

# COURT OF APPEAL

CANADA  
PROVINCE OF QUEBEC  
REGISTRY OF MONTREAL

No: 500-09-025552-159  
(500-11-049210-152)

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## MINUTES OF THE HEARING

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DATE: September 3, 2015

THE HONOURABLE GENEVIÈVE MARCOTTE, J.A.

PETITIONER	ATTORNEY
<b>SALUS CAPITAL PARTNERS, LLC</b>	Mtre Louis Therrien-Lapointe <i>(BCF s.e.n.c.r.l.)</i>
RESPONDENTS	ATTORNEYS
<b>LAURA'S SHOPPE (P.V.) INC.</b>	Mtre Gérald F. Kandestin Mtre David Stolow <i>(Kugler, Kandestin s.e.n.c.r.l., L.L.P.)</i>
<b>KPMG INC.</b>	Mtre Mark E. Meland <i>(Fishman Flanz Meland Paquin, s.e.n.c.r.l.)</i>
IMPLEADED PARTY	ATTORNEY
<b>THE CADILLAC FAIRVIEW CORPORATION LIMITED</b>	Mtre Denis St-Onge <i>(Gowling Lafleur Henderson s.e.n.c.r.l.)</i>
<b>HAPPY LONDON INTERNATIONAL INC. DARIAM GROUP INC.</b>	Mtre Neil H. Stein <b>ABSENT</b> <i>(Stein &amp; Stein inc.)</i>

<p><b>INVANHOE CAMBRIDGE INC. MONGUARD INVESTMENT LTD 20 VIC MANAGEMENT INC. SMART REAL ESTATE INVESTMENT TRUST BROOKFIELD OFFICE PROSPERTIES RIOCAN REAL ESTATE INVESTMENT TRUST</b></p>	<p>Mtre Gerald N. Apostolatos <i>(Langlois Kronström Desjardins s.e.n.c.r.l.)</i></p>
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DESCRIPTION: **Motion for leave to appeal**  
(Section 13 of the Companies' Creditors Arrangement Act, ("**CCAA**")  
and Sections 26, 494 *C.C.P.*)

Clerk: Shirley Thomas

Courtroom: RC-18

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HEARING

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Continuation of the hearing of August 31, 2015.

The parties were excused from appearing in Court this morning.

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**BY THE JUDGE:**

Judgment-see page 4.

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SHIRLEY THOMAS

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Clerk

**BY THE JUDGE**

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**JUDGMENT**

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[1] I am tasked to adjudicate a motion for leave to appeal from two judgments of the Superior Court, District of Montreal (the Honourable Marie-Anne Paquette), rendered on August 11 and 12, 2015, which respectively granted the Respondent Laura's Shoppe (P.V.) Inc. ("**Laura**")'s *Motion to continue a restructuring proceeding under the CCAA and to obtain an initial order* ("**Motion**"), as well as its *Application for interim financing charge* ("**Application**").

[2] Here, leave to appeal is governed by sections 13 and 14 of the *Companies Creditors Arrangement Act* ("**CCAA**").<sup>1</sup>

[3] In *Statoil Canada Ltd. (Arrangement relatif à)*, my colleague Hilton, J.A., underlined that appellate courts will only grant applications of this nature sparingly. He further stated that there are four cumulative criteria that must all be met in order to obtain leave to appeal:

[3] A threshold issue is the criteria to be considered upon such an application for leave. Based on the judgment of Wittman, J.A., as he then was, in *Resurgence Asset Management LLC v. Canadian Airlines Corp.*,<sup>2</sup> there are four such criteria:

- whether the point on appeal is of significance to the practice;
- whether the point raised is of significance to the action itself;
- whether the appeal is prima facie meritorious, or, on the other hand, whether it is frivolous, and;
- whether the appeal will unduly hinder the progress of the action.

[4] Judges of this Court to whom such applications have been addressed have held unanimously that the four criteria are cumulative; with the result that an applicant's failure to establish any one of them will result in the dismissal of the application.<sup>3</sup> In addition, it is also generally understood that an applicant carries a heavy burden in order to obtain leave, and that appellate courts will only grant such applications sparingly.<sup>4</sup>

[4] The Petitioner, Salus Capital Partners, LLC ("**Salus**"), is Laura's operating and term lender and holds a first ranking security over substantially all of Laura's movable

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<sup>1</sup> R.S.C. 1985, c. C-36.

<sup>2</sup> [2000] A.J. No. 610, 2000 ABCA 149, at paras. 6 and 7.

<sup>3</sup> See, for example, *4370422 Canada inc. (Davie Yards inc.) (Arrangement relatif à)*, J.E. 2012-159, 2011 QCCA 2442, at paras. 11 and 12 per Pelletier, J.A.; *Newfoundland and Labrador v. AbitibiBowater inc.*, 68 C.B.R. (5th) 57, 2010 QCCA 965, at paras. 25–29 per Chamberland, J.A.; *Papiers Gaspésia inc. (Arrangement relatif à)*, 9 C.B.R. (5th) 103, per Bich, J.A., at para. 5; *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, J.E. 2010-568, 2010 QCCA 403, per Bich, J.A., at para 9; and, *Imprimerie Mirabel inc. v. Ernst & Young inc.*, J.E. 2010-1256, 2010 QCCA 1244, per Dufresne, J.A., at para. 5.

<sup>4</sup> 2012 QCCA 665.

property. As at August 6, 2015, Laura was allegedly indebted towards it for approximately 9 million Canadian dollars and in excess of 10 million US dollars plus interest, legal and bank fees and costs.

[5] Following alleged multiple breaches of Laura's obligations under the credit agreement constituting events of default, and further to unsuccessful initial restructuring efforts, Salus formally demanded payment from Laura on July 30, 2015.

[6] Laura reacted on the following day by filing of a notice of intention to make a proposal pursuant to the *Bankruptcy and Insolvency Act*. KPMG was appointed as trustee under the notice of intention.

[7] On August 4, 2015, Laura presented an eight week cash flow forecast and inventory monetization plan prepared by its advisors Richter Advisory Group inc. ("**Richter**") which, according to Salus and its own advisors, did not demonstrate a viable restructuring plan.

[8] As a result, Salus advised Laura that, although it would be open to further discussions to resolve the matter on an interim basis pending Laura's ability to obtain alternative financing, it would not support Laura's restructuring plan and would seek the appointment of a receiver.

[9] Although it admits being advised that Laura was engaged in serious discussions regarding new financing and that it would be able to obtain a commitment before August 14, 2015, Salus claims that Laura failed to mention that the new interim lender would not be subordinated in rank and would be seeking a priority charge over all of Laura's property.

[10] According to Salus, it only became aware of this possibility upon receipt of Laura's Application, just before the hearing. At this time, Salus had already served its own Motion to appoint a receiver in the evening of Friday, August 7, 2015, presentable on the following Tuesday morning of August 11, 2015.

[11] In the meantime, on Monday, August 10, 2015, in the late evening, Laura served on Salus a *Motion to continue a restructuring proceeding under the CCAA and to obtain an initial order* ("**Motion**"), as well as an *Application for interim financing charge* ("**Application**"), also presentable the following day.

[12] At the inception of the hearing, Salus unsuccessfully sought the postponement of Laura's Motion and Application, on the basis that its legal counsel in Montreal did not have the opportunity to analyse same and prepare a rebuttal. The request for postponement was denied by Paquette, J., for the following reasons:

[3] Salus' request to postpone the hearing on the Motions will be rejected for the following reasons:

3.1 Salus' Motion, which Salus filed last Friday is presentable today;

3.2 Salus' Motion includes detailed allegations in contestation of the restructuring plan which Laura was proposing;

3.3 Salus is well aware of the operations and situation of Laura;

3.4 For instance, on July 24, 2015, Salus appointed consultants (**A&M**) to closely monitor Laura business operations and financial results on a continuing basis;

3.5 Salus' Motion shows that it has an intimate knowledge and involvement in the business of Laura;

3.6 Laura's success in securing a proposal for interim financing may come as a surprise to Salus, but the latter nevertheless remains intimately aware of all the circumstances relevant to the debate on Salus' own motion and on Laura's Motions;

3.7 Mr Raymond Massi (Richter), the consultants hired by Laura to monitor Laura's operations and financial position in accordance with the restructuring, testified on the impact which a postponement of the motions, even to this Thursday, would have on the business of Laura;

3.8 For instance, such a postponement, at this crucial time of the year, would delay the receipt of goods for another week and Laura is already 2 weeks behind in sales;

[13] The judge then immediately proceeded with the hearing and dismissed the Receiver motion presented by Salus, while granting Laura's Motion and Application, along with a safeguard order, ordering Salus to transfer the full amount obtained from Laura through the cash management system as well as to cease and desist immediately from receiving further funds from same. An initial order under the CCAA was delivered on the following day.

[14] The arguments raised in the motion for leave to appeal essentially relate to the absence of prior notice of the Motion and Application affecting Salus' rights as first ranking secured creditor and the significant prejudice suffered by it as a result of the granting of the Motion and Application.

[15] Salus argues that the judgments will have a "significant chilling effect on asset-based lending and other sources of capital in the Province of Quebec". It claims that the appeal is of significance to the practice insofar as the Court should set out reasonable guidelines and delays to present motions affecting the rights of stakeholders, as well as the circumstances justifying a party to forego its obligation to give prior notice of its motions.

[16] Salus also asserts that the appeal is of significance to the parties, given the prejudice that it will suffer, as a result of its collateral position being eroded by the restructuring process and the imposition of the following conditions:

- a \$10,000,000 priming DIP charge in favour of the interim lender Cadillac Fairview;
- a key employee retention plan (KERP) with a further priming charge of up to \$500,000;
- an administration charge of up to \$250,000;
- a stay of proceedings which prevents Salus from seeking to recover from the guarantors and others who are not otherwise subject to the judgments and

- have not sought protection under the CCAA;
- the loss of the cash management system;
- the failure to account for payment of interest and other fees otherwise payable to Salus pursuant to the credit agreement.

[17] Salus further alleges that its appeal is meritorious given that it was denied the right to adequately analyse the arguments and data contained in the Motion and Application, and was not afforded time to prepare rebuttal of the arguments put forth or to present its own evidence on the allegations of impropriety made against it, or its alleged winding down of Laura's operations and the pursuit of Salus' own agenda in the liquidation process.

[18] Salus claims that Laura misrepresented rental arrears, outstanding trade debt and working capital deficit, and that it made material omissions in the cash flows that accompanied the proceedings, as well as regarding the impact of the DIP charge and other provisions of the judgments on Salus' likely recovery, while at the same time alleging that it did not receive sufficient disclosure from Laura to assess the impact of the judgments on its claims and securities.

[19] Furthermore, according to Salus, the relief granted far exceeds what was reasonably necessary to meet the urgent needs of Laura.

[20] Finally, Salus argues that the appeal will not unduly hinder the progress of the proceedings, as it does not seek a stay of proceedings and is willing to have its case in appeal expedited.

[21] Having analysed the motion and heard the parties, I come to the conclusion that Salus does not meet the threshold required to obtain leave to appeal.

[22] Firstly, the arguments raised by Salus pertain mainly to the judge's refusal to postpone the hearing, a decision resulting from the first judge's exercise of her discretionary power in the context of her case management role, for which she provided detailed reasons. Said reasons were based on the contents of Salus' own proceedings and on the evidence that was adduced before her regarding the impact that the postponement would have on the business of Laura.

[23] Aside from claiming that it was denied the chance to be heard and that it was not given a chance to respond to the allegations of the Motion and Application, Salus does not raise any error of law nor any palpable and overriding error of fact on the part of the first judge.

[24] Without commenting on the merit of the points raised in the motion for leave to appeal, which appear to be of significance to Salus, insofar as its own financial interest is concerned, the latter fails to demonstrate that these points are of significance to the practice.


[25] Indeed, the issue of adequate prior notice is essentially fact-driven and will depend on circumstances for which there can hardly be pre-set rules. As for the concerns raised by Salus which relate to the impact of the interim financing charge on its ranking and recovery, its loss of control over the assets and property of Laura and its

lack of confidence in the success of the proposed restructuring process, Salus fails to indicate a reviewable error on the part of the first judge in her determination of fact and the exercise of the discretion afforded to her under the CCAA. Her decision to grant the Motion and Application was made after being provided with the Pre-filing report and Report on the interim financing prepared by the monitor KPMG as of August 11, 2015. The judge also heard the testimony of Laura's restructuring consultant, Mr. Raymond Massi of Richter. There is little doubt at this point that without the interim financing, Laura's business will not survive.

[26] Moreover, Salus has failed to demonstrate that the appeal will not unduly hinder the progress of the action. Granting leave to appeal in such circumstances, and despite the provisional execution, is likely to seriously impact the business of Laura and the success of the contemplated restructuring process. A pending appeal may create unnecessary uncertainty for the interim lender which would jeopardize, if not sterilize the interim financing that is urgently required to allow the business to continue its operations.

**FOR THESE REASONS, THE UNDERSIGNED:**

[27] **DISMISSES** the Motion for leave to appeal with costs.



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GENEVIÈVE MARCOTTE, J.A.