

**COURT OF APPEAL OF ALBERTA**

COURT OF APPEAL FILE NUMBER:

KING'S BENCH COURT FILE  
NUMBER:

2103 - 08305

REGISTRY OFFICE:

CALGARY

APPLICANT:

**A&M ENTERPRISE LTD.**

Registrar's Stamp

STATUS ON APPEAL:

APPELLANT

STATUS ON APPLICATION:

APPLICANT

RESPONDENT:

IN THE MATTER OF THE

*COMPANIES' CREDITORS*

*ARRANGEMENT ACT, RSC*  
1985 c C-36, as amended

AND IN THE MATTER OF  
THE COMPROMISE OR  
ARRANGEMENT OF  
WALLACE & CAREY INC.,  
LOUDON BROS LIMITED,  
and CAREY  
MANAGEMENT INC.

STATUS ON APPEAL:

**RESPONDENT**

STATUS ON APPLICATION:

DOCUMENT:

**MEMORANDUM OF ARGUMENT**

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## **INTRODUCTION**

1. The Appellant, A&M Enterprise Ltd. ("**AME**"), seeks permission to appeal a portion of the decision pronounced by the Honourable E.J. Sidnell on November 9, 2023 (the "**Decision**") in the *Companies' Creditors Arrangement Act* ("**CCAA**") proceedings of Wallace & Carey Inc. ("**Wallace**"). The Decision directed, among other things, that AME refund \$497,521.26 to Wallace within two business days.
2. The prospective appeal turns on the learned Chambers Judge's reliance on late filed materials of Wallace, the Chambers Judge's failure to provide AME the opportunity to respond to the new evidence, arguments and issues raised by Wallace in order for AME to know the case it had to meet, and the learned Chambers Judge's failure to apply the relevant facts and principles of the common law to the contractual interpretation of the In-Tranist Agreements in question and the relief being requested.

## **FACTS**

3. On June 22, 2023, the Court granted an Initial Order (as amended and restated, the "**ARIO**") pursuant to the CCAA declaring that Wallace and its related entities are companies to which the CCAA applies, granting a stay of proceedings and appointing KSV Restructuring Inc. as monitor (the "**Monitor**").
4. AME is a creditor of Wallace in the CCAA proceedings, in excess of \$1 million.
5. AME is a separate corporate entity from both Freshslice Holdings Ltd. ("Freshslice") and the Freshslice Franchisees.<sup>1</sup>

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<sup>1</sup> Affidavit of Frank Alexander, sworn September 28, 2023.

6. On July 28, 2023, Wallace and AME entered into an In-Transit Agreement, whereby Wallace agreed to pre-pay AME for pizza dough that Wallace then supplies to Freshslice Franchisees. The In-Transit Agreement provided that upon receipt of payment from Wallace, AME would proceed with shipping of the dough in accordance with historical practice.
7. On September 19, 2023 Wallace cancelled its outstanding pre-paid purchase orders with AME, and demanded the return of over \$600,000 in pre-payments.
8. Wallace then brought an application demanding, in part, the return of the pre-payments it had made to AME for purchase orders of dough it alleged it never received (which, it alleged, was the fault of AME).
9. The Freshslice Franchisees provided five affidavits outlining the issues with Wallace failing to deliver goods that had been ordered by them and paid for. Additionally, AME provided affidavits outlining the historical practice with Wallace, and providing evidence of the failure of Wallace to pickup the items which were the subject of the pre-paid purchase orders at issue. AME's witness deposed that the historical practice on "thousands" of occasions prior was that Wallace would simply pickup the goods it ordered without the need to be expressly advised about pickup.<sup>2</sup> AME provided evidence that it was at all times, and remains, willing to allow for pickup of the goods which are the subject of the refund.
10. On November 7, 2023, two days before the impugned application, Wallace filed a new affidavit and brief suggesting that their actual complaint with respect to the refund was that AME had failed to invoice Wallace and thus the In-transit Agreement obligated AME to refund the monies. However, the evidence which had

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<sup>2</sup> Affidavit of Hamid Abbaspour sworn November 1, 2023.

been filed and served previously only addressed communication issues between AME and Wallace with respect to picking up the dough and who was at fault for same; none of the previous evidence suggested any issues about AME invoicing. At no point did Wallace provide any evidence that AME had *not* invoiced or that this was ever a concern of Wallace at the relevant time.

## **ARGUMENT**

11. To obtain leave to appeal under the CCAA,<sup>3</sup> the Appellant must establish serious and arguable grounds of appeal of real and significant interest to the parties. The test subsumes four factors:<sup>4</sup> (a) the point on appeal is significant to the practice; (b) the point is of significant to the action itself; (c) the appeal is prima facie meritorious; and (d) the appeal will not unduly hinder the progress of the action. The court must then ascribe appropriate weight to each factor and decide overall whether the test is met.<sup>5</sup>

### **i. The Points on Appeal Are Significant to the Practice**

12. Suppliers of perishable items are treated differently in the CCAA, signalling Parliament's intention in accordance with proposed amendments under Bill C-280 to ensure payment to suppliers who provide perishable goods to companies subject to CCAA and bankruptcy proceedings. The Decision fails to take into account the effect, to the practice as a whole, of forcing AME to refund monies paid to it in exchange for perishable goods.

### **ii. The Points on Appeal Are Significant to the Action**

13. AME is also a creditor of Wallace, and its interests have been unfairly prejudiced.

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<sup>3</sup> *Companies' Creditors Arrangement Act*, RSC 1985 c C-36 as amended, ss 13 and 14.

<sup>4</sup> *BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264 at para 7

<sup>5</sup> *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149 at para 29.

14. The Decision effectively forces AME to go down with Wallace's sinking ship. The effect of the Decision, in forcing AME to bear the burden of any expired goods which could not be resold, is that AME will suffer the loss occasioned by a company which is not only significantly larger, but also unlikely to ever return from its current insolvent position in the CCAA and receivership proceedings. In turn, the other creditors in the proceedings will be allowed to unfairly reap the rewards to AME's detriment. Requiring AME to refund the monies when there is another more reasonable solution available (to maintain the status quo of requiring Wallace to collect the dough and resell it for a profit) which will satisfy the needs of multiple parties by equitably spreading both funds and potential losses, will also cause additional downstream effects on other corporate entities including Freshslice and its franchisees if AME is unable to weather a substantial loss.

**iii. The Proposed Appeal is *Prima Facie* Meritorious**

15. To satisfy this element, the Appellant must only show that it has an arguable case, meaning one that is not frivolous.<sup>6</sup>
16. There are two issues related to alleged errors for determination by this Honourable Court on the proposed appeal. Such errors resulted in the Justice making an adverse finding against AME and inherently that AME had triggered an obligation to refund the monies.
17. These issues are: first, whether the learned Chambers Judge erred in law in failing to give AME an adjournment to respond to new evidence and argument and by placing undue emphasis on the new evidence, and second, whether the learned Chambers Judge erred in law in failing to articulate the legal test for the remedy ordered and/or misinterpreting the legal test for the relief ultimately directed.

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<sup>6</sup> *Kerr Interior Systems Ltd, Re*, 2008 ABCA 291 at para 11.

**a. The learned Chambers Judge erred in law in failing to give the AME an adjournment to respond to new evidence and argument and by placing undue emphasis on the new evidence**

18. The Respondent filed an Affidavit and Brief two days before the application by the learned Chambers Judge. These new materials disclosed evidence and raised issues which had not been previously raised by the parties, but which were ultimately material to the learned Chambers Judge's Decision. In particular, the Respondent raised, for the first time, an allegation that the In-transit Agreement required AME to refund any monies which had not been invoiced for. The learned Chambers Judge inherently concluded that AME had failed to render invoices, and was thus contractually obligated to return the funds. However, when AME requested an adjournment to respond to these new allegations by providing the invoices in question, the learned Chambers Judge refused. AME has now provided evidence which it would have disclosed if given the opportunity to address the case it had to meet.

**b. The learned Chambers Judge erred in law in failing to articulate the legal test for the remedy ordered and/or misinterpreting the legal test for the relief ultimately directed**

19. Further to the above, the evidence and arguments which precipitated the Decision were not properly served in advance of the application, and rendered the proceeding unfair to AME. Additionally, Wallace failed to articulate the relief requested or the legal test for the relief requested. In rendering the Decision, the learned Chambers Judge referred only to the broad power to issue an order that is appropriate in the circumstances, without giving AME the opportunity to address

the case it had to meet. The powers of the Court under section 11 of the CCAA is not limitless,<sup>7</sup> and does not obviate the need for continued procedural fairness.

**iv. The Proposed Appeal Will Not Unduly Hinder the Progress of the Action**

20. This factor considers whether the delay occasioned by the appeal will unduly impede the resolution of the matter, considering the CCAA's purpose, the role of the supervising judge, the need for a timely and orderly resolution of the matter, and the effect on the interests of the parties pending a decision on appeal.
21. If leave to appeal is granted, the appeal process will not unduly impede the CCAA proceedings. Wallace is currently in the midst of a concurrent receivership involving the Monitor as receiver over an agreement for purchase and sale with 7-Elevn Canada Inc. The Approval and Vesting Order was only granted on November 17, 2023. Additionally, other Wallace related entities are still in the process of downsizing and liquidation worth millions of dollars. When the amount at play in the Decision is weighed against the fact that Wallace is still in the process of liquidation, it is clear that the determination of this issue on appeal will not on a practical level unduly interfere with the CCAA proceedings generally.

**Relief Sought**

22. The Appellant respectfully requests that this Application for Permission to Appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Per: 

Vincent Li, Counsel for  
A&M Enterprise Ltd.

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<sup>7</sup> *Stelco Inc. (Bankruptcy), Re*, [2005] O.J. No. 1171 at para 39; *Royal Oak Mines Inc., Re*, 6 CBR (4th) 314; *MNP Ltd (Eco-Industrial Business Park Inc) v Symmetry Asset Management Inc*, 2023 ABKB 429 at para 21.



**Table of Authorities**

1. [\*BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd\*, 2020 ABCA 264.](#)
2. [\*Kerr Interior Systems Ltd, Re\*, 2008 ABCA 291](#)
3. [\*Resurgence Asset Management LLC v. Canadian Airlines Corporation\*, 2000 ABCA 149](#)
4. [\*Stelco Inc. \(Bankruptcy\), Re\*, \[2005\] O.J. No. 1171](#)
5. [\*Royal Oak Mines Inc., Re\*, 6 CBR \(4th\) 314](#)
6. [\*MNP Ltd \(Eco-Industrial Business Park Inc\) v Symmetry Asset Management Inc.\*, 2023 ABKB 429](#)