

COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]

COURT OF APPEAL FILE NUMBER: 20010-0151AC
TRIAL COURT FILE NUMBER: 2001-08434
REGISTRY OFFICE: CALGARY
PLAINTIFFS/APPLICANTS: 12178711 CANADA INC.,
CALFRAC WELL SERVICES LTD.,
CALFRAC (CANADA) INC.,
CALFRAC WELL SERVICES
CORP. and CALFRAC HOLDINGS
LP, by its General Partner
CALFRAC (CANADA) INC.



STATUS ON APPEAL: RESPONDENTS

STATUS ON APPLICATION: RESPONDENTS

DEFENDANT/RESPONDENT: WILKS BROTHERS, LLC

STATUS ON APPEAL: APPELLANT

STATUS ON APPLICATION: APPLICANT

DOCUMENT: **APPLICATION FOR PERMISSION TO APPEAL**

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NOTICE TO RESPONDENT(S):

12178711 CANADA INC., CALFRAC WELL SERVICES LTD., CALFRAC (CANADA) INC., CALFRAC WELL SERVICES CORP. and CALFRAC HOLDINGS LP, by its General Partner CALFRAC (CANADA) INC.

WARNING

If you do not come to Court on the date and time shown below either in person or by your lawyer, the Court may give the applicant what it wants in your absence. You will be bound by any order that the Court makes. If you intend to rely on other evidence or a memorandum in support of your position when the application is heard or considered, you must file and serve those documents in compliance with the Rules. (Rule 14.41 and 14.43)

NOTICE TO RESPONDENT(S):

You have the right to state your side of this matter before the Court.

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

Date: August 27, 2020

Time: 9:30 a.m.

Where: TransCanada Pipelines, 2600, 450 1st Street S.W., Calgary, Alberta

Before” Single judge of the Court (Rule 14.37)

Panel of the Court (Rule 14.38)

Nature of Application and Relief Sought:

1. Granting permission to appeal, pursuant to section 14.5(1)(f) of the *Alberta Rules of Court*, from the Order of the Honourable Justice D.B. Nixon (the “**Application Judge**”) pronounced on July 27, 2020 and filed on August 7, 2020, which dismissed the application of the Wilks Brothers, LLC for an order to amend or vary paragraph 7 (the “**Stay Provision**”) of the *ex parte* order granted on July 13, 2020 under section 192 of the *Canada Business Corporations Act* RSC 1985, c. C-44 (“**CBCA**”) (the “**Preliminary Interim Order**”);
2. Abridging the time for service of this Application, extending the time for bringing this Application and such other relief as may be required; and
3. Such further and other related relief as counsel may request and this Honourable Court may grant.

Grounds for making this application:

4. The Application Judge erred in law in interpreting and applying section 192 of the CBCA to grant and continue the Stay Provision.
5. The Application Judge erred in law or in mixed fact and law in determining that the Stay Provision should be continued against holders of the second lien secured notes (the “**Second Lien Notes**”) and the trustee under the Second Lien Notes indenture (collectively, the “**Second Lien Parties**”) in circumstances where:
 - (a) The Second Lien Notes were issued by Calfrac Holdings LP, a limited partnership registered pursuant to the laws of the State of Delaware, under an indenture (the “**Indenture**”) that is governed by New York law and under

which the parties have submitted to the jurisdiction of the Courts in the State of New York;

- (b) Pursuant to US law and the express terms of the Indenture, the Second Lien Notes indebtedness automatically accelerated and became immediately due and payable by the act of the Respondents bringing the within application and the chapter 15 insolvency proceeding in the United States (the “**Chapter 15 Proceeding**”) (each being a defined Event of Default);
- (c) The Application Judge failed to consider or give effect to the operation of applicable US law, the express terms of the Indenture and the commencement of the Chapter 15 Proceeding;
- (d) The Application Judge incorrectly determined that the automatic acceleration of the Second Lien Notes was stayed through incorrect reliance on insolvency case law and insolvency doctrines that are not applicable in the context of CBCA debt reorganization provisions that apply to solvent companies;
- (e) The Application Judge erred in finding that there was no prejudice to the Second Lien Parties from the continuation of the Stay Provision; and
- (f) The effect of the Stay Provision is to usurp recently negotiated for contractual rights under foreign law in circumstances where the Second Lien Parties have no relationship with any CBCA company and are claimed

to be “unaffected”, according to the Respondents, by the proposed plan of arrangement.

6. Granting leave to appeal is appropriate in the circumstances:

- (a) There are serious and arguable grounds of real and significant interest to the parties;
- (b) The issues on appeal are important to the practice and credit market participants to provide clear guidance on the use of stays of proceedings within CBCA plans of arrangement for debt restructurings involving debt issued by foreign issuers, governed expressly by foreign law, with no relationship to the CBCA and with respect to creditors’ rights involving solvent or insolvent debtors generally;
- (c) In particular, there is a dearth of caselaw or guidance on the appropriate scope of non-consensual CBCA stays of proceedings against third parties;
- (d) The impact of the Stay Provision is material to the Second Lien Parties and the within CBCA proceeding;
- (e) The appeal will not unduly hinder the CBCA proceedings if it is heard on a Fast Track basis prior to the September 30, 2020 fairness hearing; and
- (f) The appeal is *prima facie* meritorious as there are possible errors of law, or alternatively mixed law and fact, with respect to the decision below involving the Stay Provision.

7. Section 249 of the CBCA provides that an appeal lies to the Court of Appeal of a Province from any Order other than a final Order made by a Court of that Province, only with leave of the Court of Appeal in accordance with the rules applicable to that Court.

8. This Notice of Application is filed to preserve time to appeal and the supporting Memorandum of Argument will be filed shortly. There is urgency to the Application because of the September 30, 2020 fairness hearing and if leave is granted, the Applicant will seek to proceed by Fast Track Appeal.

9. Such further and other grounds as the Applicant may advise and this Honourable Court may permit.

Material or evidence to be relied on:

10. The Order of the Honourable Justice D.B. Nixon made on July 27, 2020 and filed on August 7, 2020, together with the transcribed oral reasons delivered from the bench on July 27, 2020 (and provided to the parties on August 7, 2020);

11. Certain application materials and bench briefs that were before the Honourable Justice D.B. Nixon at the hearing of the Application on July 23, 2020;

12. Memorandum of Argument of the Applicant; and

13. Such further and other evidence as the Applicant may advise and this Honourable Court may permit.

Applicable Acts, regulations and rules:

14. CBCA sections 192 and 249;

15. Rules 14.5(1)(f), 14.40, 14.44 of the *Alberta Rules of Court*; and

16. Such further and other acts and regulations as counsel may advise and this Honourable Court may permit.