

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**BETWEEN:**

**RESOURCE CAPITAL FUND V L.P.**

**Applicant**

**- and -**

**FIRST NICKEL INC.**

**Respondent**

**APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND  
INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED AND SECTION 101  
OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43, AS AMENDED**

**FACTUM OF  
THE APPLICANT  
(Application Returnable September 4, 2015)**

September 3, 2015

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**PART I - OVERVIEW**

1. This comeback hearing of an Application made by Resource Capital Fund V L.P. (“RCF”), is for an order granting certain relief set out below in the receivership of First Nickel Inc. (“**First Nickel**” or the “**Company**”).

2. On August 20, 2015, RCF sought and obtained the appointment of KSV Kofman Inc. (the “**Receiver**”) as receiver of First Nickel pursuant to the order of Mr. Justice Mew, dated August 20, 2015 (the “**Appointment Order**”). First Nickel was in financial distress, in default of its

obligations to RCF and West Face (as defined below), and its primary asset, a nickel mine located outside of Sudbury, Ontario (the “**Lockerby Mine**”) could no longer run on an economic basis. The appointment of the Receiver was sought so that whatever remaining value there is in First Nickel’s assets can be realized, and the Lockerby Mine rehabilitated under the auspices of the appropriate government authority.

3. At the hearing to appoint the Receiver, the Court granted RCF’s request to return at a later date to seek the additional relief discussed below, on notice to affected stakeholders.

4. In the endorsement of Mr. Justice Mew made at the August 20 hearing (the “**Endorsement**”), His Honour provided that service by email of RCF’s application record and the Appointment Order on the Affected Parties (as defined below) would constitute effective service on those parties. RCF served these parties in accordance with the Endorsement on August 21, 2015.

5. In its Application materials, RCF indicated that it would be seeking the following relief at the return of this Application:

- (a) authority for the Receiver to surrender, abandon or turnover the Lockerby Mine to Her Majesty the Queen in Right of the Province of Ontario as represented by the Ministry of Northern Development and Mines (“**MNDM**”);
- (b) approval of a sales process for the Exploration Projects (as defined below);
- (c) authority for the Receiver to cause the Company to make regularly scheduled payments into the Pension Plan (as defined below), with no liability to the Receiver in its personal or corporate capacity for so doing; and

- (d) authority for the Receiver to hold a reserve for an amount sufficient to pay unremitted Harmonized Sales Tax (“HST”) as at the date of the Receiver’s appointment and to pay such amounts to Canada Revenue Agency when due and owing.

6. Following consultation with interested parties, including MNDM, RCF has revised the relief requested in (a). It is currently seeking an order of the Court permitting the Receiver to abandon the Lockerby Mine and relinquish any actual or deemed possession of, or responsibility with respect to, the Lockerby Mine, by serving a notice of abandonment on the Service List and filing such notice of abandonment with the Court as soon as practical thereafter (collectively, to “**Abandon**”). RCF is not seeking an order that would compel MNDM to accept the Lockerby Mine.

7. Regarding the relief set out in (d) above, RCF has subsequently learned that the Company has paid and estimate of all unremitted HST as at the date of the Receiver’s appointment. Therefore the requested relief is to address any residual amounts above the estimate.

8. The Receiver intends to Abandon the Lockerby Mine on September 4, 2015 and has advised MNDM and other stakeholders of these intentions.

9. This matter was originally scheduled to be heard on August 31, 2015, however on that date it was adjourned to September 4, 2015 to facilitate further discussions among the parties.

## **PART II – FACTS**

10. The facts relevant to this comeback hearing are set out in detail in the affidavit of Catherine J. Boggs, dated August 19, 2015, filed (the “**Boggs Affidavit**”), the Pre-Filing Report of KSV Kofman Inc., as proposed receiver of First Nickel Inc., dated August 19, 2015 (the “**Pre-Filing Report**”) and the First Report of the Receiver dated September 3, 2015 (the “**First Report**”). Below is a brief summary of those facts.

11. First Nickel was a publicly traded mining and exploration company headquartered in Toronto, Ontario, whose primary assets and business interests are a patented interest in the Lockerby Mine, and four exploration projects located throughout Ontario (the “**Exploration Projects**”).

Boggs Affidavit at paras. 13, 14, 17 and 55

12. RCF and West Face Long Term Opportunities Global Master L.P. (“**West Face**”) are significant shareholders of the Company, with RCF and its related partnership Resource Capital Fund IV L.P. holding approximately 67% of the issued capital, and West Face holding approximately 15%.

Boggs Affidavit at para. 15

13. First Nickel is indebted to RCF pursuant to a non-revolving credit facility (the “**RCF Credit Facility**”), which is secured by a general security agreement and demand debenture (together, the “**Security Documents**”). The Company’s other major secured lender is West Face, as agent under a loan agreement. The RCF and West Face credit facilities are on identical terms, and subject to an intercreditor agreement.

Boggs Affidavit at paras. 66, 69 and 70

14. The Receiver's counsel, Bennett Jones LLP, has reviewed the Security Documents and provided the Receiver with an opinion that RCF has validly perfected security interest in the Company's assets, as set out in the Security Documents, subject to standard assumptions and qualifications. Receiver's counsel has come to the same conclusion regarding the security granted to West Face.

Pre-Filing Report, Section 3.4

15. Historically, the Company's largest customer, representing approximately 80% of its revenue, was Glencore Canada Corporation ("Glencore"). Receivables are still owing to the Company from Glencore pursuant to the Glencore agreement.

Boggs Affidavit at para. 26; First Report at para. 2.0(5)

16. Due to fluctuations in nickel prices, the Lockerby Mine has been in and out of operation a number of times since it was acquired by the Company in 2005. Despite efforts by management to find an investor or purchaser for the Lockerby Mine over the last twelve months, the Company's management concluded that the mine cannot be operated economically. Following completion of the night shift on August 19, 2105, First Nickel discontinued its operations at the Lockerby Mine. The Receiver was appointed the next morning.

Boggs Affidavit at paras. 17-23

17. There is no third party funding available for the Receiver. There is no funding to conduct a sales process for the Lockerby Mine. No purchaser has emerged for the Lockerby Mine. The Lockerby Mine has exhausted its economic life.

18. The Receiver has taken certain steps to cause First Nickel to safeguard the Lockerby Mine. In its current non-operating state, the Lockerby Mine is costing approximately \$200,000 per week to maintain, including the costs of the restricted workforce described below, care and maintenance and water treatment. That burn rate excludes professional fees. This substantial burn rate requires the Receiver to move as expeditiously as possible to realize any value that may be in the Company's saleable equipment located at the Lockerby Mine. The economic urgency is manifest, and the Receiver has indicated it intends to Abandon the Lockerby Mine on September 4, 2015, following Court approval.

First Report at para. 4.1

#### **Employees & the Pension Plan**

19. The Company presently employs approximately 32 people for the purposes of safeguarding the Lockerby Mine and assisting the Receiver in its realization efforts. This reflects the lay-off of approximately 60 people on August 20, 2015.

Boggs Affidavit at paras. 32 and 33

20. Certain of First Nickel's employees belong to Sudbury Mine, Mill & Smelter Workers Union Local 598 ("**Unifor**") or United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Services Workers International Union, Local 2020, Unit 64 ("**USW**", together with Unifor, the "**Unions**" and each a "**Union**"). The Company maintains a defined contribution pension plan for its unionized and non-unionized employees (the "**Pension Plan**").

Boggs Affidavit at paras. 33, 41 and 42

21. The Pension Plan is registered in Ontario and had 231 active members as at December 31, 2014. Contributions are paid monthly in arrears based on wages paid in the prior month. A payment of approximately \$13,000 is anticipated to be due in September. The Company is current on its contributions.

Pre-Filing Report at Section 5; First Report at Section 6.1

22. There are also two ongoing investigations by the Ministry of Labour in respect of the Lockerby Mine.

Boggs Affidavit at paras. 38 and 39

### **Mine Closure**

23. The Receiver indicated in its Pre-Filing Report that should the realizable value of the equipment located at the Lockerby Mine not justify the cost of maintaining it in its present inactive state, the sale process for some of all of the equipment would be terminated and the Lockerby Mine would be abandoned so that the Lockerby Mine could be closed and the rehabilitation process commenced.

Pre-Filing Report at para. 4.0(6)

24. The Lockerby Mine is subject to a mine closure plan, dated May 1, 2001 (the “**Closure Plan**”) that has been acknowledged and filed with MNDM, which includes, among other things, MNDM requirements for closure and rehabilitation of the mine. Subsequent to the filing of a notice of material change to the Closure Plan in accordance with section 144(2) of the *Mining Act* R.S.O. 1990, c. M.14 (the “*Mining Act*”), MNDM determined that an amendment to the Closure Plan was required, and directed that the Closure Plan be amended and required



consultation with the Atikameksheng Anishnawbek First Nation (the "**First Nation**"). The amendment is presently in draft form, and a First Nickel representative has met with the First Nation.

Boggs Affidavit at paras. 46-48

25. The Company's obligations under the Closure Plan are secured by financial assurance in the form of a bond in the amount of CDN\$5,900,000 issued by ACE INA Insurance ("**ACE**"), pursuant to which ACE agrees to pay to MNDM any amounts demanded by MNDM in the event that the Company is in default of the Closure Plan (the "**Bond**"). The Bond is discussed in detail below.

Boggs Affidavit at para. 49

### **PART III – ISSUES**

26. The following issues are to be resolved in this Application:
- (a) Should the Receiver be granted the authority to Abandon the Lockerby Mine so that the closure and rehabilitation process can be commenced?
  - (b) Should the sales process for the Exploration Projects be approved?
  - (c) Should authority for the Receiver be granted to cause the Company to make regularly scheduled payments into the Pension Plan, with no liability to the Receiver in its personal or corporate capacity for so doing?

- (d) Should authority for the Receiver be granted to cause the Company to make payment of pre-filing HST?

#### **PART IV – ARGUMENT**

##### **A. Authority to Abandon the Lockerby Mine**

27. The Lockerby Mine, even, in its current non-operational state, is prohibitively costly to maintain. An alternative arrangement must be finalized on an urgent basis. The Receiver is working as expeditiously as possible to realize any possible value on the equipment located at the site. After completion of these sales, the Receiver seeks to Abandon the Lockerby Mine so that the rehabilitation process may commence.

28. The costs of the rehabilitation as provided for in the Closure Plan are secured up to \$5.9 million dollars by the Bond in favour of MNDM. None of the Company, the Receiver nor RCF can access this money, but MNDM can. In order to facilitate the mine closure and rehabilitation process by MNDM, RCF is accordingly requesting that this Court order that the Receiver is authorized to Abandon the Lockerby Mine on notice to the service list after which time the Receiver shall have no further responsibility or liability with respect to the Lockerby Mine. The Receiver intends to Abandon the Lockerby Mine on September 4, 2015.

29. For the reasons that follow, RCF respectfully submits that the relief requested is economically necessary and consistent with the legal principles and public policies underlying applicable mining and insolvency legislation.

The Bond

30. The *Mining Act* mandates that any financial assurance required by a closure plan be in prescribed form, one such permitted form being a bond issued by an insurer licensed under the *Insurance Act* to write surety and fidelity insurance. The Bond was provided to MNDM by the Company in accordance with this requirement.

*Mining Act* section 145(1) [Exhibit B hereto]

31. The *Mining Act* also prescribes the mechanism pursuant to which financial assurance such as the Bond is enforced. In the event that MNDM Director of Mine Rehabilitation (the “**Director**”) has reasonable or probable grounds for believing that a rehabilitation measure required by a closure plan has not or will not be carried out in accordance with the closure plan, the Director may, by order directed to the proponent under the plan and the provider of financial assurance, provide for the performance of the rehabilitation measure by calling on the financial assurance (an “**Order**”). The Director is required to give 15 days notice prior to issuing an Order.

*Mining Act*, sections 145(2) – (5), inclusive [Exhibit B hereto]

32. The terms of the Bond also provide for how it is to be realized. In the event that the Company is in default of its obligations under the Closure Plan, MNDM may send a notice of default to both the Company and ACE, stating the facts of the default and setting out the amount of money claimed by MNDM (a “**Demand**”). Upon receipt of a Demand, ACE is required to fund the amount claimed by MNDM up to \$5.9 million.

Bond (Exhibit H to the Boggs Affidavit) sections 1 & 2

33. It is open to MNDM to make a rehabilitation order and make demand under the Bond. Indeed, a notice to MNDM by the Receiver that it is Abandoning the Lockerby Mine will further evidence the fact that First Nickel cannot perform its obligations under the Closure Plan. Accordingly, the ability of MNDM to issue the Demand and trigger its rights under the Bond will not be inhibited by the Receiver relinquishing possession of the Lockerby Mine.

*The Mining Act Turn-Over Provisions*

34. The *Mining Act* provides for a number of mechanisms pursuant to which a mine may be transferred to MNDM:

- (a) *Abandonment*: Unpatented mining *claims* may be abandoned or forfeited, but the *Mining Act* does not provide for the abandonment or forfeiture of mining *lands*.  
The Lockerby Mine is patented mining land.

*Mining Act*, sections 70 – 74, inclusive [Exhibit B hereto]

- (b) *Surrender*: The concept of surrender, however, does apply to mining lands. An owner or lessee of mining lands may surrender such lands to the Crown, but only on such terms as are acceptable to the Minister, and the Minister may refuse to accept voluntary surrender if he or she has reasonable grounds for believing that the owner has failed to rehabilitate the land according to a closure plan.

*Mining Act*, section 183 [Exhibit B hereto]

- (c) *Forfeit*: With certain exceptions, if a corporation incorporated under the *Business Corporations Act* (Ontario), such as First Nickel, is dissolved and on the date of

its dissolution any property of the corporation has not been disposed of, the property is forfeited to and vests in the Crown. "Mining Lands" as defined in the *Mining Act* are exempt from the application of the *Escheats Act* (Ontario), and pursuant to the *Mining Act* they vest in the Crown as unpatented Crown land.

*Business Corporations Act* (Ontario) at section 244, *Escheats Act* (Ontario) at section 2, *Mining Act* at section 180 [Exhibit B hereto]

35. MNDM is not presently required by any of the foregoing provisions to accept ownership of the Lockerby Mine. The requested order would not require MNDM to do so. An order permitting the Receiver to Abandon the Lockerby Mine to facilitate rehabilitation will not undermine any of MNDM's rights, nor would it be inconsistent with the scheme or policy of the *Mining Act*.

*The Bankruptcy and Insolvency Act Abandonment Provisions*

36. An order permitting the Receiver to Abandon the Lockerby Mine would also be consistent with the policy set forth in Section 14.06 of the *Bankruptcy and Insolvency Act* ("*BLA*") (even though that section is not, strictly speaking, triggered in the current circumstances). That section provides:

(4) ... where an order is made which has the effect of requiring a trustee [which in this context includes a receiver] to remedy any environmental condition or environmental damage affecting property involved in a ... receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is

appointed, or during the period of the stay referred to in paragraph (b),  
the trustee

...

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

BIA at section 14.06(4) (emphasis added) [Exhibit B hereto]

37. The Lockerby Mine presents an unsustainable ongoing expense in its current state, and the only realistic end to such economic loss is the closure and rehabilitation of the site. The fundamental policy that animates section 14.06(4) is that the receiver is not an economic stakeholder in an insolvency. The requested relief is consistent with that fundamental policy. It is a court appointed officer mandated to identify and pursue the best solution available in the circumstances, subject to the Court's oversight and approval. The liability of the debtor, however, is not the liability of the receiver or the party that sought its appointment.

38. Financial accommodation exists in the form of the Bond to finance this closure and rehabilitation process. This Bond is in favour of MNDM and not the Receiver. Therefore, the Receiver requires the assistance of the Court so the process can commence and to facilitate the timely, safe and effective closure of the Lockerby Mine by MNDM. The Court is being asked to exercise its discretion in a manner entirely consistent with existing public policy and legal principles. The requested order will not interfere with MNDM's statutory rights or its ability to access the Bond to effect the necessary rehabilitation steps. Moreover, the *Mining Act* contemplates that it is MNDM that will have access to the Bond and have the means and responsibility to oversee the rehabilitation.

## B. Sales Process Approval

39. In its Pre-Filing Report, the Receiver sets out in Section 4.1 a detailed sales process for the Exploration Projects (the “**Sales Process**”). The Sales Process contemplates clear and transparent rules, a public solicitation of bids, making available additional due diligence to augment existing publically disclosed information, and a mechanism for the Receiver to review and accept bids, subject to Court approval. Given current circumstances, the proposed Sales Process is contemplated to be short (approximately 30 days), with an ability for the Receiver to extend it for an additional 30 days if warranted.

Pre-Filing Report at Section 4.1

40. RCF is seeking only the approval of the Sales Process; any sale that culminates from such process would be subject to further Court approval. While decisions regarding the structure of the sales process are distinct from the approval of any proposed transaction, the reasonableness and adequacy of a sales process must be assessed in light of the factors which the Court will take into account when considering the approval of a proposed transaction at the conclusion of the Sales Process.

*CCM Master Qualified Fund*, 2012 ONSC 1750 (“*CCM*”) at para. 6 [Book of Authorities, Tab 1]

41. Those well-known factors were established by the Court of Appeal in *Royal Bank v. Soundair Corp.* (“*Soundair*”) and involve: (i) whether sufficient effort has been made to get the best price; (ii) the efficacy and integrity of the process; (iii) whether there has been unfairness in the working out of the process; and (iv) the interests of all parties.

42. Accordingly, when considering this Sales Process, the Court should assess the transparency and integrity of the process as well as whether the process will optimize the chances, in the particular circumstances, of securing the best possible price for the Exploration Projects.

*CCM* at para. 6

43. It is respectfully submitted that the Sales Process addresses the *Soundair* principles. The process will ensure that likely prospective purchasers are given notice of the sale. Given the nature of the Exploration Projects, the number of potential purchases is not expected to be large, and so extensive solicitation beyond what is proposed would, it is submitted, be inefficient and uneconomical. The process is intended to be transparent and fair for all interested parties, and is the best option for maximizing any value that may be in the Exploration Projects. Moreover, RCF and West Face consent to the Sale Process.

### **C. Authority to Make Pension Payments without Personal Liability**

#### *Justification for Payments*

44. In the current circumstances, RCF submits that it is appropriate for the Receiver to cause the Company to continue to make ordinary course payments on a monthly basis in respect of the Pension Plan for the reasons set out in the First Report, including:

- (a) based on the Company's cash flow forecast, there is sufficient cash flow to continue to fund the monthly amount, and RCF and West Face have consented to these payments; and



- (b) the payments have priority to other secured creditors (with respect to collateral that is accounts and inventory) pursuant to section 30(7) of the *Personal Property Security Act* (Ontario) and section 57(1) of the *Pension Benefits Act* (Ontario). The priority of such payments is preserved in receiverships and bankruptcies pursuant to sections 81.6 (receiverships) and 81.5 (bankruptcies) of the *BIA*.

*Personal Property Security Act* (Ontario) at section 30(7); *Pension Benefits Act* (Ontario) at section 57(1); *BIA* sections 81.5 and 81.6 [Exhibit B hereto]; First Report at Section 6.

45. Accordingly, RCF submits that it is appropriate for the Court to make the requested order as it is in the best interests of all of the Company's stakeholders and in particular, in the best interests of the beneficiaries of the Pension Plan.

*Restriction of Receiver's Personal Liability*

46. Subsection 14.06(1.2) of the *BIA* protects a receiver from personal liability in respect of a pension plan for the benefit of the employees or former employees of the debtor that exists before the receiver is appointed:

14.06 (1.2) Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

*BIA* section 14.06(1.2) [Exhibit B hereof]

47. Section 14.06(1.2) is clear that the Receiver is protected for liabilities that exist prior to its appointment. RCF is requesting an order of this Court that also explicitly protects the Receiver for Pension Plan liabilities that arise after its appointment. In the *St. Mary's Paper Inc.*, case, an interim receiver was held liable as a successor employer as a result of making contributions to a pension plan post-appointment. The Receiver wishes to ensure that no such liability accrues to it.

*St. Mary's Paper Inc., Re.* 1993 Carswell Ont 1830, [1993] 107 D.L.R. (4<sup>th</sup>) 715 (O. C. J. Gen. Div [Commercial List]) [Book of Authorities Tab 2]

*Jurisdiction to Grant Order*

48. The Court has the authority to make the requested order. Subsection 243(1) of the BIA authorizes the Court to appoint a receiver to: (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person that was acquired for or used in relation to a business carried on by the insolvent person; (b) exercise any control that the court considers advisable over that property and over the insolvent person's business; or (c) take any other action that the court considers advisable.

49. Subsection 243(1) was provided for as part of the amendments to the BIA undertaken by Parliament and put into force in September 2009. Subsection 243(1) grants the Court broad remedial authority and authorizes the Court to fashion orders appropriate to the circumstances before the Court. In particular, paragraphs 243(1)(b) and (c) authorize the Court to appoint a receiver to "exercise any control that the court considers advisable" over the property of the debtor and to "take any other action that the court considers advisable."

*BIA* section 243(1) [Exhibit B hereof]

50. This broad remedial authority was exercised by Morawetz J. (as he then was) to provide protection to a receiver for causing a debtor to make pension payments in the CPI Portrait Studios receivership.

Order of the Honourable Mr. Justice Morawetz dated April 30, 2013 in the *CPI Corp., CPI Portrait Studios of Canada Corp. and CPI Canadian Images* receivership proceedings, at para. 14 [Book of Authorities Tab 3]

### *Conclusion*

51. It is submitted that subsection 14.06(1.2) and subsections 243(1)(b) and (c) of the BIA provide the jurisdictional foundation for the relief sought in this case, for which there is clear precedent from this Court. Upon consideration of the options available to the Receiver, a Court order providing explicit protection from personal liability in respect of the Pension Plan is not only authorized by the BIA, but also clearly the best alternative for all stakeholders.

### **D. Authority to Make Pre-Filing HST Payments**

52. Prior to the appointment of the Receiver, the Company made a payment to the Canada Revenue Agency to satisfy certain outstanding HST obligations. It appears that there are no further pre-filing HST obligations outstanding, however a reassessment is possible and further amounts could be due.

First Report at Section 6.3

53. Outside of a bankruptcy, additional pre-filing HST amounts owing would have priority over RCF and West Face's security pursuant to a deemed trust created by the *Excise Tax Act*, and RCF and West Face do not object to the payment thereof, if required.

Excise Tax Act section 222(1) [Exhibit B hereto]

#### **E. Service of Materials**

54. Pursuant to the terms of the Endorsement, RCF's counsel served each of the following parties with RCF's Application Record, the issued and entered Appointment Order a link to the Receiver's website (which contains all materials filed in these proceedings) and a version of the order sought blacklined against the comeback order included in the Application materials (collectively, the "**Affected Parties**"):

- (a) The Unions;
- (b) The Ministry of Northern Development and Mines;
- (c) The Ministry of Labour;
- (d) The Ministry of the Environment;

- (e) The Financial Services Commissioner of Ontario;
- (f) The Canada Revenue Agency;
- (g) Glencore;
- (h) The Chief and Council of the First Nation;
- (i) Deziel Repairs Inc., National Leasing Group Inc., The Bank of Nova Scotia, Atlas Copco Mining and Rock Excavation Technique Canada, Atlas Copco Canada Inc., Transcanada Pipelines Limited, Toyota Canada Credit Inc. and Roynat Inc.;  
and

Affidavit of Service of Christopher Burr, dated August 31, 2015, filed

55. The Affected Parties, together with West Face and RCF, constitute all of the parties who, in RCF's respectful submission, may reasonably be affected by the order sought at this Application. They represent the unions representing the Company's workforce, insurer, regulators, taxing authorities, the primary customer, First Nation neighbors, and registered secured creditors.


## **PART V – CONCLUSION**

56. For the reasons stated herein, RCF respectfully submits that the relief sought is fair and reasonable, and that it will enable the Receiver to conduct its duties and facilitate in the rehabilitation of the Lockerby Mine in an expeditious, efficient and safe manner. All parties likely to be affected by the relief sought have been given notice of this Application pursuant to the Endorsement, and the Company's primary economic stakeholders consent.

**PART VI – ORDER REQUESTED**

57. RCF seeks an order substantially in the form served on the service list contemporaneously with the service of this factum.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 3rd day of September, 2015.

A handwritten signature in black ink, appearing to be 'Linc A. Rogers / Chris Burr', written over a horizontal line.

Linc A. Rogers / Chris Burr  
Lawyers for the Applicant

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

Cases

1. *CCM Master Qualified Fund*, 2012 ONSC 1750 (Commercial List))
2. *St. Mary's Paper Inc., Re.* 1993 Carswell Ont 1830, [1993] 107 D.L.R. (4<sup>th</sup>) 715 (O. C. J. Gen. Div [Commercial List])

Orders

1. Order of the Honourable Mr. Justice Morawetz dated April 30, 2013 in the *CPI Corp., CPI Portrait Studios of Canada Corp. and CPI Canadian Images* receivership proceedings

**SCHEDULE "B"**  
**RELEVANT STATUTES**

**Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 14.06**

14.06 (1) No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

*Application*

(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

- (a) an interim receiver;
- (b) a receiver within the meaning of subsection 243(2); and
- (c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

*No personal liability in respect of matters before appointment*

(1.2) Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

*Status of liability*

(1.3) A liability referred to in subsection (1.2) is not to rank as costs of administration.



*Liability of other successor employers*

(1.4) Subsection (1.2) does not affect the liability of a successor employer other than the trustee.

*Liability in respect of environmental matters*

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

- (a) before the trustee's appointment; or
- (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

...

*Non-liability re certain orders*

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

- (i) complies with the order, or
- (ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

*Stay may be granted*

(5) The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

*Costs for remedying not costs of administration*

(6) If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

*Priority of claims*

(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

*Claim for clean-up costs*

(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real

property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

**Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 81.5 & 81.6**

*Security for unpaid amounts re prescribed pensions plan — bankruptcy*

81.5 (1) If the bankrupt is an employer who participated or participates in a prescribed pension plan for the benefit of the bankrupt's employees, the following amounts that are unpaid on the date of bankruptcy to the fund established for the purpose of the pension plan are secured by security on all the assets of the bankrupt:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

(b) if the prescribed pension plan is regulated by an Act of Parliament,

(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(iii) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament,

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament, and

- (iii) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act.

*Rank of security*

(2) A security under this section ranks above every other claim, right, charge or security against the bankrupt's assets, regardless of when that other claim, right, charge or security arose, except

- (a) rights under sections 81.1 and 81.2;
- (b) amounts referred to in subsection 67(3) that have been deemed to be held in trust; and
- (c) securities under sections 81.3 and 81.4.

*Liability of trustee*

(3) If the trustee disposes of assets covered by the security, the trustee is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

*Security for unpaid amounts re prescribed pensions plan — receivership*

81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

- (a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;
- (b) if the prescribed pension plan is regulated by an Act of Parliament,
  - (i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and
  - (ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution

provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(iii) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament,

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament, and

(iii) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act.

#### *Rank of security*

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

#### *Liability of receiver*

(3) If the receiver disposes of assets covered by the security, the receiver is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

#### *Definitions*

(4) The following definitions apply in this section.

“person who is subject to a receivership”

« personne faisant l'objet d'une mise sous séquestre »

"person who is subject to a receivership" means a person any of whose property is in the possession or under the control of a receiver.

"receiver"

« séquestre »

"receiver" means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

**Business Corporations Act R.S.O. 1990, c. B.16: Section 244**

*Forfeiture of undisposed property*

244 (1) Any property of a corporation that has not been disposed of at the date of its dissolution is immediately upon such dissolution forfeit to and vests in the Crown.

*Exception*

(2) Despite subsection (1), if a judgment is given or an order or decision is made or land is sold in an action, suit or proceeding commenced in accordance with section 242 and the judgment, order, decision or sale affects property belonging to the corporation before the dissolution, unless the plaintiff, applicant or mortgagee has not complied with subsection 242 (3) or (4),

(a) the property shall be available to satisfy the judgment, order or other decision; and

(b) title to the land shall be transferred to a purchaser free of the Crown's interest, in the case of a power of sale proceeding.

*Further exception*

(3) A forfeiture of land under subsection (1) or a predecessor of subsection (1) is not effective against a purchaser for value of the land if the forfeiture occurred more than 20 years before the deed or transfer of the purchaser is registered in the proper land registry office.

*No notice*

(4) Despite subsection (2), if a person commences a power of sale proceeding relating to land before the dissolution of a corporation but the sale of the land is not completed until after the dissolution, the person is not required to serve the notice mentioned in subsection 242 (4) and title to the land may be transferred to a purchaser free of the Crown's interest.

**Escheats Act R.S.O. 1990, c. E.20 Section 2**

*Saving as to mining lands*

2. Despite section 1, where mining lands as defined in the *Mining Act* have become forfeited to the Crown, such mining lands shall be dealt with and disposed of as Crown lands in the manner provided in the *Mining Act*.

**Excise Tax Act R.S.C., 1985, c. E-15 Section 222**

*Trust for amounts collected*

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

*Amounts collected before bankruptcy*

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

*Withdrawal from trust*

(2) A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

(a) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and

(b) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

### *Extension of trust*

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

### *Meaning of security interest*

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

## **Mining Act R.S.O. 1990, c. M.14 Sections 70 - 74**

### *Right to abandon claim*

70(1) The holder of a mining claim may abandon the claim at any time by filing a notice of abandonment with the recorder.

### *Abandonment of part of claim*

(2) The holder of a mining claim may abandon any part of the claim at any time on such conditions as are prescribed, by filing a notice of partial abandonment with the recorder.

### *Notice of abandonment*

(3) The recorder shall record the abandonment and the date of receipt of the notice of abandonment, and forthwith post a notice of the abandonment, together with a sketch of the abandoned claim or part to be abandoned.



*Order by recorder*

(4) Where part of a claim has been abandoned under subsection (2), the recorder shall issue an order directing the moving of posts or tags, the erection of new posts and the identification of new boundary lines and stating the time within which the work is to be completed.

*Compliance with order*

(5) A mining claim holder who is affected by an order issued under subsection (4) shall notify the recorder of that fact in writing within the time set out in the order.

*Posting of notice*

(5.1) The recorder shall post the notice, with the date of its posting.

*Extension of time or order for abandonment*

(6) The recorder may extend the time for completing work that has not been completed within the time set out in an order under subsection (4) or order that the portion of the claim on which the work was to be done be abandoned.

*Notice of order*

(6.1) If the recorder makes an order of abandonment under subsection (6), he or she shall forthwith,

- (a) notify the holder of the order and the reasons for it; and
- (b) post the order.

*When claim open for staking*

(7) Where part of a mining claim is abandoned under subsection (2) and an order of the recorder is made under subsection (6), the mining claim abandoned is open for staking from 8 a.m. standard time on the eleventh day after the posting of the order of the recorder made under subsection (6).

*Idem, abandonment of whole claim*

(8) Every mining claim abandoned under subsection (1) is open for staking from 8 a.m. standard time on the eleventh day after the notice of abandonment is filed.

*Idem, abandonment of part of claim*

(9) Where part of a mining claim is abandoned under subsection (2) and no order is made by the recorder under subsection (6), that part of the claim is open for staking from 8 a.m. standard time on the eleventh day after the posting of the notice under subsection (5.1).

*Deemed abandonment of claim*

71(1) Non-compliance by the licensee or holder of a mining claim with any requirement of this Act or the regulations as to the time or manner of the staking and recording of a mining claim or with a direction of the recorder in regard thereto, within the time limited therefor, shall be deemed to be an abandonment, and the claim shall, without any declaration, entry or act on the part of the Crown or by any officer, unless otherwise ordered by the Commissioner, be forthwith opened to prospecting and staking.

*Saving*

- (2) Despite subsection (1), where in respect of a mining claim, no dispute is on file and,
- (a) one year has elapsed since the day of the recording of the claim; or
  - (b) the first prescribed unit of assessment work has been performed and filed and, where necessary, approved,

the mining claim shall be conclusively deemed to have been staked and recorded in compliance with the requirements of this Act and the regulations.

*Forfeiture of mining claim*

72(1) Except as provided by section 73, all the interest of the holder of a mining claim before a lease has issued ceases without any declaration, entry or act on the part of the Crown or by any officer, and the claim is open for prospecting and staking,

- (a) if, without the consent in writing of the recorder or Commissioner, or for any purpose of fraud or deception or other improper purpose the holder removes or causes or procures to be removed any stake or post forming part of the staking of such mining claim, or for any such purpose changes or effaces or causes to be changed or effaced any writing or marking upon any such stake or post;
- (b) if neither the prescribed assessment work is performed nor payment in place of such assessment work is made as required by section 65, or if the work or payment is not reported, unless an application and payment for a lease of the mining claim is made under section 81.

*Proceedings as to forfeiture*

- (2) No person, other than the Minister or an officer of the Ministry or a person interested in the property affected, is entitled to raise any question of forfeiture except by leave of the Commissioner, and proceedings raising questions of forfeiture shall not be deemed to be or be entered as disputes under section 48.

*Notice of re-opening*

72.1(1) The recorder shall forthwith record the words "Cancelled/Annulé" with respect to a mining claim affected by forfeiture or loss of rights and post a notice of re-opening..

*Re-staking*

(2) Unless they have been withdrawn from prospecting or staking, lands, mining rights or mining claims affected by a forfeiture or a loss of rights are open for staking from 8 a.m. standard time on the day after the posting of the notice of re-opening.

*Extension of time*

73(1) A recorder may order an extension of time for performing assessment work or filing a report on such work if an application for the extension is made within 30 days before the time for filing the report expires and the prescribed conditions for an extension are met.

*When order takes effect*

(2) If an order granting an extension is made, it shall be deemed to have been recorded on receipt of the application and the order takes effect at that time.

*Death of licensee or holder*

74 Where a licensee in whose name a mining claim has been staked dies before the claim is recorded or where the holder of a claim dies before issue of the lease for the claim, no other person is, without leave of the Commissioner, entitled to stake or record a mining claim upon any part of the same lands or to acquire any right, privilege or interest in respect thereof within twelve months after the death of the licensee or holder, and the Commissioner may at any time make such order as the Commissioner considers just for vesting the claim in the representative of such holder and extending the time for performing the work or applying for lease, despite any lapse, abandonment, cancellation, forfeiture or loss of rights under any provision of this Act.

**Mining Act R.S.O. 1990, c. M.14 Section 145**

*Form and amount of financial assurance*

145 (1) The financial assurance required as part of a closure plan shall be in one of the following forms and shall be in the amount specified in the closure plan filed with the Director or any amendment to it:

1. Cash.
2. A letter of credit from a bank named in Schedule I to the *Bank Act* (Canada).
3. A bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance.
4. A mining reclamation trust as defined in the *Income Tax Act* (Canada).
5. Compliance with a corporate financial test in the prescribed manner.

6. Any other form of security or any other guarantee or protection, including a pledge of assets, a sinking fund or royalties per tonne, that is acceptable to the Director.

*Director's order*

(2) If the Director has reasonable and probable grounds for believing that a rehabilitation measure required by a filed closure plan in respect of which financial assurance was given has not been or will not be carried out in accordance with the plan, he or she may, by order, provide for the performance of the rehabilitation measure in the manner set out in subsection (5).

*Notice*

(3) The Director shall give the proponent written notice of his or her intention to issue the order referred to in subsection (2) at least 15 days prior to the date the order is to be issued.

*Parties affected*

- (4) Both the notice and the order referred to in this section shall be directed,
- (a) to the proponent who filed the closure plan or to their successor; and
  - (b) to any person who, to the Director's knowledge, provided the financial assurance for or on behalf of the proponent or to that person's successor or assignee.

*Realization of security*

(5) Upon the issuance of an order by the Director under subsection (2), the Crown may use any cash, realize any letter of credit or bond or enforce any other security, guarantee or protection provided or obtained as financial assurance for the performance of the rehabilitation measures and may carry out those measures, or appoint an agent to do so, as the Director considers necessary.

*Change of financial assurance*

(6) If the financial assurance provided under subsection (1) is in a form other than cash, a letter of credit, a bond or a mining reclamation trust or if the proponent fails to comply in the prescribed manner with a corporate financial test, the Director may require, in the prescribed manner, that the proponent forthwith provide cash, a letter of credit, a bond or other security, guarantee or protection acceptable to the Director or that the proponent make provision for a mining reclamation trust.

*Application for reduction in financial assurance*

(7) A proponent may apply to the Director for a reduction of the required financial assurance to an amount consistent with the financial requirements of the rehabilitation measures left to be completed if,

- (a) rehabilitation work has been performed in accordance with a filed closure plan; or
- (b) a reduction in the required financial assurance is justified in a notice submitted under subsection 144 (2).

*Special purpose account*

- (8) The amount of any cash provided as financial assurance under subsection (1) shall be paid into a special purpose account.

*Payments out of account*

- (9) The cost of any rehabilitation measures performed by the Crown or an agent of the Crown under this Part with respect to a filed closure plan and the amount of any reduction paid in cash under subsection (7) shall be paid by the Minister of Finance out of the special purpose account.

*Confidentiality*

- (10) The Director or any person who works for the Director's office shall preserve confidentiality with respect to all financial and commercial information relating to the establishment of a proponent's financial assurance.

*F.O.I. Act*

- (11) Subsection (10) prevails over the *Freedom of Information and Protection of Privacy Act*.

**Mining Act R.S.O. 1990, c. M.14 Section 180**

*Reversion to Crown*

180 Where a freehold or leasehold interest in mining lands or mining rights reverts, other than by transfer to the Crown, the land or rights may be dealt with as unpatented Crown land.

**Mining Act R.S.O. 1990, c. M.14 Section 183**

*Voluntary surrender of mining lands*

183(1) The owner, lessee or holder of any mining lands or mining rights granted under this Act or any other Act may surrender such lands or mining rights to the Crown only upon such terms as are acceptable to the Minister, and thereupon the Minister may cause a notice of determination to be filed in the proper land registry office.

*Retention as unpatented mining claims*

(2) An owner, lessee or holder who surrenders mining lands or mining rights under subsection (1) may file a notice with the recorder indicating that such owner, lessee or holder wishes to retain an interest in the lands or part of the lands thereof, in the form of unpatented mining claims.

*Staking and recording of lands*

(3) Where a notice has been filed under subsection (2), the owner, lessee or holder shall stake or cause to be staked and recorded in such size, form, manner and time as is prescribed, the lands in which an interest is to be retained.

*Extension of time by recorder or order of surrender of lands*

(4) Where mining claims have not been staked and recorded under subsection (3) within the time prescribed, the recorder may extend the time for staking and recording or may order that the mining lands or mining rights on which the staking and recording is to be performed are surrendered and the recorder shall, in the case where an order of surrender is made, by mail sent not later than the next day after the making of the order, notify the owner, lessee or holder of the recorder's action and the reason therefor.

*Prospecting, etc., on surrendered lands*

(5) Mining lands or mining rights surrendered to the Crown under subsection (1) and which are not recorded as unpatented mining claims under subsection (3) shall not be open for prospecting, staking, sale or lease under this Act until a date fixed by the Deputy Minister, notice of which shall be published in *The Ontario Gazette* at least two weeks prior thereto.

**Pension Benefits Act R.S.O. 1990, c. P.8 Section 57**

*Trust property*

57(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

*Money withheld*

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

### *Accrued contributions*

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

### *Wind up*

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

(4.1) An employer who transfers assets under section 80.4 from a single employer pension plan to a jointly sponsored pension plan and who is required to make a payment under subsection 80.4 (18) for the benefit of transferred members and other transferees shall be deemed to hold in trust for the transferred members and other transferees an amount of money equal to any payment due under subsection 80.4 (18) that has not been paid into the pension fund of the jointly sponsored pension plan.

### *Lien and charge*

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

### *Application of subss. (1, 3, 4)*

(6) Subsections (1), (3) and (4) apply whether or not the money has been kept separate and apart from other money or property of the employer.

(7) Subsections (1) to (6) apply with necessary modifications in respect of money to be paid to an insurance company that guarantees pension benefits under a pension plan.

## **Personal Property Security Act R.S.O. 1990, c. P.10 Section 30**

### *Priorities*

30(1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.
2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,

- i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and
  - ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.
3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.
4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

*Idem*

- (2) For the purpose of subsection (1), a continuously perfected security interest shall be treated at all times as if perfected by registration, if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by registration if it was originally perfected otherwise than by registration.

*Future advances*

- (3) Subject to subsection (4), where future advances are made while a security interest is perfected, the security interest has the same priority with respect to each future advance as it has with respect to the first advance.

*Exception*

- (4) A future advance under a perfected security interest is subordinate to the rights of persons mentioned in subclauses 20 (1) (a) (ii) and (iii) if the advance was made after the secured party received written notification of the interest of any such person unless,
- (a) the secured party makes the advance for the purpose of paying reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral and its preservation; or
  - (b) the secured party is bound to make the advance, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from the obligation.

*Proceeds*

- (5) For the purpose of subsection (1), the date for registration or perfection as to collateral is also the date for registration or perfection as to proceeds.



*Reperfected security interests*

(6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

*Same, extended time*

(6.1) Despite subsection (6), where a security interest that is perfected by registration becomes unperfected between February 26, 1996 and April 3, 1996, the security interest shall be deemed to have been continuously perfected from the time of first perfection if the security interest is again perfected by registration by April 12, 1996.

*Deemed trusts*

(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

*Exception*

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

**RESOURCE CAPITAL FUND V L.P.**      **v.**      **FIRST NICKEL INC.**  
Applicant      Respondents

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT  
(Comeback Hearing)**

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