1999 ABCA 178
Alberta Court of Appeal

Royal Bank v. Fracmaster Ltd.

1999 CarswellAlta 539, 1999 ABCA 178, [1999] A.J. No. 675, 11 C.B.R. (4th) 230, 209 W.A.C. 93, 244 A.R. 93

In the Matter of the Companies' Creditors Arrangement Act R.S.C. 1985, c.C-36 as Amended

In the Matter of Fracmaster Ltd.

UTI Energy Corp., Respondent (Plaintiff) and Fracmaster Ltd., Respondent (Defendant)

Royal Bank of Canada, and Royal Bank of Canada, as agent for Royal Bank of Canada, Canadian Imperial Bank of Commerce, Bank of Nova Scotia, Hong Kong Bank of Canada, Banque Nationale de Paris (Canada) and Credit Suisse First Boston Canada, Respondents (Plaintiffs) and Fracmaster Ltd., Respondent (Defendant) and UTI Energy Corp., Appellant

The Janus Corporation, Appellant (Plaintiff) and Fracmaster Ltd., Respondent (Defendant)

Royal Bank of Canada, and Royal Bank of Canada, as agent for Royal Bank of Canada, Canadian Imperial Bank of Commerce, Bank of Nova Scotia, Hong Kong Bank of Canada, Banque Nationale de Paris (Canada) and Credit Suisse First Boston Canada, Respondents (Plaintiffs) and Fracmaster Ltd., Respondent (Defendant) and UTI Energy Corp., Appellant and Calfrac Limited, Appellant

Conrad, O'Leary, Fruman JJ.A.

Heard: June 4, 1999
Judgment: June 7, 1999
Docket: Calgary Appeal 99-18326, 99-18327, 99-18331, 99-18335

Proceedings: affirming (May 17, 1999), Doc. Calgary 9901-05042 (Alta. Q.B.); and affirming (May 21, 1999), Doc. Calgary 9901-08246 (Alta. Q.B.)

Counsel: *H.A. Gorman*, for UTI Energy Corp.
V.P. Lalonde, for Janus Corporation & Alfred H. Balm.
E.W. Halt and *L. Berner*, for Calfrac Limited.
T.J. Mallett and *A.D. Little*, for BJ Services Company.
B.P. O'Leary and *A.Z.A. Campbell*, for Arthur Andersen Inc. (The Receiver).
F.R. Dearlove, for Royal Bank et al. (The Lending Syndicate).
R. Dudelzak, Q.C., for Global Securities Ltd.
W.E.B. Code, for BNPI.
G.B. Davison, for Fracmaster (For the Corporation).
S.T. Fitzgerald, for TD Asset Finance.

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

APPEAL by U and C from decision approving sale of company's assets to B; APPEAL by J from decision dismissing J's application for order directing meeting of creditors and shareholders to consider J's plan of arrangment; APPEAL by U

from decision dismissing company's application for approval of sale of company's assets to U, in judgments reported at (1999), 11 C.B.R. (4th) 204 (Alta. Q.B.) and (1999), 11 C.B.R. (4th) 217 (Alta. Q.B.).

Conrad J.A. (for the court):

1 The decision of the Court is unanimous and will be delivered by Madam Justice Fruman.

Fruman J.A. (for the court):

2 Fracmaster Ltd., an oil and gas services company with world-wide operations, encountered serious financial difficulties. With liabilities that greatly exceeded its assets, its inevitable insolvency gave rise to hurried attempts to restructure the company. A series of court proceedings and a court-authorized tender process, all conducted at break neck speed, resulted in a court order approving the sale of Fracmaster's assets to BJ Services Company for $80 million. That order, and the events which led up to it, are the subject of four appeals by prospective purchasers whose bids for Fracmaster were unsuccessful.

3 We make two preliminary observations. First, this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

4 Our second observation is that events unfolded rapidly, with short time periods and offers arriving, literally, at the last minute. Parties did not always have time to prepare and file affidavits. On occasion representations of fact were mixed with submissions of law made by counsel to the chambers judge. As a result, our record is not as complete as we might have wished. We imply no criticism. We understand Fracmaster's serious financial jeopardy, the need for haste, and the accommodation by the parties and the court to conclude matters quickly. However, the frailties of the record require that we give considerable deference to fact findings made by the chambers judge and further illustrate why leave is and should be required to appeal proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (section 13). I will refer to that statute as the "CCAA".

Facts

5 Fracmaster is an Alberta company. Beginning in the fall of 1998, when its financial condition was precarious, it unsuccessfully attempted to restructure its financial affairs. With the indulgence of a lending syndicate to whom Fracmaster owed $96 million, and whose debt was registered as a first charge on its assets, it subsequently filed a petition under the CCAA. On March 18, 1999, Fracmaster was granted an order imposing a stay of proceedings and appointing Arthur Andersen Inc. as the monitor. Fracmaster then conducted another sale process, in order to restructure the company, inject equity or sell its assets. The sale process was neither supervised nor controlled by the monitor. Several companies submitted offers or proposals, including UTI Energy Corp., Calfrac Limited and The Janus Corporation together with its principal, Alfred H. Balm.

6 When the matter returned to court in May of 1999 four applications were heard:

First, Fracmaster applied for approval of the sale of its assets to UTI. The members of the lending syndicate supported that application, in accordance with a contractual commitment they had made to UTI.

Second, that same lending syndicate, as an alternative to Fracmaster's application, applied to lift the stay, appoint Arthur Andersen as receiver, direct the receiver to approve the UTI sale and permit the lending syndicate to begin to realize on its security.

Third, Balm/Janus applied to continue the stay, adjourn the other applications, appoint an interim receiver and have the court direct the calling of meetings of secured creditors, unsecured creditors and shareholders, to consider the Balm/Janus plan of arrangement.

Fourth, Calfrac applied for approval and acceptance of its proposal to purchase Fracmaster's assets.

7 In reasons dated May 17, 1999 [reported at 11 C.B.R. (4th) 204], the chambers judge dismissed the Fracmaster, Balm/Janus and Calfrac applications. She appointed Arthur Andersen as the receiver/manager on certain terms and conditions, including the power to sell the assets of Fracmaster subject to court approval. She denied the lending syndicate's application to direct the receiver to sell the assets to UTI. Alive to concerns about delay, she asked the receiver to quickly report its recommendations about a sale of assets or other immediate action that the receiver considered appropriate for the benefit of all claimants, including the secured creditors (CCAA A.B. 333). The May 17 order in the CCAA proceedings is the subject of appeals by Balm/Janus and UTI.

8 The next day, May 18, the receiver returned to court with a notice of motion seeking directions for approval of a sale process by way of sealed bids. The process was designed to respond to the principles and objectives established by the chambers judge for a sale of assets. As there had been no independent valuations, the proposed tender process would test the market to determine whether offers were available in excess of the amount of the lending syndicate's secured debt. The process was also designed to maximize the value to the creditors; respond to concerns about delay and the need for finality; provide a process for the benefit of all creditors; and be fundamentally fair by establishing a level playing field for all participants.

9 The proposal was not greeted with unanimous approval by the prospective purchasers, and its terms were the subject of heated debate in court. At the conclusion of the May 18 proceedings, the chambers judge ordered a tender process. The order set out the terms and conditions of offers that would be considered, with final offers to be submitted by 2:00 p.m. on May 20, 1999, by way of sealed bids. The receiver would advise the interested parties of its recommendation by 8:00 p.m. on May 20, and make its recommendation to the court at 10:00 a.m. on May 21. The tender process established in the May 18 order has not been appealed.

10 Offers were submitted by UTI, Calfrac and BJ Services, a company which had previously shown interest in acquiring Fracmaster, but had not participated in the CCAA company-conducted sale process. Balm/Janus did not submit an offer. The lending syndicate continued to support the UTI offer, in accordance with a contractual commitment its members had made to UTI. The receiver recommended acceptance of the BJ Services offer, for a number of reasons, including the fact that it provided the highest cash purchase price, exceeding the Calfrac offer by $13 million and the UTI offer by $19.3 million. The chambers judge, in reasons dated May 21, 1999 [reported at 11 C.B.R. (4th) 217], approved the BJ Services offer recommended by the receiver. UTI and Calfrac appeal that decision.

The CCAA Appeals

11 Balm/Janus appeal the chambers judge's decision in the CCAA proceedings, declining to order a meeting of creditors and shareholders of Fracmaster to consider and implement Balm/Janus' proposed plan of arrangement. The appeal is supported by certain shareholders of Fracmaster and by Banque Nationale de Paris, a subordinated lender.

12 The chambers judge acknowledged that the restructuring proposed by Balm/Janus was a true plan which fit within the CCAA, leaving an after-life for Fracmaster and its shareholders. However, she noted the commercial reality that there was no equity left in Fracmaster, and that the lending syndicate had the only realistic remaining financial interest (CCAA A.B. 329-330). Under the terms of the CCAA and the Balm/Janus proposal, the plan would require the approval of the lending syndicate, which had indicated that it would not support the proposal. The chambers judge found as a fact that the lending syndicate had valid commercial reasons for its refusal (CCAA A.B. 331). She decided that it would be pointless to order meetings of creditors and shareholders and dismissed the Balm/Janus application.

13 There is no requirement under the CCAA that all proposed plans of arrangement be put to meetings of creditors and shareholders for their consideration. Sections 4 and 5 specifically employ the word "may", giving the court discretion. In exercising its discretion, the court must consider whether the proposed plan of arrangement has a reasonable chance of success: *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 10 C.B.R. (3d) 23 (Ont. Gen. Div.), or instead,

is doomed to failure: *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.). Here it was clear that the lending syndicate did not support the plan. They would be entitled to vote as a class at the meeting and defeat the plan. It was also clear that the Fracmaster situation was urgent, requiring rapid resolution, and that the delays that would be occasioned by calling the meetings would further jeopardize Fracmaster's financial condition and the value of its assets. The chambers judge did not err in concluding that the Balm/Janus plan was doomed to failure. We grant leave to appeal to Balm/Janus, but dismiss their appeal.

14 We wish to make a further observation. Under the CCAA the court has no discretion to sanction a plan unless it has been approved by a vote of a 2/3 majority in value of each class of creditors (section 6). To that extent, each class of creditors has a veto. This procedure is quite different from a court-appointed receivership. In a receivership the desires of the creditors are a significant factor, but the approval by a specific majority of creditors is not a pre-condition to court sanction, and creditors do not have an absolute veto. The difference in the procedures gives rise to different tests and considerations to be applied in each type of proceeding. While in this case the lending syndicate's desires in the CCAA and receivership proceedings were consistent, the chambers judge was not required to give the same weight to their wishes in each proceeding.

15 UTI also appeals the May 17, 1999 order denying Fracmaster's application to approve the sale of its assets to UTI under the CCAA. The chambers judge noted that the proposed sale of assets to UTI did not create any monetary return for the unsecured creditors or shareholders of Fracmaster, nor did it contemplate that they would receive any benefit. The transaction was effectively a sale of assets for the benefit of the lending syndicate, a transaction which she concluded could be accomplished in a manner that did not require the use of the CCAA (CCAA A.B. 331-332). Without deciding whether the UTI offer was commercially provident, she concluded that the sale should not be approved under the CCAA, and dismissed Fracmaster's application.

16 Although there are infrequent situations in which a liquidation of a company's assets has been concluded under the CCAA, the proposed transaction must be in the best interest of the creditors generally: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at 31. There must be an ongoing business entity that will survive the asset sale. See, for example, *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]); *Solv-Ex Corp v. Solv-Ex Canada Ltd.* (November 19, 1997), Doc. Calgary 9701-10022 (Alta. Q.B.). A sale of all or substantially all the assets of a company to an entirely different entity, with no continued involvement by former creditors and shareholders, does not meet this requirement. While we do not intend to limit the flexibility of the CCAA, we are concerned about its use to liquidate assets of insolvent companies which are not part of a plan or compromise among creditors and shareholders, resulting in some continuation of a company as a going concern. Generally, such liquidations are inconsistent with the intent of the CCAA and should not be carried out under its protective umbrella. The chambers judge did not err in concluding that the sale of assets to UTI would be an inappropriate use of the CCAA. We grant leave to appeal to UTI, but dismiss its appeal.

Receivership Appeals

17 Calfrac appeals the May 21 order which approved the sale of Fracmaster's assets to BJ Services. Its primary complaint is that the receiver failed to administer the sale process in strict compliance with the May 18 court ordered procedure. Calfrac's complaints about the process were considered by the chambers judge, and dealt with in her May 21 reasons (Receivership A.B. 119 to 122). She concluded that the terms of the May 18 order had to be read in light of the commercial realities of the business world and the bidding process. She viewed the variations as minor and not problematic and decided that the BJ Services offer was in substantially the same form as the offer proposed by the receiver.

18 A review of Calfrac's offer indicates that it too was not in strict complaince with the terms of the May 18 order. This is not entirely unexpected as the order, tender process and submission of offers came about quickly, without time to contemplate all the intricacies of fine legal drafting. Amendments to the form of agreement were contemplated in

paragraph 4. c of the May 18 order. The other paragraphs of section 4, setting out other terms and conditions, did not specifically mention amendments.

19 The tender process in this case was not a distinct and final process designed to provide a complete set of bid documents to the bidders, with no possibility of negotiation or variation, as might be the case in a construction bid. See, for example, *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.). Time did not permit the creation of such definitive conditions. Instead the process was designed to be court supervised. The amendment provisions contained in paragraph 4. c illustrate the intent to build flexibility into the process, rather than requiring strict compliance with the order. All parties were entitled to be present and make representations at the court proceedings to approve an offer, with the court to have ultimate discretion to determine whether the principles and objectives of the sale process had been met. The chambers judge did not act unreasonably in considering the commercial realities and the nature of the variations, and in accepting the form of BJ Services offer. This ground of appeal fails.

20 A second ground of appeal advanced by both Calfrac and UTI, is that the receiver and the chambers judge failed to properly consider the closing risks associated with the BJ Services offer. The chambers judge considered the closing risks in her reasons (Receivership A.B. 112 to 113) and accepted the receiver's conclusion that the closing risks associated with the BJ Services offer were more than the Calfrac offer, no greater than the UTI offer, and more than offset by the BJ Services purchase price.

21 Calfrac is critical of the summary manner in which the receiver communicated its risk assessment, and the lack of detail to back up its analysis. The receiver had 6 hours in which to analyze the offers and indicate its recommendation to the parties. The expedited procedure was set out in the May 18 order which has not been appealed. With the benefit of more time, the receiver undoubtedly would have proffered a more detailed analysis. But one cannot be overly critical of the receiver's work product, given the time constraints.

22 Both UTI and Calfrac contend that the chambers judge erred in her assessment of the closing risks. UTI suggests that she erred in concluding that the closing risks of the BJ Services offer were no greater than the UTI offer. Even if that were so, the chambers judge also concluded that the BJ Services closing risks were more than offset by the greater purchase price. If that was the case for the Calfrac offer, which involved fewer closing risks and a higher purchase price than the UTI offer, it would certainly be the case for the UTI offer, which involved greater closing risks and the lowest purchase price. We are not satisfied that the chambers judge's conclusions on risks were unreasonable. We defer to her findings and dismiss this ground of appeal.

The Lending Syndicate's Wishes

23 UTI's principal ground of appeal is that the chambers judge erred in acting upon the receiver's recommendation and approving the sale of Fracmaster's assets to BJ Services. UTI submits that the prevailing consideration for the receiver should have been the wishes and business decision of the lending syndicate, which supported the UTI offer. UTI's appeal is supported by the lending syndicate and, if the Balm/Janus appeal does not succeed, by Banque Nationale de Paris, the subordinated lender.

24 The facts in this case are unique. After the preliminary stay and CCAA order, Fracmaster conducted a company supervised sale process, which resulted in offers or proposals from several companies, including Balm/Janus, Calfrac and UTI. The lending syndicate considered the proposals, preferred the UTI offer and contractually agreed to support it. An acknowledgment to the April 26 UTI offer, signed by the lending syndicate, stated: "The above Offer is hereby acknowledged by each of the undersigned and each of them agree to support the Offer at the CCAA Proceedings."

25 On April 27, 1999 the lending syndicate signed a side letter which contemplated that the sale of assets might not be completed under the CCAA, but under an alternate transaction, such as the appointment of a receiver and conveyance of assets by the receiver to UTI. The letter stated: "It is agreed that the Term Lenders and the Operating Lender will use

their reasonable best efforts to conclude any such alternate transaction so long as they receive the same consideration as they would have received under the Offer."

26 Fracmaster applied for an order approving the sale of its assets to UTI under the provisions of the CCAA. Although the lending syndicate supported that application, in the same proceeding the lending syndicate applied for an alternate order appointing a receiver and directing the receiver to sell the assets to UTI. The chambers judge dismissed Fracmaster's application under the CCAA. She appointed a receiver but refused to direct the receiver to transfer the assets to UTI, concluding that this would fetter the receiver's discretion and largely defeat the purposes of its appointment (CCAA A.B. 333). Although the chambers judge noted that the receiver could have recommended a sale to UTI if it felt comfortable doing so, the receiver instead recommended a new sale process, involving sealed tenders. Both UTI and Calfrac participated in the sealed tender process, repeating their earlier offers. BJ Services, which had not made an offer in the CCAA proceedings, put in a new bid. It offered cash consideration to the lending syndicate of $80 million for Fracmaster's assets, compared to $60.7 million plus warrants offered by UTI and $66 million plus warrants offered by Calfrac. The lending syndicate, which had agreed to support the UTI offer before the BJ Services offer was made, stuck by their commitment and continued to support the UTI offer.

27 In accordance with the May 18 order, the receiver was required to make a recommendation to the court, bearing in mind the interests of all claimants, including the secured creditors. The bid process confirmed that the lending syndicate had the only remaining financial stake in the company. The amount of its secured debt was $96 million, which exceeded the bids. The receiver was aware that the lending syndicate supported UTI's offer, and was also aware of the letter agreement. Nevertheless, the receiver concluded that the BJ Services offer was the best offer, and recommended its acceptance.

28 The chambers judge followed that recommendation and approved the BJ Services offer. There is no suggestion that the BJ Services offer was prejudicial to the lending syndicate. The chambers judge considered the case law and concluded that although the creditors' interests were an important consideration, they were not the only consideration (Receivership A.B. 117). Accepting the principle that the creditors' views should be very seriously considered, she indicated that if she were satisfied that the receiver acted properly and providently, she would be reluctant to withhold approval of a transaction recommended by the receiver. (Receivership A.B. 118)

29 UTI concedes that had the bid process resulted in a bid which exceeded the lending syndicate's secured claim of $96 million, parties other than the lending syndicate would have had a financial interest in the outcome, and different considerations would apply. Because none of the bids exceeded $96 million, only the lending syndicate had a financial interest in the proceeds of sale of assets. UTI submits that the lending syndicate made a bargain with UTI, and that bargain should be the paramount consideration. The thrust of UTI's argument is that its offer should be accepted so long as no one else offered more than $96 million. In effect, it would have a reserve bid.

30 The narrow issue raised in the appeal is the weight to be given to the lending syndicate's wishes to accept the UTI offer. But this appeal raises a competing issue, the integrity of the bid process.

31 Lenders have the ability to appoint private receivers and deal with assets without court approval. In the circumstances of this case, where Fracmaster has many offshore assets, we are told that a private receivership without court involvement would not be expedient. Once a creditor embarks upon a court appointed receivership, the creditor loses an element of control, including the power to dictate the terms of the disposition of assets. Although the lending syndicate's preferences are an important factor to be considered by the court, its preferences do not fetter the court's discretion and are not necessarily determinative.

32 The receiver's role in a liquidation of assets is clear and well defined. Its obligation is to make a sufficient effort to obtain the highest possible sale price for the assets: *Salima Investments Ltd. v. Bank of Montreal* (1985), 21 D.L.R. (4th) 473 (Alta. C.A.), at 476. In *Royal Bank v. Soundair Corp.* (1991), 83 D.L.R. (4th) 76 (Ont. C.A.), at 93, Galligan

J.A. set out the principles which govern the function of the court and the exercise of its discretion when considering an application by a receiver for court approval of a sale:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers have been obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.
>
> The chambers judge considered each of these principles in turn, then accepted the receiver's recommendation.

33 Only in rare cases will the receiver's recommendation diverge from the wishes of the only stakeholder, and those cases must be carefully scrutinized by a judge who is asked to approve that recommendation. But we cannot say that the chambers judge acted unreasonably by following the recommendation of the receiver in this case, because of the unique facts and manner in which events unfolded.

34 After the court learned of the existence of the lending syndicate's contractual commitment to support the UTI offer in a receivership, it nevertheless ordered a sealed tender process. The receiver asked for the sale process in order to determine whether offers might be made which would exceed the amount of the lending syndicate's debt. The receiver also submitted that only a sale process would satisfy the court that it had fulfilled its mandate to maximize recovery and "give everyone a fair and reasonable attempt at bidding on the assets of the company" (Receivership A.B. 56). Once the sale process was engaged, it had to be fundamentally fair, with a level playing field for all participants.

35 The receiver contacted all parties who had previously made an offer for Fracmaster's assets or expressed an interest in making an offer. The receiver also issued a press release outlining the terms of the sale. It was therefore clearly contemplated that the bidding process would not be confined to previous bidders.

36 Some reference to a reserve bid could have been incorporated into the May 18 order indicating, for example, that UTI's offer was to be accepted unless a bid exceeded $96 million. The order was silent. Under the order, UTI was not required to repeat its earlier offer and could have changed the consideration. In fact, it could have made no offer at all. Anyone entering the bidding process might well know, as BJ Services did, that the lending syndicate supported UTI's offer and that this could create some impediments. But they could not know that UTI's offer would have the effect of a reserve bid up to $96 million. To default to the UTI bid without prior notice to the other bidders would undermine the integrity of the independent bidding process.

37 UTI chose to resubmit its earlier offer, but must have been mindful of the risks. Clause 6. (b) of UTI's offer specifically stated that the offer was conditional on court approval.

38 While neither the receiver nor the court had an obligation to sweeten the lending syndicate's negotiated deal, the fact that the effect of the recommended bid was to increase the lending syndicate's cash consideration was not itself a reason to dismiss the receiver's recommendation. Once the court embarked upon a sealed tender process other interests were engaged. The chambers judge considered the interests and desires of the lending syndicate. She also considered the other factors set out in *Soundair*, including fairness and the efficacy and integrity of the process. She balanced the competing interests, as she was required to do, and we cannot say that her conclusion was unreasonable or that she erred in principle. This ground of appeal fails.

Summary

39 We grant leave to appeal the CCAA orders to Balm/Janus and UTI. The Balm/Janus appeal, Calfrac appeal and two appeals by UTI are dismissed.

(DISCUSSION AS TO COSTS)

Conrad J.A. (for the court):

40 We have concluded that there is no reason to depart from the normal rule that costs follow the success of the appeal. Accordingly, we will order one set of costs to BJ Services to be payable in equal amounts by UTI, Calfrac and Balm/Janus. The costs are to be assessed on Column 5.

Appeals dismissed.

1999 ABQB 379
Alberta Court of Queen's Bench

Fracmaster Ltd., Re

1999 CarswellAlta 461, 1999 ABQB 379, [1999] A.J. No. 566, 11 C.B.R. (4th) 204, 245 A.R. 102

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

In the Matter of Fracmaster Ltd.

Paperny J.

Judgment: May 17, 1999 *
Docket: Calgary 9901-05042

Counsel: *G. Brian Davison*, for Fracmaster Ltd.
Brian P. O'Leary, for Arthur Andersen Inc.
Howard A. Gorman, for UTI Energy Corp.
Frank R. Dearlove, for Royal Bank of Canada.
Patrick T. McCarthy, Q.C., for Banking Syndicate.
B.A.R. Smith, Q.C., for Outside Directors.
V. Phillippe Lalonde, for Alfred Balm.
Charles P. Russell, for Harvard International Resources Ltd.
W.E. Brett Code, for Banque Nationale de Paris (Canada).
Larry B. Robinson and *Sean T. Fitzgerald*, for TD Asset Finance Corp.
Donald B. Higa, for Canawill Ltd.
Robert T. Anderson, for TrizecHahn Office Properties Ltd.
Mark G. Damm, for Employees.
J. Patrick Peacock, Q.C., for 812124 Alberta Ltd.
Anita Walker, for Tuboscope Inc.
Richard Dudelzak, Q.C., for Shareholders / Investors.
Allan G.P. Shewchuk.

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

APPLICATION by debtor corporation for approval of sale of assets; CROSS-APPLICATION by creditors for appointment of receiver.

Paperny J.:

I. Introduction

1 Fracmaster Ltd. ("Fracmaster") is an Alberta corporation. On March 18, 1999, LoVecchio J. granted an order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*), appointing Arthur Anderson Inc. as the monitor (the "Monitor"). At the same time, he imposed a stay of proceedings, effectively preventing any creditors from realizing on their assets. I later extended that stay to April 30, 1999. Various parties returned before me on April 30, 1999 with several applications. Fracmaster asked me to approve the sale of substantially all of its assets to UTI Energy Corp. ("UTI"). A syndicate of creditors (the "Syndicate") supported that application, but presented an alternate application of lifting the stay and appointing the Monitor as receiver and manager of Fracmaster. The Syndicate is represented by counsel for the Royal Bank of Canada ("Royal Bank") and represents the Royal Bank, Canadian

Imperial Bank of Commerce, Bank of Nova Scotia, Hongkong Bank of Canada, Banque Nationale de Paris (Canada) and Credit Suisse First Boston Canada. While the Royal Bank has a separate interest as well, I will, for simplicity, refer to these secured creditors, including the Royal Bank in its capacity as operating lender, as the Syndicate. Alfred Balm ("Mr. Balm"), a large shareholder of Fracmaster, requested an adjournment to allow him to develop an alternative to the UTI sale.

2 I granted an adjournment until May 14, 1999, and also extended the stay. In the interim, Mr. Balm was to be given access by Fracmaster to financial information that he might need to prepare his alternative. I also requested the Monitor to prepare a further report, including a report on the valuation of Fracmaster and its subsidiaries, to help me determine if this matter was appropriately under the *CCAA*. Finally, I asked Fracmaster to consider certain matters, including the existence of a "plan" within the meaning of the *CCAA* and any provisions for notice to creditors and other interested parties. On May 7, 1999, I granted an application by Harvard International Resources Ltd. ("Harvard") for access to financial information, so that Harvard could consider its interest in presenting an alternative to the UTI sale. I did not agree, however, to entertain the proposal or to allow it to be submitted for consideration by the stakeholders.

3 I now have six applications before me. First, Fracmaster applies to have the UTI sale approved. Second, the Syndicate (although supporting Fracmaster's application) applies, as an alternative to Fracmaster's application, to lift the stay, appoint a receiver, direct the receiver to approve the UTI sale, and allow the Syndicate to begin steps to realize on its security. Third, Mr. Balm and the Janus Corporation ("Janus") apply to continue the stay, adjourn the other applications, appoint an interim receiver, and have the court direct the calling of meetings for consideration of its proposal by the secured creditors, the unsecured creditors and the shareholders. Fourth, the previously unheard-from party Calfrac Ltd., formerly 812124 Alberta Ltd. ("Calfrac") applies for approval and acceptance of the proposal which it purports to put forward. Fifth, Cananwill Canada Limited ("Cananwill") applies for a declaration that it has a valid assignment of certain sums in priority to all security interests granted by Fracmaster, including those granted to the Syndicate. Sixth, TD Asset Finance Corp. seeks an order lifting the stay. Harvard has indicated it does not intend to seek the court's leave to put forward a proposal.

II. Facts

A. Background

4 Fracmaster applied for protection under the *CCAA*, proposing to file a compromise or arrangement with its creditors and, if appropriate, an arrangement with its shareholders.

5 In his affidavit sworn in support of the initial application, Gary Sherkey, Fracmaster's chief financial officer, deposed that for the year ending December 31, 1998 Fracmaster had a net loss of approximately $11 million before charges of $126 million were taken to reduce the carrying value of the company's Russian related assets. At March 15, 1999 Fracmaster had claims owing to trade creditors in excess of $17 million. At March 15, 1999 Fracmaster's indebtedness included a revolving demand operating facility in the amount of $32,672,000, advances under a credit facility of a subsidiary company in the amount of $12 million U.S. and a revolving demand loan of another subsidiary in the amount of $2,045,000 U.S. In addition, at March 15, 1999 Fracmaster had a term loan facility with the syndicate of banks in the amount of $63,200,000. The loan was repayable in three annual payments of approximately $21,100,000, with the initial payment due on April 30, 1999. On March 15, 1999 Fracmaster's operating facility was almost fully drawn and a payment of $7.5 million was due on March 18, 1999. Fracmaster was unable to make that payment. Fracmaster at the time had been unable to arrange for additional operating funds from its banks or elsewhere. Justice LoVecchio granted the application, including the stay requested.

6 The Monitor's April 12, 1999 report shows that Fracmaster's liabilities were:

-operating line of credit	$32,972,000.00
-term loan, long term debt	$63,590,000.00
-BNPI (contingent) (approximate)	$18,000,000.00

-accounts payable, pre-CCAA	$19,703,000.00
TOTAL:	$134,265,000.00 Cdn

The total owed to the Syndicate at that time was approximately $96,562,000.

7 According to the April 30 affidavit of Douglas Paul, a Senior Account Manager at the Royal Bank, Fracmaster and the Syndicate agreed to continue earlier efforts to sell Fracmaster. In consideration for the Syndicate allowing this *CCAA* process to be undertaken, Fracmaster provided the Syndicate with a consent order to lift the stay and a consent order to appoint a receiver.

8 On April 27, 1999, Fracmaster and the Syndicate entered into an asset purchase agreement with UTI. The purchase price is $60.7 million for the assets, plus an equity participation for the Syndicate. UTI wishes to close the transaction. Counsel for UTI states that UTI would prefer to complete the sale under the *CCAA*, but that it would still be possible under receivership. If court approval is not received for its offer, or the offer is not extended beyond May 17, 1999, UTI may terminate the offer. As is evident from the figures set out above, the UTI purchase price is significantly less than the total of the secured debt owing to the Syndicate.

9 The Syndicate supports the sale to UTI under the *CCAA*. The Syndicate is contractually obliged to support the sale. However, as mentioned, if the court declines to approve the UTI sale under the *CCAA*, the Syndicate wishes the stay lifted and a receiver appointed, so that the Syndicate can proceed to enforce its security. Notwithstanding its earlier notice of motion, the Syndicate submitted at the hearing it would seek the court to direct the receiver to complete the UTI sale.

10 Mr. Balm has been involved with Fracmaster in some capacity since its inception. Mr. Balm sold all of his Fracmaster shares (approximately 67 per cent of the outstanding shares) on September 9, 1997. The shares were sold through an instalment receipt structure. When the second instalment was due on September 9, 1998, buyers representing approximately 43 per cent of the Fracmaster shares defaulted on the payment because the share price had substantially decreased. Mr. Balm announced his intention to re-sell those shares; Fracmaster announced it was willing to cooperate with that sale. Apparently, Mr. Balm still holds approximately 43 per cent of Fracmaster's shares, giving him a substantial stake in Fracmaster.

11 In a May 11 affidavit, Mr. Margetak, President and CEO of Fracmaster, deposes that Fracmaster conducted a sales process from September 1998 to April 27, 1999. He opines that this was a full and effective canvassing of the market for parties interested in investing in or buying the assets of Fracmaster. Fracmaster's brief describes the sales process in two stages. First, there was the attempt from September 16, 1998 to March 9, 1999 to sell the shares of Fracmaster in conjunction with Mr. Balm. Second, there was the attempt from March 18, 1999 to April 27, 1999 during which certain steps were taken: (i) Fracmaster solicited and received expressions of interest from various parties; (ii) the parties were requested to file proposals by April 19 - five were received; and (iii) proposals were reviewed and negotiations occurred - the UTI sale was considered the best proposal.

12 There is a dispute over Mr. Balm's commitment to reinvesting in Fracmaster. Mr. Blam deposes that he never foreclosed the possibility of coming up with an alternative arrangement to any sale; Fracmaster's representatives depose that he indicated he was no longer interested. However, on April 30, 1999, I granted Mr. Balm access to the financial information to decide if he wished to put forward a proposal. I did not at the time agree to entertain such a proposal, or allow it to be submitted to the various stakeholders, reserving that issue for consideration today.

B. UTI's Offer

13 UTI's offer is for all, or substantially all, of Fracmaster's assets. The purchase price is $60.7 million cash, plus warrants for up to five per cent of the outstanding shares of Newco, the purchaser, a "single-purpose corporation". Through a scheme of puts and calls, the value of the warrants is effectively capped at $20 million. The result is there is no provision for unsecured creditors or shareholders. The Syndicate supports the UTI proposal and is contractually

obliged to do so. The offer does not come before the court in the form of a plan, nor does it contemplate a plan being put forward post-closing.

C. Balm/Janus Plan of Arrangement

14 This is the only true plan put forward as contemplated by the terms and spirit of the *CCAA*. This proposal offers the secured creditors $66 million, plus 720,000 warrants at an exercise price of $5 per consolidated share. The unsecured creditors would have a choice of (i) the lesser of their claim amount and $500; or (ii) an unsecured note for a maximum of 20 per cent of their claim, which appears to be payable in instalments over several years, presumably if Fracmaster is solvent at the time the payments come due. Some unsecured creditors are excluded from the plan, and will be paid in full. There would be a consolidation of the shares on a 25 for 1 basis. Shareholders would be able to purchase some of the new shares at $5 per share, although the mechanics in the proposal are unclear. The plan contemplates approval by the secured creditors as a class, the unsecured creditors as a class and the shareholders as a class. It anticipates meetings being held and a hearing to obtain court approval on July 19, 1999.

D. Calfrac Offer

15 Calfrac's purported proposal, which emerged almost literally at the last minute, is very similar to the UTI sale. Calfrac would pay a maximum of $65 million total. The Syndicate would receive $61 million, plus equity participation similar to that in the UTI sale. The unsecured creditors would receive ten cents on the dollar, to a maximum of $3 million among all the unsecured creditors. The shareholders would receive two cents per common share, to a maximum of $1 million.

E. Value of Fracmaster

16 It would have been of assistance to the Court to have an independent opinion as to the fairness of the sale process and the consideration to all stakeholders. Instead, I have Fracmaster's submission that the UTI offer represents the best available value for Fracmaster, based on the extensive sales process that was undertaken over several months.

17 I also have the valuation which the Monitor prepared at my request. However, the Monitor has requested, and I have agreed, that it be kept sealed and confidential, first, because of the expressions of interest by other parties, and, second, because releasing the valuation may prejudice Fracmaster's ability to negotiate sales of the subsidiaries and their assets. This report is limited due to time constraints, and the court recognizes that, because the valuation is sealed, it is not capable of being challenged.

18 The Monitor states in its second report (May 12, 1999) that: "The valuation evidence provided to the Court by the Monitor...indicates that the liquidation value of Fracmaster and its subsidiaries will not generate sufficient funds to satisfy the Lending Syndicate's claim." (at para. 44). The valuation clearly supports that conclusion. That valuation underscores that in a best-case scenario, the Syndicate will not be paid in full and will be left with a loss. The Monitor has not put forward a valuation scenario that would result in any recovery by the unsecured creditors, let alone the shareholders.

III. Analysis

A. Structure and Purpose of the CCAA

19 The formal title of the *CCAA* states that it is an "Act to facilitate compromises and arrangements between companies and their creditors". A wealth of case law has developed from this broad wording. As stated by L.W. Houlden and G.B. Morawetz in *Bankruptcy and Insolvency Law of Canada*, 3d ed. (Carswell, looseleaf), volume 3 at 10A-2:

> The C.C.A.A. has a broad remedial purpose giving a debtor an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It allows the debtor to

find a plan that will enable him to meet the demands of his creditors through refinancing with new lending, equity financing or the sale of the business as a going concern....

20 Therefore, the objective of the *CCAA* is to help businesses restructure or reach some other kind of arrangement with their creditors. It is generally accepted that the *CCAA* is not to be used to wind-up or liquidate a company, although there are some circumstances in which the *CCAA* can be used in such a way (Houlden and Morawetz at 10A-3).

21 For example, the court in *Associated Investors of Canada Ltd., Re* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) (reversed on different grounds) dealt with plans of arrangement that contemplated liquidation of the companies rather than their survival (at 240-41). The trial court held that the *CCAA* "is not restricted in its application to companies which are to be kept in business....(at 245).

22 Similarly, Farley J. has held that the *CCAA* "need not be employed to revitalize a corporation but can also involve a liquidation scenario" (*Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at 104), and that an orderly distribution of the company's affairs "may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally." (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at 32).

23 I accept those statements. However, I note that the court in *Olympia & York* was dealing with an arrangement which had been approved in accordance with the *CCAA* provisions (*i.e.*, it had been approved by the creditors and sanctioned by the court). In *Lehndorff*, the court explicitly required that the action (*e.g.*, liquidation) be "in the best interests of the creditors generally". The court went on to conclude that each of the applicants, who wished *CCAA* protection in order to present a plan, had a "realistic possibility of being able to continue operating" (at 32).

24 I also note the principle that even where a plan is proposed, the court need not order a meeting of the creditors or class of creditors. That is because ss.4 and 5 of the *CCAA*, which provide for such meetings, are permissive, not mandatory. As Houlden and Morawetz state at 10A-11: "If the court believes that the proposed plan or arrangement is not in the best interests of creditors, it may refuse to make the order...[I]f the plan lacks economic reality, the court will also refuse to make the order".

25 The latter point of "economic reality" is well illustrated in the recent decision of Blair J. in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). In that case, the Canadian Red Cross Society (the "Red Cross") sought *CCAA* protection with a view to putting forth a plan. The purpose of the plan was both to deal with its creditors and as part of the government-mandated process for transferring responsibility for the Canadian blood supply to two new agencies. The Red Cross was faced with approximately $8 billion of tort claims arising from contaminated blood products. The Red Cross asked the court to approve the sale of its principal assets to the two new agencies. One group of tort claimants asked the court to direct a meeting of creditors to consider a counter-proposal.

26 Even though the proceeds of sale would be far too low to satisfy the tort claims, the Red Cross and the governments involved thought the amount was the best that could be obtained, considering the urgency of transferring the blood supply services system. The central question was whether the proposed price for the asset purchase was "fair and reasonable in the circumstances, and a price that is as close to the maximum as is reasonably likely to be obtained for such assets." (at4). The price was supported by many tort claimants. After payment of the secured line of credit and certain other unspecified creditors, there would be a $70 million to $100 million pool of funds for the tort claimants.

27 The price in *Red Cross* was reached by the governments' and the Red Cross' financial advisers. The two financial advisers had retained independent appraisal experts. Another adviser reviewed the price and the process. This independent due diligence gave the court "some comfort as to the adequacy of the purchase price" (at 5).

28 The court was also faced with the "Lavigne Proposal", which would see the assets stay with the Red Cross. However, the court held that national policy decisions precluded the Lavigne Proposal from having any "realistic likelihood" of success (at 7). The court concluded that the Lavigne Proposal:

> ...does not offer a workable or practical alternative solution in the context of these CCAA proceedings. I question whether it can even be said to constitute a 'Plan of Compromise and Arrangement' within the meaning of the CCAA, because it is not something which either the debtor (the Red Cross) or the creditors (the Transfusion Claimants amongst them) have control over to make happen.

Because it was not a realistic plan in the circumstances, the court refused to order a meeting under ss.4 and 5 of the *CCAA*.

29 I accept and support the broad statement made by Blair J. in *Red Cross* (at 10):

> I cannot accept the submission that the Court has no jurisdiction to make the order sought. The source of the authority is twofold: it is to be found in the power of the Court to impose terms and conditions on the granting of a stay under section11; and it may be grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in the legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan.'

This statement must be read in light of the following wording (at 10):

> It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon.

30 Apart from the sale of assets or the Lavigne Proposal, the only alternative was liquidation. The experts opined that the value on liquidation basis would be $95-139 million less than the value of the proposed sale. Therefore, the court determined that the proposed sale price was fair and reasonable, and as close as possible to a maximum price under the circumstances (at 9). While commenting that it is not uncommon for courts to approve sales before a plan is filed or voted on (supra), the Court said the circumstances must be "appropriate" and the orders must be able to be made "within the framework and in the spirit of the *CCAA* legislation." (at 11).

B. Appropriate Remedy in this Situation

31 I do not have the benefit of an independent full appraisal of Fracmaster. I wish to emphasize that this is not the Monitor's fault. In the circumstances of this case, including time pressures and other factors, I believe that the Monitor has performed to the best of its ability.

32 However, I do have enough valuation information to determine that there is no value in Fracmaster greater than the amount owed to the secured creditors. In otherwords, there is insufficient value in Fracmaster to provide anything for the unsecured creditors or shareholders. While I appreciate that the Balm/Janus and the Calfrac proposals attempt to make a provision for the unsecured creditors and shareholders, even the total value of those proposals appears to be considerably less than the amount owed to the Syndicate of secured creditors. Both those proposals on their face offer only an incremental increase to the secured creditors but are marginally better for the unsecured creditors and, possibly, for the shareholders. While the Balm/Janus proposal has potential "upside" for all classes, I have no way of determining the economic reality of such an upside.

33 I commend Mr. Balm for the effort he has gone to in formulating his proposal and seeking financial backing. As noted earlier, it is the only option before me that fits conventionally within the *CCAA* structure. He has also gone to great lengths to address concerns that could arise, such as the BNPI secured interest and his offer to provide unsecured DIP financing. Mr. Balm's proposal theoretically leaves a life for Fracmaster and for the shareholders.

34 However, I cannot ignore the commercial and practical realities of Fracmaster's situation. The valuation evidence before me clearly indicates that there is no equity in Fracmaster. Notwithstanding the court's broad powers under the *CCAA*, the Balm/Janus proposal, and the *CCAA* itself, specifically require the approval of the secured lenders - here, the Syndicate. Regardless of whether the court could compel the Syndicate to consider and vote on the Balm/Janus proposal, I recognize and accept that the Syndicate has commercial concerns with the proposal.

35 The delay until July 19 contemplated by the Balm/Janus proposal is significant in the circumstances. The Syndicate is currently faced with a loss of approximately $35 million under the UTI sale. The Balm/Janus proposal puts the Syndicate, in the Syndicate's view, at risk to lose even more. The unsecured creditors and the shareholders face no such risk if there is delay - they have only the possibility of recovering some amount greater than zero.

36 This fundamental concept - that the Syndicate would be further risking its recovery after already accepting the reality of a $35 million loss - speaks to why these proposals do not fit within the *CCAA*. The spirit of the *CCAA* contemplates a restructuring, or at least an attempt at restructuring, for the general benefit of all stakeholders. Fracmaster's current financial situation precludes that, absent the secured creditors' agreement to accept a substantial commercial risk.

37 The Calfrac proposal is no more a plan than is the UTI proposal. Although it slightly betters UTI's pricing structure, it fails to contemplate practical procedures, including a provision for consultations with the stakeholders or a method of determining claims.

38 As with the Balm/Janus proposal, the Calfrac proposal ignores the fundamental reality that the Syndicate is not agreeable to it. Again, this is a business decision of the Syndicate, notwithstanding its contractual obligation to support the UTI sale.

39 Accordingly, neither the Balm/Janus nor the Calfrac proposals are "workable or practical", to use the language from *Red Cross*. The Syndicate has indicated it will not approve either proposal in the circumstances, and that it is contractually bound to support the UTI sale. However, more persuasive than its contractual obligation is the fact that it has valid commercial reasons for refusing to take the risk those offers present. It has been submitted, that under the broad power conferred by the *CCAA* I can require the Syndicate to consider the proposals and direct the calling of meetings for that purpose. However, to exercise my discretion in that fashion would substitute the Court's commercial view and ignore the Syndicate's business concerns, hoping it will have a change of heart, where it has the only realistic remaining financial interest in Fracmaster. I decline to do so. Given the Syndicate's refusal to consent, it would be pointless to order meetings of the creditors and shareholders to consider either proposal.

40 It may well be that the UTI proposal is a commercially provident deal. The fact that it is not in the form of a plan is not in and of itself fatal in *CCAA* proceedings. However, the proposed transaction does not create a pool of cash in which unsecured creditors or shareholders can ultimately participate for their general benefit. It does not provide for the opportunity to consult with those stakeholders because it does not contemplate their receipt of any benefit. The court does not have the comfort of an independent opinion as to the fairness of the transaction or the process leading up to it. It has only a limited opportunity to evaluate the proposal. However reasonable the proposal may be, its purpose is to facilitate a sale for the benefit of the Syndicate. That can be accomplished in a different fashion without distorting the spirit of the *CCAA*. These concerns, cumulatively, lead me to no other conclusion than this proposed sale ought not to be approved under the *CCAA*.

41 I reach this conclusion with great reluctance, as I respect the purpose of the *CCAA* and recognize the losses that are being suffered by the unsecured creditors and the shareholders. However, inappropriate use of the Act can only weaken such a valuable piece of legislation.

42 The Syndicate has applied to this Court for the lifting of the stay to allow them to enforce their security. Fracmaster has acknowledged it is indebted to the Syndicate pursuant to the terms of two general security agreements dated April

28, 1998 as supplemented and amended, that it is in default under each part of the security, that all sums owing under the security have become due and payable and that the security has become enforceable.

43 I am prepared to lift the stay for that purpose and to grant the requested order appointing Arthur Andersen Inc. ("Arthur Andersen") as receiver and manager (the "Receiver") of the present and future undertaking, property and assets of Fracmaster on certain terms and conditions. I find it just and convenient to do so. Arthur Andersen has been the Monitor since the commencement of these proceedings and has fulfilled its role independently. It is well informed and alert to the precarious financial situation of Fracmaster.

44 The Syndicate and UTI wish me to direct that the Receiver proceed to close the UTI sale. In my view the purpose of the appointment of the Receiver would be largely defeated were I to fetter his discretion in that regard. The Monitor in his submissions made it abundantly clear that he is conscious of "the absolute need to resolve this". As such, I am confident, given his prior involvement in this matter, that he will be able to take whatever immediate action he deems necessary and to report to the Court as required.

45 The Court is very much alive to the concern regarding delay in the process and the need for finality. To that end I seek advice from the Receiver as to how quickly he can report as to its recommendations with respect to a sale of assets or such other immediate action he deems appropriate for the benefit of all claimants, including the secured creditors.

46 The terms of the appointment are to include, but are not limited to, the following:

> The Receiver shall be authorized and empowered to take all steps it deems necessary to preserve and protect the undertaking, property and assets of Fracmaster for the benefit of all claimants, including the secured creditors.
>
> The Receiver shall report to this Court at the earliest opportunity, and in any event no later than May 21, 1999, as to its recommendation with respect to a sale of Fracmaster's assets, or such other immediate action as it may deem appropriate for the benefit of all claimants, including the secured creditors.
>
> The Receiver may from time to time apply to this Court for advice and direction in the discharge of its powers and duties upon notice to all parties who made submissions to the Court with respect to this order, and such other parties as the Court may direct.

47 I request the assistance of counsel in preparing a proposed form of order for my review, incorporating the above and including the necessary powers anticipated. The order is also to reflect the Court's request for aid and recognition of any court or judicial body within and outside Canada.

48 I ask counsel to re-attend before me today with the proposed form of order.

IV. Disposition

49 The Syndicate's application is granted on the terms set out above. The applications of Fracmaster, Mr. Balm/Janus and Calfrac are dismissed. The applications of Cananwill, TD Asset Finance Corp. and TrizecHahn Office Properties Ltd. are all adjourned sine die, to be dealt with by the Receiver or further Court order.

Application dismissed; cross-application granted.

Footnotes

* Affirmed (1999), (sub nom. *Royal Bank v. Fracmaster Ltd.* 11 C.B.R. (3d) 230, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 209 W.A.C. 93 (Alta. C.A.).

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