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AUG 17 2018

JUDICIAL CENTRE
OF CALGARY

COURT FILE NUMBER	1701-03460
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ALBERTA ENERGY REGULATOR
RESPONDENTS	LEXIN RESOURCES LTD. 1051393 B.C. LTD. 0989 RESOURCE PARTNERSHIP LR PROCESSING LTD. and LR PROCESSING PARTNERSHIP
APPLICANT FOR APPLICATION	MFC ENERGY FINANCE INC.
RESPONDENT FOR APLPICATION	GRANT THORNTON LIMITED in its capacity as the Receiver of the Respondents
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Burnet, Duckworth & Palmer LLP** 2400, 525 – 8 Avenue SW Calgary, Alberta T2P 1G1 Douglas A. McGillivray/David LeGeyt/David A. de Groot Phone Number: (403) 260-0349/0210/0167 Fax Number: (403) 260-0332 dam@bdplaw.com/dlegyt@bdplaw.com/ddegroot@bdplaw.com File No. 55825-3/MJD

WRITTEN SUBMISSIONS OF THE APPLICANT, MFC ENERGY FINANCE INC.

For the Application to be Heard
Before the Honourable Justice Macleod
On August 23, 2018 at 2:30 p.m.

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I. OVERVIEW

1. The Applicant MFC Energy Finance Inc. (now named Marian Energy Inc.) (**MFC Finance**) seeks to have the validity of its secured loan to 0989 Resource Partnership (**0989**) determined in an appeal of a recent decision of this Honourable Court. This will in turn determine the validity of its credit bid for certain of the receivership assets submitted pursuant to the Court ordered Sales Process. If the Sales Process is not suspended and the assets are sold to a third party before the validity of MFC Finance's secured loan is finally determined then MFC Finance's appeal will be rendered nugatory and MFC Finance will be irreparably harmed.

2. As the Receiver has repeatedly told this Court: the determination of this issue "needs to be resolved in order for the sales process to be concluded".[1]

II. FACTS

A. MFC Finance's secured interest: the Finance Loan

3. MFC Finance is the first-ranking secured creditor in these proceedings for over $15 million pursuant to various loan and security documents to 0989 (the **Finance Loan**).

B. The Sales Process Order

4. The Sales Process Order granted July 14, 2017 set out the Sales Process (as defined in the Sales Process Order) for the sale of assets of the Respondents by Grant Thornton Limited, in its capacity as the court-appointed receiver of the Respondents including 0989 (the **Receiver**).

5. The Sales Process set a date of September 15, 2017 for bids to be submitted.

6. MFC Finance participated in the Sales Process. As first-ranking secured creditor, MFC Finance submitted a credit bid for certain assets on time.[2]

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[1] Transcript of October 25, 2017 Hearing (**Transcript**) at p. 32, l. 28-32 (**Tab 1**).
[2] Affidavit of Pradeep Kumar sworn on August 15, 2018 at para 3 (**Kumar Affidavit**).

C. The Procedural Order to determine the validity of the Finance Loan

7. On October 12, 2017, the Receiver applied to this Court for advice and direction regarding the Finance Loan,[3] as the Receiver was "unable to determine whether the Finance Loan [is] valid".[4]

8. The Receiver's Fifth Report dated October 12, 2017 also advised the Court of the need to resolve the validity of the Finance Loan:

> **The Receiver requires the Court's advice** and direction with respect to the validity of the Finance Loan **in order to determine the ownership claims being asserted by** all of 1059, 597, and [MFC] **Finance**, as each of these transactions purportedly involved consideration through a reduction to the balance of the Finance Loan.[5]

9. On October 25, 2017, at a hearing in these proceedings, the Receiver's counsel again advised the Court:

> [...] with respect to **the Finance Loan**. And if we can narrow that issue and hive it off from the rest of the transactions, because **that is what needs to be resolved in order for the sales process to be concluded.**[6]

10. The Court granted the Receiver's application on October 25, 2017 for a Procedural Order, which directed the following:

> An Application to resolve **the issue of the validity of the Finance Loan** shall be heard by the Honourable Madam Justice B.E.C. Romaine on December 11, 2017, commencing at 10:00 a.m. for a full day hearing.[7]

D. The stayed determination of the validity of the Finance Loan

11. In December 2017, Madam Justice Romaine heard the Receiver's application.

12. On August 8, 2018, Romaine J. disallowed MFC Finance's secured claim in these proceedings, characterizing the Finance Loan as equity and postponing it to the claims of other

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[3] October 12, 2017 Receiver's Application (**Receiver's Application**) (**Tab 2**) at ¶1(b)(i).
[4] Receiver's Application at ¶30.
[5] Receiver's Fifth Report dated October 12, 2017 at ¶83 (emphasis added).
[6] Transcript at p. 32, l. 28-32 (emphasis added).
[7] October 25, 2017 Procedural Order in this Action (the **Procedural Order**) at ¶5(c) (**Tab 3**).

creditors pursuant to section 137 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the **BIA**), the (**Decision**).

13. On August 10, 2018, MFC Finance appealed the Decision to the Court of Appeal of Alberta (the **Appeal**).

14. As a result of the Appeal, the Decision is automatically stayed pursuant to s. 195 of the BIA, which provides that:

> **Stay of proceedings on filing of appeal**
> 195 Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, **all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of**, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.[8]

15. While s. 195 of the BIA results in an automatic stay of the Decision, it does not apply to the Sales Process Order, and so MFC Finance makes this application to suspend the Sales Process to harmonize the conduct of the Sales Process with the final determination of the validity of the Finance Loan.

III. ISSUES

16. The issues in this Application are:

(a) Does this Court have jurisdiction to adjourn or suspend the Sales Process pending a final determination of the validity of the Finance Loan?

(b) Has MFC Finance established that the Sales Process should be adjourned or suspended pending determination of the validity of the Finance Loan in the Appeal?

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[8] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 195 [***BIA***].

IV. ARGUMENT

A. This Court has jurisdiction to adjourn the Sales Process

17. The *Alberta Rules of Court* provide this Court with jurisdiction to make procedural orders, give direction, and "adjourn... all or any part of [a] ... proceeding":

> 1.4(1) To implement and advance the purpose and intention of these rules ... the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.
>
> (2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:
>
> ...
>
> > (h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order;[9]

18. Section 187 of the BIA also provides this Court with statutory jurisdiction to suspend the Sales Process:

> **Court may review, etc.**
> (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.[10]

19. The Sales Process Order at paragraph 9 expressly grants leave to any interested party to apply to this Court to vary or modify the Sales Process Order:

> Leave is hereby granted to any person or party affected by this Order to apply to this Honourable Court for a further order modifying or varying the terms of this Order, with such Application to be brought on no less than 7 days' notice to the Receiver and the AER, and any other affected party pursuant to the Alberta Rules of Court.[11]

20. This type of "Comeback Provision" is typical in insolvency related orders made in Alberta and elsewhere.[12]

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[9] Alta Reg 124/2010, Rule 1.4 [***Rules***] (**Tab 4**).
[10] *BIA*, s. 187(5) (**Tab 5**).
[11] Kumar Affidavit, Exhibit 3.
[12] *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 at para. 46 [***Canada North***] (**Tab 6**).

21. Rule 9.15(4) of the *Alberta Rules of Court* also expressly permits this Court to vary a previous order:

> 9.15(4) The Court may set aside, vary or discharge an interlocutory order
>
> (a) because information arose or was discovered after the order was made,
>
> (b) with the agreement of every party, or
>
> (c) on other grounds that the Court considers just.[13]

B. The Sales Process ought to be adjourned or suspended pending the Appeal

22. It was the Receiver who applied for direction from this Court because the Receiver required a resolution of the ownership issues by the Court for the Receiver to efficiently conclude the Sales Process. And the Receiver voluntarily suspended the Sales Process pending the Decision, in recognition that the Sales Process could not proceed until the validity of the Finance Loan was determined.

23. While the Decision provides an initial answer, the Appeal means there is a statutory stay of the Decision. As a result, there has been no resolution of the issues that the Receiver requires to be concluded to continue the Sales Process.

24. That alone, should be sufficient to adjourn the Sales Process pending the Appeal.

C. Circumstances have changed since the Sales Process Order

25. To the extent that it is necessary to vary or change the Sales Process, in *Canada North Group Inc. (Companies' Creditors Arrangement Act)*, this Court held that recourse through a Comeback Provision like that in paragraph 9 of the Sales Process Order is available when circumstances change.[14] The onus is on the party seeking the variation to show why it is appropriate and that the relief sought does not prejudice others who relied on the order in good faith.[15]

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[13] *Rules*, Rule 9.15(4) (**Tab 7**).
[14] *Canada North* at para. 50.
[15] *Canada North* at para 77.

26. The following has changed since this Court granted the Sales Process Order, and it is respectfully submitted that these changes warrant intervention pursuant to the *Canada North* rationale:

(a) On October 12, 2017, the Receiver applied for advice and direction regarding the MFC Finance Loan because the Receiver needed a resolution of the ownership issues to efficiently conclude the Sales Process;

(b) On October 25, 2017, this Court agreed with the Receiver and ordered a hearing to resolve the issue of the validity of the Finance Loan;

(c) On August 8, 2018, the Decision was rendered, disallowing MFC Finance's secured claim; and

(d) On August 10, 2018, MFC Finance filed the Appeal, and the Decision was automatically stayed.

27. Finally, no one will be prejudiced by the relief sought herein which is merely an extension of the current state of affairs. On the other hand, it would be a change to the *status quo* to restart the Sales Process now, and that would be prejudicial to MFC Finance.

28. Conversely circumstances have not changed since the Procedural Order. In granting the Procedural Order dated October 25, 2017, the Court agreed with the Receiver that the determination of this issue "needs to be resolved in order for the sales process to be concluded".[16] The Court ordered that the issue of the validity of the Finance Loan would be determined by the Court. Given the Appeal and the automatic stay, there is still no final and enforceable decision as to the validity of the Finance Loan.

D. MFC Finance will suffer irreparable harm if the Sales Process proceeds

29. MFC Finance participated in the Sales Process and application before Madam Justice Romaine in good faith and it will suffer not only prejudice, but irreparable harm, if the Sales

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[16] Transcript at p. 32, l. 28-32.

Process proceeds before there is an enforceable decision of this Court as to the validity of the Finance Loan.

30. While the test for a stay of proceedings is not the appropriate test in the circumstances, all three factors are nonetheless met and support an adjournment of the Sales Process pending the Appeal.

31. First, the Appeal raises serious issues and is neither frivolous nor vexatious.[17] The Finance Loan is described in normal loan and security documents, raising a very real issue in the Appeal as to its validity. MFC Finance respectfully submits that the Decision is extraordinary in that it overrides the plain meaning and effect of supporting loan documents. Further, the validity and ranking of the $15 million Finance Loan is a very serious and important issue, and one with crucial implications for the receivership as a whole. Moreover, the subordination of the Finance Loan has the dramatic effect of moving MFC Finance from the position of first ranking secured creditor to that of equity holder, which affects not only MFC Finance but all of the other stakeholders, and the receivership as a whole.

32. Just as importantly, MFC Finance has also appealed the unusual procedural aspects of the litigation on the grounds that they were flawed and unfair. This results from the Court's endorsement of the Receiver's approach to the litigation, which included (i) failing to provide any rationale to support the Receiver's conclusions for refusing to approve the Finance Loan, (ii) disregarding the importance of due process and fairness by ordering a process in which MFC Finance was required to submit its defense without first knowing the specifics of what it was defending, and (iii) an extraordinarily rushed litigation timetable to determine complex issues in a summary manner.

33. Second, MFC Finance will suffer irreparable harm if the Sales Process concludes prior to the determination of the Appeal:

(a) A refusal to adjourn or suspend the Sales Process would deprive MFC Finance of its right to credit bid for the assets and the assets may be sold to a different party.

[17] *Matco Capital Ltd. v Interex Oilfield Services Ltd.*, 2007 ABCA 317 at para 8 [***Matco***] (**Tab 8**).

MFC Finance would be deprived of a unique and significant opportunity that would be irreversible;[18] and

(b) A refusal to adjourn or suspend the Sales Process would render the Appeal nugatory. The Courts have consistently held that irreparable harm occurs where not to grant the relief would render an appeal nugatory.[19] If this Court refuses to grant the stay, the Appeal will be rendered moot. Further, MFC Finance's statutory right to an automatic stay pending appeal, would be undermined.

34. Third, the balance of convenience favours MFC Finance. The Receiver requested this process and voluntarily elected to suspend the Sales Process pending receipt of the Decision. The same state of affairs should continue until the Appeal is finally determined. MFC Finance, having participated in this process in good faith, merely seeks to have its rights determined in accordance with the process the Receiver chose and provided for in the BIA without being prejudiced in the meantime.

V. CONCLUSION AND RELIEF SOUGHT

35. For the Appeal to have any meaning the Sales Process must wait for the Appeal to be determined. MFC Finance respectfully requests that this Court preserve the *status quo* and suspend the Sales Process until a final determination has been made by the Court of Appeal regarding the validity of the Finance Loan.

All of which is respectfully submitted this 17th day of August, 2018.

BURNET, DUCKWORTH & PALMER LLP

Per: A Butler

Paul G Chiswell/Ashton Butler, Student-at-Law
Counsel for the Applicant
MFC Energy Finance Inc.

[18] *Matco* at para 10.
[19] *Matco*, at para. 10.

List of Authorities

TAB 1

Action No.: 1701-03460
E-File No.: CVQ17ALBERTAENERGY9
Appeal No.: _______________

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

ALBERTA ENERGY REGULATOR

Plaintiff

and

LEXIN RESOURCES LTD.

Defendant

PROCEEDINGS

Calgary, Alberta
October 25, 2017

Transcript Management Services, Calgary
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Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary, Alberta

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October 25, 2017	Afternoon Session
The Honourable Madam Justice Romaine	Court of Queen's Bench of Alberta
K. Cameron	For the Plaintiff
(No Appearance)	For the Defendant
R. Gurofsky	For the Receiver Grant Thornton
J. Cameron	For the Receiver Grant Thornton
D. A. McGillivary, QC	For MFC Energy Finance
D. De Groot	For MFC Energy Finance
D. LeGeyt	For MFC Energy Finance and 1059597
M. Buttery	For Energy Leasing Partners
R. N. Billington, QC	For Young EnergyServe Inc.
K. L. Fellowes	For MNP Ltd.
C. D. Simard	For ExxonMobil
G. Plester	For Vulcan County and MD of Willow Creek
M. Van Huizen	For Vulcan County and MD of Willow Creek
D. Girard	For MD of Foothills and Ranchland
N. Ismail	Court Clerk

THE COURT: Good morning. Please be seated.

Discussion

MR. MCGILLIVARY: Good morning, My Lady.

MS. GUROFSKY: Good morning.

THE COURT: Okay. Ms. Gurofsky, are we ready to proceed?

MS. GUROFSKY: We are. For the record, it's Robyn Gurofsky, from Borden Ladner Gervais, appearing today on behalf of the applicant, Grant Thornton Limited, in its capacity as receiver of the Lexin Group of Companies. With me is Ms. Cameron of my office.

THE COURT: Thank you.

MS. GUROFSKY: In the gallery are Mr. Costello and Mr. Basi from the receiver's office. Also in the courtroom today are Mr. McGillivary, Mr. LeGeyt, and I thought Mr. De Groot.

MR. MCGILLIVARY: He needs housekeeping items.

MS. GUROFSKY: Okay.

THE COURT: Okay.

MS. GUROFSKY: From -- from the firm of BD . They are here on behalf of MFC Energy Finance. As well as -- Mr. LeGeyt is here on behalf of the numbered company that we refer to as 597; it's 1059597.

THE COURT: Right. Thank you.

MS. GUROFSKY: Ms. Buttery is here on behalf of Energy Leasing Partners, or ELP. Mr. Billington is here on behalf of Young EnergyServe. They are a creditor of LR Processing.

Ms. Fellowes is here on behalf of MNP Ltd. MNP was appointed as trustee of LR Processing previously, and that order is subject to an appeal that was filed.

THE COURT: All right. Okay.

MS. GUROFSKY: Mr. Simard is here on behalf of ExxonMobil, working interest partner. Mr. Plester and Ms. Van Huizen are here on behalf of Vulcan County and the MD of Willow Creek. Mr. Girard is here on behalf of the MD of Foothills and Ranchland.

Ms. Cameron is here on behalf of the Alberta Energy Regulator. And there are some other members of the Alberta Energy Regulator in the gallery today.

THE COURT: Thank you.

MS. GUROFSKY: My Lady, service is in order --

THE COURT: Good.

MS. GUROFSKY: -- as set out in three application -- or three respective affidavits of service --

THE COURT: All right. Good.

MS. GUROFSKY: -- two of which have been filed, one of which we undertake to file today. In effect, the application and fifth report of the receiver were initially filed and served on October 12th on the service list, the electronic service list, via secure transfer. And that was done. Given the size of the files, a lot of people came back and said, We can't open this document. So the following day, October 13th, PDF documents were circulated in various emails to the service list.

THE COURT: Okay.

MS. GUROFSKY: The courier list was served by courier on October 13th. Four bounce-backs were received on emails, and emails were resent on Monday, October 16th, with a fax sent to Pengrowth on October 17th. All of the materials were posted to the receiver's website. I would respectfully submit that service is in order.

There are a lot of materials before you today. I mentioned the application and the fifth report of the receiver.

THE COURT: Right.

MS. GUROFSKY: Have you received those, My Lady?

THE COURT: I have, thank you.

MS. GUROFSKY: The receiver also filed a comple -- a confidential supplement to the fifth report.

THE COURT: I have that as well.

MS. GUROFSKY: You should have also received some affidavits filed by other parties including an affidavit of Garth Fai sworn on behalf of Vulcan County --

THE COURT: Yes.

MS. GUROFSKY: -- the affidavit of Cody Thorlakson sworn on behalf of the MD of Willow Creek --

THE COURT: Yes.

MS. GUROFSKY: -- affidavit of Jason Iwanika sworn on behalf of ExxonMobil --

THE COURT: Yes.

MS. GUROFSKY: -- the affidavit of Helene de Beer sworn on behalf of the AER --

THE COURT: Yes.

MS. GUROFSKY: -- and the affidavit of Lars de Pauw sworn on behalf of the Orphan Well Association.

THE COURT: I have not received that one --

MS. GUROFSKY: Okay.

THE COURT: -- but --

MS. GUROFSKY: We -- and -- and I don't believe the Orphan Well Association is here, but we do -- we should have an extra copy that we can hand up.

THE COURT: Okay.

MS. GUROFSKY: We were also served a few minutes ago with an affidavit of Samuel Morrow on behalf of MFC Finance and 597. It has not been filed. I may be referring to it a little bit in my submissions. I have an extra copy.

THE COURT: I haven't seen it.

MS. GUROFSKY: Yeah. So I -- I can hand it up.

THE COURT: Okay.

MR. MCGILLIVARY: What we may need, My Lady, with respect to that is that -- that Mr. Morrow is in Vienna. It's been notarized by at least what purports to be an Austrian notary, but typical of those things, the exhibits have not been dealt with as we would ordinarily do that. So we would need a fiat for filing, if that's okay --

THE COURT: Okay.

MR. MCGILLIVARY: -- with my learned friend. And I -- I'd ask Mr. de Groot to raise that with her if that was an issue. The exhibits is correspondence between law firms, so it's --

THE COURT: Okay.

MS. GUROFSKY: And -- and the intention, I'm told, is to file this document. We have no issue with a fiat being granted --

THE COURT: Okay. Okay.

MS. GUROFSKY: -- with respect to the exhibits.

THE COURT: Okay. I'll give you the fiat, Mr. McGillivary, when it becomes convenient --

MR. MCGILLIVARY: That would be good. And relative to the scope of the -- the need for the document at this point, a good portion of the matters addressed hopefully have been resolved, and you will -- you will be able to grant an order with respect to that. I'm not going to speak to that 'cause that's in Mr. LeGeyt's purview.

There is another aspect that will deal with some -- the procedural order that's proposed -- proposed that we should talk about.

THE COURT: Okay.

MS. GUROFSKY: Perhaps what I'll do is I'll go through -- I -- I think there have been some questions from interested parties about what exactly it is that we're seeking today. So perhaps I'll go through that for the clarity of those parties here and for the court.

THE COURT: Okay.

Submissions by Ms. Gurofsky

MS. GUROFSKY: We're really seeking four things today, one is a bankruptcy order with respect to Lexin and 0989 Partnership. We're seeking a sealing order with respect to the confidential supplement to the receiver's fifth report. We're

seeking an order authorizing the receiver to include certain equipment in the sales process claimed to be owned by 597 and leased to Lexin. And we're seeking the advice and direction of the court regarding the claim asserted by Finance in the amount of approximately $15 million stemming from what Finance says is -- or was a secured loan in the amount of $37 1/2 million.

If the court's unable to make a determination on that today, we have a proposed --

THE COURT: Sorry. I --

MS. GUROFSKY: -- form of procedural order.

THE COURT: -- I don't mean to laugh, but I'm assuming that -- that there -- since -- since I hadn't received anything from Finance and 597, that -- that the concept of me being able to make a decision on that one today is -- is --

MS. GUROFSKY: Difficult?

THE COURT: -- difficult. Okay.

MS. GUROFSKY: Understood.

THE COURT: Now go ahead.

MS. GUROFSKY: So we have a form of procedural order. I think Mr. McGillivary has concerns about what we are seeking in terms of a process, which is an abbreviated process given where we're at in these proceedings.

THE COURT: Right.

MS. GUROFSKY: And I'll speak to that in a minute.

THE COURT: Okay.

MS. GUROFSKY: I think it's fair to say that the receiver had hoped not to be here today bringing this application. There's a fairly lengthy history here by the receiver of attempting to obtain information. Those attempts are outlined in the fifth report and in previous reports filed in these proceedings. And -- and we've obtained a lot of information to date, but a lot of information remains outstanding, including basics like minute books from registered offices, things like that.

All of this is occurring against a backdrop of a sales process, My Lady, which the receiver is attempting to run through its sales advisor, Sayer Energy, which process was approved by the court on July 14th.

Many of the issues which are outlined in the fifth report and the confidential supplement regarding related parties or non-arm's-length parties impact upon the relative success of the sales process. And I will touch on that in a moment.

And I think it's important to keep in mind that the sales process is being run for the benefit of all the debtor stakeholders which include municipalities, the government in respect of unpaid Crown royalties, an unprecedented number of surface lessors -- I think the Surface Rights Board at one point said they had 800 applications -- working interest partners, and of course the Alberta Energy Regulator, the original applicant in these proceedings. And there are other stakeholders as well.

There have also been some allegations recently made by Finance that the receiver is running a materially inaccurate, fundamentally flawed, and misleading process. And these allegations were made after the receiver had understood that there was some path in place to move forward. So this is another reason why we are here today. Clearly, there was no path forward, and -- and so we're -- we're before Your Ladyship.

The receiver requires certainty in order for the sales process to proceed, and a clear path forward in order to derive value for the large -- larger body of stakeholders. So I indicated that there are -- that there are in essence four arms of relief that we're seeking today.

I will leave the Finance alone for a minute, and I would propose to deal with what the receiver understands to be the uncontentious issues of the sealing order and the bankruptcy order. We have recently, this morning, reached a resolution with Mr. LeGeyt on behalf of 597 with respect to a form of order for the 597 equipment.

THE COURT: Good.

MS. GUROFSKY: We intend to engage in discussions with Ms. Buttery on behalf of her client to determine if we can agree to a similar form of order. And -- and that's not before you today, though, My Lady.

THE COURT: Right. Yeah.

MS. GUROFSKY: I'll propose to deal first with the bankruptcy order.

THE COURT: Go ahead.

MS. GUROFSKY: I would submit that the test for a bankruptcy order with respect to Lexin and 0989 Partnership is met. Each of Lexin and 0989 owe debts in excess of $1,000 to multiple creditors, and each have committed an act of bankruptcy in the preceding six months by failing to meet their obligations generally as they come due.

Some examples of the debts include -- and I'm not going to list all of them -- but security deposits owing of over $70 million to the AER; municipal property taxes have not been paid when due going back to 2015; Crown royalty payments owing of at least $3.4 million; not to mention the claims of surface lessors which are unquantified at this time but exceed $1,000 together.

Given that the assets of the company have been suspended, the oil-and-gas assets have been suspended pursuant to orders of the AER that were issued in February of this year. These assets are not cashflowing, and as a result, 0989 and Lexin have been unable to satisfy any obligations and they are hopelessly insolvent.

As a result, the receiver seeks to have a bankruptcy order granted with respect to each of these entities, and is making the application pursuant to the powers given to it in the original receivership orders, in particular paragraph 3(q) of the Lexin receivership order and paragraph 5(q) of the 0989 receivership order, each of which have the identical language providing that: (as read)

> The receiver has the power to, with leave of the court, assign the debtor into bankruptcy, to become trustee in bankruptcy of the debtor, and to take all steps reasonably required to carry out its role as trustee in bankruptcy of the debtor should the receiver deem it appropriate in the circumstances to do so.

The receiver certainly does deem it appropriate in the circumstances here. We're doing this essentially to allow the trustee, if appropriate, to pursue claims under section 96 of the *BIA*. again should it become necessary to do so, and to preserve the time periods with respect to those sections.

We are seeking a bankruptcy order today rather than an assignment -- a leave to pursue an assignment, which is what the paragraph in the receivership orders provide for. We're already before Your Ladyship, and we -- we just felt that this was a little bit more efficient to do.

The order being sought -- and we can hand up a form of order -- proposes that, with the exception of any causes of action belonging to Lexin and 0989, all business property, assets, and undertakings will not vest in the trustee, and instead are to remain with the receiver subject to the terms of the pre-existing receivership orders.

My Lady, there's already a process in place to deal with these assets and a court-supervised process in the receivership proceedings.

THE COURT: Right.

MS. GUROFSKY: And I think it's also important to note that the receivership orders, given sort of the unique circumstances of the applicant and the circumstances facing the assets at the time the receivership orders were granted, that the receiver does not actually have care and custody of the oil and gas sites because those care -- that care and custody is with the OWA and the WIPs, the working interest partners.

The receiver does have all of the other powers that you would typically see in the template receivership order afforded to receivers, including the ability to market and sell these assets. So we didn't see the need to add a layer of costs with the receiver taking care and custody.

What we're essentially seeking to do with the bankruptcy order is preserve the status quo while allowing a trustee to be appointed to pursue any causes of action.

THE COURT: Right.

MS. GUROFSKY: Subject to any questions of My Lady or any of the parties --

THE COURT: No. No, no.

MS. GUROFSKY: -- then --

Decision

THE COURT: I have no questions. I understand. Would anyone like to address this?

Okay. Then I am -- I'm satisfied that the test to put these parties into bankruptcy is met,

that it's appropriate and reasonable in the circumstances to grant this order, particularly with respect to the preservation of a limitation periods issue, that the receiver has the existing power to assign the debtors into bankruptcy pursuant to the original order. Specifically, I -- I'm satisfied that the exception language set out in paragraph 5 of the order is appropriate in the circumstances, and I'll give you the order.

MS. GUROFSKY: Thank you.

THE COURT: Thank you. Thank you.

Submissions by Ms. Gurofsky

MS. GUROFSKY: I'll now propose to deal with the sealing order --

THE COURT: Okay. Thank you.

MS. GUROFSKY: -- the sealing order pursuant to which this receiver seeks to seal the confidential supplement to the fifth report for a period of three months following the discharge of the receiver.

The basis for the application for the sealing order is that the confidential report contains information related to bids received by the receiver in an ongoing sales process. The receiver intends or hopes to complete that sales process, and any information of course pertaining to the bids that is disclosed to the public could adversely affect that process and would prejudice the integrity of the process.

So as per the *Sierra Club* test, we submit that the salutary effects of the sealing order outweigh the ter -- the deleterious effects of such sealing, and that an order to protect the commercial interests associated with the receiver's process and the stakeholders' recoveries, we would submit that the sealing order is appropriate in the circumstances and meets the requirements of the test.

And again, the sealing that we're seeking is -- is not an indefinite period of sealing. It's for a period of three months subsequent to discharge of the receiver.

Decision

THE COURT: Okay. Thank you. Anyone wish to address the sealing order application?

Okay. Seeing that no one is -- is -- appears to be opposed, I am satisfied that that *Sierra Club* test has been met, that the sealing order is necessary and proportionate in its terms, and I'll give you that order.

Okay. Thank you. Go ahead, Ms. Gurofsky.

Submissions by Ms. Gurofsky

MS. GUROFSKY: Thank you. I will now turn to the Finance loan. While we do have a form of consent order on the 597 -- on the 597 equipment order, I think it's important to understand the Finance loan and get the basis of that before turning to the 597 transaction.

I want to outline the facts, not as in (sic) much detail as is contained in the report, but summarize the facts that the receiver has been able to piece together -- together over the past six months regarding the Finance loan. And you'll have seen from the report many of these facts are obtained through counsel to Finance directly, but they're also through the Lexin and 0989 accounting records and recently received bank statements from Raiffeisen Bank or RBI bank in Austria which is where 0989 and Lexin appear to have banked.

So I think we need to understand that, as -- going forward, we see that the parties involved here are non-arm's-length, or appear to be non-arm's-length. Finance, Lexin, and 0989 in respect of the Finance loan involve non-arm's-length parties.

Lexin, 0989, Finance, and 597 in respect of the 597 equipment transaction and the other transactions that are outlined in the receiver's report, including the seismic data sale to Finance and the land transaction involving Finance and 1059, again all appear to be non-arm's-length parties.

I'm leaving Energy Leasing Partners out of that. There's no evidence before us currently that ELP is a non-arm's-length party and Ms. Berry -- Ms. Buttery will be answering some questions hopefully from us regarding that.

THE COURT: Okay.

MS. GUROFSKY: I should also state that, in the report, we called all of these things -- we used the defined turn -- term of 'reviewable transactions'. And perhaps that -- you know, we didn't intend to use that in terms of the old language of the *BIA*, and that was not the reference there, but these are transactions that we are reviewing.

THE COURT: Yeah.

MS. GUROFSKY: Turning back to the Finance loan, we know that Finance has provided a demand loan agreement, a promissory note, and a general security agreement. The receiver -- counsel, our firm -- has reviewed these documents, and the general security agreement constitutes a valid security interest in the property of Lexin and 0989 to secure the obligations of Lexin and 0989 to Finance.

The question is: What are those obligations? And this is a question we've been attempting to have answered since about April of this year. We do know, after some digging, the following: that on June 30th, 2015, M. Financial Corp. advanced the $37.5 million to 0989's Austrian bank account.

M. Financial is a Barbados company. Michael Smith is the director of M. Financial. He is also a director of Finance and -- or was a director of Finance and Lexin at the relevant times. Michael Smith is also a director of MFC Bancorp, which is the publicly-traded company on the New York Stock Exchange.

So we're looking at the snapshot of what happens on June 30th, 2015. On that same day, 0989, after receiving this $37 1/2 million, makes two advances to each of Lexin and Bancorp totalling to the penny 30 -- the $37 1/2 million. Lexin receives $24,916,755.60, and Bancorp receives $12,653,744.40.

On the same day, Lexin transfers that $24.9 million to MFC Energy Austria -- MFC Energy Holdings Austria, pardon me. We refer to them as MFC Austria. MFC Austria appears to be a subsidiary of Bancorp, and Michael Smith is listed as a managing director of MFC Austria.

So what we see is 37 1/2 million coming into 0989's account, and on the same day, in odd numbers, it being disbursed to Bancorp and ultimately MFC Austria through Lexin. We don't know of course where the money goes after that or where it came from because we only have a snapshot of the statements from the parties in receivership.

Prior to getting those bank statements, the receiver conducted a review of the accounting records, and this was done in an attempt to understand, you know, whether the money came in and how it was booked. And the receiver notes that $37 1/2 million is recorded as an account payable to M. Financial, and that the $24.9 million and $12.6 million, the payments to MFC Austria and Bancorp, are recorded as share capital.

Other than these observations, the receiver has no other information about the nature of these transactions and -- and why they occurred. And it's the basis of the Finance loan

that is the stated consideration for approximately $22 1/2 million of asset dispositions made from Lexin and 0989 in the following six months. And that doesn't include the approximately $900,000 seismic sale to Finance in the month preceding the receivership order.

In a perfect world, My Lady, you might make a determination on the validity of the Finance loan today, but I don't know that you can do that. But we would like a resolution given the urgencies surrounding the sales process. And I just want to briefly list what those urgencies are.

We have a set of deteriorating oil and gas assets that have not been properly produced or maintained for some time now. While shut-in orders were issued for all of the properties in February of 2017 by the AER, in some cases the properties hadn't been producing for over a year.

The longer the delay in these proceedings, the higher the cost. And while that's not unique to this process, what is unique here, My Lady, is that the lender under the receiver's certificate is the Alberta Energy Regulator who's funded by industry and the public. The OWA has put in evidence --

THE COURT: I'm sorry, Ms. Gurofsky.

MS. GUROFSKY: Yes.

THE COURT: If you can hold on -- madam clerk, can I have a -- I've run out of ink.

MS. GUROFSKY: Okay.

THE COURT: Can I have another pen, please. Thank you.

Go ahead, Ms. Gurofsky. Sorry.

MS. GUROFSKY: Now, the OWA filed an affidavit, and I regret that you haven't received it. I think Ms. Cameron has handed up a copy to you. It's the affidavit of -- or she will be handing up a copy. It's the affidavit of Lars de Pauw.

THE COURT: Okay.

MS. GUROFSKY: And in that affidavit, the OWA's evidence is that it has incurred approximately $1.17 million since the date of the receiver --

receivership order to maintain the assets, and that it further anticipates over $1 million in costs to bring certain pipelines and the facility into compliance with provincial regulations.

It anticipates approximately $100,000 per month being incurred for contract field staff, and additional internal costs to the OWA associated with administering the wells. So of course the quicker the receiver is able to sell some of these wells, the faster the burden on the OWA will be alleviated.

And if the saleable assets are not sold in the near future, the AER's affiant notes that certain -- and that's Ms. de Beer -- notes that certain of the aff -- aff -- certain of the assets may required downhole suspension to mitigate risks to public health and safety, again increasing costs.

And, My Lady, my understanding is that once you have downhole suspension, a party will have to incur costs to bring that facility out of the downhole suspension state to resume production, which will likely result in decreased recoveries to the estate as bidders consider this in their offers.

So as is typical, I would submit, in insolvency proceedings, the best value is usually derived in the initial sales process -- not always, but I think that would be the case here. We can't forget of course about the surface lessors, the municipalities, the royalty holders, the working interest partners, and others who continue to be unpaid. And the conclusion of a sales process and the transfer of these assets to viable and responsible producers will bring some certainty to these claimants that they will receive a benefit from these assets going forward.

And with -- with respect to the validity of the Finance loan and -- and the sales process, we now have the unanticipated participation in the sales process by a related party as set out in the confidential confidential supplement. I'm not going to go into detail in that, but I think that emphasizes the importance of resolving the validity of the loan on an expedited basis.

I think it's important to keep in mind that the Finance loan represents a claim being asserted by a creditor in an insolvency proceeding. Typically, the onus is on that creditor to prove their claim to the satisfaction of the receiver, failing which the creditor brings a court application on evidence to support the claim, and we don't have that evidence. There is evidence that the receiver has put together, but we don't have the evidence from the creditor.

Since March of 2017, the receiver has been corresponding with various counsel for

Finance. And in fairness to my friends in attendance today, they've only just recently been retained, so I -- I will perhaps leave them out of that.

It's now the end of October. And while we have made great strides in obtaining information, the rece -- receiver still has many questions which remain unanswered. And we are in your hands here, My Lady.

The -- the proposed form of scheduling order seeks to move this matter towards a resolution in an efficient and expedited manner with all -- yeah.

THE COURT: Ms. Gurofsky, do you have a copy --

MS. GUROFSKY: I do.

THE COURT: -- so that I can look it while you're speaking? Thank you. Okay. Great. Thank you. Go ahead.

MS. GUROFSKY: So you'll see that there are a bunch of dates that are left out.

THE COURT: M-hm.

MS. GUROFSKY: We do have, of course, proposals for those dates. And we want to ensure that all relevant information is -- is put before the court in affidavit format from the claimant. And, of course, if we're satisfied with the explanation that's provided, there's no need for a hearing, but we just haven't got to that point yet. And I'd like to set the hearing down so that we have some certainty and some deadlines.

Now, we have provided a copy of this order to our friends yesterday. We understand this morning that there are significant concerns about our proposed time lines which we've only sort of generally relayed to them. My understanding is there was a request for an arbitration by Finance, and -- and I -- I just don't think that's appropriate here. What we'd like to see is, as I said, an affidavit provided by Finance or whomever is the appropriate person to explain why the money came in and on the same day immediately went out to related parties. And we'd like that evidence on or before November 1. And while this might be quite tight in you -- ordinary circumstances, I would submit this is not ordinary circumstances and this is not a surprise. We've been asking about this.

Now, granted the RBI bank statements were only received in early October, but we were in communication with counsel asking to explain this when we obtained the bank statements. If the affiant is to be produced for cross-examination we'd like the affiant to

make themselves available on November 6th and 7th. I understand from Mr. McGillivray that the -- any affiant is out of the country, in Hong Kong or Austria. And, in my view, we have technology. I'm sure we can make it work. Responses to any undertakings given as a result of cross-examination to be delivered by November 10th and the receiver to advise whether it's satisfied with the information obtained, and I'm -- I'm comfortable saying providing reasons for its decision by its decision by November 15th.

We'd like, in best case circumstances, to have a hearing on this if necessary by the end of November. Again, we can't conclude a sales process, in our view, given what's transpired and given the unanticipated bid.

Of course, if Your Ladyship is available, we would -- we would -- we believe there might be efficiencies associated with Your Ladyship hearing this matter considering that there is a significant amount of documentation in such a short period of time, but, of course, I will leave that up to you.

And I think briefs will depend on the date set for the hearing. I understand my friend had indicated that, if the re -- the receiver is filing any further evidence, that it should do so and the receiver should make itself available for examination. The receiver has no evidence on the Finance loan other than what it has been able to generate in its investigation, and that's before the court already in the fifth report. If a formal request to examine the receiver on that report is made we'll consider it.

THE COURT: Okay.

MS. GUROFSKY: So that is the form of procedural order that we're seeking. What I would propose to do now, perhaps my friend, or -- or anyone in the gal -- or in the courtroom wants to speak to that, rather than sort of conclude on that order, I would propose to switch to the 597 issue, unless, you know, of course, someone wants to respond.

THE COURT: Okay. What would be more efficient? Should we speak to this procedural order first? Why don't I hear from the parties?

UNIDENTIFIED SPEAKER: I am not certain. The 597 issue I think will go by consent.

UNIDENTIFIED SPEAKER: Yeah, there's no substance to the order.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: (INDISCERNIBLE).

MS. GUROFSKY: That --

THE COURT: Okay. Well, then let's -- let's deal with that.

MS. GUROFSKY: Let -- let's deal with the 597 --

THE COURT: Yeah, okay.

MS. GUROFSKY: -- issue. And it is going by consent, but I will just be putting a few facts on the record as outlined in the report. And I may refer to this affidavit of Mr. Morrow that was --

THE COURT: Yeah.

MS. GUROFSKY: -- recently provided this morning.

THE COURT: I don't believe I sto -- I don't believe I have a copy yet of that. Okay. Thank you.

MS. GUROFSKY: So this 597 equipment transaction is one of the transactions in which the assets of Lexin were -- were purportedly sold to a related party, in effect, in exchange for a reduction of -- reduction to the Finance loan. The transaction is described at length beginning at paragraph 47 of the fifth report.

Briefly, 0989, in which we understand Lexin holds a 99.99 percent interest, sold certain oil and gas equipment to 597 on December 29th, 2015. The equipment consists of things like compressors, flare stacks, tanks. This isn't sort of truck fleets or photocopiers. This is equipment that is affixed to the ground to assist in the extraction and production of oil and gas. It's rare, I think, to see this type of equipment leased in -- in oil and gas type operations, but --

MR. MCGILLIVRAY: Sorry, I don't recall any evidence of the rarity or not.

MS. GUROFSKY: That's --

MR. MCGILLIVRAY: I want my friend to be pretty careful in this kind of area because they're challenging this transaction, and she's making assertions from which the receiver hasn't even commented on --

THE COURT: Okay.

MR. MCGILLIVRAY: -- on the rarities or not. She's also made assertions with respect to oil and gas production earlier in relation to her thing, that -- you know, I don't mind -- I understand things move along fairly quickly in these kind of proceedings, but there should be an evidentiary basis for it before you start accepting that -- her understanding.

THE COURT: I have read the receiver's report thoroughly. And -- and I understand Ms. Gurofsky is -- is -- is presenting a summary for the court -- for the members of the court here in general. I'm not going to accept that -- I'm not going to accept that -- that -- that what she says in summary is necessarily the evidentiary basis --

MR. MCGILLIVRAY: Fair -- fair enough.

THE COURT: -- which is more in the receiver's report. Go ahead.

MS. GUROFSKY: The stated -- I -- I should say the -- the equipment has remained on the Lexin sites. And only more recently has the receiver been advised that a portion of the equipment has been removed, and we don't know from whom. That's all outlined in the reports.

The stated purchase price for the equipment was $14,000,093 -- 93,000. And the consideration for the sale was paid through the issuance of 14,093,000 shares of 597 to -- to 0989. On the same day, December 29th, 2015, 0989 sells those 597 shares to Finance in exchange for a reduction of the debt, the Finance debt, by, we understand, 14,093,000.

Things start to become unclear when we look at the documentation provided by 597's then legal counsel which suggests that the consideration payable by Finance for the shares was paid by way of setoff of $24.5 million worth of debt owing by Finance to 0989. And this $24.5 million debt apparently arose as a result of Finance's purchase of the 597 for 14,093,000 as well as certain shares in a numbered company we call 1059, a related company, for $4.7 million approximately, which, when combined, does not in fact equal 24 1/2 million.

We -- the receiver's made attempts back in April and May to obtain a further understanding of these calculations in the transactions. No such clarity really has been provided. But the receiver understood that, in effect, the sale of the assets was paid for by way of a reduction to the Finance loan in the amount of 14,093,000.

So understanding the Finance loan of course becomes important in understanding the 597 transaction along with other certain other asset (INDISCERNIBLE) outlined in the report, the receiver was advised about a month ago of some additional documentation indicating that the purchase price for the 597 equipment in December of 2015 was in fact $13,279,000. It's unclear whether the corresponding shares were reduced, but I can confirm, based on a very quick review of the affidavit of Mr. Morrow, that he references the purchase price as being $13,279,000.

We were also advised about a month ago of an additional asset share transaction involving MFC Energy (Montana), a company that we were previously unaware of, as well as certain cash payments made by 0989 directly to Finance purportedly to reduce the Finance loan. These amounts could not be verified in the bank statements in their entirety.

While there is some ambiguity regarding --

THE COURT: Yes.

MS. GUROFSKY: -- these transactions, let's assume for a minute that the equipment was transferred. The equipment was then leased pursuant to a lease agreement as between 597 and lessor and 0989 as lessee, the lease agreement also dated December 29th, 2015, and it is a lease for a period of more than one year.

We have reviewed PPR registrations. These were previously filed. But for ease of reference, we've refiled them in an affidavit of Rhonda Wustocken (phonetic), and we have copy -- a copy of that. I don't know that Your Ladyship needs to refer to them, but I will just outline on the record 597 registered a security interest at the PPR against certain equipment on January 19th, 2016. The registrations are made as against MFC Resource Partnership, who's the predecessor to 0989 Resource Partnership, and against MFC Energy Corporation, the predecessor to Lexin.

Corporate searches indicated that MFC Resource Partnership cha -- ship changed its name to 0989 on February 3rd, 2016, and MFC Energy Corporation changed its name to Lexin on February 2nd, 2016. Those corporate searches are appended to the receiver's fifth report.

The PPR searches, however, are not amended to reflect the name changes until April 26th, 2017, so not within the 15-day period required under the *PPSA*. And I think there's some assumptions being made that, given the related nature of the parties, 597 is deemed to have known or ought to have known about the name changes at the time they were made.

I don't think this turns on anything today other than to say these facts raise priority issues at a distribution application, we would submit. And what we are seeking today is not a determination of priorities but an order recognizing the right of the receiver to sell this equipment in the sales process.

And this right is confirmed by the principles espoused in -- in the Supreme Court of Canada decision in *Giffen* and adopted in cases like *Gimli*, of this court, that the priority regime established by the personal property legislation takes precedent over ownership claims.

I think it's fair to say -- well, I don't know if my friend agrees with me on that point, but we were able to negotiate a form of order that allows the equipment to be included in the sale, preserving all rights of the parties to argue with respect to ownership, priority, any -- and so no determination with respect to those issues is purported to be made in this form of order. And -- and we're fine with that if this means that we can proceed with a sale in an expedited manner.

We have a form of order --

THE COURT: Okay.

MS. GUROFSKY: -- that includes the changes that were proposed by Mr. LeGeyt and accepted (INDISCERNIBLE). And -- and this preservation of rights is found in paragraph 4. And it basically says nothing in the order determines ownership of the equipment, value of the equipment, whether the sale should be approved, whether the receiver's process generated fair market value. These are all things that can be determined at a later date, and -- and that's fine.

What we're saying is that the receiver will hold all of the net sale proceed -- all of the sale proceeds from the asset sale net of the receiver certificates, which, of course, would be paid.

THE COURT: Okay.

MS. GUROFSKY: So that's the form of order.

THE COURT: Mr. LeGeyt?

MR. LEGEYT: Yeah, very briefly, My Lady. Thank you. Ms. Gurofsky's correct, we have agreed to the form of order. I would stress on behalf of my client the importance for fair market value to be achieved by the receiver through this

process. My clients are of the view that the 597 property has significant value. And while that is a question for another day, the affidavit of our client, which Your Ladyship may not have had a chance to review yet, stresses the concept of fair market value over and over.

And Ms. Gurofsky is right. The -- the order before you today does not -- or -- or is without prejudice to the parties' rights to argue the merits, though I note, with the greatest respect, I think Ms. Gurofsky is attempting to get into the merits today. And I would ask Your Ladyship to disregard those submissions. Thank you.

THE COURT: Thank you, Mr. LeGeyt. I'll -- anyone wish to address this consent order. Mr. Simard, yes.

MR. SIMARD: Thank you, My Lady.

THE COURT: Okay.

MR. SIMARD: I'll address both the procedural and the order just handed up. I've just seen these for the first time this morning, but, from our perspective, they're intertwined. So Exxon Mobil, you've seen from our client's affidavit, is a joint interest owner in a number of oil and gas producing properties. And a number of the pieces of equipment that were in the possession of the debtors who are in receivership and -- and are now contested, to some extent, as -- as attested in our client's affidavit, with respect to the -- the equipment that is described as having been sold to 597 and leased back, we have confirmed we have joint interests in some of that equipment.

So this is a typical working interest ownership situation. And, as described in the receiver's report, we -- we would be a working interest partner with a joint interest in some of that equipment. We had not received notice of any sale of the equipment by the debtors, 2597, or otherwise.

And then with respect to the seismic, as well, we're currently doing a bit more research, our client is, to determine the exact nature of our interest. But we -- the client currently believes that -- that it also has a joint interest in -- in that -- in that seismic. So --

THE COURT: Can I just confirm that seismic is not the subject of the sales process at this point, is it?

MS. GUROFSKY: That's right.

MR. SIMARD: That's right.

THE COURT: Okay. Thank you.

MR. SIMARD: So that takes me to the -- the order just handed up regarding the sale of disputed equipment. The -- and, as I said, I've just seen it now, but I -- I would ask Ms. Gurofsky to clarify in paragraph 2 before -- before that order is granted that the definition of the 597 equipment should -- should be clarified so that it's specific to the joint interest owned by -- owned by or through Lexin or 0989 and/or claimed by 597 or affiliates to make it clear that our clients, or other working interest owners as well who may or may not be here, their joint interest in the property is not being marketed.

And I'm sure the receiver's data room and sales process does that, but I -- I -- I think that that should be -- should be stated clearly in this order. We're certainly putting everyone on notice, and we have been with the receiver since the start, that we have interests in some of these assets and the receiver, of course, can't market our joint interests.

So I think that's my only comment on that order, My Lady. That seems acceptable, that that -- the order seems acceptable, subject to -- to that one matter of clarification.

With respect to the procedural order, I'll just make a comment because our -- our client's interest not only is -- is to -- here -- here to -- to send me here to clarify our interest in some of these assets and make sure that our interests are preserved and recognized in the process, but we also, for the general reasons you've seen in the receiver's materials and in the materials from the AER and the OWA, we want this matter to proceed quickly, efficiently. We obviously want the joint interests and the assets we have an interest in to be disposed of and to be taken over by somebody who -- who can operate, maintain, or deal appropriately with the assets so that they're not in this state of paralysis that has -- that has developed and is now present in the receivership.

So with respect to the procedural order, I heard her submissions. I agree with her submissions, that in receiverships it is absolutely typical as -- as a matter of procedure and, I would submit, also fundamental as part of -- as a matter of substance, that people making secured claims against the company have the onus on them to provide whatever loan security or other evidence they feel they need to to prove their claim to the -- to the receiver, and then the receiver opines on that claim. And if there's a dispute, the court can determine it summarily.

But what I saw in the affidavits filed by my -- my learned friend, Mr. McGillivray and Mr. LeGeyt and their colleague this morning, suggested that somehow the receiver had to tell them at this stage what they didn't like about their secured claim or the basis on which they were challenging it, and then they would respond. I think that's totally backward. The onus is on creditors.

And I would suggest that the same is true of parties who are making property claims with respect to property that is in the possession or control of the debtor companies in receivership. The concept of a property proof of claim in the *Bankruptcy Act* is -- is, of course, well know, and it's the same process.

So the only suggest I make, and I'm not central to these issues as -- as the other parties are, but the procedural order seems to be a valid -- a valid way to require the secured creditor to prove its security and to prove -- prove it by way of evidence the receiver has not been able to recover to that. But that -- that type of process, I would suggest, may also be useful with respect to the number of parties commented on in the -- in the receiver's report who claimed to own interests in the assets that are or were in the possession of -- of Lexin and 0989 when these proceedings started.

And that may also -- I don't know if the time for the granting of such an order is not, but I would suggest that all of these things should move forward quickly so that we can get a sales process concluded and get resolution.

THE COURT: Okay.

MR. SIMARD: Thank you.

THE COURT: Thank you, Mr. Simard. Okay, Ms. --

MS. BUTTERY: My Lady, sorry.

THE COURT: Ms. -- oh, I'm sorry, Ms. Buttery, please.

MS. BUTTERY: That's okay. I have a comment generally about a process order.

THE COURT: Okay.

MS. BUTTERY: Is now the time? I know that my friend, Mr. LeGeyt, has not -- my friend, Mr. LeGeyt, has not spoken about it, but is it proper to speak about it now?

THE COURT: I -- I think perhaps we should -- we should finish with the 597 order. And then I'll ask for comments on the process order --

MS. BUTTERY: Thank you.

THE COURT: -- Ms. Buttery. Thank you. Ms. -- I'm sorry, Gurofsky, Mr. Simard has suggested an amendment to paragraph 2. Is that acceptable?

MS. GUROFSKY: It is. And --

THE COURT: And I'll ask Mr. LeGeyt, as well.

MS. GUROFSKY: And I have some of the (INDISCERNIBLE) language.

THE COURT: Okay.

MS. GUROFSKY: And I can read it out or -- or circulate it among --

THE COURT: I think --

MS. GUROFSKY: I think it's (INDISCERNIBLE).

THE COURT: I think really Mr. LeGeyt is -- you know, is the first person who should review that language.

MR. LEGEYT: Oh, yeah, no objection here, My Lady, yeah.

THE COURT: Okay.

MS. GUROFSKY: And I don't think anyone would have an objection over this. But paragraph 2 would say the receiver is entitled and empowered to market, sell, convey, or transfer the equipment listed in schedule A to the bill of sale between 1597 and 0989 dated December 29th and attached to the fifth report as appendix 12 over which there is an ownership dispute amongst various parties, including 597 and Exxon Mobil with the proper names being included.

Does that --

THE COURT: Yeah. Is -- is Exxon Mobil the only working interest party involved in this?

MS. GUROFSKY: They're -- Exxon Mobil is the only working interest party who is more --

THE COURT: At fault in this equipment?

MS. GUROFSKY: -- more active, at least.

THE COURT: Okay.

MS. GUROFSKY: There be others, but we haven't heard from anyone.

THE COURT: Oh, okay. Mr. Simard?

MR. SIMARD: I don't -- with respect, I don't know that that addresses my concern. My concern was more specifically -- we do have a dispute. And -- and it may be the case that 597 is claiming they owe 100 percent of -- of these pieces of equipment. We don't know that. I think there was some -- there was perhaps some suggestion about that early in the process. What I'm trying to capture in -- in the wording I was proposing was, I think, the working interest in these -- in these properties is 75:25.

We want it to make clear that the only -- the only joint interest that can be marketed is the joint interest purportedly owned by the Lexin parties or their affiliates. And so if they're claiming more than 75 percent, and nobody in this room may -- may know as we stand here today, I just -- I don't know if that wording captures it. And we may have to sadly revisit it and look at some -- some drafts and --

MS. GUROFSKY: Why don't we have a discussion after --

THE COURT: Yes.

MS. GUROFSKY: -- the hearing and we'll talk about language?

THE COURT: Okay. Okay.

MS. GUROFSKY: We'll come to an agreement.

THE COURT: Okay. Okay, with respect to the process order, do you have anything in addition you'd like to say, Ms. Gurofsky? You've put -- you've put out the -- the schedule that -- that you believe is -- is reasonable for this. Did you

want to add anything before I ask for comments?

MS. GUROFSKY: No. I -- I would just emphasize that, you know, in our view, and I said this already but I'll say it again, doing this in an efficient manner is so important to ensuring that we have a sale process that derives any benefit for the stakeholders.

THE COURT: I think what I'll do is I'll ask for comments for -- from anyone who wishes to speak in support of the process order. And then I'll turn to you, Mr. McGillivray. Ms. Buttery?

MS. BUTTERY: No. I have concerns that --

THE COURT: Okay.

MS. BUTTERY: -- other parties may be bound by it, and that's why I'm not speaking.

THE COURT: Okay.

MS. BUTTERY: Thank you.

THE COURT: Okay. Ms. Cameron? Okay.

MS. CAMERON: Thank you, My Lady. And if I may also make a couple of comments in response to the equipment order, as well.

THE COURT: Sure.

MS. CAMERON: First of all, my client supports the application of Ms. Gurofsky. And we're actually very supportive of the amendment proposed by Mr. Simard to propose a process to deal with the equipment claims. Ms. Gurofsky did set out quite conse -- succinctly the prejudice and concerns that my client has with continue delays -- delays in this process.

One point of clarification I'd like to make is, while historically we have received some public funding for the AR, currently we are a hundred percent funded by industry, so it is the industry that's bearing the burden, not only to fund this receivership, but also bearing the burden of the costs while the OWA addresses these sites.

Part of our concerns with the delay today is the AR took the unprecedented step of appointing a receiver to try to facilitate the movement of these sites where possible to responsible parties so that they could be produced for the benefits of Albertans and to ensure that the environmental liabilities are ultimately addressed.

Part of our concern with the equipment claims and the statements earlier today, that there needs to be a focus on the value of the equipment, is, while there may be some value to that equipment, it's also the AR's position that there's liabilities associated with that equipment. Their position on the sites have potentially contributed to the environmental issues that result on the site.

As Ms. (sic) Simard mentioned, depending on the working interest participant share of the equipment owners, they also potentially have abandonment and reclamation obligations under our legislation, as well.

So we just want to put on the record and make sure nobody's surprised that, at some future point in time, should there be an application regarding the ownership of the equipment, or even the sales proceeds regarding the sales, not only are there environment obligations we assert attached to those, but in addition to that, the AR does claim a statutory lien in response of the wells and facilities and associated equipment where Lexin and its related entities do have an interest in the same.

So we would -- we support the application. And in relation to the procedural order, we do just want to reassert that there is some need for an expedited process on this. As mentioned by Ms. Gurofsky, some of these sites have been out of operations for over a year now, as set out in the affidavit of Ms. de Beer from the Alberta Energy Regulator. It's getting to the point in time where certain steps do need to be taken if the sites aren't going to be put back into operation relatively soon to try to preserve the safety and environmental matters that could attach to those sites.

So we are hoping that there can be some swift resolution in this matter so we have some certainty as to what next steps need to occur at these sites to ensure that the environment and public remain protected. Thank you.

THE COURT: Thank you. Than you, Ms. Cameron. Anyone else wish to speak in favour of the -- of the process, the procedure order? Mr. --

UNIDENTIFIED SPEAKER: My Lady, I want to make a couple comments in the 597 order, if I might, now or later. It doesn't matter to me.

THE COURT: We're getting a little -- I'll -- I'll -- I will call on you later, if you don't -- if you don't mind.

UNIDENTIFIED SPEAKER: Okay.

THE COURT: Let's just deal with procedure now. Okay. Anyone -- Mr. McGillivray, I guess, are you going to address the procedure order?

MR. MCGILLIVRAY: My Lady, I don't want you to be confused at the genesis of suggesting that there be a process for the resolution of the issue of the validity of the loan. It started with my learned friend. I had suggested this some days ago and that we develop a process in order that we could resolve this. It makes sense. There's a live issue.

The receiver seems to think that the receiver needs more information in order to make a decision. Having been provided with loan documentation and bank transfers and a whole bunch of other stuff, he still thinks he needs something more, and -- and that's fair enough. That's fine. We'll -- we'll deal with that.

The problem that I am faced with is, is that these -- even by my learned friend's submissions to you, seem to be interrelated and with a number of other transactions that would be clearly non-arm's length, I think, because they are related entities. But that mere fact, given the timing, doesn't make them improper transactions by any stretch. The court would have to determine that on evidence in the fullness of time.

But because they have to be interrelated and because the players with respect to them may not be one or two people -- and the two people that I'm thinking about this point, but there may be many more, and I just simply don't know on that, are Mr. Morrow (phonetic), who is in Austria. And I understand that that is Mr. Morrow's home base.

My dealings with Mr. Smith (phonetic) in the last couple of evenings have been because he is in Hong Kong and we would be waking him at 5 and 6 in the morning to deal with somebody at 1 or 2 in the morning on the other side of the world with us and the Vancouver counsel in-between.

My friend suggests that a comprehensive affidavit that would involve probably a thousand pages of materials by November 1 with me having out-of-town commitments commencing this afternoon through to Monday, and then being out-of-town from Wednesday through to the following Monday -- it just doesn't work. And the form of order that she provided had a whole bunch of blanks, but she didn't tell me what her time line was. Her turnaround for the 8th just doesn't work. Her turnaround for the 10th just doesn't work.

Five days later from the receiver may be just fine from whenever we complete the

process.

THE COURT: So what are you suggesting would be a reasonable time to produce this affidavit, Mr. McGillvary?

MR. MCGILLVARY: Well, the concern seems to be a holdup in the sales process. And that, as I understand it, relates to a bid that my clients, or a related entity has made, which is in part a credit forgiveness bid, as I understand it.

THE COURT: I'll --

MR. MCGILLVARY: And so if you don't know if there's any credit --

THE COURT: Okay. Mr. McGillvary, there is a -- there is a sealing order on that.

MR. MCGILLVARY: Well, there may very well be. I'm not giving any detail.

THE COURT: No.

MR. MCGILLVARY: It's just the fact that they're in the game. That certainly is not --

THE COURT: Okay. Okay. Well . . .

MR. MCGILLVARY: I mean, I don't know -- I've seen the redacted portion --

THE COURT: Okay.

MR. MCGILLVARY: -- of -- of that report and it -- that's all I know is the redacted portion.

THE COURT: Okay. Okay. But yes, there is an urgency with respect to having this matter, and it appears to be -- to me from the information before me to be related to the sales process. So that's why I ask you this question, When can your client produce this affidavit?

MR. MCGILLVARY: Well, why can't the sales process take this into

account?

THE COURT: Excuse me?

MR. MCGILLVARY: Has anybody canvassed that? It's can this issue --

THE COURT: Okay. Okay.

MR. MCGILLVARY: -- be accommodated in the sales process?

THE COURT: Okay. Are you -- are you suggesting that -- that -- are -- are we talking about timing, or are we talking about the procedure to prove the Finance and all that?

MR. MCGILLVARY: We're -- we're talking about timing and -- even the procedure.

THE COURT: Okay. Okay.

MR. MCGILLVARY: I -- I'm -- I'm all for going for this --

THE COURT: Okay. So I'm asking you the question --

MR. MCGILLVARY: Okay.

THE COURT: -- when can your client produce this affidavit?

MR. MCGILLVARY: My client's affidavit could be reasonably produced by mid-November. It --

THE COURT: No, that -- that's not -- that's not reasonable. I can understand November 1st.

MR. MCGILLVARY: I'm -- I'm not even in the country until the 8th.

THE COURT: Well, you have, I assume, people in your firm that could cover for you?

MR. MCGILLVARY: I -- they can cover to a degree, but --

THE COURT: I -- I'm sorry, but Mr. --

MR. MCGILLVARY: -- I'm -- I'm the person engaged.

THE COURT: -- Mr. McGillvary, you were the person engaged, but you certainly -- you know, you have to be available to -- to -- to participate in this process as well.

MR. MCGILLVARY: I was available to participate in the process. And the first time I heard the timing is when my friend gave it to you now.

THE COURT: Okay.

MR. MCGILLVARY: The order I've got has got a bunch of blanks in it.

MS. GUROFSKY: It's been several weeks that we've wanted the matter heard --

THE COURT: Right.

MS. GUROFSKY: -- and dealt with before the end of November.

THE COURT: Okay. I'm sorry --

MR. MCGILLVARY: I'm sorry, I'm not --

THE COURT: -- let's just get back to --

MR. MCGILLVARY: -- the first time I heard the --

THE COURT: I'm not -- I'm not arguing --

MR. MCGILLVARY: -- end of November is now.

THE COURT: -- with you Mr. -- Mr. McGillvary. I'm saying that -- that we need to -- we need to set this procedure.

MR. MCGILLVARY: I have no trouble with that.

THE COURT: I can understand that November 1st is a very

short period of time for you to -- to have this affidavit. When you're suggesting mid-November --

MR. MCGILLVARY: That's the 15th.

THE COURT: -- be -- because of your obligations, your other obligations, I have to say to you in these circumstances -- although many times as a court we try to accommodate counsel's personal -- personal obligations or other business obligations. In this kind of proceeding there are times when we can't do that.

So what I'd like to do is, we've been going for quite some time. I'm going to call for a 15-minute adjournment. Given -- given what I've said to you, that the 15th of November is not -- is not in my view reasonable, why don't you and Ms. Gurofsky have some conversations about working some acceptable times. Okay. Fifteen minutes.

(ADJOURNMENT)

THE COURT: Thank you. Please be seated. Ms. Gurofsky?

MS. GUROFSKY: Well, My Lady, I regret to advise that we've been unable to reach an agreement on the schedule.

THE COURT: Okay.

MS. GUROFSKY: I think there's a couple of issues. One is that I understand the 1,000 pages of affidavit relates to not only the Finance loan, but all of the other transactions that are referenced in the report of the receiver. And while I understand that these parties might want to respond or speak to these issues, the urgency for us is with respect to the Finance loan.

And if we can narrow that issue and hive it off from the rest of the transactions, because that is what needs to be resolved in order for the sales process to be concluded.

THE COURT: M-hm.

MS. GUROFSKY: So that's the first issue. I think the second issue that I ne -- I -- I need to just emphasize is that -- and I'll say we're about two weeks off right now with a proposal by Finance and the related parties to have a hearing the week of December 15th.

But that means then that we then have to take steps to negotiate purchase and sale

agreements, and we likely won't be in court to have those agreements approved until January. So that's why it's important for us to have the matter by the -- by the end of November so that we can be in court before the end of the year, ideally, to have sales approved.

THE COURT: Okay.

MS. GUROFSKY: And so I would say that if we can hive off the issues and separate Finance from the rest of the transactions, that should make things a little bit easier in terms of putting evidence forward.

THE COURT: Okay. Mr. McGillvary?

MR. MCGILLVARY: The difference that my learned friend and I have is really a matter of about two weeks, My Lady, and it isn't two weeks in the context of wanting to, you know, delay things. It's two weeks because it has to be.

My client says rightly or wrongly that on the motion he -- they want me, you know, old fat guy with not much hair. I have a longstanding, many, many months total blackout commitment between the 25th of November and the 9th of December. I am simply unavailable.

I had said that we could do the argument on the motion in the week of December 11th. I prefer not the 11th, but I'm asking for an indulgence in any event, the 11th being the Monday, because I'm -- I'm -- I'm back late the night of the -- of the 9th, so -- on that. So I've suggested anytime in that week I would do it, the 11th if that's what the court's directions was. I prefer 12, 13, or 14.

But on that, I understand my learned friend's problems. To the extent that we're looking at the existence or not of, you know, a multi-million dollar loan that my client has said that it has laid out real money for in -- in relation to that. We're pushing things on this.

I understand the receiver's concern and the receiver wanting to do the final steps and the timing on that. Perhaps they can go to work on that, but candidly, that's the best I can do without the court just basically saying my client can't have their choice of counsel.

THE COURT: What about Ms. Gurofsky's point that she wants this to focus on the Finance loan, not all of the issues?

MR. MCGILLVARY: It may be it can be done that simply, but I can't commit to that. And -- but that's the first part. We -- we can deal with the timing to

start. The key point is when can we argue this thing, because even if we move it forward, I'm unavailable from that last week of November into the first week of December, just simply not available there.

And that isn't something that came up today. That is something that's been sitting out for close to a year now.

THE COURT: Okay.

MR. MCGILLVARY: So it's -- it's that time frame for the argument of the matter that creates the problem.

THE COURT: Or your client has to get other counsel.

MR. MCGILLVARY: Or -- or they've got to get other counsel.

THE COURT: Yeah. Okay.

MR. MCGILLIVARY: And that would be -- I think, from the client's perspective, from what I understand, they would not be happy with that. But --

THE COURT: Okay.

MR. MCGILLIVARY: -- as I say, in the fullness of things, we're talking about two weeks. If things have got to get compressed, then maybe the receiver's got to compress, too. And I recognize that that's difficult, and --

MS. GUROFSKY: And we're prepared to do that.

THE COURT: No, I think the receivers are prepared to compress it.

MS. GUROFSKY: We're prepared to have the matter heard on November 24th.

THE COURT: Yeah. I don't think -- okay.

I need to hear from other people with respect to the procedure order. I think, Ms. Buttery, you're first up.

MS. BUTTERY: Thank you, My Lady.

THE COURT: Okay.

Submissions by Ms. Buttery

MS. BUTTERY: My Lady, my comments are more of a general sense, not related to the specific order and the timing related thereto. But -- and it probably starts with me grumbling a bit, and I apologize, but those are my instructions.

THE COURT: Okay.

MS. BUTTERY: So my -- in the receiver's report -- and -- and Ms. Gurofsky is aware I'm going to grumble a little -- at page 5, my client's big beef is being -- and I can just describe it to you, My Lady --

THE COURT: Okay. Sure.

MS. BUTTERY: -- that there are a number of transactions that are "capital 'R' capital 'T'" reviewable transactions. And as your Ladyship is well aware, there is a -- a specific concept of a reviewable transaction in the solvency matters, and in my submission is a pejorative term, frankly, especially when it relates to my client and their transaction.

And so my client would like me to put on the record that they are quite askance as being pinned with this pejorative term, and as a result just want on the record that they have been doing their best to cooperate with the receiver in providing that information.

And just because it wasn't clear because some other counsel seemed to have an impression that my clients were holding up the sale, the receiver does note, in fairness to the receiver, dealing with my client starting at page 37, that my client has cooperative -- cooperated through counsel -- namely, Cassels Brock.

And specifically, I will note just for the record that they -- my client has provided most -- not all -- of the information requested, and that the receiver is reviewing it; and, further, that we have agreed that the equipment that we claim to be -- have an ownership in is -- can be sold subject of course to certain conditions that, you know, would mainly fall along the same lines that -- that Mr. LeGeyt's clients and Mr. McGillivary's clients have negotiated.

So they just wanted that frankly put on the record that they're -- they're doing their best and -- and they are cooperating to the best of their ability.

With respect to --

THE COURT: And I should say thank you for that, Ms. Buttery. I did note that they were agreeing --

MS. BUTTERY: Yes.

THE COURT: -- that the equipment could be put in the sale, and you can assure your client I did not take 'reviewable transaction' in the more technical sense.

MS. BUTTERY: Thank you.

THE COURT: Okay. Thank you.

MS. BUTTERY: They will appreciate hearing that.

THE COURT: Okay.

MS. BUTTERY: There is -- there is a little wrinkle, as there always is in these matters, and that relates to one facility called a Cowley gas plant. It's not before the court today. It has been the subject matter of some discussions between the receiver, Ms. Gurofsky, Ms. Cameron, and myself over the last day and a half. It may be an issue before the court. I'm hopeful it won't be. We're going to deal with the matters in the next few days, but I did want to flag that -- that just in case that does come up again.

THE COURT: Okay.

MS. BUTTERY: And then finally, with respect to the process order, we of course agree that there needs to be a process. I'm a big proponent of summary proceedings in insolvency matters. My concern of course is the time frame that is perhaps going to be pressed upon Mr. McGillivary, and I would be in the same position, that my instructing client -- in fact, my instructions come from counsel in Germany then through the client, so it's even another level of complexity.

And the only thing I wanted to say after this long-winded sentence is: I wouldn't want this compressed time line to serve as a precedent for another order or request that would be made. And I think it wouldn't be, leaving aside the Cowley gas plant, because my client (a) is not objecting to the sale in any way, and (b) is not a bidder in the process.

So there is no credit bid issue that they raise in this circumstance.

Those are my submissions.

THE COURT: I understand that. And so I -- I take what you have to say -- let me just clarify a couple of things.

MS. BUTTERY: M-hm.

THE COURT: So you would agree that the focus of this compressed time line should be the Finance loan --

MS. BUTTERY: Yes.

THE COURT: -- and not the other issues, some of which may affect your client?

MS. BUTTERY: Yes.

THE COURT: And I guess I should -- I might as well ask you: Are you available the week of December 11th? Are you going to participate, and would you be --

MS. BUTTERY: I don't believe I'm going to participate in the Finance proceedings, but I would be available, or someone from my office would be.

THE COURT: Okay. Okay. Thank you.

MS. BUTTERY: Thank you.

THE COURT: Just a question. I'm not -- don't want you to panic. Okay.

MS. GUROFSKY: And if I could just clarify, the receiver doesn't see this procedural order binding any of the other parties with respect to their claims. As noted, we want to deal with the narrow issue of the Finance loan.

THE COURT: Right. Okay.

I'm sorry, Mr. Plester?

MR. PLESTER: Yes, My Lady.

THE COURT: Yeah. Thank you.

Submissions by Mr. Plester

MR. PLESTER: I will be very brief. So again, Greg Plester, Brownlee LLP. I'm only going to be addressing the 597 equipment issue.

THE COURT: Oh.

MR. PLESTER: And when I prepared my submissions last night, there was no consent order in place, so I'm going to move those aside, but I will make a few quick comments.

The two affidavits filed by our county and the clients, the Vulcan County and the MD of Willow Creek, are basically in respect to the relationship between the 597, but also the Energy Leasing Partners' assets and their claim for taxes.

Essentially, the taxes levied by the county are levied in respect to, among other things, machinery and equipment. Some of this machinery and equipment includes machinery and equipment claimed by either of 597 or Energy Leasing Partners.

In our view, because there are outstanding taxes and because of this connection to the assets in question, section 348 of the *MGA* gives our clients, and all municipalities in Alberta similarly -- similarly, a special lien against the assets in question. So we believe that it's a live issue.

And I understand that, under the terms of the consent order, anything that would affect that is going to be parked down the road for another day. I just wanted to put it on the record this morning, My Lady, that the municipalities in question are going to be asserting that special lien, and that special lien we do believe attaches to some of the assets in question.

THE COURT: Okay. Thank you.

MR. PLESTER: Thank you, My Lady.

THE COURT: Thank you.

MR. PLESTER: Otherwise, we support all of the relief requested by the receiver.

THE COURT: Okay. Thank you.

Does anyone else wish to speak to the process order before I turn back to Ms. Gurofsky?

Okay, Ms. Gurofsky.

MR. GIRARD: Oh, I'm sorry, My Lady.

THE COURT: Oh, I'm sorry. Sorry, sorry.

Submissions by Mr. Girard

MR. GIRARD: Just -- Girard, first initial 'D', for the record on behalf of the MD of Foothills and Ranchland. And the sequencing makes sense partly because we respectfully submit on their behalf that their position is quite frankly very similar to the ones taken by Willow Creek and Vulcan County.

THE COURT: Right.

MR. GIRARD: And so I would merely echo Mr. Plester's submissions with respect to those.

THE COURT: Okay. Thank you, sir.

MR. GIRARD: Thank you.

THE COURT: Okay. Ms. Gurofsky?

MS. GUROFSKY: My Lady, I don't think I need to say much more. I really point out -- and this is contained in the fifth report and in previous reports of the receiver -- that both Finance and 597 have had various counsel on this file from the start, from Lerners to Sangra Moller, and only recently have they engaged Burnet, Duckworth.

So I would suggest that there's got to be someone who can attend and make themselves available by the end of November. We do not want to push the sales process into January, given all of the costs and issues you heard today. We are prepared to have the matter heard on November 24th.

Discussion

THE COURT: Okay. Let me -- let me tell you, during the -- during the adjournments, I took the opportunity to speak to the trial coordinators. And I can tell you that I could certainly -- I'll tell you that the week of Nov -- that November 24th looks to be a problem, you know.

MS. GUROFSKY: Okay.

THE COURT: I've been given sort of unofficial word that, if I was prepared to do it in early December, they would -- that they would be able to change my schedule to do that. And I agree that there's some urgency here. So -- and the earliest, I'm sorry, I could do it would be the week of December 4th.

So we're really talking about the week of December 4th or the week -- and I can also do it the week of December 11th. There's -- there is one week difference. I'm sorry, Ms. Cameron wants to -- I mean, it's not -- I'm not saying that -- okay. Go ahead.

MS. CAMERON: Yeah. December 4th -- the week of December 4th, you know, we -- we believe we might still be able to deal with a sale approval application --

THE COURT: Yeah.

MS. CAMERON: -- by the end of the -- the month.

THE COURT: Okay. What about December 11th? And I guess I'm looking to the receiver. Is December 11th livable? I'm -- I don't want to undermine you, Ms. Gurofsky. Do you want a few minutes to talk to the receiver? It's just that we are talking about a one-week difference now, and Mr. McGillivary has raised right to counsel issue. If you do need an adjournment --

MS. GUROFSKY: I don't think so. I mean, other parties might want to make submissions on this, but if the hearing is schedule for December 11th, we'll make that work.

THE COURT: Okay. Okay. Then -- then I think I can tell you -- as I said, I've got unofficial approval --

MS. GUROFSKY: Yes.

THE COURT: -- but I think I can tell you --

MS. GUROFSKY: Okay.

THE COURT: -- I could hear it on that date.

MS. GUROFSKY: Thank you.

THE COURT: I want to make it clear, though, I believe this should be focussed on the Finance loan, not the other issues. It is a compressed schedule, and I don't want the -- either side to be -- to be making this any more complicated given that I will have to make a decision very quickly in order for these sales to -- to conclude by the end of the year, okay?

Mr. McGillivary?

MR. MCGILLIVARY: I have no difficulty with that, I think, but I don't want to be hearing a spin out of my friend relating to whatever concerns they've got about other issues affecting credibility with respect to the point -- time on that because otherwise --

THE COURT: Well, we can --

MS. GUROFSKY: We have no --

MR. MCGILLIVARY: -- I'm going to put my whole story forward.

THE COURT: -- we can deal with that. You know, we can deal with that as it goes.

MS. GUROFSKY: -- we have no application with respect to those transactions as yet. I think we need to understand -- as I've said and I've -- as I've always said, I think, we need to understand the Finance loan, and then we can deal with these other issues.

THE COURT: Right.

MS. GUROFSKY: I don't plan to intersperse the two issues on the December 11th.

THE COURT: Right. Okay. Okay. What I'd like to do then

is -- is set it for December 11th. And I don't really want to go through the process. What I'd like you to do, Ms. Gurofsky and Mr. -- McGillivary and whoever else needs to be present during that hearing, you would work backwards from that date.

MS. GUROFSKY: We'll do that.

THE COURT: If you're not able to resolve that, if you could maybe bring it back to me tomorrow. Just let me know and I'll try to fit you in sometime, okay?

MS. GUROFSKY: Thank you.

THE COURT: Okay. Is there anything else? Oh, there's the --

MR. MCGILLIVARY: So --

THE COURT: -- of course, there's the consent order.

MR. MCGILLIVARY: -- Monday the 11th?

THE COURT: Monday the 11th.

MR. MCGILLIVARY: Okay.

THE COURT: Yeah. Okay.

MS. GUROFSKY: If I could just also put on the record, I said I was going to speak to this Mr. Morrow affidavit. I did not. I will speak to it on December 11th --

THE COURT: Okay.

MS. GUROFSKY: -- or at the appropriate time.

THE COURT: Okay. I haven't had a chance to read it. I --

MS. GUROFSKY: Yes.

THE COURT: -- okay. What about the -- the consent order, the 597 order? Have you been able to resolve the --

MS. GUROFSKY: We have --

THE COURT: -- the issues?

MS. GUROFSKY: -- and we have some language that all of the parties are comfortable with. We think it makes sense to just clean it up.

THE COURT: Sure.

MS. GUROFSKY: And we'll send a copy of that, hopefully together with the scheduling order, to Your Ladyship this afternoon.

THE COURT: Okay. Okay. Yeah.

UNIDENTIFIED SPEAKER: (INDISCERNIBLE).

THE COURT: Oh. The time of the hearing on the 11th, 10:00. I'm -- I'm assuming a full day. If you need any more time, if you could tell me as soon as possible and I will clear it -- try to clear it with the trial coordinators.

MS. GUROFSKY: Thank you.

THE COURT: Okay. Thank you.

PROCEEDINGS ADJOURNED UNTIL 10:00 AM, DECEMBER 11, 2017

Certificate of Record

I, Nina Ismail, certify that this is the record made of the recording of the proceedings in courtroom 1702, held in Calgary Court of Queen's Bench, and I was the official in charge of the recording.

Certificate of Transcript

I, Sue Kranz, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability, and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

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TAB 2

Form 27
[Rules 6.3 and 10.52(1)]

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COURT FILE NUMBER	**1701-03460**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	Calgary
PLAINTIFF	**ALBERTA ENERGY REGULATOR**
DEFENDANTS	**LEXIN RESOURCES LTD., 1051393 B.C. LTD., 0989 RESOURCE PARTNERSHIP, LR PROCESSING LTD. and LR PROCESSING PARTNERSHIP**
DOCUMENT	**APPLICATION BY RECEIVER: ADVICE & DIRECTION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Robyn Gurofsky/Jessica L. Cameron Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9774/9715 Facsimile: (403) 266-1395 Email: rgurofsky@blg.com/jcameron@blg.com File No. 547730-000021

NOTICE TO RESPONDENTS: See Service List, Schedule "A" to this Application

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date	October 25, 2017
Time	10:00 a.m.
Where	Calgary Courts Centre, 601-5th Street SW, Calgary AB
Before Whom	The Honourable Justice B.E. Romaine

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. Grant Thornton Limited, in its capacity as the court-appointed receiver (the "**Receiver**") of Lexin Resources Ltd. ("**Lexin**"), 1051393 B.C. Ltd. ("**105**"), 0989 Resource Partnership ("**0989**"), LR Processing Ltd. ("**LR Ltd.**") and LR Processing Partnership ("**LR Processing**" and collectively with Lexin, 105, 0989 and LR Ltd. the "**Lexin Group**"), seeks:

   (a) The advice and direction of this Court in respect of the Receiver's court-approved sales process (the "**Sales Process**"), which is presently in progress, and in particular, the advice and direction of the Court as a result of certain ownership claims in a portion of the property located on Lexin owned Sites and listed for sale in the Sales Process;

   (b) The advice and direction of this Court in respect of a series of transactions (the "**Reviewable Transactions**") entered into by the Lexin Group and certain non-arm's length parties, including:

      (i) a secured loan MFC Energy Finance Inc. ("**Finance**") asserts it advanced to 0989 in the amount of $37,570,500 (the "**Finance Loan**");

      (ii) a transfer of equipment from Lexin or 0989 to 1049597 B.C. Ltd. ("**597**"), the consideration for which is stated to be a reduction to the Finance Loan;

      (iii) a transfer of certain lease and land interests from Lexin or 0989 to 1059032 B.C. Ltd. ("**1059**"), the consideration for which is stated to be a reduction to the Finance Loan;

      (iv) a transfer of certain seismic data from Lexin or 0989 to Finance, the consideration for which is stated to be a reduction to the Finance Loan;

      (v) a transfer of certain oil and gas assets from Lexin or 0989 to Notine Holdings Inc. ("**Notine**"), the consideration for which is unclear; and

      (vi) a transfer of certain additional equipment from Lexin or 0989 to Jixin Energy Inc. ("**Jixin**") and then to Energy Leasing Partners Ltd. ("**ELP**"), the consideration for which is unclear.

   (c) The appointment of Grant Thornton Limited as trustee in bankruptcy over Lexin and 0989 for the purposes of preserving limitations periods in the event the Receiver deems it appropriate to challenge the Reviewable Transactions;

   (d) A declaration that the relief sought to date by the Receiver constitutes remedial relief pursuant to the *Limitations Act* (Alberta), such that the limitations periods in which the Receiver or a trustee in bankruptcy may pursue claims to challenge the Reviewable Transactions as any of a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction pursuant to any of the *Fraudulent Preferences Act* (Alberta), the *Fraudulent Conveyances Act 1571* (13 Eliz 1, c 5), the *Bankruptcy and Insolvency Act* (Canada), or any other applicable federal or provincial legislation is preserved;

(e) Approving the Receiver's activities and conduct to date, including the Receiver's conduct with respect to the Sales Process; and

(f) A sealing order with respect to the Confidential Supplement to the Fifth Report.

2. Such further and other relief as Counsel may advise and this Honourable Court permit.

Grounds for making this application:

Background

3. On March 20, 2017, this Court granted the Alberta Energy Regulator's ("**AER**") application to petition Lexin into receivership (the "**Lexin Receivership Order**"). Subsequently, on June 13, 2017, this Court granted the Receiver's application to petition 105, 0989, LR Ltd. and LR Processing into receivership pursuant to a consent receivership order (the "**Expanded Receivership Order**" and together with the Lexin Receivership Order the "**Receivership Orders**"). All capitalized terms used but not otherwise defined herein shall have the meaning given to them in the Expanded Receivership Order.

4. The Lexin Receivership Order and the Expanded Receivership Order appointed the Receiver over all of the Debtors' Property, but provided that, while the Receiver may take possession and exercise control over the Property, the Receiver is not required to take possession or exercise physical control over any of the Debtors' oil or gas wells, pipelines, facilities or sites regulated by the AER (the "**Sites**").

5. The Sites for which the Debtors were the sole operator and owner are now under the care and custody of the Orphan Well Association; however, Sites operated by the Debtors (or any one of them) in which there are working interest participants ("**WIPs**") have been placed under the care and custody of those WIPs.

6. While the Receiver cannot take physical possession of the Sites, the Receiver is authorized to conduct a sales and marketing process with respect to all of the Debtors' Property.

Application for Bankruptcy Order

7. The Receivership Orders allow the Receiver, with leave of the Court, to assign the Lexin Group, or any one of them, into bankruptcy, should the Receiver deem it appropriate to do so in the circumstances.

8. Each of Lexin and 0989 have debts owing to creditors in excess of $1,000 and are therefore "insolvent persons" pursuant to the BIA.

9. Given that both Lexin and 0989 are insolvent persons pursuant to the BIA, and in light of the Reviewable Transactions outlined below, the Receiver has determined that it is appropriate to assign Lexin and 0989 into bankruptcy.

10. Should this Honourable Court grant the Receiver's application to assign each of Lexin and 0989 into bankruptcy, the Receiver seeks an Order which provides that Lexin's and 0989's Property shall immediately be transferred from the trustee in bankruptcy back to the Receiver, subject to the terms of the Receivership Orders. As a result, the Receiver shall continue its efforts to sell Lexin and 0989's Property for the benefit of their stakeholders, whilst the Property remains in the care and custody of the OWA and WIPs, respectively.

Summary of Non-Arm's Length Parties

11. A lengthy overview of the corporate relationships between the Lexin Group and the parties involved in the Reviewable Transactions is contained in the Receiver's Fifth Report, dated October 12, 2017 (the "**Fifth Report**").

12. A summary of the overlapping relationships between these entities is as follows:

(a) Michael Smith is a past or present director and/or officer of all of Lexin (former), 105 (former), Finance, 1059 (former), MFC Bancorp Ltd. ("**Bancorp**"), M Financial Corp. ("**M Financial**") and MFC Energy Holding Austria GmbH ("**MFC Austria**");

(b) Samuel Morrow is a past or present director and/or officer of all of 105 (former), Finance, 597, 1059, Notine, Bancorp and MFC Austria;

(c) Ferdinand Steinbauer is a past or present director and/or officer of all of Lexin (former), Finance, 1059 and MFC Austria;

(d) Gerardo Cortina is a past or present director and/or officer of all of 597 (former), Notine (former), MFC Austria and Bancorp; and

(e) All of 0989, 105, Finance, 597, 1059, Notine and Bancorp maintain registered and/or records offices with Sangra Moller. Additionally, each of Lexin's and Jixin's registered officers were formerly also maintained with Sangra Moller.

Secure Loan Claimed by Finance

13. Pursuant to the Finance Loan, Finance claims to have advanced approximately $37.5 million to 0989 and as a result of a general security agreement, is asserting a first secured loan position as against each of 0989 and Lexin to secure those obligations.

14. All of the demand loan, promissory note and general security agreement pertaining to the Finance Loan appear to have been signed or co-signed by Michael Smith on behalf of both entities, where applicable.

15. The bank account statements of 0989 show a receipt of $37,570,500 on June 30, 2015 from M Financial, apparently on behalf of Finance, along with same-day withdrawals in the amounts of $24,916,755.60 and $12,653,744.40 (totalling $37,570,500) resulting in no net change to the account.

16. The wire statements provided to the Receiver show that the beneficiaries of the $24,916,755.60 and $12,653,744.40 withdrawals from 0989's account were Lexin and Bancorp, respectively. Lexin's account statements show that on June 30, 2015, the same day the $24,916,755.60 was deposited into its account, the entirety of the funds ($24,916,755.60) were wired to MFC Austria, resulting in no net change to Lexin's account.

17. The Receiver's investigations of the 0989 accounting records do not record a cash receipt of $37,570,500; they only record an account payable of $37,570,500 owing to M Financial and a corresponding reduction in the share capital account. The Lexin accounting records contain no entries for 2015 as all accounting activity appears to have been recorded through 0989.

Reviewable Transactions

597 Equipment Transaction

18. Pursuant to a bill of sale between 0989 and 597 dated December 29, 2015 (the "**597 PSA**"), 0989 purportedly sold to 597 certain of its surface equipment. The consideration payable pursuant to the 597 PSA was $14,093,000, which was tendered by 597 through the issuance of 14,093,000 Class A voting shares of 597 to 0989.

19. Finance has advised the Receiver that all of 0989's shares in 597 were sold by 0989 to Finance on December 29, 2015, being the same day as the 597 transaction. The consideration payable

respecting 0989's sale of the 597 shares to Finance was by way of set-off of a $24,520,781 debt owing by Finance to 0989 (the "**Finance Share Debt**") as against the Finance Loan, such that the Finance Loan balance was to be reduced at that time to $13,049,719. The Finance Share Debt arose as a result of Finance's purchase from 0989 of the 597 shares and 1059 shares pursuant to a Share Purchase Agreement between 0989 and Finance, dated December 29, 2015 (the "**Finance SPA**"). The Finance SPA provided that the consideration paid in respect of the 597 shares was $14,093,001 (and as noted below $4,768,374 was paid in respect of the 1059 shares).

1059 Land Transaction

20. Pursuant to a purchase and sale agreement between 0989 and 1059 dated December 29, 2015 (the "**1059 PSA**"), 0989 purportedly sold to 1059 certain of its land and mineral interests. The consideration payable pursuant to the 1059 PSA was $4,768,374, payable by 1059 through the issuance of 4,768,374 of its shares to 0989.

21. Finance has advised the Receiver that $4,768,374 of the Finance Loan was repaid on December 29, 2015, being the same day as the 1059 transaction, by way of a transfer of 0989's 4,768,374 shares in 1059 to Finance at an ascribed value of $1.00 per share.

MFC Energy (Montana) Inc. Share Sale

22. Finance has advised the Receiver that $790,000 of the Finance Loan was further reduced on January 6, 2016, through the sale of shares in MFC Energy (Montana) Inc. from 0989 to Finance.

Seismic Sale

23. Finance has advised the Receiver that $890,000 of the Finance Loan was further reduced on February 7, 2017, through the sale of seismic data from 0989 to Finance.

Notine Transaction

24. Pursuant to a purchase and sale agreement between 0989 and Notine dated November 6, 2015 (the "**Notine PSA**"), Notine purportedly purchased from 0989 a number of 0989's producing oil and gas assets in the Niton area of Alberta. The consideration payable pursuant to the Notine PSA was $50,000,000, payable by Notine through the issuance of 50,000,000 of its shares to 0989.

25. The Receiver has learned that 0989 sold all of its shares in Notine to MFC Austria on December 18, 2015 (the "**Notine Share Sale**").

26. The consideration from MFC Austria for the Notine Share Sale was a $50 million non-interest bearing (until demand issued) and non-assignable promissory note payable from MFC Austria to 0989. The Receiver has been advised that this promissory note has been either cancelled or satisfied and continues to investigate this matter.

ELP Transaction

27. Pursuant to a purchase and sale agreement between Lexin, 0989 and Jixin dated March 30, 2015 (the "**Jixin PSA**"), Jixin purportedly purchased from Lexin and/or 0989 certain equipment for $1.00. Subsequently, pursuant to a bill of sale between Jixin and ELP dated November 12, 2015, Jixin sold this same equipment to ELP for $2,165,000. The sale as between Jixin and ELP was apparently a sale and lease back arrangement; however, the Receiver has not been provided with a copy of the leasing arrangements between Jixin and ELP.

28. There is no record contained in Lexin or 0989's accounting system of a sale of this equipment from Lexin or 0989 to Jixin in 2015, or anytime thereafter. Additionally, this equipment was insured by Lexin in 2015 and 2016 until the cancellation of Lexin's insurance for non-payment in September 2016.

29. ELP has not yet provided the Receiver with the information and documentation necessary for the Receiver to confirm ELP's ownership claims to this equipment. The Receiver does understand that the equipment subject to this transaction remains on Lexin licensed Sites.

Request for Advice and Direction

30. Based upon the information the Receiver has gathered to date, it has been unable to determine whether the Finance Loan was valid. This has complicated the Receiver's ability to determine the ownership claims made by each of 1059, 597 and Finance, as each of these transactions purportedly involved a reduction as against the Finance Loan.

31. Each of 1059, 597 and Finance have advised the Receiver that it is unable to market and sell the assets over which they claim an ownership interest in, and which assets are situated on Lexin licensed Sites.

32. With respect to the assets presently included in the Sales Process, the Receiver has confirmed that:

(a) The 597 equipment is included;

(b) None of the lands and minerals claimed to be owned by 1059 are included; and

(c) None of the shares in MFC Energy (Montana) Inc. or seismic data has been included.

33. The Receiver requires the advice and direction of the Court in order to determine whether it may proceed with sales affecting the equipment over which 597 claims an ownership interest. Further, the Receiver requires the advice and direction of the Court in order to determine whether it may market and sell the lands and minerals claimed to be owned by 1059 and shares in MFC Energy (Montana) Inc. or seismic claimed to be owned by Finance, as sales of these assets would increase the potential realizations available to the Lexin Group's stakeholders.

34. As a result, the Receiver seeks Orders which:

(a) Provides the Receiver with advice and direction regarding the continuation of the Sales Process, and in particular, whether the Receiver is authorized to sell the equipment which 597 claims to own;

(b) Provides the Receiver with advice and direction regarding Finance's status as a creditor of the Lexin Group;

(c) Appoints Grant Thornton Limited as trustee in bankruptcy of Lexin and 0989 for the purposes of preserving limitations periods in the event the Receiver deems it appropriate to challenge the Reviewable Transactions, with an automatic assignment of all other business, undertaking and assets from the trustee to the Receiver pursuant to the pre-existing Receivership Order and Expanded Receivership Order;

(d) Declare that the relief sought to date by the Receiver constitutes remedial relief pursuant to the *Limitations Act* such that the limitations periods in which the Receiver or a trustee bankruptcy may pursue claims to challenge the validity of the Notine transaction and the ELP transaction as any of a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction pursuant to any of the *Fraudulent Preferences Act* (Alberta), the *Fraudulent Conveyances Act 1571* (13 Eliz 1, c 5), the *Bankruptcy and Insolvency Act* (Canada), or any other applicable federal or provincial legislation is preserved;

(e) Approve the Receiver's activities and conduct to date, including the Receiver's conduct with respect to the Sales Process; and

(f) Seals the Confidential Supplement, which contains both commercially sensitive information and information that if disclosed could adversely affect the Receiver's ongoing Sales Process.

Material or evidence to be relied on:

35. The Fifth Report of the Receiver, dated October 12, 2017.

36. The Confidential Supplement to the Fifth Report of the Receiver.

37. The pleadings and Receiver's Reports previously filed in these proceedings.

38. Such further and other material as counsel may advise and this Honourable Court may permit.

Applicable rules:

39. Alberta *Rules of Court*, AR 124/2010, and in particular Rules 1.3, 3.75, 6.3, 6.4, 11.27, 11.29 and 13.5.

40. *Bankruptcy and Insolvency General Rules*, and in particular Rules 3, 6 and 11.

41. Such further and other rules as Counsel may advise and this Honourable Court permit.

Applicable Acts and regulations:

42. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended, and in particular Part XI thereof.

43. *Fraudulent Preferences Act*, RSA 2000, c F-24.

44. *Fraudulent Conveyances Act 1571* (13 Eliz 1, c 5).

45. *Limitations Act*, RSA 2000, c L-12.

46. Such further and other acts and regulations as Counsel may advise and this Honourable Court permit.

Any irregularity complained of or objection relied on:

47. None.

How the application is proposed to be heard or considered:

48. In person before the Honourable Justice B.E. Romaine with some or all of the parties' present.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

Schedule "A" Service List

COURT FILE NUMBER	**1701-03460**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	Calgary
APPLICANT	**ALBERTA ENERGY REGULATOR**
RESPONDENT	**LEXIN RESOURCES LTD.**
DOCUMENT	**SERVICE LIST**

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Prospex Resources Ltd. (A120) c/o Paramount Resources Ltd. (04W4) 4700-888 3 Street SW Calgary AB T2P 5C5	
Westhill Petroleum Ltd. (0EX2) 3300, 421 7th Ave SW Calgary, AB T2P 4K9	
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TAQA North Ltd. (A2TG)	regulatoryaffairs@taqa.ca

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TAB 3

COURT FILE NUMBER	**1701-03460**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	**ALBERTA ENERGY REGULATOR**
DEFENDANT	**LEXIN RESOURCES LTD., 1051393 B.C. LTD., 0989 RESOURCE PARTNERSHIP, LR PROCESSING LTD. and LR PROCESSING PARTNERSHIP**
DOCUMENT	**PROCEDURAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Robyn Gurofsky/Jessica L. Cameron Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9774/9715 Facsimile: (403) 266-1395 Email: rgurofsky@blg.com/jcameron@blg.com File No. 547730/000021 Box 11

DATE ON WHICH ORDER WAS PRONOUNCED: October 25, 2017

NAME OF JUSTICE WHO MADE THE ORDER: B.E. Romaine

LOCATION OF HEARING: Calgary, Alberta

UPON the application of Grant Thornton Limited, in its capacity as the court-appointed receiver (the "**Receiver**") of Lexin Resources Ltd., 1051393 B.C. Ltd., 0989 Resource Partnership, LR Processing Ltd. and LR Processing Partnership (collectively the "**Debtors**") for the advice and direction of this Court respecting, amongst other things, the validity of the secured loan (the "**Finance Loan**") asserted by MFC Energy Finance Inc. ("**Finance**"); **AND UPON** having read the Fifth Report of the Receiver, dated October 12, 2017, filed (the "**Fifth Report**"), the Confidential Supplement to the Receiver's Fifth Report, dated October 18, 2017 (the "**Confidential Report**"), the Affidavits of Service of Vanessa Vu and Kristal Bolton, respectively, each filed, and the pleadings and proceedings filed herein, including the Lexin Receivership Order granted on March 20, 2017 and the Expanded Receivership Order granted on June 13, 2017; **AND UPON** determining that it is in the best interests of the Debtors' stakeholders that a procedure be established by which Finance is required to prove the validity of the Finance Loan; **AND UPON** hearing from counsel for the Receiver, the Alberta Energy Regulator and counsel for any other interested parties appearing at the hearing of this application:

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Finance shall provide any further information to substantiate the Finance Loan, in the form of affidavit evidence, and Finance shall file and serve such affidavit evidence on the Service List established in respect of these proceedings on or before November 10, 2017.

2. If either the Receiver or any other interested party requests that an affiant who swears an affidavit in accordance with paragraph 1 of this Order be produced for cross-examinations, Finance shall produce such affiant for cross-examinations by no later than November 17, 2017.

3. Responses to any undertakings given as a result of cross-examinations in accordance with paragraph 2 hereof shall be delivered by Finance to the Receiver and any other party who conducted cross-examinations on or before November 24, 2017.

4. The Receiver shall advise Finance whether the Receiver is approving or disallowing Finance's claim pursuant to the Finance Loan on or before November 29, 2017. The Receiver's determination shall be based solely upon the information contained in the Fifth Report and additional information provided in accordance with the terms of this Order.

5. In the event the Receiver advises Finance that its claim pursuant to the Finance Loan has been disallowed by the Receiver,

   a) Finance shall file and serve its brief of law in support of the validity of its claim on or before December 4, 2017;

   b) Any interested party, including the Receiver, who wishes to file a brief in response to the Finance Brief shall file and serve their respective briefs of law on or before December 7, 2017; and

   c) An Application to resolve the issue of the validity of the Finance Loan shall be heard by the Honourable Madam Justice B.E.C. Romaine on December 11, 2017, commencing at 10:00 a.m. for a full day hearing.

Miscellaneous Matters

6. Service of this Order shall be deemed good and sufficient by serving the same on:

a) the persons listed on the service list (attached as Schedule "A" to the Application); and
b) by posting a copy of this Order on the Receiver's website at: www.grantthornton.ca/lexin

7. No other persons are entitle to be served with a copy of this Order.

8. Service of this Order shall be deemed good and sufficient regardless of whether service is effected by PDF copy attached to email, facsimile, courier, personal deliver or ordinary mail.

____
Justice of the Court of Queen's Bench of Alberta

TAB 4

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 1 — Foundational Rules
Division 2 — Authority of the Court

Alta. Reg. 124/2010, s. 1.4

s 1.4 Procedural orders

Currency

1.4Procedural orders
1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

1.4(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

(h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order;

(i) determine whether a judge is or is not seized with an action, application or proceeding;

(j) include any information in a judgment or order that the Court considers necessary.

1.4(3) A decision of the Court affecting practice or procedure in an action, application or proceeding that is not a written order, direction or ruling must be

(a) recorded in the court file of the action by the court clerk, or

(b) endorsed by the court clerk on a commencement document, filed pleading or filed document or on a document to be filed.

Currency
Alberta Current to Gazette Vol. 114:13 (July 15, 2018)

TAB 5

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VII — Courts and Procedure(ss. 183-197)
Authority of the Courts

R.S.C. 1985, c. B-3, s. 187

s 187.

Currency

187.
187(1)Seal of court
Every court shall have a seal describing the court, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of the court in all legal proceedings.

187(2)Court not subject to be restrained
The courts are not subject to be restrained in the execution of their powers under this Act by the order of any other court.

187(3)Power of judge in chambers
Subject to this Act and to the General Rules, the judge of a court may exercise in chambers the whole or any part of his jurisdiction.

187(4)Periodical sittings
Periodical sittings for the transaction of the business of courts shall be held at such times and places and at such intervals as the court directs.

187(5)Court may review, etc.
Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

187(6)Enforcement of orders
Every order of a court may be enforced as if it were a judgment of the court.

187(7)Transfer of proceedings to another division
The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

187(8)Trial of issue, etc.
The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of that judge or officer is subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior court when the appeal shall, subject to section 193, be to the Court of Appeal.

187(9)Formal defect not to invalidate proceedings
No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

187(10)Proceedings taken in wrong court
Nothing in this section invalidates any proceedings by reason of their having been commenced, taken or carried on in the wrong court, but the court may at any time transfer the proceedings to the proper court.

187(11)Court may extend time

Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

187(12)Court may dispense with certain requirements respecting notices

Where in the opinion of the court the cost of preparing statements, lists of creditors or other material required by this Act to be sent with notices to creditors, or the cost of sending the material or notices, is unjustified in the circumstances, the court may give leave to omit the material or any part thereof or to send the material or notices in such manner as the court may direct.

Amendment History

1992, c. 1, s. 20; 1992, c. 27, s. 66; 2004, c. 25, s. 87

Currency

Federal English Statutes reflect amendments current to July 25, 2018
Federal English Regulations are current to Gazette Vol. 152:15 (July 25, 2018)

End of Document

TAB 6

2017 ABQB 550
Alberta Court of Queen's Bench

Canada North Group Inc (Companies' Creditors Arrangement Act)

2017 CarswellAlta 1631, 2017 ABQB 550, [2017] A.W.L.D. 4936, [2017] A.W.L.D. 5003, [2018] 2 W.W.R. 731, 283 A.C.W.S. (3d) 214, 52 C.B.R. (6th) 308, 60 Alta. L.R. (6th) 103

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended

AND In the Matter of a Plan of Arrangement of Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd (Applicants)

J.E. Topolniski J.

Heard: August 11, 2017
Judgment: September 11, 2017
Docket: Edmonton 1703-12327

Counsel: Darren R Bieganek, Q.C., for Monitor, Ernst & Young
George F Body, for Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue
Jeffrey Oliver, for Business Development Bank of Canada
Stephanie A Wanke, for Applicants, Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

Subject: Income Tax (Federal); Insolvency; Tax — Miscellaneous

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
  X.5 Claims of Crown
    X.5.a Federal
      X.5.a.v Miscellaneous

Tax
I General principles
  I.5 Priority of tax claims in bankruptcy proceedings

Headnote

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Miscellaneous

Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

RULING on Canada Revenue Agency's motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National for unremitted source deductions.

***J.E. Topolniski J.*:**

Introduction

1 This case is about whether Court ordered "super-priority" security interests granted in a *Companies' Creditor Arrangement Act*[1] (*CCAA*) proceeding can take priority over statutory deemed trusts in favour of Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue (CRA) for unremitted source deductions.

2 Acknowledging that its success on this motion would cause a chill on commercial restructuring, CRA relies on the comeback provision in an initial *CCAA* Order made July 5, 2017 (Initial Order) to vary "super-priority" charges made in favour of an interim financier, the directors of the debtor companies, and the Monitor and its counsel (Priority Charges), which subordinate its deemed trust claims arising under the *Income Tax Act (ITA)*[2], *Canada Pension Plan Act*[3] *(CPP Act)*, and *Employment Insurance Act*[4] *(EI Act)* (collectively, the Fiscal Statutes)[5].

3 CRA's view is that the deemed trusts give it a proprietary, rather than a secured interest in the Debtors' assets that cannot be subordinated. Alternatively, if it is a secured creditor, its first place position under the Fiscal Statutes cannot

be undermined by the Priority Charges. Canada North Group Inc, Canada North Camps Inc, Camcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd and 1919209 Alberta Inc (the Debtors), the Monitor, and the interim financer, Business Development Bank of Canada (BDC), strenuously oppose the motion.

4 In addition to the priority issue, there are a number of interconnected, subsidiary issues including: Whether the subject is proper for variance, the onus on a comeback motion, technical service versus actual notice, and delay prejudice.

5 For the reasons that follow, CRA's interest arising under the Fiscal Statutes is properly subordinated by the Priority Charges. Concerning the subsidiary issues, I have (obviously given the foregoing) found that the question is appropriate for a comeback hearing. I have also found that CRA bears the onus and that, even if CRA had prevailed, it would have been inappropriate to disturb the Priority Charges for the period between the Initial Order and this hearing on August 11, 2017, because of the delay prejudice.

The Factual Landscape

6 No surprise given the nature of the proceedings, matters have unfolded quickly.

7 The Debtor's restructuring plan began with s 50.4(1) *Bankruptcy and Insolvency Act* (*BIA*)[6] notice of intention to make a proposal to creditors that very quickly changed to a plea for *CCAA* relief.

8 The originating *CCAA* materials were served on CRA via courier at its Edmonton office (CRA Office) on June 28. The service package included:

a. The originating application returnable July 5, 2017 seeking a stay of proceedings and basket of other relief, including the Priority Charges;

b. A draft form of initial order that set out the sought after charges: Interim financier charge of $1,000,000, administrative charge of $1,000,000, and the director's indemnity charge of $50,000,000; and

c. An affidavit of a director of the Debtors attesting to a $1,140,000 debt to CRA for source deductions and GST (the evidence does not breakdown what is owed for source deductions, which is the only remittance in issue).

9 On July 5, the Debtors' motion and a cross-motion to appoint a receiver of three of the debtor companies by the Debtor's primary lender, Canadian Western Bank (CWB), proceeded. CRA did not appear (more will be said about this later). The Court refused CWB's receivership application and granted the Initial Order, which included typical service provisions and a comeback clause (Comeback Provision). The Priority Charges track the draft form of Order with one change - a (consensual) $500,000 reduction to the administrative charge.

10 On July 6, the Debtors served CRA with the Initial Order by mailing it to the CRA Office, a permissible form of service under Alberta's *Rules of Court*. Also on this day, the CRA employee responsible for *CCAA* filings in western Canada (CRA Representative) received the Initial Order. The curious routing was via a Department of Justice Canada (DOJ) lawyer who was given it by a party that noted CRA's manifest absence at the initial hearing.

11 On July 12, the Monitor published notice of the proceedings in one local and one national newspaper and created a proceeding-specific website.

12 By July 13, the Debtor's service package had wended its way from the CRA Office to the CRA Representative's hands.

13 Next, on July 20, when BDC had advanced $900,000 of the Priority $1,000,000 facility, the Debtors served a motion to extend the stay of proceedings (made in the Initial Order) returnable July 27 (Extension Motion). Again, service was on the CRA Offices.

14 Then, on July 21, CWB served another motion to appoint a receiver also returnable on July 27. CWB served CRA by sending the documents to a DOJ lawyer.

15 On July 25, the Debtors served CRA with an application to increase interim financing returnable July 27 on the ground that they had a new contract to supply camps for firefighters battling the wildfires then ravaging British Columbia (Enhanced Financing Motion).

16 Late on the afternoon of July 26, CRA's counsel emailed an unfiled version of this motion and a draft form of the order to be sought to the Monitor's and Debtors' counsel, who passed the information to BDC's counsel.

17 On July 27, all three motions proceeded. CRA appeared, taking no position. In the result, the stay of proceedings was extended until September 26, and the interim financing was increased to $2,500,000 (written reasons were later filed: 2017 ABQB 508 (Alta. Q.B.)). After the Court delivered its oral reasons for decision, CRA's counsel rose to advise that his client would be filing this motion, noting the risk to BDC for "additional advances subject to the Crown's charges." In response, BDC's counsel indicated that his client had earlier learned of CRA's intentions and was still prepared to advance under the facility.

The Legal Landscape

The CCAA and Judicial Decision Making

18 The *CCAA*'s purpose is to allow financially distressed businesses with more than $5,000,000 debt to keep operating and, where possible, avoid the social and economic costs of liquidation.

19 The *CCAA* process "creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all." [7]

20 When enacting the *CCAA*, Parliament understood that liquidation of insolvent businesses is harmful to creditors and employees and the optimal outcome is their survival. [8] This notion would not have been lost on Parliament when the *CCAA* was substantially amended in 2009 (2009 amendments). Indeed, in a post-2009 amendment case, *Sun Indalex Finance, LLC v. United Steelworkers*, [9] Cromwell J, concurring in result and writing for McLachlin CJ and Rothstein J, spoke of the *CCAA's* purpose saying:

> [It] is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. [10]

21 The Court's function during the *CCAA* stay period is to supervise and move the process to the point where the creditors approve a compromise or it becomes evident that the attempt is doomed to fail. [11] Typically, this requires balancing multiple interests.

22 *CCAA* s 11 cloaks the Court with broad discretionary power to make any order it considers appropriate in the circumstances, subject to the restrictions set out in the *Act*. However, as the Supreme Court of Canada observed in *Century Services*, there are limits on the exercise of inherent judicial authority in a *CCAA* restructuring. [12]

23 The Supreme Court also provides this overarching direction for exercising *CCAA* judicial authority in *Century Services*:

> The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question

is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit [13].

24 In interpreting and applying the *CCAA*, the Court is to employ a hierarchical approach, and consider and, if necessary, resolve the underlying policies at play. [14]

A Brief History of Deemed Trust Litigation

25 While there are other priority cases involving disputes between CRA and insolvent entities, this discussion necessarily begins with *Royal Bank of Canada v. Sparrow Electric Corp.* [15]

26 The contest in *Sparrow Electric* was between CRA's deemed trust claim for unremitted source deductions under the *ITA* and security interests under the *Bank Act* [16] and the Alberta *Personal Property Security Act.* [17] CRA lost the priority battle since the security interests were fixed charges attaching to the secured property when the debtor acquired it. Consequently, CRA's deemed trust had no property to attach to when it later arose. In response to *Sparrow Electric*, Parliament amended the *ITA* by expanding s 227 (4) and adding s 227(4.1) (detailed below).

27 The next noteworthy case is *First Vancouver Finance v. MNR*, [18] which concerned a priority dispute between CRA's deemed tax trusts and the interest of a third party purchaser of assets bought in an insolvency proceeding sale. The interpretation of *ITA* s 227(4.1) was at the fore.

28 The Supreme Court found in favour of the third party purchaser. Writing for the majority, Iacobucci J noted:

a. In principle, the deemed trust is similar to a floating charge over all the debtor's assets in favour of the Crown (at para 40);

b. The deemed trust operates "in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction" (at para 33);

c. Property subject to the deemed trust can be alienated by the debtor, after which the deemed trust applies to the proceeds (at para 42); and

d. The deemed trust is not a "true trust," nor is it governed by common law requirements under ordinary principles of trust law, but the effect of s227(4.1) is to revitalize the trust whose subject matter has lost all identity (citing Gonthier J in *Sparrow Electric*) (at para 27-28).

29 The Supreme Court concluded that Parliament intended s 227(4) and (4.1):

. . . to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. (at para 28).

30 *First Vancouver* was considered in the 2007 decision, *Temple City Housing Inc (Companies' Creditors Arrangement Act)*, [19] and again in June 2017 in *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*. [20]

31 In *Temple City*, CRA opposed a Priority charge in favour of an interim financier (then termed a debtor in possession, or DIP, financier) on the basis that it had a proprietary interest in the debtor's assets under its (tax) deemed trusts. Unlike this case, it was decided before the 2009 amendments.

32 Like others before her with no statutory authority to grant the super priority charges, Romaine J assessed the merits and relied on the Court's inherent jurisdiction to grant the charge.

33 The Alberta Court of Appeal denied leave to appeal, finding the issue unimportant to the practice because amendments allowing such charges were on the horizon and future cases would engage statutory interpretation (the Court of Appeal's forecast of looming amendments was sidelined by Parliamentary inaction, and the amendments were eventually proclaimed in force on September 18, 2009). The Court also found the issue unimportant to the case itself for two distinct reasons. First, the proceeding had taken on a momentum that would make it virtually impossible to "unscramble the egg." Second, an appeal would hinder the restructuring as the DIP lender would not advance without being in a priority position.

34 Next is the seminal decision in *Century Services*, which considered the deemed trust for GST arising under the *Excise Tax Act* (ETA).[21] Despite the different deemed trust at issue, *Century Services* is important for many reasons including, general interpretation of the *CCAA*, policy considerations, the Court's function, and the parameters for exercising inherent jurisdiction.

35 *Rosedale Farms* concerned deemed tax trusts and a super-priority interim financing charge in a *BIA* proposal scenario. The reasons disagree quite strongly with the logic of *Temple City*. The Court also found that because CRA did not have the requisite notice, it could not be bound by the interim financing Order.

36 I will return to the conflicting views expressed in *Temple City* and *Rosedale Farms* in the context of the priority analysis.

The Statutory Provisions

37 The relevant statutory provisions are set out below. All emphasis is mine.

38 *CCAA* s 2(1) defines the term, "secured creditor" as including:

> **a holder of . . . a trust** in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada... .

39 *ITA* s 224(1.3) defines "secured creditor" as "a person who has a security interest in the property of another person." It defines "security interest" as:

> **any interest in**, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, **created by or arising out of a** debenture, mortgage, hypothec, lien, pledge, charge, **deemed or actual trust,** assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for.

40 The *EI Act* and *CPP Act* cross-reference these definitions.

41 The relevant portions of *CCAA* ss 11.2, 11.51, and 11.52 read:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 *CCAA* s 37, previously s 18.2, reads:

37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision") . . . .

43 *ITA* ss 227(4) and (4.1) read:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) **Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada,** any enactment of a province or any other law, **where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid** to Her Majesty in the manner and at the time provided under this Act, **property of the person and property held by any secured creditor** (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust **is deemed**

(a) *to be held*, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, *in trust for Her Majesty whether or not the property is subject to such a security interest*, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

44 *EI Act* s 86(2.1) and *CPP Act* s 23(3) are identical to *ITA* s 227(4.1).

45 With that legal backdrop, I turn now to address whether I can and, if so should, entertain CRA's motion, or whether it is properly the subject of an appeal to the Court of Appeal.

Jurisdiction to Entertain CRA's Motion

46 The language of the Comeback Provision is typical in initial *CCAA* Orders made in this province and elsewhere. It reads:

58 Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

47 The answer to whether I have jurisdiction to entertain CRA's motion or whether it is properly a subject of appeal to the Court of Appeal rests on the answers to: for whom and when is the Comeback Provision is available.

Who can rely on the Comeback Provision?

48 The Comeback Provision is available to any interested party. It is only logical that an interested party that was not given notice of a *CCAA* initial hearing can rely on the comeback clause. [22] Similarly, and depending upon the circumstances, an interested party given notice may also access the comeback clause.

49 CRA is an interested party that received notice of the motion for the Initial Order. While the Initial Order deemed that service to be good and sufficient, CRA's actual knowledge came the day after it occurred.

When can the Comeback Provision be used?

50 Recourse through the comeback clause is available when circumstances change. As explained in *Pacific National Lease Holding Corp., Re*:

[I]n supervising a proceeding under the C.C.A.A. **orders are made, and orders are varied as changing circumstances require**. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. [23] [emphasis added]

51 Likewise, in *Re Royal Oak Mines Inc*, Blair J (as he then was) observed that the comeback clause is a means of sorting out issues as they arise during the course of the restructuring. [24]

52 Logically, non-disclosure of material information in an *ex parte* initial application also supports recourse via the comeback clause. [25]

53 An analogous form of statutory recourse is found in *BIA* s 187(5). A sparingly used tool, variance under this provision is a practical means of determining if an order should continue in the face of changed circumstances or fresh evidence. [26]

54 Equally, under r 9.15(1) of the Alberta *Rules of Court* the Court can set aside, vary, or discharge an entered judgment or order (interlocutory or final) if it was made without notice to an affected person, or to correct an accident or mistake if the person did not have adequate notice of the trial. In a similar vein, r 9.15(4) allows the Court to set aside, vary, or discharge an interlocutory order by agreement of the parties, or because of fresh evidence, or other grounds that the Court considers just.

55 Likely because many, if not most, *CCAA* authorities deal with variance of *ex parte* initial orders, little is written about recourse by appeal versus comeback. One example is the rather unusual case of *Re Algoma Steel Inc*,[27] where creditors filed a simultaneous comeback motion and appeal of the initial *ex parte* order. The appeal was heard first. The Court of Appeal found that the appeal was premature (because the order was a "lights on" order) and said that variance should have been pursued.

56 Comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself - which Rowbothom JA described as the virtual impossibility of unscrambling the egg in *Temple City*.[28]

57 Next, I will discuss service and timing concerns.

Service

58 It is trite that the point of service is that a party must get notice of the proceeding and that a party serving documents on a proper address for service must be able to do so with confidence.[29]

59 As previously noted, CRA was served on June 28 at the CRA Office by courier delivery.

60 Rule 11.14(1)(b) provides that service is effected on statutory entities and other entities by "being sent by recorded mail, addressed to the entity, to the entity's principal place of business or activity in Alberta." Recorded mail includes mail by courier and the date of effective service is "on the date acknowledgement of receipt is signed": r 11.14(2)(b).

61 Rule 3.9 requires that an originating application and supporting affidavits be served at least 10 days before the return date. To comply, the Debtors had to serve by June 25, but because this date fell on a weekend, technically compliant service mandated delivery of the service package on June 23.

62 CRA points to the Office of the Superintendent of Bankruptcy's (OSB) website in defence of the position that service was lacking. In part, it reads:

> To make sure insolvency documents are processed quickly and effectively, you should send them to the appropriate area of the CRA.

The webpage also identifies "key processing areas for insolvency documents", which in this case is the office where the CRA Representative is located in Surrey, British Columbia.

63 The OSB website does not assist CRA. While companies seeking relief under the *CCAA* may retain insolvency professionals in advance of their filing, imposing an expectation that debtors heed the OSB's 'unofficial advice' is simply asking too much. More importantly, to require compliance is contrary to the Alberta *Rules of Court*.

64 Properly, CRA does not cast blame on the Debtors for the fact that its own challenges routing mail caused the delay in getting the service package into the right hands. What CRA does say is that despite this, it should have the opportunity to address its significant challenge to the Priority Charges because if the service package was delivered to the regional office responsible for *CCAA* matters by June 25, it was "very likely that CRA would have been represented at the July 5th application."

65 The Debtors effected service, albeit short notice service, on CRA, which the Court deemed to be good and sufficient. Short notice in insolvency proceedings is not a new concept and CRA is not new to insolvency proceedings. Indeed, it is a seasoned and sophisticated player in the *CCAA* arena with access to the might of the federal government's resources.

66 These observations aside, the *CCAA* is not all about technicalities and technical compliance. It is about ensuring maintenance of the *status quo* in the sorting-out period, balancing interests, and, in that vein, hearing from all affected voices whenever it is practicable to do so.

67 In the result, despite the glaring failure of CRA's mail management system and although CRA was effectively and technically served on June 28, the purpose of service was not fulfilled until July 6 when CRA became aware of the Initial Order. On this basis, I am satisfied that I have jurisdiction to hear the variance motion. In finding as I do, I am mindful that CRA is asking whether the Priority Charges ought to have been granted in the first instance, which could well be the subject of appeal. However, *Algoma Steel* supports the notion that variance may be the preferred route where a party did not have actual notice of an order made early in the proceeding.

Timing

68 While comeback relief may be appropriate, it "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question." [30]

69 Armed with knowledge of the Initial Order the day after it was made and well-knowing that the beneficiaries of the Priority Charges would rely upon them, CRA waited twenty days to informally announce its intentions. Then, CRA chose to attend and take no position at the Extension and Enhanced Financing Motions. It also chose to defer advising the Court of this intended motion until after the Court delivered its decision on those motions.

70 CRA's dawdling put BDC, the Monitor, and perhaps the directors at risk of significant prejudice, and it is unfair for it to now ask that the priority be reversed before it gave meaningful notice to all affected parties.

71 The options for fixing the appropriate date of meaningful notice are the date of informal notice, the hearing date, and the release of these Reasons. In my view, the most appropriate date is the hearing of this motion because experience shows that not all informally announced motions actually proceed.

72 Accordingly, irrespective of whether CRA prevails at the end of the day, all of the Priority Charges should be unaffected until August 11, 2017.

73 I turn next to who bears the onus.

The Onus

74 The authorities disagree on who bears the onus where the party seeking to vary under a comeback clause was served. Indeed, Blair J (as he then was) observed that there may be no formal onus, but there "may well be a practical one if the relief sought goes against the established momentum of the proceeding." [31]

75 In *General Chemical Canada Ltd., Re,* [32] Farley J stated that "[I]n any comeback situation, the onus rests solely and squarely with the [initial] applicant to demonstrate why the original or initial order should stand."

76 In contrast, in *Re Target Canada Co*, Morowetz J directed a comeback hearing that was to be a "true" comeback hearing in which the applying party did "not have to overcome any onus of demonstrating that the order should be set aside or varied." [33] There, the initial order went beyond a usual "first day" order. While service was not addressed, it is evident that many, if not most, of the stakeholders were not represented at the hearing.

77 Considering the practicalities of *CCAA* matters, my view is that barring unforeseen circumstances, the onus on a variation application should be this:

- When the initial application is made *without notice* or with insufficient notice, the initial applicant bears the onus of satisfying the court that the terms of the initial order are appropriate.

- When the initial application is made *with notice*, the onus is on the party seeking the variation to show why it is appropriate and that the relief sought does not prejudice others who relied on the order in good faith.

78 I now turn to the substantive priority issue.

Who has priority?

79 It is beyond debate that *ITA* s227 (4) and the mirrored provisions in *EI Act* (s 86(2) and *CPP Act* (s 23(3)) create deemed trusts, and that *CCAA* s 37(2) explicitly preserves their operation. The debate is simply about whether CRA's interest arising from the deemed trusts can be subordinated by the Priority Charges.

80 Two principal questions arise:

i. What is the nature of CRA's interest?

ii. Does CRA's statutorily secured status elevate it above a Priority Charge?

What is the nature of CRA's interest?

81 CRA relies on the extension of trust provisions in the Fiscal Statutes to support the notion that it holds a proprietary rather than secured interest in the Debtors' property. Key to its position is the effect of the concluding phrase in s 227(4.1):

> Notwithstanding any other provision of this Act . . . property held by any secured creditor... is deemed...and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [emphasis added]

82 CRA asserts that these words take it beyond a mere secured creditor because they do not just *deem* the Crown to be the owner of the interest, but rather, says that it *is* the owner.

83 This is the same position CRA advocated in *Temple City*, where Romaine J distilled these features of tax deemed trusts from *First Vancouver* :

- The "deemed trust" is not in "truth a real one as the subject matter of the trust cannot be identified from the date of creation of the trust;" and

- In principle, the deemed trust is similar to a floating charge over all the assets of the tax debtor in that the tax debtor is free to alienate its property, and when it does, the trust releases the disposed-of property and attaches to the proceeds of sale. To find otherwise would freeze the tax debtor's assets and prevent it from carrying on business, which was clearly not a result intended by Parliament.

84 Justice Romaine determined that despite the concluding words of s 227(4.1) these features were inconsistent with a property interest, noting that the definition of a "security interest" in the *ITA* included a "deemed or actual trust", which supports the interest being capable of having the same treatment as a security interest under the *CCAA*.[34]

85 Moir J in *Rosedale Farms* disagreed finding instead that:

- The analogy of the deemed trust to a floating charge in *First Vancouver* was not about creating security, but rather, sales made in the ordinary course of business. Iacobucci J's statement that the question of priority of secured creditors did not arise is noted. [35]

- The "notwithstanding" language of *ITA* s 227(4.1) expressly overrides the *BIA* and all other enactments thereby giving priority to the deemed trust. [36]

- Reliance on the *ITA* definition of "secured interest" is misguided. [37]

86 Moir J correctly notes Justice Iacobucci's observation that the creation of secured creditor priority did not arise in *First Vancouver* . However, as I read *Temple City*, the analysis did not rest on the floating charge analogy. Rather, like the *ITA* definition of "secured creditor," it was but one of several features supporting the result. That said the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings.

87 *Rosedale Farms* is distinguishable in that it concerned a *BIA* scenario. Nevertheless, even if it were otherwise, like Romaine J, I accept that the definitions of secured creditor and security interest in the *CCAA* and Fiscal Statutes support finding that the interests arising from the deemed trusts are security interests, not property interests. In particular, I note that s 224(1.3) defines a security interest as "any interest in property that secures payment . . . and includes a ... deemed or actual trust ... ."

88 Indeed, it would seem inconsistent to interpret the interest they create in a way contrary to their enabling statutes.

89 For these reasons, I conclude that CRA's interest is a security interest, not a proprietary interest. The impact and interplay of the "notwithstanding" language in *ITA* s 227(4.1), the discussion of which follows, does not change my conclusion.

Does CRA's statutorily secured status elevate it above the Priority Charges?

90 It may appear that *CCAA* ss 11.2, 11.51, or 11.52 conflict with the deemed trust sections in the Fiscal Statutes, and that a strict "black letter" reading of only ss 227(4) and (4.1) may support CRA's interpretation. However, one must not read these provisions in a vacuum. The Fiscal Statutes, the *BIA*, and the *CCAA* are part of complex legislative schemes that operate concurrently and must "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." [38] Each references the other, expressly or impliedly, and it would be an error to focus on only one section in one piece of the entire scheme.

91 *ITA* s 227(4.1) opens with these words:

> **Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law**, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty notwithstanding any security interest in such property . . . . [emphasis added] (Notwithstanding Provision)

92 CRA points to the *obiter dicta* of Fish J (in his separate concurring reasons) in *Century Services* (at para 104) finding that Parliament intended deemed trusts to prevail in insolvency proceedings as a complete answer. The other members of the Court did not adopt his reasoning. For that reason, I cannot find his *obiter dicta* to be "the answer."

93 While the *CCAA* preserves the operation of the Fiscal Statutes deemed trusts, it also authorizes the reorganization of priorities through Court ordered priming.

94 CRA urges that the Fiscal Statutes and the *CCAA* can be 'stitched together' to read:

> Notwithstanding [sections 11, 11.2, 11.51, and 11.52 of the *Companies' Creditors Arrangements Act*,] property of [the Applicants] equal in value to the [unremitted source deductions] . . . is beneficially owned by Her Majesty notwithstanding any security interest in such property [including security interests granted pursuant to ss. 11.2, 11.51, or 11.52 of the *CCAA*] and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

95 The problem with "stitching" in this way is that incorporating these sections into the Notwithstanding Provision implies that they are somehow in conflict with it. The Supreme Court of Canada has taken a restrictive view of what constitutes a conflict between statutory provisions of the same legislature.

96 In *Thibodeau v Air Canada*,[39] the Court addressed whether there was a conflict between the *Official Languages Act* and the *Convention for the Unification of Certain Rules for International Carriage by Air*, concluding that there is a conflict between two provisions of the same legislature "*only* when the existence of the conflict, in the restrictive sense of the word, *cannot be avoided by interpretation*"[40] [emphasis added]. Nothing in these *CCAA* sections directly conflict with s 227(4.1) and thus, one must attempt to interpret these provisions without conflict.

97 Further, in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*,[41] the Supreme Court of Canada, dealing with another complex legislative scheme, said:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme **which cannot be ignored**:
>
> > As the product of a rational and logical legislature, the statute is considered to form a system. **Every component contributes to the meaning as a whole**, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
> >
> > (P. -A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p 308)
> >
> > As in any statutory interpretation exercise . . . courts need to examine **the context that colours the words and the legislative scheme**. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute **while preserving the harmony, coherence and consistency of the legislative sch**eme (***Bell ExpressVu***, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": ***Bristol-Myers Squibb Co***., at para. 102. [emphasis added]

98 Deschamps J observed in *Century Services*, at para. 15:

> . . . the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

99 She also quoted with approval the reasons of Doherty JA in *Elan Corp v Comiskey*[42] (Doherty JA was dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

100 In a survey of *CCAA* cases, Dr. Janis Sarra found that 75% of the restructurings required the aid of interim lenders.[43]

101 In *Indalex*, the Supreme Court of Canada observed the phenomenon, citing Sarra, and said:

> . . . case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries.[44]

102 The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.

103 Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.

104 Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work — where it has the most significance is at the end.

105 Further, the 2009 amendments codifying and elaborating on priority charges that had previously been granted under the Court's residual, inherent jurisdiction, shows Parliament's intention that secured creditors' interests could be eroded if the Court was satisfied of the need.

106 Had Parliament wanted to limit the Court's ability to give priority to these charges, it could have drafted s 11.52(2) (and the mirror provisions) to expressly provide:

> . . . priority over the claim of any secured creditor **except the claim of Her Majesty over deemed trusts under s. 227(4) and (4.1) of the Income Tax Act**.

107 CRA's interpretation recognizes the obvious, underlying policy reason favouring the collection of unremitted source deductions, which is described as being "at the heart" of income tax collection in Canada": *First Vancouver* at para 22. However, it fails to reconcile that objective with the Canadian insolvency restructuring regime and Parliament's continued commitment (as evidenced by the 2009 amendments) to facilitating complex corporate *CCAA* restructurings, even if erosion of security is required.

108 The *CCAA*'s aim is to facilitate business survival and avoid the multiple traumas occasioned by business failure. Interim financiers are an integral part of the restructuring process. Without them, most *CCAA* restructurings could not get off the ground. Likewise, directors and insolvency professionals are essential to the process, and they too need the comfort of primed charges to fully engage in the process. Surely, Parliament knew all of these things when it passed the 2009 amendments authorizing primed charges.

109 CRA's position, which it acknowledges will cause a chill on complex restructurings, undermines the *CCAA*'s purpose for the sake of tax collection. It disregards the rather obvious, that successful corporate restructurings result in continued jobs to fuel and fund its source deduction tax base. Notably, its interpretation fails to reconcile these purposes.

110 The Fiscal Statutes and the *CCAA* should, if possible, be interpreted harmoniously to ensure that Parliament's intention in the entire scheme is fulfilled.

111 It is logical to infer that Parliament intended to create a co-existing statutory scheme that accomplished the goals of both the Fiscal Statues and the *CCAA*. In my view, it is possible to construe these legislative provisions in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme.

112 I conclude that it is the Court's order that sets the priority of the charges at issue. The relevant *CCAA* sections allow the Court, where appropriate, to grant priority *only* to those charges necessary for restructuring. The purpose of the deemed trusts in the Fiscal Statutes is still met as deemed trusts maintain their priority status over *all other* security interests, but those ordered under ss 11.2, 11.51, and 11.52.

113 A harmonious interpretation respecting both sets of statutory goals is one that preserves the deemed priority status over all security interests, subject to a Court order under *CCAA* ss 11.2, 11.51, and 11.52 granting a "super priority' to those charges.

114 For these reasons, I find that the *CCAA* gives the Court the ability to rank the Priority Charges ahead of CRA's security interest arising out of the deemed trusts.

Order accordingly.

Footnotes

1 RSC 1985, c C-36 as amended, ss 11.2, 11.4, 11.51 11.52.

2 RSC, 1985, c 1 (5th Supp) 6.

3 RSC 1985, c C-8.

4 SC 1996, c 23.

5 Para 44 of the Initial Order provides that the Priority Charges constitute a charge on all of the debtors' property which, subject to s 34(11) of the *CCAA*, rank in priority to all other security interests, including trusts, liens, and encumbrances, statutory or otherwise.

6 RSC 1985, c B-3.

7 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 77, [2010] 3 S.C.R. 379 (S.C.C.).

8 *Century Services* at paras 15, 17.

9 *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at para 205, [2013] 1 S.C.R. 271 (S.C.C.).

10 ***Indalex*** at para 105.

11 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), [1991] 2 W.W.R. 136 (B.C. C.A.) at 140, (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.).

12 *Century Services* at paras 64-66.

13 ***Century Services*** at para 70.

14 *Century Services* at paras 65 and 70.

15 *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.) .

16 *SC 1991, c 46.*

17 SA 1988, c P-4.05.

18 *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720 (S.C.C.).

19 *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274 (Alta. Q.B.), leave to appeal denied *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1, 43 C.B.R. (5th) 35 (Alta. C.A.).

20 *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*, 2017 NSSC 160 (N.S. S.C.).

21 *RSC 1985, c E15.*

22 *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) at para 5; *Comstock Canada Ltd., Re*, 2013 ONSC 4756, 4 C.B.R. (6th) 47 (Ont. S.C.J.) at para 49; *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (N.S. T.D.); *CanaSea PetroGas Group Holdings Ltd., Re* (2014), 18 C.B.R. (6th) 283 (Ont. S.C.J.) at paras 13-14.

23 *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265, 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]) at para 30.

24 *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at para 28.

25 *Re CanaSea PetroGas Group Holdings Ltd.*

26 *Elias v. Hutchison* (1980), 12 Alta. L.R. (2d) 241 (Alta. Q.B.) (at para 6), (1980), 35 C.B.R. (N.S.) 30 (Alta. Q.B.), aff'd (1981), 121 D.L.R. (3d) 95, 37 C.B.R. (N.S.) 149 (Alta. C.A.); *Christiansen v. Paramount Developments Corp.*, 1998 ABQB 1005 (Alta. Q.B.) (at para 24), (1998), 8 C.B.R. (4th) 220 (Alta. Q.B.); *Fitch v. Official Receiver* (1995), [1996] 1 W.L.R. 242 (Eng. C.A.); *Lyall, Re* (1991), 8 C.B.R. (3d) 82 (B.C. S.C.).

27 *Algoma Steel Inc., Re*, [2001] O.J. No. 1994 (Ont. S.C.J. [Commercial List]), leave to appeal refused, (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 (Ont. C.A.).

28 At para 14.

29 *Concrete Equities Inc., Re*, 2012 ABCA 266 (Alta. C.A.) at paras 19, 24.

30 *Muscletech*, at para 5.

31 *Royal Oak*, at para 28.

32 *General Chemical Canada Ltd., Re* (2005), 7 C.B.R. (5th) 102 (Ont. S.C.J. [Commercial List]) at para 2.

33 *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.) at para 82.

34 *Temple City*, at para 13.

35 *Rosedale Farms*, at para 39.

36 *Ibid*, para 35.

37 *Ibid*, para 29.

38 *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para 21.

39 *Thibodeau c. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 (S.C.C.).

40 *Thibodeau* at para 92.

41 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.).

42 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.) at para 57.

43 Janis P Sarra, *Rescue!: Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199.

44 ***Indalex*** at para 59.

TAB 7

Current to August 15, 2018

Alta. Reg. 124/2010, r. 9.15

Judicature Act

ALBERTA RULES OF COURT

Alta. Reg. 124/2010

Part 9
Judgments and Orders

Division 3
Corrections, Further Orders, Setting Aside, Varying and Discharging Judgments and Orders

RULE 9.15

Setting aside, varying and discharging judgments and orders

9.15(1) On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made

(a) without notice to one or more affected persons, or

(b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing.

(2) Unless the Court otherwise orders, the application must be made within 20 days after the earlier of

(a) the service of the judgment or order on the applicant, and

(b) the date the judgment or order first came to the applicant's attention.

(3) The Court may, on any terms the Court considers just,

(a) permit a defence to be filed by a party who has been noted in default,

(b) set aside, vary or discharge a judgment granted upon application against a defendant who was noted in default, or whose statement of defence was struck out under rule 3.37, or

(c) set aside, vary or discharge a judgment entered in default of defence by the plaintiff for the recovery of property under rule 3.38, or for a debt or liquidated demand under rule 3.39.

(4) The Court may set aside, vary or discharge an interlocutory order

(a) because information arose or was discovered after the order was made,

(b) with the agreement of every party, or

(c) on other grounds that the Court considers just.

** Editor's Table **

Provision	Changed by	Effective	Gazette Date
9.15	Alta. Reg. 122/2012 s8	2012 Jul 12	2012 Jul 31

*****

Alta. Reg. 124/2010 r9.15 effective November 1, 2010 (Alta. Gaz. August 14, 2010); Alta. Reg. 122/2012 s8.

TAB 8

2007 ABCA 317
Alberta Court of Appeal (In Chambers)

Matco Capital Ltd. v. Interex Oilfield Services Ltd.

2007 CarswellAlta 1336, 2007 ABCA 317, [2008] A.W.L.D. 135, 162 A.C.W.S. (3d) 12

In the matter of an application under sections 46 and 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

Matco Capital Limited (Plaintiff) and Interex Oilfield Services Ltd., Cam-Star Resources (1990) Ltd. and Roblyn Oilfield Maintenance Ltd. (the Interex Group) (Defendants)

Midfield Supply Ltd., Spartan Controls Ltd., Startec Refrigeration Services Ltd., Cox Crane Service Ltd., Lampman Electric Ltd., A.M.E. Mechanical Ltd., Bergen Consulting, Millenia Resource Consulting, NIWA Crane Ltd., Lynco Construction Ltd., Border Insulators Inc., 779208 Alberta Ltd., Sabine C02 Logistics Inc., Bowridge Manufacturing (Appellants) and The Interex Group by its Receiver-Manager Hardie & Kelly Inc. (The Receiver) (Respondent)

M. Paperny J.A.

Heard: October 10, 2007
Judgment: October 12, 2007
Docket: Calgary Appeal 0701-0273-AC

Counsel: T.P. Lysak for Appellant
R.S. Van De Mosselaer for Respondent, Hardie & Kelly Inc.
R.S. Nishumura, C.A. Murray for Purchasers Arc Resources Limited
C. Nicholson for Purchasers Milagro Energy Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Civil practice and procedure
XXIII Practice on appeal
XXIII.12 Staying of proceedings pending appeal
XXIII.12.b Stay of execution

Headnote

Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — Stay of execution

After receiver-manager H Inc. received bids for property of I Group in accordance with court-approved process, group of I Group's lien holders, appellant M Ltd., unsuccessfully sought disclosure of purchase prices and adjournment to determine possibility of submitting own bid — Chambers judge granted orders approving sale and liquidation — M Ltd. brought application for stay of execution of orders approving sale — Application dismissed — Supreme Court of Canada case set out tripartite test for stay of enforcement of court orders: applicant must show that there is serious question to be tried; that applicant will suffer irreparable harm if stay is refused; and that balance of convenience favours applicant — Balancing of competing interests of disclosure to stakeholders and fair and equal treatment was serious issue — Although possible harm to M Ltd. was speculative, if relief sought would have been nugatory if stay was not allowed, that may have been sufficient to establish irreparable harm — Impact of stay on sale process and on stakeholders as whole had to be considered — Real prospect that sales would not proceed and market would be negatively affected with no assurance of forthcoming comparable offers tipped balance of convenience in favour of respondents — Potential harm to entire estate from granting stay far outweighed any benefit to M Ltd.

APPLICATION for stay of execution of orders for sale and liquidation of property.

***M. Paperny J.A.*:**

1 The appellants are a group of lienholders who seek to stay execution of the orders of the chambers judge granted September 28, 2007, approving the sale of various assets of Interex Oilfield Services Ltd., Cam-Star Resources (1990) Ltd., and Roblyn Oilfield Maintenance Ltd. (the "Interex Group") to three different purchasers and liquidation of a CO2 plant.

2 By order dated July 26, 2006, Hardie & Kelly Inc. was appointed receiver-manager of the Interex Group. By orders dated February 9 and March 22, 2007, the court approved a process for the sale of the assets of the Interex Group. The appellants had notice of those orders and of the sale process, which included a deadline for the submission of sealed bids. Having determined the most favourable bids and negotiated agreements of purchase and sale with various purchasers, the receiver brought a motion seeking court approval of the sales and of the liquidation. That motion was returnable on September 26, 2007 but was adjourned to September 28, 2007 at the request of these appellants to give the stakeholders time to resolve their differences. At that time, the appellants sought disclosure of the purchase prices of all the assets (including the liquidation expenses and the projected liquidation revenues) and requested an adjournment for one week in order to determine their position, including the possibility that they might bid on the assets. The appellants submitted that as interested and affected stakeholders, they were entitled to disclosure of the purchase prices of each proposed sale before making submissions on the approval application.

3 The receiver agreed that in the usual course of a receivership, all affected stakeholders were entitled to know the purchase price on an approval hearing. However, he was of the view that the unique position of the appellants and the integrity of the sale process demanded that the purchase prices not be disclosed. Specifically, the receiver noted that the appellants had indicated early on that they might be interested bidders on the assets, and that despite their knowledge of the ongoing sale process, they chose not to bid but were now using their position as lienholders to require disclosure of the purchase prices to put together a competing late bid. The receiver submitted that that would work a fundamental unfairness to the court approved sale process it had undertaken. The chambers judge agreed and declined to disclose the purchase prices to the lienholders or grant the requested adjournment. She granted the four orders approving the sales and the liquidation.

4 The test for a stay of enforcement of a court order is well known and requires application of the tripartite test articulated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.): the applicant must show there is a serious question to be tried; that the applicant will suffer irreparable harm if the stay is refused; and that the balance of convenience favours the applicant, namely, if the stay is refused the applicant will suffer greater harm than the respondent would if the stay was granted.

5 On the first branch of the test, this court must consider whether an appeal from the orders approving the sales and the liquidation raises a serious issue. The appellants submit that as a court-authorized process, the process as a whole should be transparent and fair. Accordingly, all interested parties should be given access to crucial information necessary for them to assess their positions, based on their respective rights and interests. As such, it was a reviewable error for the chambers judge to decline to provide the purchase prices for their consideration in the context of an approval application. The respondents to the application submit that a chambers judge supervising a receivership is often called upon to exercise a discretion to preserve the integrity of the process and there is no error in her having declined to disclose the purchase prices to the lienholders here.

6 In declining to require disclosure of the purchase prices, and approving the sales and liquidation as requested, the chambers judge stated:

> There has been a thorough and diligent sales process with respect to the CO2 assets, commencing in early February of this year through to mid-July. The deadline was extended twice for particular reasons in order to maximize value

> for the stakeholders. I note that unsecured creditors have little to hope for from the process so this is not a case of a last minute offer coming in that would improve matters for all stakeholders, recognizing of course that the lienholders certainly are major stakeholders.
>
> I also note that Mr. Busse and his clients [the lienholders] have been part of this process since the beginning, that they have participated in court applications and were certainly aware of the sales process as it occurred. ... [The lienholders] have come forward asking that approval of the sales to [purchasers] who have complied with the process and whose offers have been recommended by the receivers should be delayed to allow them to try to put together what they say should not be characterized as a competing bid, but certainly appears to be that[.] [T]hey wish to consider whether they want to put together a scheme to have the assets turned over to the lienholders in settlement of their liens. This is not a firm proposal of any kind, but an idea and would require successful negotiations to take out the major secured creditor that have not yet been effected.
>
> The lienholders have made it clear that they are acting in two capacities, as creditors and as potential bidders of some kind. I have heard from the receiver the reason why the receiver felt that they — it would not be appropriate to provide information to the lienholders, given the two hats that they wore, that they wear, and I am satisfied that this is justifiable given what the lienholders have said in this court, they want to do with the information.

7 While recognizing that candour and fairness of process were critical, she further held ". . . fairness of process does not mean that lienholders are entitled to, in effect, lie in the weeds to see if they are happy with the price for the assets and then obtain that information in order to determine whether they can come up with something better."

8 The determination of whether there is a serious question to be tried is a preliminary assessment of the merits of the case only, and I need only be satisfied that the application is neither frivolous nor vexatious. I am satisfied that the appeal here raises a serious issue.

9 The sale process in the context of a court-appointed receiver includes both the submission of bids and the court approval process. Fairness and candour are paramount in both stages of the process. As this court noted in *Bank of Nova Scotia v. Henuset Resources Ltd.* (1989), 70 Alta L.R. (2d) 320, [1989] A.J. No. 945 (Alta. C.A.) the entire process must be objectively fair to all parties having a legitimate interest in it. The purchase price is material information to which a creditor would be entitled in the usual course. In other words, public disclosure is part of a judicial approval process. The integrity of the sale process is but one aspect of a court approval process that demands fairness and equality of treatment to all, including disclosure of all necessary information for stakeholders to make informed decisions. How those competing interests could or should be balanced to achieve these objectives is such an issue.

10 The second branch of the test, irreparable harm, refers to the nature of the harm that would be suffered were a stay not to be granted. The applicants submit that absent a stay, the sales "may be closed" and the disassembly of the Interex Group's CO2 plant will begin, thus precluding consideration of "potential alternatives available" to them. In other words, the appeal will be moot and as such, their interest in considering alternatives will be gone. However, the chambers judge found that the appellants were well aware of the orders authorizing the sale process and of the deadline for bids. They made no effort to pursue other alternatives or to make a reserve bid, an option that was open to them and that would have preserved the integrity of the court-ordered sale process. Any harm resulting from declining a stay is not entirely the result of the appellants' lack of access to the purchase prices. It was open to the appellants to prevent such potential harm earlier in the process. The lienholders also concede that there may be no harm at all if the prices are high enough to leave them with no concerns regarding approval of the sales. At its highest, the irreparable harm here is the loss of an opportunity to put a different deal together, an opportunity which is at best speculative. However, it may be sufficient to establish irreparable harm where it can be shown that the relief sought would be nugatory if a stay was not allowed: *Triple Five Corp. v. United Western Communications Ltd.* (1994), 19 Alta. L.R. (3d) 153, 27 C.P.C. (3d) 201 (Alta. C.A.), (motion for a stay of execution dismissed: [1994] S.C.C.A. No. 226 (S.C.C.)). I am prepared to so find for the purpose of this application.

11 Finally, does the balance of convenience favour granting a stay? Do the interests of the appellants in a stay outweigh the interests of the other stakeholders and the estate as a whole? Serious potential consequences of a stay include a loss of all of the sales approved by the court below, and a "tainting of the market" such that the value of the assets are diminished in the eyes of prospective purchasers, a potential harm to all of the stakeholders, including the appellants. No one has challenged the propriety or efficacy of the receiver's sale process. In other words, there has been a broad canvassing of the available market with a view to maximizing the return to all stakeholders. The process undertaken by the receiver is not impugned. Nor are its conclusions that the sale agreements represent the best offers available for the assets. In assessing the balance of convenience, I am obliged to consider the impact of a stay on the sale process and on the stakeholders as a whole. The real prospect that the sales will not proceed and that the market will be negatively affected with no assurance that there will be any other comparable offer forthcoming from the appellants or elsewhere tips the balance of convenience in favour of the respondents. The potential harm to the entire estate from granting a stay far outweighs any benefit to the appellants.

12 The application for a stay pending appeal is dismissed.

Application dismissed.