wish of Bellatrix not to have disappointed so many people. Asking them to wait further as the corpus of the funds is gradually reduced by costs and economic factors is still a hindering of the process. That factor also favors dismissal of the motion.

VI. Conclusion

[79] The motion by BPC for leave to appeal is dismissed.

Application heard on February 17, 2021

Reasons filed at Calgary, Alberta
this 5th day of March, 2021

Watson J.A.

Appearances:

H.A. Gorman, Q.C./G. Benediktsson
for the Applicant

K.J. Bourassa/J.W. Reid
for the Respondent National Bank of Canada

R.J. Chadwick/C. Descours
for the Respondent Bellatrix Exploration Ltd.

J.G.A Kruger, Q.C.
for PricewaterhouseCoopers Inc. in its capacity as the Court appointed Monitor of Bellatrix Exploration Ltd.