COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-027418-185
(500-11-048114-157)

DATE: May 15, 2018

CORAM: THE HONOURABLE NICHOLAS KASIRER, J.A.
MARK SCHRAGER, J.A.
ROBERT M. MAINVILLE, J.A.

IN THE MATTER OF THE PLAN OF ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LTD. & AL.:

0778539 B.C. LTD.
APPLICANT — Respondent

1128349 B.C. LTD.
APPLICANT IN CONTINUANCE
v.

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUEBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
RESPONDENTS — Petitioners
and

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED
IMPLEADED PARTIES — Impleaded Parties

and

FTI CONSULTING CANADA INC.
IMPLEADED PARTY — Monitor

JUDGMENT

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[1] The Applicant seeks leave pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act* to appeal a judgment of the Superior Court, District of Montreal (the Honourable Stephen W. Hamilton) dated March 14, 2018.

[2] For the reasons of Mainville, J.A., with which Kasirer and Schrager JJ.A. concur, **THE COURT:**

[3] **DISMISSES** the leave application, with legal costs.

NICHOLAS KASIRER, J.A.

MARK SCHRAGER, J.A.

ROBERT M. MAINVILLE, J.A.

M^tre^ Max R. Bernard
LCM AVOCATS INC.
For the applicant

M^tre^ Bernard Boucher
M^tre^ Ilia Kravtsov
BLAKE CASSELS & GRAYDON
For the respondents

M^tre^ Sylvain Rigaud
NORTON ROSE FULBRIGHT CANADA
For FTI Consulting Canada Inc.

Date of hearing: April 24, 2018

REASONS OF MAINVILLE, J.A.

[4] Pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act* ("**CCAA**"), the applicant is seeking leave to appeal a judgment of the Superior Court, District of Montreal (the Honourable Stephen W. Hamilton) dated March 14, 2018 declaring that Wabush Mines was not obliged to pay a minimum royalty under a 1959 mining lease for the period between July 1, 2015 and June 30, 2017.

Preliminary Issue: Service of the Application for Leave to Appeal

[5] The application for leave to appeal is provided for and governed by sections 13 and 14 of the CCAA:

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.	**13.** Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards.
14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.	**14.** (1) Cet appel doit être porté au tribunal de dernier ressort de la province où la procédure a pris naissance.
(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time	(2) Tous ces appels sont régis autant que possible par la pratique suivie dans d'autres causes devant le tribunal saisi de l'appel; toutefois, aucun appel n'est recevable à moins que, dans le délai de vingt et un jours après qu'a été rendue l'ordonnance ou la décision faisant l'objet de l'appel, ou dans le délai additionnel que peut accorder le tribunal dont il est interjeté appel ou, au Yukon, un juge de la Cour suprême du Canada, l'appelant n'y ait pris des procédures pour

> he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.
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> parfaire son appel, et à moins que, dans ce délai, il n'ait fait un dépôt ou fourni un cautionnement suffisant selon la pratique du tribunal saisi de l'appel pour garantir qu'il poursuivra dûment l'appel et payera les frais qui peuvent être adjugés à l'intimé et se conformera aux conditions relatives au cautionnement ou autres qu'impose le juge donnant la permission d'en appeler.

[6] Under articles 139, 352 and 357 of Quebec's *Code of Civil Procedure* ("CCP"), applications for leave to appeal must be served by bailiff upon the respondent unless a special mode of service is authorized by the clerk of the Court pursuant to article 112 CCP. Service on the respondent rather than on counsel for the respondent is a new requirement which was introduced on January 1, 2016 with the coming into force of a new version of the CCP.[1]

[7] In this case, a preliminary issue was raised by the Court concerning the manner in which the application for leave to appeal was served on the respondents. This was effected by way of counsel for the respondents accepting the document for their clients, rather than by a bailiff serving directly upon the respondents.

[8] As is the usual practice for CCAA proceedings initiated in Quebec, the rectified initial Superior Court order under the CCAA, dated May 25, 2015, provides for ongoing special rules for serving materials on the parties. The initial CCAA order also calls upon other courts and tribunals to give effect to the order and to act in aid of and to be complementary in carrying it out:

> 63. **DECLARES** that the Wabush CCAA Parties and any party to these proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the Wabush CCAA Parties shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.
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> 69. **REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America and any court or administrative body elsewhere, to give effect to this Order [...] and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.

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1 *Droit de la famille — 16200*, 2016 QCCA 103, para. 12.

[9] Since an appeal under the CCAA is governed by a federal statute and since those appeal proceedings in Quebec are regulated "as far as possible/autant que possible" according to the practice in this Court, I am of the view that insofar as a special order is operative in the CCAA proceedings and is coupled with an order requesting aid from other courts, an application for leave to appeal to this Court pursuant to sections 13 and 14 of the CCAA may be properly served pursuant to that order. As a practical result, there is no need to resort to another special order in this Court when an ongoing order is already provided for under the initial CCAA proceedings.

[10] This approach to serving the application for leave to appeal is consistent with the general principles of the CPP which strive to simplify proceedings. In short, the rules of civil procedure are "designed to ensure the accessibility, quality and promptness of civil justice, the fair, simple, proportionate and economical application of procedural rules, the exercise of the parties' rights in a spirit of co-operation and balance, and respect for those involved in the administration of justice."[2]

[11] Moreover, this outcome is also in keeping with the principle that in CCAA appeal proceedings, the CPP serves as supplemental law in matters of procedure, but that it gives way to the provisions of special legislation such as the CCAA.[3]

[12] It would be good practice for the party seeking leave to appeal in a CCAA proceeding to attach to its application the pertinent extracts of the initial CCAA order providing for ongoing standing rules relating to serving documents.

[13] In conclusion, in this case, the application for leave to appeal was properly served upon counsel.

Criteria for Leave to Appeal under the CCAA

[14] The criteria and principles governing an application for leave to appeal under sections 13 and 14 of the CCAA have been canvassed many times.[4] There are four criteria:

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2 Preliminary Provision of the CCP.

3 *Ibid.*, para. 3; *Amaya inc. v. Derome*, 2018 QCCA 120, para. 102.

4 *Fonds de financement d'entreprises Fierra FP c. Raymond Chabot inc.*, 2018 QCCA 199, para.17 (Gagnon, J.A., in chambers); *Bridging Finance v. Béton Brunet 2001 inc.*, 2017 QCCA 138, paras. 14-15 (Kasirer, J.A., in chambers); *Arrangement relatif à Bloom Lake General Partner Limited*, 2017 QCCA 15, para. 8 (Marcotte, J.A., in chambers); *Aviva compagnie d'assurance du Canada v. Béton Brunet*, 2001, 2016 QCCA 1837, para. 2 (Schrager, J.A., in chambers); *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665, paras. 3-4 (Hilton, J.A., in chambers); *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403, paras. 9-11 (Bich, J.A., in chambers); *9145-7978 Québec inc. (Arrangement relatif à)*, 2007 QCCA 618. paras. 13-17 (Gendreau, J. A., in chambers). This reflects the jurisprudence from other Canadian appellate courts: *Nortel Networks Corporation (Re)*, 2016 ONCA 749, para. 6; *Nortel Networks Corporation (Re)*, 2016 ONCA 332, para. 34; *Puratone (Re)*, 2014 MBCA 13, paras. 15-19 (MacInnes, J.A., in chambers); *National Bank of Canada v. Stomp Pork Farm Ltd.*, 2008 SKCA 73, para. 15; *Crystallex (Re)*, 2012 ONCA 404, par. 70;

(a) whether the issue proposed to be raised on appeal is of significance to the practice;

(b) whether that issue is of significance to the CCAA proceedings themselves;

(c) whether the appeal appears *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(d) whether the appeal will unduly hinder the progress of the CCAA proceedings.

These criteria are cumulative and failure to satisfy all the criteria will result in the dismissal of the leave application. It is also understood that the applicant carries a heavy burden in order to obtain leave to appeal and that leave is granted sparingly.

[15] These criteria and principles flow from the very purpose of the CCAA, which is to provide debtors an opportunity to sort out their financial difficulties through a plan of arrangement enabling them to remain in business under new financial arrangements or to proceed to the sale of all or part of their businesses in an orderly and timely fashion. Creditors are thus potentially provided with a larger return than under bankruptcy proceedings while, as far as feasible, continued employment of staff and the interests of shareholders are better protected. To achieve these ends, the judge presiding over CCAA proceedings has broad discretionary powers and an overriding supervisory role. The judge is called upon to achieve a delicate balancing of the interests of various stakeholders. Repeated recourse to an appellate court is ill-suited to this process and that is why an appeal in CCAA proceedings cannot be initiated without leave. This is also why leave applications are subject to stringent criteria.

Disposition of the Application for Leave to Appeal in this Case

[16] The Wabush Deposit was mined starting in 1965 and operations were suspended in 2014. On May 20, 2015, Wabush Iron Co. Limited and Wabush Resources Inc. applied for and were granted court protection under the CCAA. The applicant holds the mining lease for the deposit entered into in 1959 and which provides for minimum royalties. The amounts claimed by the applicant as minimum royalties while mining operations were suspended were set aside and held in trust by the monitor pending the resolution of the dispute as to whether any such royalties were owed.

[17] In June 2017, the right to mine the deposit was acquired by Tacora Resources Inc. As a result, the dispute between Wabush Mines and the applicant is limited to the sole question of which parties are entitled to the amounts held in trust by the monitor as royalties and amounting to $6,543,349.42, including interest, as of December 2017.

Pine Valley Mining Corporation v. Marubeni Corporation, 2008 BCCA 263, paras. 16-20 (Chiasson, J.A., in chambers); *Kenroc Building Materials Co. Ltd. v. Kerr Interior Systems Ltd.*, 2008 ABCA 291, para. 7 (Ritter, J.A., in chambers); *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 149, paras. 6-7 (Witmann, J.A., in chambers).

[18] The Superior Court judge interpreted the mining lease and more specifically the expression "Iron Ore Products which can be produced from the remaining proven ore" contained therein to define a cap. He found that the cap at any point in time is based on the quantity of Iron Ore Products (as defined in the lease) that can be produced in the circumstances existing at that time; he further found that production of Iron Ore Products must be profitable at any given time in order for the payment of a minimum royalty to be triggered at that time.[5] As a result, the judge concluded that a minimum royalty is only owed under the lease at any given time when iron ore can be economically extracted from the deposit at that time. He further found, as a matter of fact, that no iron ore could be economically extracted from the deposit for the period between July 1, 2015 and June 30, 2017.[6] As a result, he decided that no minimum royalties were owed for that period. He therefore ordered the monitor to transfer the amounts held in trust into the general trust account in connection with the restructuring of the CCAA parties.[7]

[19] The applicant submits that the profitability of mining the ore at any given time was never a factor to be considered for the purposes of the minimum royalty set out in the mining lease. It adds that the Superior Court judge improperly rejected the expert evidence it submitted to assist in the interpretation of the terms of the lease and also erred by accepting into evidence and relying on the opinion of a Newfoundland lawyer on the interpretation, under Newfoundland law, of the expression "remaining proven ore" found in the mining lease. In short, the applicant challenges the Judge's interpretation of the terms of the lease.

[20] The interpretation of a specific contract is not usually of significance to the practice since the legal obligations arising from a contract are limited, in most instances, to the interests of the particular parties to the contract, as is the case here.[8]

[21] In addition, the proposed appeal raises issues relating primarily to contractual interpretation, which is essentially a question of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract considered in light of a factual matrix.[9] This weighs in favour of deference to first instance decision-makers on points of contractual interpretation.[10] Contrary to the applicant's assertions, the Superior Court Judge in this case considered the terms of the mining lease as a whole[11] and his interpretation of the terms of the mining lease as they relate to the minimum royalty appear neither unreasoned nor *prima facie* unreasonable.

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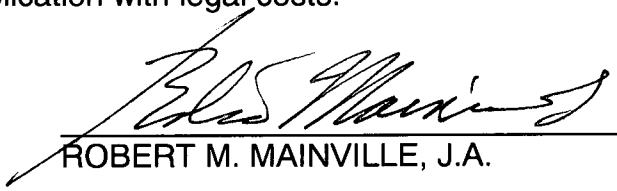
5 Judgment in first instance, paras. 45-46, 53 and 113.
6 *Ibid.*, paras. 106 and 114.
7 *Ibid.*, paras. 115-117.
8 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, para. 53; *Bluberi Gaming Technologies Inc. (Arrangement relative à)*, 2016 QCCA 1306, para. 27 (Kasirer, J.A., in chambers); *Pine Valley Mining Corporation v. Marubeni Corporation*, 2008 BCCA 263, paras. 25-26 (Chiasson, J.A., in chambers).
9 *Sattva Capital Corp. v. Creston Moly Corp. supra*, note 7, para. 50.
10 *Ibid.*, para. 53.
11 Judgment in first instance, paras. 47-50.

[22] As a result, the applicant fails to satisfy at least two of the four criteria required for leave to appeal to be granted, *i.e.* the issue is not of significance to the practice and does not appear *prima facie* meritorious.

[23] Regarding the expert evidence considered by the Superior Court Judge to interpret Newfoundland and Labrador law, even if this had been an issue for appellate review (a matter I need not decide) no objection was raised in first instance to the tendering of such evidence. This ground consequently also fails to meet the criteria for leave to appeal.

[24] I would therefore dismiss the application with legal costs.



ROBERT M. MAINVILLE, J.A.