

In the Court of Appeal of Alberta

Citation: 12178711 Canada Inc v Wilks Brothers LLC, 2020 ABCA 313

Date: 20200908
Docket: 2001-0151-AC
Registry: Calgary

Between:

**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.**

Respondents

- and -

Wilks Brothers, LLC

Applicant

- and -

G2S2 Capital Inc.

Interested Party

**Reasons for Decision of
The Honourable Madam Justice Marina Paperny**

Application for Permission to Appeal

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[1] Wilks Bros, LLC (Wilks) seeks permission to appeal a decision interpreting a stay of proceedings (the stay provision) granted under s 192 of the *Canada Business Corporations Act*, RSC 1985, c C-44 (*CBCA*) as part of a broader Preliminary Interim Order.

[2] The respondents, collectively referred to as the Calfrac entities, applied under the *CBCA* to put forward a plan of arrangement. As part of those proceedings, they sought and obtained a Preliminary Interim Order that included the impugned stay provision. The stay provision has the intention and effect of suspending the rights and remedies of various creditors of the Calfrac entities. The Calfrac entities have found considerable support among stakeholders, sufficient to advance the arrangement, and the court has authorized a stakeholder meeting for September 17, 2020 to permit a vote on the arrangement and, if the vote is successful, to authorize the Calfrac entities to apply for a final order.

[3] On the comeback application, Wilks applied to vary the stay provision so that it would not apply to the Second Lien Noteholders (a creditor class which includes Wilks). Wilks argued that the Second Lien Notes have automatically accelerated by their terms and by operation of law. As such, they say, the notes are now fully due and payable and the stay provision has no impact on the automatic acceleration of the notes.

[4] The presiding judge rejected that proposition. In doing so, he concluded that the court has jurisdiction to order the stay provision. He noted that courts stay proceedings against a broad spectrum of third parties, and that stay provisions can and may interfere with or suspend contractual rights if to do so is in keeping with the general purpose of the plan and the *CBCA* in order to effect a restructuring.

[5] There is no legal test for leave to appeal under s 249 of the *CBCA* spelled out in that Act. The parties agree that it would be appropriate to apply the same test as that under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*), although Wilks argues that other provisions of the *CCAA* and the jurisprudence arising from their application ought not apply here.

[6] The test under the *CCAA* was developed having regard to the purpose of that Act. The considerations articulated under that test are also germane to the proceedings under the *CBCA* in this case: a proposed plan of arrangement that will affect a host of stakeholders and is driven by commercial realities and timelines. The plan is an effort to restructure a corporate entity so that it can ultimately remain viable and repay its creditors and other affected stakeholders. Interestingly, and as an aside, the substantive rights of the Second Lien Noteholders are not affected by the proposed plan. The matter at issue before the court is whether the rights of the Second Lien

Noteholders under their indenture can be suspended for the period during which the stay is operative. In this case, that would be something less than two months.

[7] The test has four parts:

- a) Is the point on appeal significant to the practice;
- b) Is the point of significance to the action itself;
- c) Is the appeal *prima facie* meritorious;
- d) Will the appeal unduly hinder the progress of the action.

[8] Wilks wishes to advance the following arguments on appeal: the court had no jurisdiction to grant the order; the chambers judge incorrectly applied the anti-deprivation rule to the *ipso facto* clause in the indenture; and the chambers judge erred in interpreting the stay provision. The fundamental question raised before the chambers judge, and which would be before this court if leave to appeal is granted, is whether or not the *ipso facto* clause in the Second Lien Indenture is valid, or if it offends the common law anti-deprivation rule.

[9] The application for leave to appeal is dismissed for the following reasons.

[10] First, that there is jurisdiction to grant this order cannot be seriously questioned. Without exhaustively reviewing the case law, courts have recognized the flexibility afforded by s 192 of the *CBCA* to propose a plan of arrangement. Courts often use the mechanics and jurisprudence developed under the *CCAA* to bring such plans forward. They have also looked to the purpose of the *CCAA* for guiding principles under the *CBCA*. In my view, there is no error in doing so and the first ground of appeal is without sufficient merit to justify an appeal.

[11] Insofar as reliance on the anti-deprivation rule is concerned, this court recently concluded that rule is very much a part of, indeed fundamental to, Canadian insolvency and restructuring law: see *Capital Steel Inc v Chandos Construction Ltd*, 2019 ABCA 32 (recently appealed to the Supreme Court of Canada and currently under reserve). As such, acceleration clauses like that found in the Second Lien Indenture can be stayed or overridden by courts under insolvency and restructuring legislation. That law is binding on me as it was on the chambers judge.

[12] The characterization of the issues raised as novel does not withstand scrutiny, in my view. It cannot fairly be said that there is no jurisprudence under the *CBCA* that provides for the proposal of a plan of arrangement. That is what is being done here. Stay provisions are an important mechanism to give the corporate entity an opportunity to put forward a proposal that will find favour with creditors and other stakeholders – to afford a reasonable but not infinite amount of breathing space to negotiate with stakeholders and to provide an even playing field for stakeholders during that process.

[13] Moreover, the issue raised by the proposed appeal is not of particular significance to the action. The Second Lien Noteholders are unaffected in the proposed plan. The stay provision

results in only a temporary stay of their rights under the indenture; the purpose of the stay provision is to preserve the status quo ante as it existed immediately prior to the Calfrac entities' filing of the application. At most, the provision suspends their rights for a brief period of time. The rights of the Second Lien noteholders are not compromised under this plan.

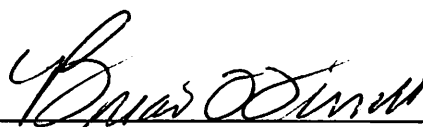
[14] At this point, the plan appears to be finding favour among stakeholders. An appeal on this issue will unduly hinder any potential implementation of the plan. There is a serious question as to whether the appeal could reasonably be disposed of before the return date of the fairness hearing, September 30, 2020. On the other hand, the Second Lien Noteholders and Wilks are unaffected creditors whose rights are, at most, suspended for a brief period of time. There can be little if any prejudice to them in the circumstances.

[15] For these reasons, the application for leave to appeal is dismissed.

Application heard on September 1, 2020

Reasons filed at Calgary, Alberta
this 8th day of September, 2020




Authorized to sign for: _____ Paperny J.A.

Appearances:

C.D. Simard

K.J. Zych

for the Respondents

L. Jackson

for the Applicant

P.H.Griffin

L.E. Thacker

for G2S2 Capital Inc.

H. Gorman, Q.C.

for the Special Committee of the Board of Directors

R. Chadwick

for the Ad Hoc Committee of Noteholders